$27.—

THE

LAW-DICTIONARY:

EXPLAINING THE

RISE, PROGRESS, AND PRESENT STATE,

OF THE

ENGLISH LAW;

DEFINING AND INTERPRETING

THE TERMS OR WORDS OF ART;

AND

Comprising Copious Information on the Subjects

OF

LAW, TRADE, AND GOVERNMENT.

ORIGINALLY COMPILED BY
GILES JACOB:

CORRECTED AND GREATLY ENLAGRED,
BY T. E. TOMLINS,
Of the Inner Temple, Barrister at Law.

The first American from the second London edition.

IN SIX VOLUMES.

VOL. I.

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PREFACE

TO TOMLINS' FIRST EDITION.

THE utility of a Dictionary, containing not only a definition and explanation of the terms used in the science of the *English* law, but also a general summary of the theory and practice of the law itself, having been so fully evinced by the success of *ten editions* of the work on which the volumes here presented to the reader are founded; any observations upon that subject would be superfluous: something, however, is requisite to introduce the following sheets; as due both to the proprietors and the editor of this *General Law-Dictionary;* which is offered to the attention and patronage, not only of the profession, but of all who wish to obtain a knowledge of the duties imposed upon them, and the rights secured to them, by the laws of their country.

It is now more than four years since the proprietors of *Jacob's Law-Dictionary* (the last edition of which was published in the year 1782) applied to the present editor, to prepare the work for republication. This he very cheerfully undertook; imagining at first that nothing more could be required than to employ his attention on such statutes and reports as the course of time had produced since that edition: little aware that a thorough revisal of the whole had become absolutely necessary, from the numerous improvements in our law; which had by no means been sufficiently attended to, either in that, or even in the preceding edition.

A cursory perusal of *Jacob's Dictionary* soon convinced the writer, that, to render the work really useful to the profession and the public, in the present state of the law, much labour, time, and study must be employed; that unremitting diligence alone could collect

and digest the materials for such a compilation; and that, strictly keeping in view *Jacob's* original plan, it would demand some judgment so to arrange, simplify, and methodize the information obtained, as to preserve the general character of the work, and yet to introduce every proper correction and improvement.

To this task, then, he seriously applied himself. He first carefully examined the text, as it stood in the *tenth edition.* Here he found much sound learning on the origin and antiquity of our law, defaced with unskilful interpolations: innumerable statutes, long repealed, detailed at large as existing laws:* the other statutes quoted throughout the work, (by continued errors of the press through various editions,) incorrectly cited: except in some few instances, a want of method, and poverty of language, pervading the whole body of the work: and the improvements of our law, during the last thirty years and more, either wholly passed over, or very superficially noticed.

His next step, therefore, was to correct the errors which appeared. Solely to perform this was a long and tedious labour. Every statute quoted has been examined; and it is by no means an exaggeration to say, that *many thousand errors*, in this particular alone, have been detected and amended. To erase whatever was superseded or contradicted by modern laws or determinations, was next requisite. And when thus much was performed, a vast void remained, to be filled up with a summary of the state of the law, as at present existing.

In many instances, where the law relative to one subject was scattered through the book, the whole has been brought together under a single title, consolidated, re-arranged, and enlarged; and the proper references made from title to title.† In some few others, it was found convenient to remove the whole of a title, as it stood in the former work; and to supply its place by a new abridgment of the law on that particular subject.‡ In no case, however, has any alteration been made, without mature

* Titles *Highways*, *Turnpikes*, and others.

† *Award*, *Arbitration*, *Homicide*, *Murder*, *Manslaughter*, *Executor*, *Administrator*, *Advowson*, *Presentation*, *Usurpation*, and very many others.

‡ *Bankrupt*, *Bill of Exchange*, *Highways*, *Wills*, &c.

consideration, and a sincere wish for the improvement of the work, and the instruction of the reader.

In the next place, the editor considered himself called upon to introduce many new titles; some on the origin and antiquity of our law;* and several connected with the commercial concerns of the country;† which had for the most part been entirely omitted, or at best very slightly referred to, by *Jacob* or his continuators. These additions, it is believed, do not make less than *one fourth part* of the present volumes.

To enable himself to perfect the plan which his mind soon formed, in the order above stated, the editor has applied to all such publications as seemed more immediately adapted to his purpose.

The statutes have been perused with peculiar care and diligence: almost all which are material, even to the end of the session of parliament in 1796, are introduced; and throughout the work it is believed, that none are omitted to be noticed which passed before the thirty-third year of the present reign. The long time which the Dictionary has taken in going through the press, has therefore, it is hoped, on the whole, operated rather to the benefit than the prejudice of all who may have occasion to consult it.

To the excellent series of modern term reports in the courts of *Westminster-Hall*, which have appeared within the last ten years; to the various new editions of former reports, and other law books of long established reputation; in alluding to which, it would be injustice not to particularize the *Coke upon Littleton*, *Peere Williams's Reports*, and *Hawkins's Pleas of the Crown:* together with many other smaller volumes well deserving notice, as including systems of particular branches of the law; to all these recourse has been had; and the information contained in them has been applied to the present purpose, with a care and attention which, the editor trusts, have not been totally fruitless.

But above all, the *Commentaries* of the learned *Blackstone* have been fully and freely applied to, and the most material parts of them adopted; sometimes abridged; but

* *Tenures*, &c.

† *East-India Company*, *Navigation Acts*, *Insurance*, &c. &c.

more frequently enlarged by additions from the various sources above alluded to. The edition last published has been used, whenever the term of its publication allowed; and many of the new notes there introduced have been added to the mass of modern intelligence here presented to the reader.

Whenever, in consulting any of the above authorities, the writer of this had occasion to question or differ from the positions there laid down, he intended to state his dissent with modesty and candour. To error every author is liable; *opere in longo fas est.* Many mistakes have been silently corrected in all the books consulted on this occasion. The editor seeks only that indulgence which he has bestowed, with a liberality more unbounded than can well be imagined.

Systematical rules, and their exceptions, seem in general of more consequence than a multiplied variety of cases. Rules give the effect of cases, without the tediousness of their detail. It has been said by a very eminent lawyer, "that precedents are frequently rather apt to confound; that every case has its own peculiar circumstances, and therefore ought to stand on its own bottom." On this maxim chiefly are all the additions to the work compiled, and the whole re-digested. The deviations from it, where they still occur, have frequently arisen, rather from a deference to the names of former editors, and from a desire of not making alterations which might be thought merely capricious, than from a conviction of the necessity or propriety of such a mode of compilation.

The principle, therefore, of this Dictionary, thus enlarged and improved, is to convey to the uninformed a competent general knowledge of every subject connected with the LAW, TRADE and GOVERNMENT, of these kingdoms: to show the origin, foundation, progress, and present state of our POLICY and JURISPRUDENCE. Information of this nature must interest every man of liberal education in whatever sphere: to *magistrates*, whether superior or subordinate, it will be found particularly useful: by *lawyers* it will, doubtless, be applied to, as a digest of learning previously obtained; and an index to further inquiries on the theory and practice of our law, in all its various branches.

In endeavouring to complete an undertaking of such

length and importance, the editor is fully conscious that many errors and inadvertencies must, even yet, have escaped; omissions, he hopes, there are now but few; and for the inconsistencies which must inevitably appear, he relies for pardon on the good sense of all who are competent to judge on a work so multifarious and extensive.

It was impossible to enter into the great variety of subjects contained in these volumes, without being occasionally led into observations, which apply rather to the system of politics, and the general theory of government, than to the confined question of law. This license was necessarily taken by former editors of *Jacob;* and was used, to some extent, by *Cowell* in his *Interpreter.*

The true interest of nations would best be consulted by preserving the greatest harmony between those, whom it seems to be the business and the pleasure of political (at least of party) writers, "*more studious to divide than to unite,*" to set at variance. Government has no rights, and the people have no duties, inconsistent with the true welfare of each other: the reciprocal conditions of their friendship and security may be comprised in two words; PROTECTION and OBEDIENCE. It has been the constant wish of the editor, in compiling the following sheets, to place in the strongest light every argument and decision which may tend to show, what care the laws and constitution of *Great Britain* have progressively taken to enforce both those principles, and to guard *Britons* against the fatal consequences which must attend a violation of either.

The indulgence of the reader is yet a little longer requested, to a few words, which the editor hopes to be excused for stating respecting himself.

Anxious, from very early youth, to become a member of the profession to which he has the honour to belong, it was his misfortune to be compelled, by certain untoward circumstances, to enter into that profession, and into life, prematurely; without either education or experience sufficient to enable him to perform the duties imposed upon him by such a situation. He very soon perceived his deficiencies, and endeavoured to supply them by diligent study and observation. A few years brought him near the point at which he aimed: but at the moment when assistance was most wanted, he was disappointed of receiving it; through his own neglect, in

omitting to apply to those who were really capable and desirous to have afforded it. He retired, for a while, from his public practice at the bar; and betook himself to more silent, but not less laudable, employments. He found friends; where indeed he least expected them! He has since succeeded in life beyond his merits, almost beyond his hopes. His former literary efforts have not been thought wholly unworthy approbation; on the present he rests with somewhat more confidence, though with no small portion of fear; since his future fate and pursuits may depend on its success. On the candour of the public (more particularly of the profession) he relies; and whether he shall retain the pen, or resume the gown, in public or in private, it shall be his unceasing study to deserve that encouragement, which seldom fails to await on well-meant endeavours, and honourable exertions.

T. E. TOMLINS.

DOCTORS'-COMMONS,
Jan. 23, 1797.

ADVERTISEMENT

TO TOMLINS' SECOND EDITION.

IN the Preface to the former Edition of this Work, published by the present Editor in the year 1797, *the errors and deficiencies of preceding Editions of the Law-Dictionary, founded on that originally compiled by Giles Jacob, were very fully pointed out; as also the method pursued in amending those errors, and supplying those deficiencies: these it would be useless here to recapitulate. The Work, as then published, has met with much indulgence and encouragement: The new impression now called for is improved by the addition throughout of the Statutes to the end of the Session of Parliament* 46 *Geo. III.; and in all instances where it was possible, the Acts passed during the time the Work was in the press, as late as those of* 48 *Geo. III. have been noticed: Such modern decisions of the Courts of Law and Equity have also been inserted as appeared to be of importance in explaining or elucidating the general System of Law, or any of the particular Subjects treated of.*

The Dictionary has hitherto been confined to the Definition of the Terms, and the History of the Principles and Practice, of the English Law. The Law of Scotland, in its Terms, and in many of its Principles, differs materially from that of England. Into Ireland the Doctrines of the Common Law of England were early introduced; and many of the provisions of English and British Statutes have been from time to time extended to Ireland by Acts made in the Parliaments held there. The Legislative Union between England and Scotland, which took place at the beginning of the eighteenth Century, and that between Great Britain and Ireland, which distinguished its close, seem to call for information how far the Laws and Sta-

tutes of the various parts of the United Kingdom agree with each other. As the first step for the purpose of affording such information, many of the Terms of the Law of Scotland have been inserted in these Volumes, with such explanations of them as it was in the power of the Editor to afford, from resources not very extensive: The immediate effects also produced by the respective Unions, together with instances in which the Laws now in force in Scotland or Ireland accord with, or differ from, those of England, have been occasionally stated and explained.

T. E. T.

Hilary Vacation,
1809.

A MODERN LAW DICTIONARY,

CONTAINING

THE PRESENT STATE OF THE LAW

IN THEORY AND PRACTICE;

WITH

A DEFINITION OF ITS TERMS, AND THE HISTORY OF ITS

RISE AND PROGRESS.

A B A

AB, From the word *abbot*, in the beginning of the name of any place, shows that probably it once belonged to some *abbey*; or that an abbey was founded there. *Blount.*

ABACOT. A cap of state wrought up in the form of two crowns; worn by our ancient British kings. *Chron. Angl.* 1463. *Speim. Gloss.*

ABACTORS, *abactores* ab *abigendo.*] Stealers and drivers away of cattle *by herds*, or in great numbers. *Cowel.*

ABACUS. Arithmetick: from the *abacus*, or table strewed with dust, on which the ancients made their characters and figures. *Cowel. Du Fresne.* Hence

ABACISTA. An Arithmetician. *Cowel.*

ABANDUM, *abandonum.*] Any thing sequestered, proscribed or abandoned. *Abandon*, i. e. *in bannum res missa*; a thing banned or denounced as forfeited and lost; from whence, to abandon, desert, or forsake as lost and gone. See Title *Insurance.*

ABARNARE, from *Sax. Abarian.*] To discover and disclose to a magistrate any secret crime. *Leg. Canuti, c.* 104.

ABATAMENTUM. An entry by interposition. 1 *Inst.* 277. See the succeeding articles.

TO ABATE, from the *Fr. Abattre.*] To prostrate, break down, or destroy; and in law to *abate* a castle or fort is, to beat it down. *Old Nat. Br.* 45. *Stat. Westm.* 1. *c.* 17. *Abattre maison*, to ruin or cast down a house, and level it with the ground; so *to abate a nuisance* is to destroy, remove, or put an end to it.

To *abate a writ*, is to defeat or overthrow it, by showing some error or exception. *Brit. c.* 48.—In the statute *de conjunctim feoffatis*, it is said the writ shall be abated; i. e. disabled and overthrown. *Stat.* 34 *E.* I. 1.

So it is said an appeal shall *abate*, and be defeated by reason of covin or deceit. *Staundf. P. C.* 148.—And the justices shall cause the said writ to be *abated* and quashed. *Stat.* 11 *H.* VI. *c.* 2.

The word *abate*, is also used in contradistinction to *disseise*; for as he that puts a person out of possession of his house, land, &c. is said to disseise; so he that steps in between the former possessor, and his heir, is said to *abate*; he is called an *abator*, and this act of intrusion or interposition is termed an *abatement*. 1 *Inst.* 277 *a. Kitch.* 173. *Old Nat. Br.* 91. 115.

ABATEMENT. For its least usual meanings see the two preceding articles.

In its present most general signification it relates to writs or plaints; and means, the quashing or destroying the plaintiff's writ or plaint.

A Plea in Abatement is, a plea put in by the defendant, in which he shews cause to the court why he should not be impleaded or sued; or if impleaded, not in the manner and form he then is: therefore praying that the writ or plaint may abate; that is, that the suit of the plaintiff may for that time cease. 1 *Inst.* 134 *b.* 277. *F. N. B.* 115. *Cowel. Gilb. H. C. P.* 186: *Terms de Ley*, 1.

On this subject shall be considered

I. *The various Pleas in Abatement.*

1. To the Jurisdiction of the Court.
2. To the Person of the Plaintiff.
   - *a.* Outlawry.
   - *b.* Excommunication.
   - *c.* Alienage.
   - *d.* Attaint; and other Pleas in Abatement.
3. To the Person of the Defendant.
   - *a.* Privilege.
   - *b.* Misnomer.
   - *c.* Addition.
4. To the Writ and Action.
5. To the Count or Declaration.
6. On Account of; *a.* The Demise of the King.
   b. The Marriage } of the Parties.
   c. The Death }

II. *The Time and Manner of pleading in Abatement; and herein of pleading in Bar or Abatement.*

III. *The Judgment in Abatement.*

I. 1. The courts of *Westminster* have a superintendency over all other courts, and may, if they exceed their jurisdiction, restrain them by prohibition; or, if their proceedings are erroneous, may rectify them by writs of error and false judgment. Nothing shall be intended within the jurisdiction of an inferior court, but what is expressly alleged; so that where an action on promise is brought in such inferior court, not only the promise, but the consideration of it, (*i. e.* the whole cause of action,) must be alleged to arise within that jurisdiction; such inferior courts being confined in their original creation, to causes *arising* within the express limits of their jurisdiction; and therefore if a debtor who has contracted a debt out of such limited jurisdiction, comes within it, yet he cannot be sued there for such debt.

There are no pleas to the jurisdiction of the courts at *Westminster* in transitory actions, unless the plaintiff by his declaration shews that the cause of action accrued within a county palatine, or it be between the scholars of *Oxford*, or *Cambridge*. 4 *Inst.* 213. 1 *Sid.* 103.

There is a difference between a franchise to demand conusance, and a franchise *ubi breve domini regis non currit*. For in the first case the tenant or defendant shall not plead it, but the lord of the franchise must demand conusance; but in the other case the defendant must plead it to the writ. 4 *Inst.* 224. See Titles, *Franchise*, *Conusance*, *County Palatine*.

Where a franchise, either by letters patent or prescription, hath a privilege of holding pleas within their jurisdiction, if the courts at *Westminster* intrench on their privileges, they must demand conusance; that is, desire that the cause may be determined before them: for the defendant cannot plead it to the jurisdiction. And the reason is, because when a defendant is arrested by the king's writ, within a jurisdiction where the king's writ doth not run, he is not legally convened, and therefore he may plead it to the jurisdiction; but the creating *a new franchise* does not hinder the king's writ from running there as before, but only grants jurisdiction to the lord of the liberty. *Bacon's Abr.* Title *Courts*. (D. 3.)

If the court has not a general jurisdiction of the subject, the defendant *must plead* to the jurisdiction, for he cannot take advantage of it on the general issue. And in every plea to the jurisdiction another jurisdiction must be stated. *Cowp.* 172.

The pleas to the jurisdiction, are either that the cause of action, or the person of the party, is not the object of the jurisdiction of the court; of the first sort are pleas that the land is held in *ancient demesne*, or that the cause of action arose in the *County Palatine*, or within the *Cinque Ports*, or other inferior courts, having peculiar local jurisdiction. Of the latter sort is the plea of *Privilege*; but which is generally considered rather as a plea to the person of the defendant. See this Dictionary under those titles; and *post*, Division 3. *a.* of the present head.

2. *a. Outlawry* may be pleaded in abatement, because the plaintiff having refused to appear to the process of the law, thereby loses its protection; but this is only a disability till the outlawry is reversed, or till he has obtained a charter of pardon. 1 *Inst.* 128. *Lit.* § 179. *Dy.* 23. 222. *Ass.* 49. *Br. Nonability*, 25.

This disability is only pleadable when the plaintiff sues in his *own right*; for if he sues in *auter droit* as executor or administrator, or as mayor with his commonalty, outlawry shall not disable him; because the person or body whom he represents has the privilege of the law. When the plaintiff brings a writ of error to reverse an outlawry, the outlawry in that suit or in any other shall not disable him. The outlawry itself must not oe an objection, for that would be *exceptio ejusdem rei cujus petitur dissolutio*; and if a man were outlawed at several men's suits, and one should be a bar to another, he could never reverse any of them. 1 *Inst.* 128. *Doct. Plac.* 396, 7.

When outlawry is pleaded in abatement, the plaintiff shall not reply that the outlawry is erroneous, for it is good till reversed. 1 *Lutw.* 36.

As to the time and manner of pleading outlawry, see *post*, under Division II. of this Title *Abatement*.

Outlawry in a county palatine cannot be pleaded in any of the courts of *Westminster*, for the plaintiff is only ousted of his law *within that jurisdiction*. *Gilb. Hist. C. P.* 200. *Fitz. Coron.* 233. It has been suggested,

but surely without reason, that outlawry, in the county palatine of *Lancaster*, *may* be pleaded in the courts of *Westminster*; because that county was erected by act of parliament in the time of *E.* III. whereas those of *Chester* and *Durham* are by prescription. 12. *E.* IV. 16. *Doct. Plac.* 396.

b. A person *excommunicated* is disabled to do any judicial act; as to prosecute any action at law; (though he may be sued;) be a witness, &c.

Excommunication is a good plea even to an executor or administrator, though they sue in *auter droit*; for an excommunicated person is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses: also it is one of the effects of excommunication, that he cannot be a prosecutor or attorney for any other person, and therefore cannot represent the deceased. 1 *Inst.* 134. 43 *E.* III. 13. *Thel.* 11.

But in an action brought by officers with their corporation, the defendant shall not plead excommunication in the officers; because a corporation cannot be excommunicated as such; and they sue and answer by attorney. *Thel.* 11. 30 *E.* III. 4. 1 *Inst.* 134. 4 *Inst.* 340.

Excommunication is no plea in a *qui tam* action; the statute giving the informer ability to sue. 12 *Co.* 61.

When excommunication is pleaded in the plaintiff, he shall not reply that he has appealed from the sentence; for it is in force until repealed, and whilst it is in force he cannot appear in any of the courts of justice; but he may reply that he is absolved, for then his disability is taken away. *Bro. Excom.* 3. 3 *Bulst.* 72. 20 *H.* VI. 25. *Roll.* 226.

When prohibition is brought against a bishop, and he pleads excommunication against the plaintiff, and in the excommunication there is no cause thereof shewn, this is not a good plea; for in such case it will be intended, that the excommunication was for endeavouring to hinder the bishop's proceeding, by application to the temporal court; and if such excommunication were allowed, it would destroy all prohibitions. *Thel.* 10, 11. 28 *E.* III. 27. 8 *Co.* 68.

c. Alienage is a plea in abatement, now discouraged and but seldom used; the following however appears to be still law on the subject.

It may be pleaded in abatement, in an action real, personal or mixed, that the demandant or plaintiff is an alien, if he be an alien enemy; and in an action real or mixed, that he is an alien, though he be in amity. But in an action personal, it is no plea that he is an alien if he be in amity. 1 *Inst.* 129 *b.* *Ast. Ent.* 11. 9 *E.* IV. 7. *Yelv.* 198. 1 *Bulst.* 154. *Bro.* Title *Denizen*. But see 1 *Ld. Raym.* 282.

Where the defendant pleads that the plaintiff is an alien, in abatement of the writ, it is triable where the writ is brought, and the replication must conclude to the *country*: but otherwise, it is said, where it is pleaded in bar, that the plaintiff is an alien, the replication must conclude with an *averment*. *Salk.* 2. *West.* 5. *Amb.* 394.

Where the defendant pleaded that the plaintiff was an alien, born at *Rouen* in the kingdom of *France*, within the ligeance of the king of *France*; the plaintiff replied that he was an alien friend, born at *Hamburgh*, within the ligeance of the Emperor, and traversed that he was born at *Rouen*; *Holt* inclined that it was an ill traverse and offered an ill issue. *Comb.* 212. See Title *Aliens*.

d. Attaint; It may be pleaded in abatement, that the plaintiff is attainted of treason or felony; or attainted in a *præmunire*; or that he hath abjured the realm. 1 *Inst.* 128 *a.* 129 *b.* 130 *a.* *Noy*, 1. *Sho.* 155.

Popish Recusancy, can no longer be considered as pleadable since the *Stat.* 31. *Geo.* III. *c.* 32. See Title *Papist*.

Coverture; It is also pleadable in abatement to the person of the plaintiff that she is a *feme covert*. 1 *Inst.* 132 *b.* and that she is the wife of the defendant. 1 *Bro. Ent.* 63. And by the defendant that she is herself a *feme covert*. *Lutw.* 23. *Barnes*, 334. See Title *Baron* and *Feme*, and *post*, 6. *b.*

Joint Actions; Of pleas in abatement for want of proper parties. See *Com. Dig.* Title *Abatement*, (E. 8.) (F. 4.) See also Titles, *Action*, *Jointenants*, &c.

A defendant may plead in abatement to the person of the plaintiff, that there never was any such person *in rerum natura*. See *Com. Dig.* Title *Abatement*, (E. 16.)

3. *a.* The officers of each court enjoy the privilege of being sued only in those courts to which they respectively belong; because of the duty they are under of attending those courts, and lest their clients' causes should suffer if they were drawn to answer to actions in other courts. 2 *Mod.* 297. *Vaugh.* 155. 2 *H.* VII. 2. 2 *Ro. Ab.* 272. 1 *Lutw.* 44. 639. So a baron of the *Cinque Ports*, is to be impleaded within that jurisdiction. See *Com. Dig.* Title *Abatement*, (D. 3.) and this Dict. Title *Cinque Ports*.

But this is to be understood when the plaintiff can have the same remedy against the officer in his own court, as in that where he sues him; for if money be attached in an attorney's hands by foreign attachment in the sheriff's court in *London*, the attorney shall not have his privilege; because in this case the plaintiff would be remediless. 1 *Saund.* 67, 8.

So if a writ of entry, or other real action be brought against an attorney of the king's bench, he cannot plead his privilege; for the king's bench hath not cognizance of real actions. 1 *Saund.* 67.

So if an attorney of the *Common Pleas* be sued in a criminal *appeal*, he shall not have his privilege; for his own court hath not cognizance of this action. 38 *H.* VI. 29 *b.* 9 *E.* IV. 35. *Cro. Car.* 585. 1 *Leon.* 189. 2 *Leon.* 156.

This privilege, which the courts indulge their officers with, is restrained to such suits only as they bring in their own right; for if they sue or are sued as executors or administrators, they then represent common persons and are entitled to no privilege. *Hob.* 177.

So if an officer of one court sue an officer of another court, the defendant shall not plead his privilege; for the attendance of the plaintiff is as necessary in his court as that of the defendant in his; and therefore the cause is legally attached in the court where the plaintiff is an officer. 2 *Mod.* 298. 2 *Lev.* 129. 2 *Ro. Ab.* 275. *pl.* 4. *Moor.* 556.

So if a privileged person brings a joint action, or if an action be brought against him and others, he shall not have his privilege; but if the action can be *severed* without doing any injury, the officer shall have his privilege. *Dy.* 377. *Godb.* 10. 2 *Ro. Ab.* 275. 2 *Lev.* 129. 1 *Vent.* 298, 9.

An officer shall not have his privilege against the king. *Bro. Superscd.* 1. 2 *Ro. Ab.* 274. But in a *qui tam* action, at the suit of an informer, he shall have his privilege. *Lil. Reg.* 7. 3 *Lev.* 398. *Lutw.* 193.

If a person who hath the privilege of being sued in another court, be in *actual custody* of the marshal of *K. B.* he cannot plead his privilege; but otherwise where he is bailed, and so only legally supposed in custody. 1 *Salk.* 1. *Comb.* 390.

The court of *K. B.* will take notice of the privilege of their own officers; as where a *filazer* of the king's bench was arrested by writ, he

was discharged on common bail; being an immediate officer of the court where his attendance was absolutely necessary. *Salk.* 544. But where an *attorney* of the *common pleas* was sued by bill in the court of *K. B.* on motion for his being discharged the court denied it and put him to plead his privilege. 1 *Mod. Ent.* 26. See 1 *Wils.* 306. 2 *Black. Rep.* 1085.

After a *general imparlance* an officer cannot plead his privilege, because by imparling he affirms the jurisdiction of the court, but after a *special* imparlance he may plead his privilege. *Bro. Priv.* 25. 22 *H.* VI. 6. 22. 71. 1 *Ro. Rep.* 294. 1 *Sid.* 29. 2 *Ro. Ab.* 278, 9. *Hardr.* 365. 1 *Lutw.* 46. 1 *Salk.* 1. And now the common practice is to use a special imparlance. See further this Dict. Title *Privilege.* Indeed no plea in abatement is good after a general imparlance. 4 *Term Rep.* 227.

b. Misnomer, is the using one name for another, the misnaming either of the parties. This may be pleaded in abatement by the defendant, whether the misnomer is in his own name, or in that of the plaintiff; and this in christian or surname, name of dignity, name of office or addition. See *post*, and *Com. Dig.* Title *Abatement*, (E. 18.)(F. 17.)

But though a defendant may by pleading in abatement take advantage of a misnomer, yet in such plea he must set forth his right name, so as to give the plaintiff a better writ. *Finch.* 363. 9 *H.* V. 1.—which is the intent of all pleas in abatement. 4 *Term Rep.* 227.

Where a defendant comes in *gratis*, or pleads by the name alleged by the plaintiff, he is estopped to allege any thing against it. *Sty.* 440. Where one is misnamed in a bond, the writ should be in the right name, and the count show that defendant, by *such* a name made the bond. To a plea of misnomer the plaintiff may reply, that defendant was known by the name in the writ. 1 *Salk.* 6, 7.

One defendant cannot plead *misnomer* of his companion, for the other defendant may admit himself to be the person in the writ. 1 *Lutw.* 36. The defendant, though his name be mistaken, is not obliged to take advantage of it; and therefore if he be impleaded by a wrong name, and afterwards impleaded by his right name, he may plead in bar the former judgment, and aver that he is the same person. *Gilb. H. C. P.* 218.

Where an indictment for a capital crime is abated for *misnomer* of the defendant, the court will not dismiss him, but cause him to be indicted *de novo* by his true name. 2 *Hawk. P. C.* 523. See further this Dict. Title *Misnomer.*

c. Addition, is a title given to a man besides his christian and surname, setting forth his estate, degree, trade, &c. Of estate, as yeoman, gentleman, esquire, &c. Of degree, as knight, earl, marquis, duke, &c. Of trade, as merchant, clothier, carpenter, &c. There are likewise additions of place of residence, as *London*, *York*, *Bristol*, &c. If one be both a duke and earl, &c. he shall have the addition of the most worthy (i. e. superior) dignity. 2 *Inst.* 669. But the title of duke, marquis, earl, &c. are not properly additions, but names of dignity. *Terms de Ley*, 20. The title of knight or baronet is part of the party's name [as is also clarencieux or king at arms, &c.] and ought to be exactly used; but the titles of esquire, gentleman, yeoman, &c. being no part of the names, are merely additions. 1 *Lil.* 34. An earl of *Ireland* is not an addition of honour here in *England*, but such person must be called by his christian and surname, with the addition of esquire only; so sons of *English* noblemen, though they have titles given them by curtesy in respect of their families, if they are sued, must be named by their christian and

surnames, with the addition of esquire; as, *A. B.* Esq. commonly called Lord *A.* 1 *Inst.* 16 *b.* 2 *Inst.* 596. 666.

By the common law, if a man that had no name of dignity was named by his christian and surname in all writs it was sufficient. If he had an inferior name of dignity, as knight, &c. he ought to be named by his christian and surname, with the name of dignity; but a duke, &c. might be sued by his christian name only, and name of dignity, which stands for his surname. 2 *Inst.* 665, 6. By stat. 1 *H.* V. *c.* 5. it is enacted that in suits or actions where process of *outlawry* lies, (See 1 *Salk.* 5.) *additions* are to be made to the name of the defendant to shew his estate, mystery, and place of dwelling; and that writs not having such additions shall be *abated*, if the defendant take exception thereto, but not by the court *ex officio*. See *Cro. Jac.* 610. 1 *Ro. Rep.* 780. If a city be a county of itself, wherein are several parishes, addition thereof, as of *London*, is sufficient. But addition of a parish not in a city must mention the county, or it will not be good. 1 *Danv.* 237.

The name of earl if omitted abates the writ. *Dav. Rep.* 60 *a.* and it shall not be amended. *Hob.* 129. 1 *Vent.* 154. But if a person is created an earl pending the action, bill, or suit, it shall not *abate*. See stat. 1 *E.* VI. *c.* 7. § 3. But there must be an entry on the roll stating that after the last continuance, *ss.* on such a day and year, the king by his letters patent created, &c. setting them forth with a *profert in curia*, &c. which the said defendant doth not deny, &c. 1 *Mod. Ent.* 31, 32.

If there are two persons, father and son, with the same name and addition, in an action brought against the son, he ought to be distinguished by the appellation of *the younger*, added to his other description, or the writ may be abated; but in an action against the father, he need *not* be distinguished by the appellation of *the elder*. See 2 *Hawk. P. C.* 187.

On the whole it is proper to observe as to *misnomers* and want of addition, that the courts of *Westminster* will not abate a writ for a trifling mistake; and will in all cases amend, if possible. See Title *Amendment*.

4. The writ being the foundation of the subsequent proceedings, great certainty and exactness is requisite, to the end that no person be arrested or attached by his goods, unless there appear sufficient grounds to warrant such proceedings; so that if the writ vary materially from that in the register, or be defective in substance, the party may take advantage of it. See 5 *Co.* 12. 9 *H.* VII. 16. 10 *E.* III. 1. *Hob.* 1. 51, 52. 80. *Carth.* 172. But where the writ shall not abate for variance from the register, so that it be equivalent, see *Hob.* 1. 51, 52.

Where a demand is of two things, and it appears the plaintiff hath action only for one, the writ may not be abated in the whole, but shall stand for that which is good; but if it appear that though the plaintiff cannot have this writ which he hath brought for part, he may have another, the writ shall abate in the whole. 11 *Rep.* 45. 1 *Saund.* 285.

In case administration be granted, after the action brought, and this appears, the plaintiff's writ shall abate. *Hob.* 245.

It is a good plea in abatement that *another action* is depending for the same thing; for whenever it appears on record, that the plaintiff has sued out two writs against the same defendant, for the same thing, the second writ shall abate; and it is not necessary that both should be pending at the time of the defendant's pleading in abatement; for if there was a writ in being at the time of suing out the second, it is plain the second was vexatious and ill *ab initio*. But it must appear plainly to be for

the same thing; for an assize of lands in one county shall not abate an assize in another county, for these cannot be the same lands. 4 *H.* VI. 24. 9 *H.* VI. 12. 5 *Co.* 61. *Doct. Pl.* 10.

In general writs, *as trespass, assize, covenant*, where the special matter is not alleged, and the plaintiff is nonsuited before he counts, and the second writ is sued pending the other, yet the former shall not be pleaded in abatement; because it doth not appear to the court that it was for the *same thing*; for the first writ being general, the plaintiff might have declared for a distinct thing from what he demanded by the second writ; but when the first is a special writ, and sets forth the particular demand, as in a *precipe quod reddat*, &c. there the court can readily see that it is for the same thing; and therefore though the plaintiff be nonsuited before he counts, yet the first shall abate the second writ, it being apparently brought for the same thing. 5 *Co.* 61. *Doct. Pl.* 11. 12. In an action of debt, &c. another action depending in the courts of *Westminster* for the same matter is a good plea in abatement; but a plea of an action in an inferior court is not good, unless judgment be given. 5 *Co.* 86. and see 5 *Co.* 62.

If a second writ be brought tested the same day the former is abated, it shall be deemed to be sued out after the abatement of the first. *Allen*, 34.

If an action pending in the same court, be pleaded to a second action brought for the same thing, the plaintiff may pray that the record may be inspected by the court, or demand *oyer* of it, which if not given him in convenient time he may sign his judgment. *Dy.* 227. *Carth.* 453. 517.

In action of debt on a judgment, defendant cannot plead a writ of error brought and pending either in bar or abatement; but the court usually stays proceedings on terms till the error is decided. 1 *Bac. Abr.* 14.

5. After the party suing has declared, the party impleaded may demand *oyer* of the writ; and then if there be any fault or insufficiency in the count for a cause apparent in itself, or if there be a variance between the count and the writ, or between the writ and a record, specialty, &c. mentioned in the count, the party impleaded ought to shew it by his pleading. *Thel. lib.* 10. *c.* 1. § 5. *Fitz. Count*, 27.

Defendant may plead in abatement of a declaration where the action is by original; but if it be by bill he must plead in abatement of the bill only. 5 *Mod.* 144. A little variance between the declaration and the bond pleaded will not vitiate the declaration; but uncertainty will abate it. *Plowd.* 84. The variance of the declaration from the obligation, or other deed on which it is grounded, will sometimes abate the action. *Hob.* 18. 116. *Moor.* 645. And if a declaration assign waste in a town not mentioned in the original writ, the writ of waste shall abate. *Hob.* 38.

Likewise where the declaration is otherwise defective, in not pursuing the writ, or not setting forth the cause of action with that certainty which the law requires, or laying the offence in a different county from that in which the writ is brought. 1 *New Abr.* 6.

6. *a.* As to the *demise* of the king; at common law, all suits depending in the king's courts were discontinued by the death of the king; so that the plaintiffs were obliged to commence new actions, or to have re-summons or attachment on the former processes, to bring the defendant in; but to prevent the inconvenience, expense and delay which this occasioned, the stat. 1 *E.* VI. *c.* 7. was made.

Proceedings on an information, in nature of *quo warranto*, are not abated by the demise of the crown. 2 *Stra.* 782. Where the king brings a writ of error in *quare impedit*, it abates by his death. 2 *Stra.* 843.

b. With respect to the *marriage* of the parties; *coverture* is a good plea in *abatement*, which may be either before the writ sued, or pending the writ. By the first the writ is abated *de facto*, but the second only proves the writ abateable; both are to be pleaded, with this difference, that coverture, pending the writ, must be pleaded, after the last continuance; whereas coverture before the writ brought, may be pleaded at any time, because the writ is *de facto* abated. *Doct. Pl.* 3. 1 *Leon.* 168, 169. *Vide* 2 *Ld. Raym.* 1525. *Comb.* 449. *Lut.* 1639.

If a writ be brought by *A.* and *B.* as baron and feme, whereas they were not married until the suit depended, the defendant may plead this in abatement; for though they cannot have a writ in any other form, yet the writ shall abate, because it was false when sued out. *Fitz. Brief*, 476. If a writ be brought against a feme covert as sole, she may plead her coverture; but if she neglects to do it, and there is a recovery against her as a feme sole, the husband may avoid it by writ of error, and may come in at any time and plead it. *Latch.* 24. *Stile*, 254. 280. 2 *Roll. Rep.* 53. If an action be brought in an inferior court against a feme sole, and pending the suit she intermarries, and afterwards removes the cause by *habeas corpus*; and the plaintiff declares against her as a feme sole, she may plead coverture at the time of suing the *habeas corpus*; because the proceedings here are *de novo*; and the court takes no notice of what was precedent to the *habeas corpus*; but upon motion on the return of the *habeas corpus*, the court will grant a *procedendo*. For though this be a writ of right, yet where it is to abate a rightful suit the court may refuse it; and the plaintiff had bail below to this suit, which by this contrivance he might be ousted of, and possibly by the same means of the debt. 1 *Salk.* 8.

In ejectment againt baron and feme, after verdict for the plaintiff, baron dies between the day of *Nisi Prius* and the day in Bank; adjudged that the writ should stand good against the feme, because it is in nature of a trespass, and the feme is charged for her own act; and therefore the action survives against her. So if the wife had died, the baron should have judgment entered against him. *Cro. Jac.* 356. *Cro. Car.* 509. 1 *Roll. Rep.* 14. *Moor.* 469.

If a feme sole plaintiff, after verdict, and before the day in bank, takes husband, she shall have judgment, and the defendant cannot plead this coverture, for he has no day to plead it at. *Cro. Car.* 232. 1 *Bulst.* 5.

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'Tis now in general held, that if a *feme sole* commences an action, and pending the same marries, the suit is abated; but that it is otherwise with respect to a feme sole defendant, as she shall not take advantage of her own act. See further, Title *Baron and Feme*.

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The death of a plaintiff did generally at common law *abate* the writ before judgment, till the stat. 8 & 9 *W.* III. *c.* 11; which declares that neither the death of plaintiff or defendant after interlocutory judgment shall *abate* it, if the action might be originally prosecuted by and against the executors or administrators of the parties: and if there are two or

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The death of a plaintiff did generally at common law *abate* the writ before judgment, till the stat. 8 & 9 *W.* III. *c.* 11; which declares that neither the death of plaintiff or defendant after interlocutory judgment shall *abate* it, if the action might be originally prosecuted by and against the executors or administrators of the parties: and if there are two or

more plaintiffs or defendants, and one or more die, the writ or action shall not *abate*, if the cause of action survives to the surviving plaintiff or against the surviving defendant, but such death being suggested on record the action shall proceed. For the cases previous to this statute, see *Cro. Eliz.* 652. 1 *Inst.* 139. *Dy.* 279. *Hard.* 151. 164. *Stile*, 299. 3 *Mod.* 249. *Cro. Car.* 426. 1 *Jones*, 367. 1 *Roll. Abr.* 756. 1 *Show. Rep.* 186. 1 *Vent.* 34. 3 *Mod.* 249.

But in a writ of error if there be several plaintiffs, and one dies, the writ shall abate, because the writ of *error* is to set persons *in statu quo*, before the erroneous judgment given below; and they that are plaintiffs in error were *distinct* sufferers in the judgment, since there might be different executions issued thereupon, and different representatives were by such judgment affected; and by consequence the survivor cannot prosecute the writ of error for the whole, lest by a collusive persuasion, or by negligence or design he should hurt the representative of the deceased. *Bridg.* 78. *Yelv.* 208. 10 *Co.* 1351. 1 *Vent.* 34. 1 *Sid.* 419. *cont.* But if any of the defendants in error die, yet all things shall proceed, because the benefit of such judgment goes to the survivor, and he only is to defend it. *Sid.* 419. *Yelv.* 208. 1 *Ld. Raym.* 439. If there be several persons named as plaintiffs in the writ, and one of them was dead at the time of purchasing the writ, this may be pleaded in *abatement*; because it falsifies the writ; and because the right was in the survivors, at the time of suing the writ, and the writ not according to the case. 20 *H.* VI. 30. 18 *E.* IV. 1. 2 *H.* VII. 16. 1 *Brownl.* 3, 4. *Clift. Ent.* 6. *Rast. Ent.* 126.

By stat. 17 *Car.* II. *c.* 8. (made perpetual by 1 *Jac.* II. *c.* 17. § 5.) it is enacted, that the death of either of the parties between verdict and judgment, shall not be alleged for error, so as judgment be entered within two terms after such verdict. See 1 *Salk.* 8. 2 *Ld. Raym.* 1415. *Sid.* 385. See Title *Amendment*.

II. A plea in abatement must be put in within *four* days after the return of the writ, because the person coming in by the process of the court ought not to have time to delay the plaintiff. *Lutw.* 1181. 2 *Stra.* 1192.

But if a declaration be delivered against one in custody, he has the whole term to plead in abatement. *Salk.* 515.

If the declaration be delivered in the vacation, or so late in term, that defendant is not bound to plead to it that term, he may plead in abatement, within the first four days of next term.

As pleas in abatement enter not into the merits of the cause, but are dilatory, the law has laid the following restrictions on them. First, by the statute of 4 & 5 *Ann. cap.* 16. for amendment of the law, no dilatory plea is to be received unless on oath, and probable cause shewn to the court. Secondly, no plea in abatement shall be received after *respondeas ouster*, for then they would be pleaded *in infinitum*. 2 *Saund.* 41. Thirdly, they are to be pleaded before imparlance. See *Yelv.* 112. 1 *Lutw.* 46. 178. 2 *Lutw.* 1117. *Doct. Pla.* 224. 4 *Term Rep.* 227. 520. Except where ancient demesne is pleaded; for this may be done after imparlance, because the lord might reverse the judgment by writ of deceit, and it goes in bar of the action itself. For this see *Dyer in marg.* 210. *Stile*, 30. *Latch.* 83. 5 *Co.* 105. 9 *Co.* 31. *Han. Ent.* 103.

A plea in abatement must be signed by counsel, and filed with the clerk of the papers; and without an affidavit annexed to it, judgment may be signed. *Impey's Instruct. Cler.* K. B.

With respect to pleas to the *jurisdiction* of the court, it is to be observed that the defendant must plead *in propriâ personâ*; for he cannot plead

by attorney without leave of the court first had, which leave acknowledges the jurisdiction; for the attorney is an officer of the court, and if he put in a plea by an officer of the court, that plea must be supposed to be put in by leave of the court. 1 *New Abr.* 2.

The defendant must make but half defence, for if he makes the full defence *quando & ubi curia consideraverit*, &c. he submits to the jurisdiction of the court. *Lutw.* 9. 1 *Show. Rep.* 386.

If a plea is pleaded to the *jurisdiction* of the court, it ought to conclude with a prayer of judgment in this manner, *viz. The said defendant prays judgment, whether the court will take any further cognizance of the said plea.* 1 *Mod. Ent.* 24.

Pleas in *disability* of the *plaintiff*, may not be pleaded after a general imparlance: 1 *Lutw.* 19. In pleading *outlawry* in disability in another court, the ancient way was to have the record of the outlawry itself *sub pede sigilli* by *certiorari* and *mittimus*; (See *Doct. Pl.* 393. *Stam.* 103. *Fitz. Coron.* 233.) but this being very expensive, it is now sufficient to plead the *capias utlagatum* under the seal of the court from whence it issues; for the issuing of execution could not be without the judgment; and therefore such execution is a proof to the court that there is such a judgment, which is a proof that the defendant's plea of matter of record is proved by a matter of record; and consequently appears to the court not to be merely dilatory; and therefore on shewing such execution, if the plaintiff will plead *nul tiel record*, the court will give the defendant a day to bring it in. *Co. Lit.* 128. *Doct. Plac.* See Title *Outlawry*.

Outlawry may be pleaded in bar, after it is pleaded in abatement, because the thing is forfeited, and the plaintiff has no right to recover. 11 *H.* VII. 11. 2 *Lutw.* 1604.

Outlawry may be always pleaded in *abatement*, but not in *bar*, unless the cause of action be forfeited. *Co. Lit.* 128 *b. Doct. Pl.* 395.

In *personal actions* where the *damages* are uncertain, *outlawry* cannot be pleaded in *bar*; but in *actions on the case*, where the *debt* to avoid the *law wager*, is turned into *damages*, there *outlawry* may be pleaded in *bar*, for it was vested in the king, by the forfeiture, as a debt certain, and due to the outlaw; and the turning it into damages, whereby it becomes uncertain, shall not divest the king of what he was once lawfully possessed of. 2 *Lutw.* 1604. 3 *Lev.* 29. 2 *Vent.* 282. 3 *Leon.* 197. 205. *Cro. Eliz.* 204. *Owen*, 22.

Where *excommunication* is pleaded, it is not sufficient to shew the writ *de excommunicato capiendo* under the seal of the court; for the writ is no evidence of the continuance of the excommunication, since he may be absolved by the bishop, and that will not appear in the king's court, because such assoilment is not returned into the king's court from whence the *significavit* is sent.

Alienage may be pleaded either in bar or abatement: in the latter case to an alien in league; in the former to an alien enemy. 1 *Inst.* 129 *b.* See *ante*, I. 2. *c.*

If a plea in abatement be pleaded to the *person* of the *plaintiff*, there it must conclude, *if he ought to be compelled to answer.* 1 *Mod. Ent.* 34.

In all pleas of abatement which relate to the person, there is no necessity of laying a venue, for all such pleas are to be tried where the action is laid. 1 *Bac. Abr.* 15.

If it be pleaded to the *writ*, then the plea concludes with the prayer of *judgment of the writ*, and that the *writ* may be *quashed*. When it is to the

action of the *writ*, there he should shew that the party ought not to have *that* writ, but by the matter of his plea should intimate to him how he should have a better. *Latch.* 178. *Respondere non debet* is a proper beginning to a plea to the *jurisdiction* of the court, but a plea of *ne unques executor*, ought to begin with *petit judic'* de *billa*. 5 *Mod.* 132, 133. 146. 1 *Saund.* 283. 2 *Saund.* 97. 189. 190. 339. *Lutw.* 44. *Show.* 4.—In a replication to a plea in abatement where matter of fact is pleaded, the plaintiff must pray his damages; but where matter of *law* is pleaded, the plaintiff must only pray that his *writ* may be *maintained*. 1 *Ld. Raym.* 339. 594. 2 *Ld. Raym.* 1022.—If one pleads matter of *abatement*, and *concludes* in *bar*, *Et petit judicium si actionem habere debet*, thought he *begins* in *abatement*, and the matter be also in *abatement*, yet the conclusion being in *bar*, makes it a *bar*; and the reason is, because you *admit* the *writ*, by concluding specially against the *action*. 18 *H.* VI. 27. 32 *H.* VI. 17. 36 *H.* VI. 18. 22 *H.* VI. 536. 1 *Show.* 4. 2 *Ld. Raym.* 1018. If a man pleads matter in *bar*, and concludes in abatement, it shall be taken for a plea in *bar*, from the nature and reason of the thing; for the plaintiff can have no writ if he has not a cause of action, and therefore the court will take the plea to be in bar. 37 *H.* VI. 24. 36 *H.* VI. 24. 2 *Mod.* 6.

The *nature* of a *plea* in *abatement* is to entitle the plaintiff to a *better writ*; See 4 *Term Rep.* 227. and it hath been expressly resolved, that where the plea is in abatement, and it is of necessity that the defendant must disclose matter of bar, he shall have his election to take it either by way of bar or abatement. 2 *Roll. Rep.* 64. *Salkill* v. *Shilton*. In short, whatever destroys the plaintiff's action, and disables him *for ever* from recovering, may be pleaded in *bar*. But the defendant is not always obliged to plead in bar, but may plead in *abatement*, as in *replevin* for goods, the defendant may plead property in himself, or in a stranger, either in bar or in *abatement*, for if the *plaintiff* cannot prove property in himself, he fails of his action for ever; and it is of no avail to *him* who has the property if *he* has it not. 1 *Vent.* 249. 2 *Lev.* 92. 1 *Salk.* 5. 94. *Carth.* 243.

Where matter of *bar* may be pleaded in *abatement*, *vide* 2 *Ld. Raym.* 1207, 1208.

If a defendant together with a plea in abatement plead also a plea in bar, or the general issue, he thereby waives the plea in abatement; and the plea in bar or general issue only shall be tried. 2 *Hawk. P. C.* 277. and the authorities there cited.

III. If issue be taken upon a plea to the *writ*, judgment against the defendant is *peremptory*; but if there be a *demurrer*, the judgment is then, only that the plaintiff *answer over*. *Yelv.* 12. *Allen*, 66.

Whatever matters are pleaded in abatement of an appeal or indictment of felony, and found against the defendant, yet he may afterwards plead over to the felony. 2 *Hawk. P. C.* 277. But in criminal cases, not capital, on *demurrer* in abatement adjudged against the party, the court will give final judgment, and not *respondeas ouster*. *Ibid.* 471.

In appeals of *mayhem* and all civil actions, (except *assizes* of *mort d'ancestor*, *novel disseisin*, *nuisance* and *juris utrum*,) if a plea in abatement triable by the county be found against the defendant, he shall not be suffered afterwards to plead any new matter, but final judgment shall be given against him, 2 *Hawk. P. C.* 277. and see the authorities there cited.

Upon a judgment in *waste* for the damages recovered, the defendant *demurs* partly in *abatement*, and partly in *bar*, the court shall give judgment in chief. *Show.* 255. In debt, if the defendant pleads in abatement to the writ, to which the plaintiff imparls, and at the day given, the defendant makes default, judgment is *final* upon the default, though the plea was only in abatement. 10 *E.* IV. 7. *Mod. Cases*, 5. The judgment for the defendant, on a plea in abatement, is *quod breve* or *narratio cassetur ;* if issue be joined on a *plea* in *abatement*, and it be found for the plaintiff, it shall be peremptory against the defendant, and the judgment shall be *quod recuperet*, because the defendant choosing to put the whole weight of his cause upon this issue, when he might have had a plea in chief, is an admittance that he had no other defence. *Yelv.* 112. 2 *Show.* 42. *Str.* 532. and in this case the jury who try that issue shall assess the damages.

If there be two defendants and they plead two several pleas in abatement, and there be issue to one and demurrer to the other, if the issue be found for the defendant, the court will not proceed on the demurrer ; and *sic vice versa*, for either way the writ is abated, and the other plea becomes useless. *Hob.* 250. 1 *Bac. Abr.* 15.

ABATOR, See *Abate.*

ABATUDA. Any thing diminished. *Moneta* abatuda, is money clipped or diminished in value. *Cowel. Du Fresne.*

ABBACY, *abbatia.*] The government of a religious house, and the revenues thereof, subject to an *abbot*, as bishoprick from bishop.

ABBAT, or *Abbot ; abbas*, Lat. *abbé*, Fr. *abbud*, Sax. by some derived from the Syriac *abba*, *pater.*] A spiritual lord or governor, having the rule of a religious house. Of these abbots here in *England* some were elective, some presentative ; and some were mitred, and some were not ; such as were mitred had episcopal authority within their limits, being exempted from the jurisdiction of the diocesan ; but the other sort of *abbots* were subject to the diocesan in all spiritual government. The mitred *abbots* were lords of parliament, and called *abbots sovereign*, and *abbots general*, to distinguish them from the other *abbots.* And as there were *abbots*, so there were also *lords priors*, who had exempt jurisdiction, and were likewise lords of parliament. Some reckon twenty-six of these lords *abbots* and priors that sat in parliament. Sir *Edward Coke* says, there were twenty-seven parliamentary *abbots* and two priors. 1 *Inst.* 97. In the parliament, 20 *R.* II. there were but twenty-five ; but *anno* 4 *Ed.* III. in the summons to the parliament at *Winton* more are named. And in *Monasticon Anglicanum* there is also mention of more, the names of which were as follow : *abbots* of *St. Austin Canterbury*, *Ramsey*, *Peterborough*, *Croyland*, *Evesham*, *St. Bennet de Hulmo*, *Thornby*, *Colchester*, *Leicester*, *Winchcomb*, *Westminster*, *Cirencester*, *St. Albans*, *St. Mary York*, *Shrewsbury*, *Selby*, *St. Peter's Gloucester*, *Malmsbury*, *Waltham*, *Thorney*, *St. Edmunds*, *Beaulieu*, *Abingdon*, *Hide*, *Reading*, *Glastonbury*, and *Osney.* And priors of *Spalding*, *St. John's* of *Jerusalem*, and *Lewes.* To which were afterwards added the *abbots* of *St. Austin's Bristol*, and of *Bardeny*, and the priory *de Sempringham.* See also *Spelman's* Glossary. These *abbeys* and priories were founded by our ancient kings and great men, from the year 602 to 1133. An *abbot* with the monks of the same house were called the *convent*, and made a corporation. *Terms de Ley*, 4. By stat. 27 *H.* VIII. c. 28. all *abbeys*, monasteries, priories, &c. not above the value of 200*l. per ann.* were given to the king, who sold the lands at

low rates to the gentry. *Anno* 29 *H.* VIII. the rest of the *abbots*, &c. made voluntary surrenders of their houses to obtain favour of the king; and *anno* 31 *H.* VIII. a bill was brought into the house to confirm those surrenders; which passing, completed the dissolution, except the hospitals and colleges, which were not dissolved, the first till the 33d, and the last till the 37th of *H.* VIII. when commissioners were appointed to enter and seize the said lands, &c.

ABBATIS. An avener or steward of the stables; an ostler.—*Spelm.*

ABBROCHMENT, *abbrocamentum.*] The forestalling of a market or fair. *MS. Antiq.*

ABBUTTALS. See *Abuttals.*

To ABDICATE, *abdicare.*] To renounce or refuse any thing. *Terms de Ley*, 5.

ABDICATION, *abdicatio.*] In general, is where a magistrate or person in office, renounces and gives up the same, before the term of service is expired. And this word is frequently confounded with resignation, but differs from it, in that *abdication* is done purely and simply; whereas *resignation* is in favour of some other person. *Chamb. Dict.* 'Tis said to be a renunciation, quitting and relinquishing, so as to have nothing further to do with a thing; or the doing of such actions as are inconsistent with the holding of it. On king *James* II.'s leaving the kingdom, and *abdicating* the government, the Lords would have had the word *desertion* made use of; but the Commons thought it was not comprehensive enough, for that the king might then have liberty of returning. The *Scots* called it a forefaulture (*forfeiture*) of the crown, from the verb *forisfacio*. This word was fully canvassed in the *Parliamentary Debates*, at that time.

ABDITORIUM. An abditory or hiding place, to hide and preserve goods, plate, or money; and is used for a chest in which reliques are kept, as mentioned in the inventory of the church of *York*. *Mon. Ang. p.* 173.

ABEREMURDER, *aberemurdrum.*] Plain or downright murder; as distinguished from the less heinous crimes of manslaughter and chance-medley. It is derived from the Saxon *ebere*, apparent, notorious, and *morth*, murder; and was declared a capital offence, without fine or commutation, by the laws of *Canute*, *cap.* 93. and of *Hen.* I. *cap.* 13. *Spelm.*

TO ABET, *abettare*, from the Saxon *a*, (*ad vel usque*) and *bedan* or *beteren*, to stir up or incite.] In our law signifies to encourage or set on; the substantive *abetment* is used for an encouraging or instigation. *Staundf. Pl. Cr.* 105. An *abettor* (*abettator*) is an instigator or setter on; one that promotes or procures a crime. *Old Nat. Br.* 21. See Title *Accessary*.

ABEYANCE; or *abbayance*, from the Fr. *bayer*, to expect.] Is what is in expectation, remembrance, and intendment of law. By a principle of law, in every land there is a fee-simple in somebody, or it is in *abeyance*; that is, though for the present it be in no man, yet it is in expectancy, belonging to him that is next to enjoy the land. 1 *Inst.* 342. The word *abeyance* hath been compared to what the civilians call *hæreditatem jacentem*; for as the civilians say lands and goods *jacent*, so the common lawyers say that things in like estate *are in abeyance*; as the logicians term it *in posse*, or in understanding; and as we say *in nubibus*, that is, in consideration of law. See *Plowd. Rep.* 547.

If a man be a patron of a church, and presents one thereto, the fee of the lands and tenements pertaining to the rectory is in the parson; but if the parson die, and the church become void, then the fee is in *abeyance*, until there be a new parson presented, admitted, and inducted: for the patron hath not the fee, but only the right to present, the fee being in the incumbent that is presented. *Terms de Ley*, 6.

If a man makes a lease for life, the remainder to the right heirs of *J. S.* the fee-simple is in *abeyance* until *J. S.* dies. 1 *Inst.* 342. If lands be leased to *A. B.* for life, the remainder to another person for years, the remainder for years is in *abeyance*, until the death of the lessee for life; and then it shall vest in him in remainder as a purchaser, and as a chattel shall go to his executors. 3 *Leon.* 23. Where tenant for term of another's life dieth, the freehold of the lands is in *abeyance* till the entry of the occupant. 1 *Inst.* 342 *b.*

Fee-simple in *abeyance* cannot be charged until it comes *in esse* so as to be certainly charged or aliened; though by possibility it may fall every hour. 1 *Inst.* 378.

The necessity there was in the old law, that there should always be some person to do the feudal duties, to fill the possession and to answer the actions which might be brought for the fief, introduced the maxim that the freehold could never be in abeyance. (See 2 *Wils.* 165.) But it was admitted there were some cases in which the *inheritance* when separated from the freehold might be so. But this abeyance or suspension of the inheritance could not but be considered with a very jealous eye, and it was agreed that it should be discountenanced and discouraged as much as possible, and allowed upon none but the most urgent occasions. The chief reasons of this may be found in *Blackstone's* argument in the case of *Perryn* and *Blake*; and Mr. *Hargrave's* observations on the rule in *Shelly's* case. To these reasons the modern law has added her marked and unremitted odium of every restraint upon alienation; it being clear that no restraint could be more effectual than the admission of a suspension of the inheritance. The same principles have in some degree given rise to the well known rule of law, that a preceding estate of freehold is indispensably necessary for the *support* of a contingent remainder; and they influence in some degree the doctrines respecting the destruction of contingent remainders. See 1 *Inst.* 216 *a.* and 342 *b.* and the notes there.

As to the *abeyance of titles of honour*, and their being revived by the royal nomination, see 1 *Inst.* 165 *a.* where Lord *Coke* says, that if an earl of *Chester* die, leaving more daughters than one, the eldest shall not of right be a countess, but the king may, for the uncertainty, confer the dignity on which daughter he pleases. And this doctrine, says Mr. *Hargrave* in his note, is undoubtedly law, though our books furnish little matter on the subject; and there are many instances of an exertion of this prerogative. One of the most remarkable took place in the person of the late Mr. *Norborn Berkley* who in the year 1764 was called to the House of Peers in right of the old barony of *Botetourt*, after an *abeyance* of several centuries, and was allowed to sit according to the antiquity of that barony. See *Cas. in Dom. Proc.* 1764. Another instance was in the case of Sir *Francis Dashwood*, late Lord *De Spencer*; for in 1763 he was called to the ancient barony of that name in right of his deceased mother, who was the eldest sister and one of the co-heirs of an earl of *Westmoreland*, on whose death that barony had become in *abeyance*, and being so summoned he took his seat as premier baron in place of Lord *Abergavenny*, who before possessed that distinction.

ABGETORIA, *abgetorium*. The alphabet. *Mat. Westm.*—The *Irish* still call the alphabet *abghitten*.

ABIGEVUS, for *abigens*. The same as *Abactor*, which see, and *Bract. Tract.* 1. *l.* 1. 3. *cap.* 6. 105 *a.*

ABILITY, to inherit. See Title *Alien*.

ABISHERING or ABISHERSING. Is understood to be quit of amercements. It originally signified a forfeiture or amercement, and is more properly, *mishering*, *misherding*, or *miskering*, according to *Spelman*. It hath since been termed a liberty or freedom; because wherever this word is used in a grant or charter, the persons to whom made, have their forfeitures and amercements of all others, and are themselves free from the controul of any within their fee. *Rastal's Abr. Terms de Ley*, 7.

ABJURATION, *abjuratio*.] A forswearing or renouncing by oath: in the old law it signified a sworn banishment, or an oath taken to forsake the realm for ever. *Staundf. Pl. C. l.* 2. *c.* 40.

Formerly in king *Edward* the *Confessor's* time, and other reigns down to the 22 *H.* VIII. (in imitation of the clemency of the *Roman* emperors towards such as fled to the church,) if a man had committed felony here, and he could fly to a church or church-yard before his apprehension, he might not be taken from thence to be tried for his crime; but on confession thereof before the justice, or before the coroner, he was admitted to his oath, to *abjure* or forsake the realm; which privilege he was to have forty days, during which time any persons might give him meat and drink for his sustenance, but not after, on pain of being guilty of felony: See *Horn's Mirror, lib.* 1. But at last, this punishment being but a perpetual confinement of the offender to some sanctuary, wherein (upon *abjuration* of his liberty and free habitation) he would chuse to spend his life, (as appears by the stat. *anno* 22 *H.* VIII. *c.* 14.) this privilege was abolished by stat. 21 *Jac.* I. *cap.* 28. and this kind of abjuration ceased. 2 *Inst.* 629.

As to the effect of abjuration, on the marriage tie, see Title *Baron & Feme*.

In its modern and now more usual signification, it extends to the person as well as place; as for a man to *abjure* the Pretender by oath, is to bind himself not to own any regal authority in the person called the Pretender, nor ever to pay him any obedience, &c. See on this subject, Title *Nonconformists*, *Oaths*, *Papist*, *Recusants*, &c.

ABOLITION. A destroying or effacing, or putting out of memory: it also signifies the leave given by the king, or judges, to a criminal accuser to desist from further prosecution. Stat. 25 *H.* VIII. *c.* 21.

TO ABRIDGE, *abbreviare*, from the Fr. *abbreger*.] To make shorter in words so as to retain the sense and substance. And in the common law it signifies particularly the making a declaration or count shorter, by severing some of the substance from it: a man is said to *abridge* his plaint in assize, and a woman her demand in action of dower, where any land is put into the plaint or demand which is not in the tenure of the defendant; for if the defendant pleads non-tenure, joint-tenancy, &c. in abatement of the writ, as to part of the lands, the plaintiff may leave out those lands, and pray that the tenant may answer to the rest. See *Brook*. Title *Abridgment*, *vide* 21 *H.* VIII. *c.* 3.

ABRIDGEMENT. A large work contracted into a narrow compass. See Titles, *Books*, *Literary Property*.

ABROGATE, *abrogare*.] To disannul or take away any thing: to *abrogate* a law, is to lay aside or repeal it. Stat. 5 & 6 *Ed.* VI. *c.* 3.

ABSENTEES, or *des absentees*. A parliament so called was held at *Dublin*, 10 *May*, 8 *Hen.* VIII. And mentioned in letters patent, dated 29 *Hen.* VIII. 4 *Inst.* 354.

ABSOLVE. See *Assoile.*

ABSOLUTIONS, from *Rome*. See title *Papists.*

ABSONIARE. A word used by the *English Saxons* in the oath of fealty, and signifying to shun or avoid.— As in the form of the oath among the *Saxons* recorded by *Somner.*

ABSQUE HOC. See title *Traverse.*

ABUTTALS, from the French *abutter* or *abouter*, to limit or bound.] The buttings and boundings of lands, East, West, North or South, with respect to the places, by which they are limited and bounded. *Camden* tells us that limits were distinguished by hillocks raised in the lands called *Botentines*, whence we have the word *butting*. The sides on the breadth of lands are properly *adjacentes*, lying or bordering; and the ends in length *abbuttantes*, *abutting* or bounding. The boundaries and *abuttals* of corporation and church lands, and of parishes, are preserved by an annual procession. Boundaries are of several sorts; such as inclosures of hedges, ditches and stones in common fields, brooks, rivers, and highways, &c. of manors and lordships.

ACCAPITARE, *accapitum*. To pay relief to lords of manors.— *Capitali domino* accapitare. *Fleta*, *l.* 2. *c.* 50.

ACCEDAS AD CURIAM. A writ to the sheriff where a man hath received false judgment in a hundred court, or court baron. It issues out of the Chancery, but is returnable into *B. R.* or *C. B.* And is in the nature of the writ *de falso judicio*, which lies for him that had received false judgment in the county court. In the *Register of Writs* it is said to be a writ that lies as well for justice delayed, as for false judgment; and that it is a species of the writ *recordare*, the sheriff being to make record of the suit in the inferior court, and certify it into the king's court. *Reg. Orig.* 9. 56. *F. N. B.* 18. *Dyer*, 169.

ACCEDAS AD VICECOMITEM. Where a sheriff hath a writ called *Pone* delivered to him, but suppresseth it, this writ is directed to the coroner, commanding him to deliver a writ to the sheriff. *Reg. Orig.* 83.

ACCEPTANCE, *acceptatio.*] The taking and *accepting* of any thing in good part, and as it were a tacit agreement to a preceding act, which might have been defeated and avoided, were it not for such *acceptance* had.

As to the effect of acceptance of Rent, See Titles, *Rent*, *Lease.*

How far the acceptance of one Estate shall destroy another, See Title *Estate.*

Where the acceptance of money shall discharge a Bond, See Title *Bond.*

How far the acceptance of one thing shall be a good bar to the demand of another.

Where the condition of a bond is to pay money, acceptance of another thing is good. But if the condition is not for money, but a collateral thing, it is otherwise. *Dyer* 56. 9 *Rep.* 79. The *acceptance* of uncertain things, as customs, &c. made over, may not be pleaded in satisfaction of a certain sum due on bond. *Cro. Car.* 193. If a woman hath title to an estate of inheritance, as dower, &c. she shall not be barred by any collateral satisfaction or recompense: and no collateral *acceptance* can bar any right of inheritance or freehold, without some release, &c. 4 *Rep.* 1.

When a man is entitled to a thing in gross, he is not bound to *accept* it by parcels; and if a lessor distrain for rent, he is not obliged to *accept* part of it; nor in action of detinue, part of the goods, &c. 3 *Salk.* 2.

Debt upon bond conditioned for the obligor to make an assurance of such lands to such uses as in the condition mentioned; the defendant pleaded, that he had made a feoffment of the same lands to other uses than in the condition expressed, which the obligee had accepted; upon demurrer it was adjudged an ill plea; for the obligor ought not to vary from the uses set forth in the condition. 1 *Brownl.* 60.

Acceptance of a *less* sum may be in satisfaction of a *greater* sum, if it be before the day on which the money becomes due. 3 *Bulst.* 301. See Title *Payment*.

ACCESSARY or Accessory. *Accessorius, Particeps criminis.*] One guilty of a felonious offence, not principally, but by participation; as by command, advice, or concealment, &c.

Abettors and *Accomplices* also come in some measure under the name, though the former not strictly under the legal definition, of Accessaries. An *Abettor* is one who, stirs up, incites, instigates or encourages, or who commands, counsels or procures, another to commit felony; and in many, indeed in almost all cases, is now considered as much a principal as the actual felon, in some cases more, as in the case of murder. See *Leach's Hawk. P. C. l.* 2. *c.* 29. § 7, 8. & *c.* 33. § 98—103. An *Accomplice* is one of many equally concerned in a felony, and is generally applied to those who are admitted to give evidence against their fellow-criminals, for the furtherance of justice which might otherwise be eluded; and this is done on the ancient principle of law relative to *Approvers*. See *Leach's Hawk. P. C. l.* 2. *c.* 37. § 3. 7. & notes: 4 *Comm.* 329.

The following extracts from *Blackstone's Commentaries*, (4 *Comm.* 34—40 & 323.) with some slight additions inserted, seem to be most proper to give the reader a methodized general idea of the subject.—Consult also *Hale's Hist. P. C.* and *Hawk. P. C.* for fuller information.

I. *Of Principals.*—A man may be principal in an offence in two degrees. A principal in the first degree, is he that is the actor, or absolute perpetrator of the crime; and in the second degree, he who is present, aiding and abetting the fact to be done. 1 *Hale's P. C.* 615. which presence need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance. *Foster*, 350. And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or persuading another to drink it, (*Keb.* 52.) who is ignorant of its poisonous quality, (*Foster*, 349.) or giving it to him for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed. 3 *Inst.* 138. And the same reason will hold, with regard to other murders committed in the absence of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap, or pitfall, for another, whereby he is killed; letting out a wild beast, with an intent to mischief; or exciting a madman to commit murder, so that death thereupon ensues; in every of these cases the party offending is guilty of murder as a principal in the first degree. For he cannot be called an accessary, that necessarily presupposing a principal; and the poison, the pitfall, the beast or the madman, cannot be held principals, being only the instruments of death. As there-

fore he must be certainly guilty either as principal or accessary, and cannot be so as accessary, it follows that he must be guilty as principal: and if principal, then in the first degree, for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist. 1 *Hale's P. C.* 617. 2 *Hawk. P. C.* 441, 2.

II. *Of Accessaries.*—An Accessary is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed. In considering the nature of which degree of guilt, we will examine, 1st. What offences admit of accessaries, and what not: 2. Who may be an accessary before the fact: 3. Who may be an accessary after it: 4. How accessaries, considered merely as such, and distinct from principals are to be treated: 5. Of accessaries or accomplices accusing principals.

1. In high treason there are no accessaries, but all are principals: the same acts, that make a man accessary in felony, making him a principal in high treason, upon account of the heinousness of the crime. 3 *Inst.* 138. 1 *Hale's P. C.* 613. Besides, it is to be considered, that the bare intent to commit treason is many times actual treason; as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessaries before the fact, since the very advice and abetment amount to principal treason. But this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in these, no advice to commit them, unless the thing be actually performed, will make a man a principal traitor. *Foster*, 342. In petit treason, murder and felonies with or without benefit of clergy, there may be accessaries: except only in those offences, which by judgment of law are sudden and unpremeditated, as manslaughter and the like, which therefore cannot have any accessaries before the fact. 1 *Hale's P. C.* 615. So too in petit larceny, and in all crimes under the degree of felony, there are no accessaries either before or after the fact: but all, persons concerned therein, if guilty at all, are principals. 1 *Hale's P. C.* 613. the same rule holding with regard to the highest and lowest offences; though upon different reasons. In treason all are principals, *propter odium delicti*; in trespass all are principals, because the law, *quæ de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim that *accessorius sequitur naturam sui principalis*: 3 *Inst.* 139. and therefore an accessary cannot be guilty of a higher crime than his principal, being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessary only to the crime of murder, though had he been present and assisting he would have been guilty, as principal, of petty treason, and the stranger of murder. 2 *Hawk. P. C.* 441, 2.

Though generally an act of parliament, creating a felony, renders (consequentially) accessaries before and after, within the same penalty, yet the special penning of the act of parliament in such cases sometimes varies the case. Thus the statute of 3 *Hen.* VII. *c.* 2. against taking away maidens, &c. makes the offence and the procuring and abetting, yea and wittingly receiving also, to be all equally principal felonies, and excluded of clergy. 1 *Hale's P. C.* 614.

In what cases accessaries are excluded from clergy, see Title *Felonies without Clergy.*

2. Sir *Matthew Hale*, (3 *Hale's P. C.* 615, 616.) defines an *accessary before the fact* to be one, who being absent at the time the crime was committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessary: for if such procurer, or the like, be present he is guilty of the crime as principal. If *A.* then advises *B.* to kill another, and *B.* does, in the absence *A.* now *B.* is principal, and *A.* is accessary in the murder. And this holds though the party killed be not *in rerum natura* at the time of the advice given. As if *A.* the reputed father advises *B.* the mother of a bastard child, unborn, to strangle it when born, and she does so, *A.* is accessary to the murder. *Dyer*, 186. And it is also settled, (*Foster*, 126.) that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessary before the fact. It is likewise a rule, that he who in anywise commands or counsels another to commit an unlawful act is accessary to all that ensues upon that unlawful act, but is not accessary to any act distinct from the other; as if *A.* commands *B.* to beat *C.* and *B.* beats him so that he dies, *B.* is guilty of murder as principal, and *A.* as accessary; but if *A.* commands *B.* to burn *C.*'s house, and he in so doing commits a robbery, now *A.* though accessary to the burning, is not accessary to the robbery, for that is a thing of a distinct and unconsequential nature. 1 *Hale's P. C.* 617.— But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison *A.* he is stabbed or shot, and dies, the commander is still accessary to the murder, for the substance of the thing commanded was the death of *A.* and the manner of its execution is a mere collateral circumstance. 2 *Hawk. P. C.* 443. By stat. 3 & 4 *W.* & *M. c.* 9. benefit of clergy is taken away from accessaries before the fact to *burglary*, by commanding, counselling, &c.

3. *An accessary after the fact* may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. 1 *Hale's P. C.* 618. Therefore to make an accessary *ex post facto* it is in the first place requisite that he knows of the felony committed. 2 *Hawk. P. C.* 446. In the next place, he must receive, relieve, comfort or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assister an accessary. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force or violence to rescue or protect him. 2 *Hawk. P. C.* 444, 5. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler, to let him escape, makes a man an accessary to the felony. And by stat. 11 & 12 *W.* III. *c.* 7. the receiving a pirate, or any vessel or goods piratically taken, renders the receivers accessary to the piracy. But to relieve a felon in gaol with clothes or other necessaries, is no offence: for the crime imputed to this species of accessary is the hindrance of public justice, by assisting the felon to escape the vengeance of the law. 1 *Hale's P. C.* 624. To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere misdemeanor, and made not the receiver accessary to the theft, because he received the goods only, and not the felon. 1 *Hale's P. C.* 620. To remedy this the stat. 3 *W.* & *M. c.* 9. & 1 *Anne*, *c.* 9. were passed against such receivers; and now by the stat. 5 *Anne c.* 31. and 4 *Geo.* I. *c.* 11. all such receivers are made accessaries (where the principal felony ad-

mits of accessaries) *Foster*, 73. and may be transported for fourteen years; and in the case of receiving linen goods stolen from the bleaching-grounds, are by st. 18. *Geo.* II. *c.* 27. declared felons without benefit of clergy.

The felony must be complete at the time of the assistance given; else it makes not the assistant an accessary. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessary to the homicide; for till death ensues, there is no felony committed.— 2 *Hawk. P. C.* 447. But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists the child, or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who may have any of them committed a felony, the receivers become accessaries, *ex post facto*. 3 *Inst.* 108. 2 *Hawk. P. C.* 320.— But a feme covert cannot become an accessary by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she to discover her lord. 1 *Hale's P. C.* 621.

4. The general rule of the ancient law is, that accessaries shall suffer the same punishment as their principals; if one be liable to death, the other is also liable. 3 *Inst.* 188. Why, then, it may be asked, are such elaborate distinctions made between accessaries and principals, if both are to suffer the same punishment? For these reasons; 1st. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted: the commission of an actual robbery being quite a different accusation from that of harbouring the robber. 2dly. Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy, a distinction is made between them; accessaries *after the fact* being still allowed the benefit of clergy in all cases (except horse-stealing, stat 31 *Eliz. c.* 12. and stealing of linen from bleaching-grounds, stat. 18. *Geo.* II. *c.* 27.) which is denied to the principals, and accessaries *before the fact*, in many cases; as among others in petit treason, murder, robbery, and wilful burning. 1 *Hale's P. C.* 615. And perhaps if a distinction were constantly to be made between the punishment of principals and accessaries even before the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices, by reason of the difference of his punishment, *Beccar. c.* 37. 3dly. Because no man formerly could be tried as accessary till after the principal was convicted, or at least he must have been tried at the same time with him, though that law is now much altered. 4thly. Because, though a man be indicted as accessary and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counselling a felon is no acquittal of the felony itself: but it is a matter of some doubt whether if a man be acquitted as principal, he can be afterwards indicted as accessary *before* the fact; since those offences are frequently very nearly allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also. 1 *Hale's P. C.* 625, 626. 2 *Hawk. P. C.* 529, 530. *Foster*, 361. But it is clearly held, that one acquitted as principal may be indicted as accessary *after*

the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons the distinction of principal and accessary will appear to be highly necessary, though the punishment is still much the same with regard to principals and such accessaries as offend before the fact is committed.

By the old common law, the accessary could not be arraigned till the principal was attainted, unless he chose it, for he might waive the benefit of the law; and therefore principal and accessary might and may still be arraigned and plead, and also be tried together. But otherwise if the principal had never been indicted at all, had stood mute, had challenged about thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessary in any of these cases could not be arraigned: for *non constitit* whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessary should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen, where it was possible that a trial of the principal might be had *subsequent* to that of the accessary; and therefore the law still continues that the accessary shall *not* be tried so long as the principal remains liable to be tried *hereafter*. But by stat. 1 *Anne*, c. 9. if the principal be once convicted, and before attainder, (that is, before he receives judgment of death or outlawry,) he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases in which no *subsequent* trial can be had of the principal, the accessary may be proceeded against, as if the principal felon had been attainted; for there is no danger of future contradiction. And upon the trial of the accessary, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice, that the accessary is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact, as in point of law. *Foster*, 365. &c.; and by stat. 10 *Geo.* III. *c.* 48. buyers or receivers of stolen jewels, gold or silver plate, where the stealing shall have been accompanied with burglary or robbery, may be tried (and transported for 14 years) before the conviction of the principal. By the stat. 2 & 3 *E.* VI. *c.* 24. the accessary is indictable in that county where he was accessary, and shall be tried there, as if the felony had been committed in the same county; and the justices before whom the accessary is, shall write to the justices, &c. before whom the principal is attainted, for the record of the attainder. 1 *Hale's Hist. P. C.* 623.

Where the principal is not attainted, but discharged by being burnt in the hand only, the accessary after the fact ought to be discharged without burning in the hand, on being put to his book. *Cro. Car.* 566. *pl.* 3. Where there are two principals, the attainder of one of them gives sufficient foundation to arraign the *accessary*. *Jenk. Cent.* 76.

5. The old doctrine of *approvements*, when one criminal appealed or accused his accomplices in order to obtain his pardon is now grown into disuse; but is fully provided for in the case of *coining*, *robbery*, *burglary*, *house-breaking*, *horse-stealing*, and *larceny*, (from shops, warehouses, stables and coach-houses,) by stat. 4 & 5 *W.* & *M.* *c.* 8. 6 & 7 *W.* III. *c.* 17. 10 & 11 *W.* III. *c.* 23. & 5 *Anne*, *c.* 31. which enact, that if any such offender, being out of prison, shall discover *two* who have

committed the like offences, he shall on their conviction, in cases of *burglary* or *house-breaking*, receive the reward of 40*l.* given to persons apprehending such felons; and in general be entitled to a pardon of all capital offences, excepting only murder and treason, and of them also in cases of coining; but under stat. 15 *Geo.* II. *c.* 28. the pardon extends only to offences by coinage. And in cases of stealing iron, lead or other metals, the accomplice convicting receivers shall (under stat. 29. *Geo.* II. *c.* 30.) be pardoned all *such* offences. It is usual also for justices of peace to admit accomplices to other felonies, to be witnesses against their fellows; on an *implied confidence* that, in case of a complete discovery without prevarication or fraud, they shall receive a pardon; but to which they are not entitled of right. *Leach's Hawk. l.* 2. *c.* 37. § 7. and notes. 3 *Comm.* 330.

ACCOLA. An husbandman who came from some other parts or country to till the lands, *eo quod adveniens terram* colat. And thus distinguished from *Incola*, *viz.* Accola *non proprium, proprium colit* Incola *terra. Du Fresne.*

ACCOLADE, from the Fr. *accoler*, *collum amplecti.*] A ceremony used in knighthood by the king's putting his hand about the knight's neck.

ACCOMPLICE. See *Accessary.*

ACCOMPT. See *Account.*

ACCORD. *Fr.*] Is an agreement between two or more persons, where any one is injured by a trespass, or offence done, or on a contract, to satisfy him with some recompence; which accord, if executed and performed, shall be a good bar in law, if the other party after the *accord* performed, bring an action for the same trespass, &c. *Terms de Ley.*

I. In what cases
II. In what manner } Accord may be pleaded.

I. When a duty is created by deed in certainty, as by bill, bond, or covenant to pay a sum, of money, this duty accruing by writing, ought to be discharged by matter of as high a nature; but when no certain duty arises by deed, but the action is for a tort or default, &c. for which damages are to be recovered, there an *accord* with satisfaction is a good plea. 6 *Rep.* 43. In *accord* one promise may be pleaded in discharge of another, before breach; but after breach, it cannot be discharged without a release in writing. 2 *Mod.* 44. *Accord* with satisfaction upon a covenant broken, is a good plea in satisfaction and discharge of the *damages. Lutw.* 359. And *accord* made before the covenant broken, hath been adjudged a good bar to an action of covenant, as it may be in satisfaction of damage to come. 1 *Danv. Abr.* 546.

If a contract *without deed* is to deliver goods, &c. there money may be paid by *accord* in satisfaction; but if one is bound in an obligation to deliver goods, or to do any collateral thing, the obligee cannot by *accord* give money in satisfaction thereof: though when one is bound to pay money, he may give goods or any other valuable thing in satisfaction. 9 *Rep.* 78. 1 *Inst.* 212. Where damages are *uncertain*, a lesser thing may be done in satisfaction, and in such case an *accord* and satisfaction is a good plea; but in action of debt on a bond, there a lesser sum cannot be paid in satisfaction of a greater. 4 *Mod.* 88. *Accord* with satisfaction is a good plea in personal actions, where damages only are to be recovered; and in all actions which suppose a wrong *vi & armis*,

where a *capias* and *exigent* lie at the common law, in trespass and ejectment, detinue, &c. *accord* is a good plea: So in an appeal of maihem. But in *real* actions it is not a good plea. 4 *Rep.* 1. 9. 70. 9 *Rep.* 77.— Of late it hath been held, that upon mutual promises an action lies, and consequently, there being equal remedy on both sides, an *accord* may be pleaded without execution, as well as an arbitrament. *Raym.* 450. 2 *Jones*, 158. *Acceptance* of the thing agreed on in these *accords* is the only material thing to make them binding. *Hob.* 178. 5 *Mod.* 86.

II. *Accord executed* only is pleadable in bar, and *executory* not.— 1 *Mod.* 69. See *Com. Dig.* Title *Accord* (C.) Also in pleading it, it is the safest by way of *satisfaction*, and not of *accord* alone. For if it be pleaded by way of *accord*, a precise execution thereof in every part must be pleaded: but, by way of satisfaction, the defendent need only allege, that he paid the plaintiff such a sum, &c. in full satisfaction of the *accord*, which the plaintiff received. 9 *Rep.* 80. The defendant must plead, that the plaintiff *accepted* the thing agreed upon *in full satisfaction*, &c. And if it be on a *bond*, it must be in satisfaction of the *money* mentioned in the condition, and *not* of the *bond*; which cannot be discharged but by writing under hand and seal. *Cro. Jac.* 254. 650. See further, *Com. Dig.* Title *Accord*. See Titles, *Acceptance*, *Award*, *Bond*, *Estate*, *Lease*, *Rent*, *Payment*.

ACCOUNT or ACCOMPT; *computus.*] Is a writ or action which lies against a bailiff or receiver to a lord or others, who by reason of their offices and businesses are to render *account*, but refuse to do it. *F. N. B.* 116.

This action is now seldom used; but the most liberal, extensive and beneficial action is for *money had and received* by defendant to plaintiff's use, which will lie in almost (if not in every) case where one hath money of another's in his hands, which he ought to pay him. This form of action is equivalent to a bill in equity. An action on the case on *insimul computassent* is also usual for the balance of a settled account.— The action of account however lies in the following cases.

If a person receives money due to me upon an obligation, &c. I may either have an action of *account* against him as my receiver; or action of debt, or on the case, as owing me so much money as he hath received. 1 *Lill.* 33. If I pay money in my own wrong to another, I may bring an action against him for so much money received to my use; but then he may discharge himself by alleging it was for some debt, or to be paid over by my order to some other person, which he hath done, &c. 1 *Lill.* 30. But if a man have a servant, whom he orders to receive money, the master shall have *account* against him, if he were his receiver. *Co. Lit.* 172. If money be received by a man's wife to his use, action of *account* lies against the husband, and he may be charged in the declaration as his own receipt. *Co. Lit.* 295. *Account* does not lie against an infant; but it lies against a man or woman, that is *guardian bailiff* or *receiver*, being of age and dis-covert: and though an apprentice is not chargeable in this action, for what he usually receives in his master's trade, yet upon collateral receipts he shall be charged as well as another. *Co. Lit.* 172. *Roll. Abr.* 117. 3 *Leon.* 92.

As to other actions of *account*, they will not lie of a thing certain; if a man delivers 10*l.* to merchandize with, he shall not have *account* of the 10*l.* but of the profits, which are uncertain: and this is one reason why this action will not lie for the arrears of rent. 1 *Danv. Abr.*

215. Action of account may be brought against a factor that sells goods and merchandizes upon credit, without a particular commission so to do, though the goods are *bona peritura*. 2 *Mod.* 100. If there are two demands in a declaration, to which the defendant pleads an *account* stated, the plaintiff can never after resort to the original contract, which is thereby merged and discharged in the *account*: if *A.* sells his horse to *B.* for 10*l.* and there being divers other dealings between them, they come to an *account* upon the whole, and *B.* is found in arrear 5*l.* *A.* must bring his *insimul computasset* for it; but if there be only one debt betwixt the parties, entering into an *account* for that would not determine the first contract. 1 *Mod. Rep.* 206. 2 *Mod.* 44. It has been held, that mutual demands on an *account* are not extinguished by settling it, and promise to pay the balance; wherefore *assumpsit* lies for the original debt. *Fitzgib.* 44. A man having received of another 100*l.* to be employed in merchandize abroad, covenants at his return to *account* to him; this doth not alter the case, but notwithstanding the covenant, action of *account* may be brought. 2 *Bulst.* 256. And if I deliver to another person goods or money beyond sea, to be delivered again to me in *England* at a certain place, and he delivers it not, I may be relieved by this action. *F. N. B.* 18.

Account may be brought against the following persons:

If a man makes one his *bailiff* of a manor, &c. he shall have a writ of *account* against him as *bailiff*; where a person makes one *receiver*, to receive his rents or debts, &c. he shall have *account* against him as *receiver*, and if a man makes one his *bailiff* and also his *receiver*, then he shall have *account* against him in *both* ways. Also a person may have a writ of *account* against a man as bailiff or receiver, where he was not his bailiff or receiver; as if a man receive money for my use, I shall have an *account* against him as receiver; or if a person deliver money unto another to deliver over unto me, I shall likewise have *account* against him as my receiver: so if a man enter into my lands to my use, and receive the profits thereof I shall have *account* against him as bailiff. 9 *H.* VI. 36 *H.* VI. 10 *R.* II. *Fitz. Account*, 6.

A judgment in *account* as receiver, is no bar to action of *account* as bailiff; but 'tis said a bailiff cannot be charged as receiver, nor a receiver as bailiff; because then he might be twice charged. 2 *Lev.* 127. 1 *Danv. Abr.* 220, 221. The heir may have writ of *account* before or after his full age, against a guardian in socage; and if he sue the guardian for profits of his lands taken before he is fourteen years old, he must charge him as guardian; but if it be for taking the profits after that age, there he must sue him as bailiff. *Lit.* 124. *F. N. B.* 118. Where an heir sues a stranger that doth intermeddle with his land, he shall charge him in *account* as guardian. *F. N. B.* 18.

A man devises lands to be sold by his executors, and the money thence arising to be distributed amongst his daughters; action of *account* lies in this case for the daughters against the executors. *Jenk. Cent.* 215. 2 *Roll. Abr.* 285. An action of *account* lies against a bailiff, not only for what profits he hath made and raised, but also for what he might have made and raised, by his care and industry, his reasonable charges and expenses deducted. *Co. Lit.* 172. In this instance the action of *account* may be preferable to that for *money had and received*.—One merchant may have *account* against another, where they occupy their trade together; and if one charges me as bailiff of his goods *ad merchandizandum*, I must answer for the increase, and be punished for my

negligence; but if he charges me as receiver *ad computandum*, I must be answerable only for the bare money or thing delivered. *F. N. B.* 117. *Co. Lit.* 272. 2 *Leon. Ca.* 245.

If a bailiff or receiver make a deputy, action of *account* will not lie against the deputy, but against him. 1 *Leon.* 32.

Statutes.—In the writ of *account* the process by the common law was summons, attachment, and distress infinite. The statute of *Marlbridge* (52 *H.* III. *c.* 23) gave attachment by the body, if the bailiff had no lands by which he might be distrained. 2 *Inst.* 380. By the stat. *West.* 2. (13 *E.* I. *st.* 1. *c.* 11.) if the accountant be found in arrearages the *auditors* that are assigned to him have power to award him to prison. In the process of outlawry, &c. the stat. 13 *E.* III. *c.* 23. gives an action of *account* to the executors of a merchant; the statute 25 *Ed.* III. *c.* 5. to executors of executors; the statute of 31 *Ed.* III. *c.* 11. to administrators: and by the statute 3 and 4 *Ann. c.* 16. actions of *account* may be brought against the executors and administrators of every guardian, bailiff and receiver, and by one joint-tenant, tenant in common, his executors and administrators against the other as bailiff, for receiving more than his share, and against their executors and administrators; and the auditors appointed by the court may examine the party on oath.

It may be proper to say something concerning the *Plea* and *Judgment* in account; and though the order may seem somewhat irregular, it will be necessary first to explain the nature of the judgment, which being rightly understood, the distinctions as to the method of pleading will be more easily conceived.

The usual judgment is *quod computet*, on which the defendant is taken by *capias ad computandum*; but there are two judgments in this writ, for if the defendant cannot avoid the suit by plea, judgment is first given, *That he do account*; and having done this before the auditors, there is another judgment entered, that the plaintiff shall recover of the defendant so much as is found in arrear. 11 *Rep.* 40. The first judgment is but an award of the court, like a writ to inquire of damages; and these two judgments depend one upon another; for if judgment be to *account* and the party die before he hath *accounted*, the executor cannot proceed in the action, but it must be begun again; and no writ of error will lie upon the first till after the second judgment. *Ibid.*

With respect to the plea, the following distinctions are to be noticed:

What may be pleaded in bar to the action, shall not be allowed to be pleaded before the auditors. *Cro. Car.* 82. 161. Some pleas are in bar of the *account*, and others in discharge before auditors; and some pleas will be allowed before auditors, that will not be in bar to the *account*. *Dyer*, 21. 11 *Rep.* 8. In *account* the plaintiff declared of the receipt of money by the hands of a stranger; the defendant pleaded a gift of the money afterwards by the plaintiff; this was a good plea as well in bar of the action, as before auditors. *Winch.* 9.

The pleas in this action are, *quod nunquam fuit receptor*; *quod plene computavit*, &c. It is no plea by an *accountant* that he was robbed; unless he alleges it was without his default and negligence, and then it will be a good plea. *Co. Lit.* 89. That the defendant *never was bailiff*, is the general bar; and it is a good plea in bar, by claiming a property in the things to be *accounted* for. 29 *E.* III. 47. A defendant, as receiver, cannot wage his law, where he receives the money by another's hands: 'tis otherwise where he received it of the plaintiff himself. 1 *Cro.* 919.

It may be proper to add, that the process in *account* is summons, *plone* and distress; and, upon a *nihil* returned, the plaintiff may proceed

to outlawry. The statute of limitations, 21 *J.* I. *c.* 16. doth not bar a man who is a merchant from bringing action of *account* for merchandize at any time; but all other actions of *account* are within the statute.

In *Chancery* upon an *account* of fifteen or twenty years standing, the defendant may be allowed to prove, on his own *oath*, what he cannot otherwise make proof of; but here the particulars must be named, as to whom the money was paid, for what, and when, &c. 1 *C. Rep.* 146.—And a defendent shall be discharged upon his oath of sums under 40*s.* though it is held a plaintiff shall not so charge another, or be allowed any thing in equity on his oath. 2 *C. Cas.* 249. 1 *Vern.* 283. See *Oath.* Vide *Comyn's Digest*, Title *Accomptz.—Kydd's Com. Dig.* Introduction to that Title.

ACCOUNTANT-GENERAL. An officer in the court of *Chancery*, appointed by act of parliament, to receive all money lodged in court. He is to convey the money to the Bank, and take the same out by order; and he is only to keep the account with the Bank; for the Bank is to be answerable for all money received by them, and not the *Accountant-General*, &c. *stat.* 12 *Geo.* I. *c.* 32. No fees shall be taken by this officer or his clerks, on pain of being punished for extortion; but they are to be paid salaries. The *Accountant-General* 650*l. per annum*, out of interest made of part of the suitors' money. See Title *Chancery*.

Counterfeiting the hand of the Accountant-General is felony without clergy, by stat. 12 *Geo.* I. *c.* 32. *sec.* 9.

ACCOUNTS PUBLICK. By stat. 25 *Geo.* III. *c.* 52. the patents formerly granted to Lord *Sondes* and Lord *Mountstuart* as auditors of the imprest are vacated, and the annual sum of 7,000*l.* each is made payable to them during their respective lives. § 1. 3.

Under this act his Majesty appoints five commissioners by letters patent; two of whom are to be comptrollers of the army accounts; salaries are granted to each, paid out of the aggregate fund, not exceeding in the whole 4,000*l.* These are stiled *The Commissioners for auditing the publick accounts;* and hold their offices *quamdiu se bene gesserint*, (except the comptrollers of army accounts who continue commissioners so long only as they are comptrollers.) Before they act they take an oath before the chancellor of the exchequer "faithfully, impartially and truly to execute "the powers and trusts vested in them." § 4.

The Treasury appoint officers, clerks, &c. for making up and preparing for declaration the publick accounts of the kingdom, with salaries; and allow for all charges out of the aggregate fund to an amount not exceeding 6,000*l. per annum*, which is in lieu of all fees and perquisites. § 5.

The commissioners under this act are invested with all the powers, and subject to the same duties and controul as the auditors of the imprest formerly were; except as altered by the act. The commissioners administer oaths to the officers and clerks for the performance of their duties. § 8. and to accountants. § 12, 13. For their mode of proceeding see the act.

ACCROCHE, from the *Fr. accrocher*, to hook or grapple unto.] It signifies to encroach, and is mentioned in the statute 25 *Ed.* III. *c.* 8. to that purpose. The *French* use it for delay; as *accrocher un procés*, to stay the proceedings in a suit.

ACCUSATION, *accusatio.*] The charging any person with a crime. By *Magna Charta* no man shall be imprisoned or condemned on any *accusation*, without trial by his peers, or the law. None shall be vexed upon any *accusation*, but according to the law of the land; and no man

may be molested by petition to the king, &c. unless it be by indictment, or presentment of lawful men, or by process at common law. Stat. 25 *Ed.* III. *st.* 5. *c.* 4. 28 *Ed.* III. *c.* 3. None shall be compelled to answer an *accusation* to the king, without presentment, or some matter of record. Stat. 42 *Ed.* III. *c.* 3. See stat. 38 *E.* III. *c.* 9. By statute 5 and 6 *E.* VI. *c.* 11. § 12. and 1 *P.* and *M. c.* 10, 11. in treason there must be two lawful *accusers*. As to self-accusation, see Title *Evidence*. See Title *Malicious Prosecution*.

ACEMANNES-CEASTER, *Acemanni Civitas.*] Bath. *q. v.*

ACEPHALI. The levellers in the reign of king *Hen.* I. who acknowledged no head or superior. *Leges Hen.* I. *Du Cange.*

AC ETIAM BILLÆ:—*And also to a bill* to be exhibited for 20*l.* debt, &c.] Words in, or a clause of, a writ, where the action requires bail. The stat. 13 *Car.* II. *st.* 2. *c.* 2. which enjoins the cause of action to be particularly expressed in the writ or process which holds a person to bail, hath ordained the adding of this clause in writs to the usual complaints of trespass, which latter gives cognizance to the court, while that of debt authorises the arrest. This ought not to be made out against a peer of the realm, or upon a penal statute, or against an executor or administrator, or for any debt under 10*l.* in the superior courts. Nor in any action of account, action of covenant, &c. unless the damages are 10*l.* or more; nor in action of trespass, or for battery, wounding or imprisonment; except there be an order of court for it, or a warrant under the hand of one of the judges of the court out of which the writ issues. 1 *Lill. Abr.* 13. See *North's* Life of Lord Keeper *Guildford*, fol. 99, 100. *Impey's Instructor Clericalis*, *K. B. and C. P.* and this Dictionary, Titles *Arrest*, *Bail*.

ACHAT, *Fr. Achet.*] A contract or bargain. Purveyors by stat. 34 *Ed.* III. *c.* 2. were called *Achators*.

ACHERSET, An ancient measure of corn, conjectured to be the same with our quarter or eight bushels.

ACHOLITE, *Acholitus.*] An inferior church servant, who next under the subdeacon, followed or waited on the priest and deacons, and performed the meaner offices of lighting the candles, carrying the bread and wine, and paying other servile attendance.

ACKNOWLEDGMENT-MONEY, Is a sum paid in some parts of *England* by the copyhold tenants on the death of their landlords, as an acknowledgment of their new lords; in like manner as money is usually paid on the attornment of tenants.

ACQUIETANDIS PLEGIIS, A writ of *justicies*, lying for the surety against a creditor, who refuses to acquit him after the debt is satisfied. *Reg. of writs*, 158.

ACQUIETANTIA DE SHIRIS ET HUNDREDIS, To be free from suits and services in shires and hundreds.

ACQUIETARE, *quietum reddere.*] To acquit. *Dr. Wilk. Gloss.* It also sometimes signifies to pay. *Mon. Angl. tom.* 1. *fol.* 199.

ACQUITTAL, from the *French* word *Acquitter*, and the *Latin* compound *Acquietare.*] To free or discharge. It signifies in one sense to be free from entries and molestations of a superior lord for services issuing out of lands; (See *Termes de Ley*;) and in another signification (the most general) it is taken for a deliverance and setting free of a person from the suspicion of guilt: as he that on trial is discharged of a felony is said to be *acquietatus de felonia*; and if he be drawn in question again for the same crime he may plead *auter-foits acquit*; as his life shall not be twice put in danger for the same offence. 2 *Inst.* 385.

Acquittal in *fact*, is when a person is found Not guilty of the offence by a jury, on verdict, &c. But in murder, if a man is *acquitted*, appeal may be brought against him. 3 *Inst.* 273.

If one be *acquitted* on an indictment of murder, supposed to be done at such a time; and after indicted again in the same county, for the murder committed at another time: here, notwithstanding that variance the party may plead *auter-foits acquit*, by averring it to be the same felony; so where a person is indicted a second time, for robbery upon the same person, but at another vill, &c. 2 *Hawk. P. C.* Where a man is discharged on special matter found by the *grand jury*, yet he may be indicted *de novo* seven years afterwards, and cannot plead this *acquittal*; as he may upon the special matter found by the petty jury, and judgment given thereon. *Ibid.* 246. See also *Leach's Hawkins*, *c.* 26. § 64.

If a person is lawfully *acquitted* on a malicious prosecution, he may bring his action, &c. for damages, after he hath obtained a copy of the indictment; but it is usual for the judges of gaol-delivery to deny a copy of an *acquittal* to him who intends to bring an action thereon, when there was probably cause for a criminal prosecution. *Carth. Rep.* 421. See *Leach's Hawkins*, *c.* 23. § 142. &c. By stat. 3 *Hen.* VII. *c.* 1. if either principal or accessary be *acquitted* on an indictment for murder, the court may remit him to prison, or bail him, at their discretion, till the year and day (for appeal) be passed.

ACQUITTANCE, *Acquietantia.*] Signifieth a discharge in writing, of a sum of money, or debt due; as, where a man is bound to pay rent, reserved upon a lease, &c. and the party to whom due, on receipt thereof, gives a writing under his hand witnessing that he is paid; this will be such a discharge in law, that he cannot demand and recover the sum or duty again, if the *acquittance* be produced. *Termes de Ley*, 15. *Dyer*, 6. 25. 51. An *acquittance* is a discharge and bar in the law to actions, &c. And if one acknowledges himself to be satisfied by deed, it may be a good plea in bar, without any thing received; but an *acquittance*, without seal, is only evidence of satisfaction, and not pleadable.

'Tis observed, that a general receipt or *acquittance* in full of all demands, will discharge all debts, except such as are on specialty, *viz.* bonds, bills, and other instruments sealed and delivered; on which account those can be destroyed only by some other specialty of equal force, such as general release, &c. There being this difference between that and the *general acquittance*. See *Cro. Jac.* 650.

But in some cases a court of equity will order accounts to be opened, even after an acquittance in full of all demands.

And now, in the superior courts of law the producing an acquittance will not bar the action, if the plaintiff can by any means shew a mistake, and that he has not been paid, or paid so much as the acquittance is for.

In some cases payment may be refused, unless an acquittance is given. Thus the obligor is not bound to pay money upon a single bond, except an *acquittance* be given him by the obligee; nor is he obliged to pay the money before he hath the *acquittance*. But in case of an obligation with a condition, it is otherwise; for there one may aver payment. And by stat. 3 & 4 *Ann. c.* 16. if an action of debt is brought upon a single bill, and the defendant hath paid the money, such payment may be pleaded in bar of the action.

A servant may give an *acquittance* for the use of his master, where such servant usually receives his master's rents, &c. and a master shall

be bound by it. *Co. Lit.* 112. The manner of tender and payment of money shall be generally directed by him who pays it, and not by him who receives it; and the *acquittance* ought to be given accordingly.

ACRE, from the *German Acker*, *Ager*.] A quantity of land, containing in length 40 perches, and in breadth four perches; or in proportion to it, be the length or breadth more or less. By the customs of various countries, the perch differs in quantity, and consequently the *acre* of land. It is commonly about 16 feet and a half, but in *Staffordshire* it is 24 feet. According to the statute 24 *Hen.* VIII. *c.* 14. concerning the sowing of flax, it is declared that 160 perches make an *acre*, which is 40 multiplied by four; and the ordinance of measuring land, 33 *Ed.* I. *st.* 6. agrees with this account. The word *acre* formerly meant an open ground or field; as *castle-acre*, *west-acre*, &c. and not a determined quantity of land.

ACRE, or ACRE FIGHT; an old sort of duel fought by single combatants, *English* and *Scotch*, between the frontiers of their kingdoms, with sword and lance; this duelling was also called camp fight, and the combatants, champions, from the open field that was the place of trial.

ACTILIA, Military utensils. *Du Cange.*

ACTION, *actio.*] Is the form of a suit given by law for recovery of that which is one's due; or it is a legal demand of a man's right. *Co. Lit.* 285. The learned *Bracton* thus defines it, *Actio nihil aliud est quam jus prosequendi in judicio quod alicui debetur. Actions* are either *criminal* or *civil*; criminal to have judgment of death, as appeals of death, robbery, &c. or only to have judgment for damage to the party, fine to the king and imprisonment, as appeals of maihem, &c. *Co. Lit.* 284. 2 *Inst.* 40. *Civil Actions* are such as tend only to the recovery of that which by reason of any contract, &c. is due to us; as *action* of debt, upon the case, &c. 2 *Inst.* 61.

Under *criminal actions* may be classed *actions penal*; which lie for some penalty or punishment on the party sued, be it corporal or pecuniary. *Bract.*

Actions upon statute, brought upon the breach of any statute, whereby an action is given to the person injured that lay not before; as where one commits perjury to the prejudice of another, the party that is injured may have a writ upon the statute. Such action is now obsolete.

Actions popular, given on the breach of some penal statute, which *every man* hath a right to sue for himself and the king, by information, action, &c. And because this *action* is not given to one especially, but generally to any that will prosecute, it is called *action popular*; and from the words used in the process, (*qui tam pro domino rege sequitur quam pro se ipso*, who sues *as well* for the king as for himself,) it is called a *qui tam* action. See Title *Information.*

Civil Actions are divided into *real*, *personal* and *mixed*. Action *real* is that action whereby a man claims title to lands, tenements, or hereditaments, in fee, or for life: and these *actions* are possessory, or auncestrel; possessory of a man's own possession and seisin; or auncestrel of the possession or seisin of his ancestor.

Action personal is such as one man brings against another, on any contract for money or goods, or on account of any offence or trespass; and it claims a debt, goods, chattels, &c. or damages for the same.

Action mixed is an *action* that lieth as well for the thing demanded, as against the person that hath it; in which the thing is recovered, and likewise damages for the wrong sustained: it seeks both the thing whereof

a man is deprived, and a penalty for the unjust detention. But detinue is not an *action mixed*, notwithstanding the thing demanded and damages for withholding it be recovered; for it is an *action* merely personal, brought only for goods and chattels.

In a *real action*, setting forth the title in the writ, several lands held by several titles may not be demanded in the same writ; in *personal actions* several wrongs may be comprehended in one writ. 8 *Rep.* 87. A bar is perpetual in *personal actions*, and the plaintiff is without remedy, unless it be by writ of error or attaint: but in *real actions*, if the defendant be barred, he may commence an action of a higher nature, and try the same again. 5 *Rep.* 33. *Action of waste* sued against tenant for life, is in the realty and personalty; in the realty, the place wasted being to be recovered, and, in the personalty, as treble damages are to be recovered. *Co. Lit.* 284.

Many *personal actions* die with the person. Real actions survive. If lessee for years commit waste, and dies, *action of waste* may not be had against his executor or administrator, for waste done by the deceased. And where a keeper of a prison permits one in execution to escape and afterwards dieth, no *action* will lie against his executors. This must be understood, of that kind of keeper, to whom the prison actually belongs, as the *marshal*, the *warden* of the Fleet, &c. not of a gaoler who acts as servant to a sheriff, &c. for in such case, the death of the gaoler is not any bar to an action against the sheriff, to whom in fact, the prison actually belongs. *Co. Lit.* 53. Action of *debt* lies not against executors upon a contract for the eating and drinking of the testator. 9 *Rep.* 87. But an action on the *case* on promises will lie against an executor or administrator on the promises of their testator or intestate. An executor cannot bring an appeal of larceny from the testator, for it is a mere personal action. *H. P. C.* 184. *S. P. C.* 50. And an appeal of death is a personal action given to the heir; and like others shall therefore die with the person. 2 *Hawk. P. C.* 244.

In all actions merely personal arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the action dies with the person. 4 *Inst.* 315. and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant committed, in their own personal capacity, any manner of wrong or injury. But in actions arising *ex contractu*, by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by, the executors, (*March* 14.) being indeed rather actions against the property than the person. 3 *Comm.* 302.

Again, actionsare either *local* or *transitory*. *Actions real* and *mixed*, ejectment, waste, trespasses, *quare clausum fregit*, &c. are to be laid in the same county where the land lieth: *personal* and *transitory actions*, as debt, detinue, assault and battery, &c. may be brought in any county. *Co. Lit.* 282. Except against justices and officers of corporations and parishes, (under stat. 21 *Jac.* I. *c.* 12.) or against officers acting under particular acts of parliament; which frequently direct actions against them, to be laid in the respective counties, where the facts happen. *Actions transitory* may be laid in any county, although the statute 6 *R.* II. enacted, That writs of debt, account, &c. should be commenced in the county where the contracts were made; for that statute was never put in use; and yet generally *actions* have been laid in the county where the cause of them was

arising, except as above. If the cause of *action* arise in two counties, an *action* may be brought in either county; but if a nuisance be erected in one county, to the damage of a man in another, the assize must be brought *in confinio comitatuum*. *Mich.* 8 *Ann. B. R.* By stat. 21 *Jac.* I. *c.* 4. all suits on penal statutes shall be laid in the county where the offence is committed. See Title *Venue*.

Actions likewise are said to be *perpetual* and *temporary*: *Perpetual*, those which cannot be determined by time; and all *actions* may be called perpetual that are not limited to time for their prosecution: *Temporary actions* are those that are expressly limited: and since the statute of limitations, (21 *Jac.* I. *c.* 16.) all *actions* seem to be temporary; or not so perpetual, but that they may in time be prescribed against; a *real action* may be prescribed against within *five* years, on a fine levied, or recovery suffered. See Title *Limitation of Actions*.

Actions are also *joint* or *several*; *joint*, where several persons are equally concerned, and the one cannot bring the *action* or cannot be sued, without the other; *several*, in case of trespass, &c. done, where persons are to be severally charged, and every trespass committed by many is several. 2 *Leon.* 77.

As to joining several matters in one action the following is to be observed.

In personal actions, several wrongs may be joined in one writ; but actions founded upon a tort, and on a contract, cannot be joined, for they require different pleas and different process. 1 *Keb.* 847. 1 *Vent.* 366. So where there is a tort by the common law, and a tort by statute, they may not be joined; though where several torts are by the common law, they may be joined, if personal. 3 *Salk.* 203.

Trover and assumpsit may not be joined; but in an action against a common carrier, the plaintiff may declare in case upon custom of the realm, and also upon trover and conversion: for not guilty answers to both. 1 *Danv. Abr.* 4. Debt upon an *amerciament*, and upon a *mutuatus*, may be joined in one declaration. *Wils. p.* 1. 248. So case for a *misfeasance* and negligence may be joined with a count in *trover*, in the same declaration. *Ib. par.* 2. 319. Two counts may be joined in the same declaration, where there *is the same judgment* in both. *Ib.* 321. And any action may be joined, where the plea of not guilty goes to all. 8 *Rep.* 47. But, it seems, ejectment and battery cannot be joined; for after verdict, where several damages were found, the plaintiff was allowed to release those for the battery, and had judgment for the ejectment. 1 *Danv.* 3. If this is law, it shews that causes of action cannot in every instance be joined, where the same plea will go to the whole. The doctrine in *Danvers*, seems to be law, for supposing, *ejectment*, *assault and battery*, &c. joined in one action, and a general verdict on not guilty for the plaintiff; a new execution on such a judgment must be framed. Indeed the joining two such actions, seems rather absurd. Although persons may join in the personalty, they shall always sever in actions concerning the realty; and *waste* being a mixed action, savouring of the realty, that being more worthy, draws over the personalty with it. 2 *Mod.* 62. A person cannot, as administrator, &c. join an action for the right of another, with any action in his own right; *because the costs will be entire, and it cannot be distinguished how much he is to have as administrator, and how much for himself.* 1 *Salk.* 10. See a variety of cases, well selected and digested on this subject. *Com. Dig.* Title *Action*.

It remains now to consider,

I. *By whom, and against whom Actions may be brought.*
II. *What particular Actions are adapted to particular Cases.*

It may be previously observed, that an action does not lie before a cause of action accrued; and if it be not pleaded in abatement, yet if it appears on the record, it may be moved in arrest of judgment, 2 *Lev.* 197. *Carth.* 114. Vide *Sho.* 147. or assigned for error. *Cro. Eliz.* 325. See further *Kyd's Com. Dig.* title *Abatement*, (G. 6.) and *Action*, (E.)

In some cases, certain things are required by act of parliament to be done by the plaintiff previous to the commencement of an action, or he cannot recover; as in actions against justices of the peace, a month's notice must be given by stat. 24 *Geo.* II. *c.* 44.—Vide *Morgan's Vade Mec.* 20.

I. In all *actions* there must be a person able to sue; the party sued must be one suable for the thing laid; and the plaintiff is to bring his right and proper *action* which the law gives him for relief. 1 *Shep. Abr.* 20. There are three sorts of *damages* or wrongs, either of which is a sufficient foundation for an *action*. 1. Where a man suffers damages in his *fame* and credit. 2. Where one has damage to his person, as by battery, imprisonment, &c. which respects his *liberty*. 3. Where a person suffers any damage in his *property*. *Carth. Rep.* 416.

A man attainted of treason or felony, convict of recusancy, an outlaw, excommunicated person, convict of *præmunire*, an alien enemy, &c. cannot bring an *action*, till pardon, reversal, absolution, &c. But executors or administrators, being outlawed, may sue in the right of the testator or intestate, though not in their own right. A *feme covert* must sue with her husband; and infants are to sue by guardian, &c. *Co. Lit.* 128. *Actions* may be brought *against* all persons, whether attainted of treason or felony, a convict recusant, outlawed or excommunicate, &c. and a *feme covert* must be sued with her husband. A *scire facias*, or any writ to which the defendant may plead, or by which the plaintiff may recover, is an *action*. 6 *Rep.* 3. *Salk.* 5. See title *Abatement*.

II. There are various kinds of actions, suited to different cases, as actions of COVENANT, DEBT, DETINUE, TRESPASS, TROVER, &c. which see under their respective titles.

But where the law has made no provision, or rather, where no general action could well be framed beforehand, the ways of injuring, and methods of deceiving being so various, every person is allowed to bring a special action on his own case. 1 *New Abr.* 44. *Co. Lit.* 56. a. 6 *Mod.* 53, 54.

This action is, in practice, become the most universal of any; as most of the other actions may, under particular circumstances, be resolved into this, which it will be necessary, therefore, to consider somewhat largely.

Action upon the *case* is a general *action* given for redress of wrongs and injuries, done without force, and not particularly provided against by law, in order to have satisfaction for damage; and (by stat. 19 *H.* VII. *c.* 9.) in *actions upon the case*, the like process is to be had as in *actions* of trespass or debt. It is called *action on the case*, because the whole cause or *case*, as much as in the declaration (except time and place) is set down in the writ; and there is no other action given in the case, save only where the plaintiff hath his choice to bring this or another *action*. Formerly, all actions were sued in the court of *Common Pleas*, and there the foundation of the suit is, a writ, called an *original*, whereupon the *capias* is grounded, and which *original* contains the nature of the plain-

tiff's complaint at large; and it is the same where suits are commenced in *B. R.* by *original* out of *Chancery*.

In all cases, where a man has a temporal loss, or damage by the *wrong* of another, he may have an action upon the case to be repaired in damages. But the particular damage must be specially alleged.

This action, as hath been intimated, lies in a great variety of instances, which are particularly enumerated in COMYNS's Digest. Of these the chief are,

1. Action on the case for WORDS; which is brought for words spoken or written, which affect a person's life, reputation, office, or trade, or tend to his loss of preferment, in marriage or service, or to his disinheritance, or which occasion him any *particular damage*. This action therefore will lie for charging another with any capital or other crime. To say of another he is a traitor, *action* lies. 1 *Bulstr.* 145. But if one call another a seditious, traitorous knave, no *action* lieth; because the words imply an intention only, and not an unlawful act. 4 *Rep.* 19. Nor to say of a man he deserves to be hanged; nor to call another a rogue generally, or say he will prove him to be a rogue; though it will lie to say a man is a rogue on record. 4 *Rep.* 15. *Danv.* 92. Words which charge a person with being a murderer, highwayman, or thief, in express terms, are held *actionable*. 1 *Roll. Abr.* 47. Though for saying such a one would have taken his purse on the highway, or have robbed him, an *action* lies not; for nothing is shown to be done in order thereto. *Cro. Eliz.* 250. Likewise to say a man was in gaol for stealing any thing is not *actionable*, for the words do not affirm the theft. *Danv.* 140. But to say, I think *A. B.* committed such a felony; or, I dreamt he stole a horse, &c. these words are *actionable*. *Dal.* 144. 1 *Danv.* 105. If a felony be done, and common fame is that such a person did it, although one may charge or arrest him on suspicion of that felony, yet a man may not affirm that he did the same, for he may be innocent all the while, and therefore affirming it hath been held *actionable*. *Hob.* 138. 203. 381.

It was heretofore held, that no action would lie for words importing a charge of murder, without an averment that the person said to be killed was dead; but the latter and better opinion is, that the party shall be intended to be dead, unless the contrary appears in the pleadings. 1 *Vent.* 117. *Cro. Jac.* 489. *Sid.* 53. *Cro. Eliz.* 560. 823. Though *quære* if the party is proved alive? So words accusing of sodomy. 1 *Sid.* 373.

When such words are spoken of another maliciously, for which, if true, the party spoken of might be punished criminally, *action* lies; as, to say of a person, he hath perjured himself; or that he would prove him perjured; or that he was forsworn in the Court of Chancery, Common Pleas, &c. are *actionable*; but not to call a person forsworn man, unless it be said in a court of record. 3 *Inst.* 163. *Danv.* 87. 89. To say a man hath forged an obligation, &c. and he will prove it; this is *actionable*. *Danv.* 130.

Some writers make a difference, where the subsequent words are introduced by the word *and*; as, you are a thief, *and* have stolen, &c. which are additional, and shall not correct; and the word *for*; as you are a thief, *for* you have, &c. *Hob.* 386. *Sty.* 115. *Godb.* 89. The words, He is a maintainer of thieves, and keeps none but thieves in his house, will not support an *action*, unless it be averred that he knew them to be thieves. *Cro. Eliz.* 746.

To say an alehouse-keeper keeps a bawdy-house, *action* lies. *Cro. Eliz.* 582. Though to say of an innkeeper, that he harbours rogues, &c. is not *actionable*; for his inn is common to all guests. 2 *Roll. Rep.* 136. To say of another he hath the *French* pox, *action* will lie. *Cro.*

Jac. 430. See *Noy*, 151. To call a man a whore-master, or a woman whore, no *action* lies; for these are merely spiritual offences. *Danv. Abr.* 80. But calling a woman whore in *London* is *actionable*, as she is liable to be punished by the custom of the city. See *Com. Dig.* title *Action upon the Case for Defamation*, (D. 10.)

Words likewise are actionable which tend to the disgrace or detriment of a person in *office*, or of a man in the exercise of his *profession* or *trade*.

Calling an officer in the government, &c. Jacobite, hath been held *actionable*; not of a private person. 7 *Mod. Ca.* 107. To say a justice of peace doth not administer justice, is *actionable*. *Cro. Eliz.* 358. And so for other disgrace in his office. But words relating to a man's office must have a plain and direct meaning, to charge him with some crime that is punishable; and be spoken of his office, or otherwise they are not *actionable*. 6 *Mod.* 200. Thus the plaintiff, being a *justice of peace*, the defendant said Mr. *Stukely covereth and hideth felonies, and is not worthy to be a justice of peace*; actionable, for though his office is not named, the words necessarily refer to it. 4 *Rep.* 16. See 1 *Leon.* 335. 1 *Vent.* 50.

Slander, &c. brought by a *doctor of the civil law*, who was also a *justice of peace*, and *chancellor of the bishopric of Norwich*, for these words, *he is not fit to be a chancellor or a justice of peace, he is a knave, a rascal, and a villain, he is not fit to practise, he ought to have his gown pulled over his ears*; actionable. 2 *Lutw.* 1288.

The defendant spoke to an officer, (*viz.*) *You have cozened the State of* 20,000*l. and I will prove it; for you have received* 25,000*l. of the office, and not compounded for it, and have foisted in words in the order of your commission*; actionable. *Sty.* 436.

In offices of *profit*, for such words as impute the want either of understanding, ability, or integrity to execute them, this *action* lies. But in offices of *honour*, words that impute want only of ability, are not actionable; as to say of a justice of peace, *He a justice of peace! he is an ass, and a beetle-headed justice*: the reason is, because a man cannot help his want of ability, as he may his want of honesty; otherwise where words impute dishonesty or corruption. 2 *Salk.* 695. But if *special* damage can be proved, it is actionable; and indeed in every case, where special damage can be proved, an action will lie.

As to words tending to the disgrace or detriment of a man in his *profession* or *trade*; where the words are disgracing to a man's profession, they also must appear to be spoken precisely of it; for to say a person hath cozened one in the sale of certain goods, is not *actionable*; unless you show that the party lived by such selling. 1 *Roll. Abr.* 62.

To say of a *doctor in divinity*, *Doctor S. is robbing the church*; and at another time, *Doctor S. hath robbed the church*; actionable. *Cro. Car.* 301. 417.

In *case*, &c. in which the plaintiff declared, that he was instituted and inducted into a parsonage in, &c. and that he executed the office of a pastor in that church for the space of four years, and that the defendant said of him, *You are a drunkard, a whore-master, a common swearer, and a common liar, and you have preached false doctrine, and deserve to be degraded*; after a verdict for the plaintiff, it was objected that the words are not actionable, because they import no civil or temporal damage to the plaintiff; but adjudged actionable; for, if true, he may be degraded, and so lose his freehold. *Allen*, 63.

These words spoken of a preaching parson, *Parrat is an adulterer, and had two children by B. G.'s wife, and I will cause him to be depri-*

ved for it; not actionable; for 'tis a *spiritual defamation*, and punishable in that court. *Cro. Eliz.* 502.

To say of a counsellor, that he is no lawyer; that they are fools who come to him for law, and that he will get nothing by the law, *action* lies. 1 *Danv.* 113. And it is the same to say, he hath disclosed secrets in a cause.

To call a doctor of physic fool, ass, empiric, and mountebank, or say he is no scholar, are *actionable*. *Cro. Car.* 270. So to say of a schoolmaster, put not your son to him, for he will come away as very a dunce as he went. *Hetl.* 71. Where one says of a midwife, that many have perished for her want of skill, an *action* will lie. *Cro. Car.* 211. If one calls a merchant bankrupt, *action* lies. 1 *Leon.* 336. And to call a trading person bankrupt, or knave, is *actionable*. 1 *Danv.* 90. Also if one say of a merchant, that he is a beggarly fellow, and not able to pay his debts; or say of a person that he is a runaway, and dares not show his face, by reason whereof he is disgraced, and injured in his calling, these are *actionable*. *Raym.* 184.

Words tending to the loss of preferment in marriage, &c. are actionable. Thus to say that a woman hath a bastard, or is with child; or that a certain person hath had the use of her body, whereby she loses her marriage, *action* lies, *i. e.* by reason of the special damage. If a man is in treaty with a woman to marry, and another tells him she is under a precontract; this doth not imply a scandal, but yet, if false, an *action* will lie if she loses her marriage by means of those words. To say of a man that he lay with a certain woman, &c. by which he loses his marriage, is *actionable*; for in these cases there is a temporal damage. 1 *Danv.* 81.

As to words tending to a person's disinheritance, if one says of another that has land by descent, that he is a bastard; *action upon the case* lies, as it tends to his disinheritance. *Co. Ent.* 28. But to say of a son and heir apparent, that he is a bastard, *action* lies not until he is disinherited, or is prejudiced thereby. 1 *Danv.* 83. To slander the title of another person to his lands is *actionable*; but the words must be false, and be spoken by one that neither hath, nor pretendeth title to the land himself; and who is not of counsel to him that pretends right. 4 *Rep.* 17. If a man shall pretend title to the land another hath in possession, and hath no colour of title to it; and shall say he hath such a deed or conveyance of it, where in truth he hath none, or if he hath any, it is a counterfeit and forged deed, and he knows it to be so; in this case the words may bear an *action*; but if there be any colour for what is said, they will not be *actionable*. *Cro. Jac.* 163. *Yelv.* 80. 88. And the party of whom the words are spoken, must have, or be likely to have, some special damage by the speaking of them; as that he is hindered in the sale of his lands, or in his preferment in marriage, &c. without which it is said *action* doth not lie. 1 *Cro.* 99. *Cro. Jac.* 213. 397. *Poph.* 187. 2 *Bulst.* 90. The affirming that another hath title to the land, where *actionable*. See 4 *Rep.* 175.

If *A.* says, that *B.* said that *C.* did a certain scandalous thing, *C.* shall have *action* against *A.* with averment that *B.* never said so, whereby *A.* is the author of the scandal. Supposing *B.* did not in fact say so. *Cro. Jac.* 406. See 1 *Roll. Abr.* 64.

It is to be observed in general, that though scandalous words are spoken before a man's face, or behind his back, by way of affirmation or report, when drunk or sober; and although they are spoken in any other than the *English* language, if they are understood by the hearers, they are *actionable*; also words may be *actionable* in one county which

are not so in another, by the different construction, &c. 4 *Rep.* 14. *Hob.* 165. 236. But if the defendant can make proof of the words, he may, in an action for damages, plead a special justification. *Co. Ent.* 26. The words to maintain this *action* must be direct and certain, that there may be no intendment against them ; but as some words separate, without others joined with them, are not *actionable*, so some words that are *actionable* may be qualified by the precedent or subsequent words, and all the words are to be taken together. 4 *Rep.* 17. 1 *Cro.* 127. *Moor Ca.* 174. 331. Vide 4 *Rep.* 20. *Hob.* 126. Where words spoken are somewhat uncertain, they may, by apt averments, be made certain and actionable. 2 *Bulst.* 227. So by the pleadings of the parties, and verdict of a jury for the plaintiff. *Cro. Jac.* 107. The thing charged by the words must be that which is possible to have been done ; for if it be of a thing altogether and apparently impossible, no action lies. 4 *Rep.* 16. No action will lie for words spoken in pursuit of a prosecution in an ordinary course of justice ; as where a lawyer, in pleading his client's cause, utters words according to his instructions ; as saying of one he is a bastard, when this is to defend the party's own title where he himself doth claim to be heir of the land that is in question, these words will not bear an action. *Cro. Jac.* 90. 4 *Rep.* 13.

In this action the nature of the words must be set forth, with the manner of speaking them, when and where spoken, and before whom, and the damage thereby to the plaintiff ; that his credit was, and how impaired, with the aggravating circumstances ; but it matters not whether the plaintiff doth in his declaration set forth *all* the *circumstantial* words as they are spoken ; so as to show the very words that are *actionable*, and the substance of them, &c.

There is no branch of the law in which the decided cases are so contradictory to each other, and the decisions so frequently irreconcilable to their avowed principles, as this action on the case for words ; many cases in the old authors are certainly not law, and the fairest observation on the subject is, that " what words are actionable or not, will be more satisfactorily determined by an accurate application of the general principles on which such actions depend, than by a reference to adjudged cases, especially those in old authors." See the case of *Onslow* v. *Horne*, 3 *Wils.* 177. where the principles are well explained.

2. Action on the case likewise lies upon an *Assumpsit* or undertaking ; and such action is founded on a contract either express or implied by law, and the verdict gives the party damages in proportion to the loss he has sustained by the violation of the contract. 4 *Co.* 92. *Moor*, 667. See tit. *Assumpsit*.

3. It has been premised, that a special action on the case lies in all instances wherein no general action could be framed ; it will be necessary, therefore, to point out some of those particular cases to which it is most peculiarly applicable.

It was formerly held, that if my fire, by misfortune, burnt the goods of another man, for this wrong he should have *action on the case* against me ; and if my servant put a candle or other fire in any place in my house, and this burnt my house and the house of my neighbour, *action on the case* lay for him against me. 1 *Danv.* 10. But this action is now destroyed by stat. 6 *Ann.* c. 31. See tit. *Fire*, *Waste*.

Action on the case likewise lies against *Carriers* and others, upon the custom of *England*. See tit. *Carrier*.

A common Innkeeper is chargeable for goods stolen in his house. See tit. *Inns* and *Innkeepers*.

This *action* lies for *deceit* in contracts, bargains and sales; if a vintner sells wine, knowing it to be corrupt, as good and not corrupt, though without warranty, *action* lies. *Danv.* 173. So if a man sells a horse, and warrants him to be sound of his limbs, if he be not, *action on the case* lies. A person warrants a horse, wind and limb, that hath some secret disease known to the seller, but not to the buyer, this *action* may be brought; though if one sell a horse, and warrant him sound, and he hath at the time visible infirmities, which the buyer may see, *action on the case* will not lie. *Yelv.* 114. *Cro. Jac.* 675. Where one sells me any wares or commodities, and is to deliver that which is good, but delivers what is naught; or sells any thing by false or deceitful weights and measures, with or without warranty, *action on the case* lies; and so where a man doth sell corrupt victuals, as bread, beer, or other thing for food, and knows it to be unwholesome. *Dyer*, 75. 4 *Rep.* 18. *Cro. Jac.* 270. Yet if the buyer or his servant shall see and taste the victuals, &c. and like and accept the same, no *action* can be maintained. 7 *H.* IV. 16. Nor will *case* lie upon a warranty of what is out of a man's power, or of a future thing; as that a horse shall carry a man thirty miles a day, or the like. *Finch*, 188. If a man sells certain packs of wool, and warrants that they are good and merchantable, if they are damaged, *action on the case* lies against him. 1 *Danv.* 187. The bare affirmation by the seller of a particular sort of diamond, without warranting it to be such, will not maintain an *action*. *Cro. Jac.* 4. 196. But where a man hath the possession of a personal thing, the affirming it to be his own is a warranty that it is so; though it is otherwise in case of lands, where the buyer at his peril is to see that he hath title. 1 *Salk.* 210. If a person sells to another cattle or goods, that are not his own, *action on the case* lies; so if he warrants cloth to be of such a length, that is deficient of it. See tit. *Deceit*.

For *Neglect*, or *Malfeasance*; as if a taylor, &c. undertakes to make a suit of clothes, and spoils them, *action* lies; and if a carpenter promises to repair my house before a certain day, and doth not do it, by which my house falls; or if he undertakes to build a house for me, and doth it ill, *action on the case* lies. 1 *Danv.* 32. If a surgeon neglects his patient, or applies unwholesome medicines, whereby the patient is injured, this *action* lieth. And if a counsel retained to appear on such a day in court, doth not come, by which the cause miscarries, *action* lies against him: so if after retainer, he become of counsel to the adversary against the plaintiff. 11 *H.* VI. 18.

Where a smith promises to shoe my horse well, if he pricks him, *action on the case* lies; and so when he refuses to shoe him, on which I travel without, and my horse is damaged. For stopping up a watercourse or way; breaking down a party wall; stopping of ancient lights, and for any private nuisance to a man's water, light, or air, whereby a person is damnified, this *action* lieth. *Cro. Eliz.* 427. *Yelv.* 159.

Where any one personates another, for cheating at gaming, where a surety is not saved harmless, &c. 2 *Inst.* 193.

If I lend another my horse to ride so far, and he rides further, or forward and backward, or doth not give him meat, this *action* lieth. *Cro. Eliz.* 14. And where one lends me a horse for a time, if he take him from me within that time, or disturb me before I have done what I hired him for, *action on the case* lies: and though I ride the horse out of the way in my journey, he may not take him from me. 8 *Rep.* 146. See tit. *Bailment*. This *action* lies for keeping a dog accustomed to bite sheep, if the owner knew the vitious quality of the dog. But not for a man's dog running at my sheep, though he kills them, if it be

without his consent, and he did not know that the dog was accustomed to bite sheep. Vide 1 *Danv. Abr.* 19. *Hetl.* 171.

Action on the case will lie against a *Gaoler* for putting irons on his prisoner; or putting him in the stocks; or not giving sufficient sustenance to him, being committed for debt. *F. N. B.* 83. The master may in many cases have this *action* against his servant, steward, or bailiff, for any special abuse done to him, and for negligence, &c. Also it lies for taking or enticing away my servant, and retaining him; or threatening a servant, whereby I lose his service. *Lane*, 68. *Cro. Eliz.* 777. 1 *Shep. Abr.* 52. 59. A servant is trusted with goods and merchandise consigned to him by a merchant, to pay the customs for them, and dispose of them to profit; if he deceive the merchant, and have allowance for it on his account, and to defraud the king, lands some of the goods without paying the customs, by which they are forfeited, *action on the case* lieth. *Lane*, 65. *Cro. Jac.* 266.

If I trust one to buy a lease or other thing for me, and he buyeth it for himself, or doth not buy it, this *action* lies against him; but if he doth his endeavour it sufficeth. *Bro.* 117. Where a man is disturbed in the use of a seat in the church, which he hath had time out of mind; a steward is hindered in the keeping of his courts; a keeper of a forest disturbed in taking the profits of his office; a bailiff in distraining for an amerciament, or the like; *action on the case* will lie. *Bendl.* 89. *Lib. Intr.* 5. *Moor*, 987. An *action on the case* lies for him in reversion, against a stranger, for damage to his inheritance, though there be a term *in esse*. 3 *Lev.* 360. Also if a lessor comes to the house he has demised, to see if it be out of repair, or any waste be done, and meets with any disturbance therein; or if one disturbs a parson in taking his tithes, this *action* lies. *Cro. Jac.* 478. 2 *Inst.* 650. And for setting up a new mill on a river, to the prejudice of another who hath an ancient mill, an *action* will lie. *Lib. Intr.* 9.

Action on the case likewise lies for and against commoners, &c. for injuries done in commons. *Sty.* 164. *Sid.* 106. *Cro. Jac.* 165. 2 *Inst.* 474. See tit. *Common*.

Action on the case may likewise be brought for malicious prosecutions: where a suit is without ground, and one is arrested, *action on the case* lies for unjust vexation: and for falsely and maliciously arresting a person for more than is due to the plaintiff, whereby the defendant is imprisoned, for want of bail; or if it be on purpose to hold him to bail, *action on the case* will lie, after the original action is determined. 1 *Lev.* 275. 1 *Salk.* 15. An *action* likewise lies against sheriffs, for default in executing writs; permitting escapes, &c.

Actions on the case likewise lie for *conspiracy*, *escape* and *rescous*, *nuisances*, &c. which see under the several titles. And for a general abridgment of the law on this subject, see *Com. Dig.* tit. *Action*. See further, *Limitation*, *Original*.

ACTION PREJUDICIAL, (otherwise called *preparatory*, or *principal*,) Is an action which arises from some doubt in the principal; as in case a man sues his younger brother for lands descended from his father, and it is objected against him that he is a bastard; now this point of bastardy is to be tried before the cause can any further proceed; and therefore it is termed *prejudicialis*, *quia prius judicanda*. *Bract. lib.* 3. *c.* 4. *numb.* 6. *Cowel.*

ACTION OF A WRIT, Is a phrase of speech used, when one pleads some matter, by which he shows the plaintiff had no cause to have the writ he brought, yet it may be that he may have another *writ* or *action* for the same matter. Such a plea is called *a plea to the ac-*

tion of the writ ; whereas, if by the plea it should appear that the plaintiff hath no cause to have an *action* for the thing demanded, then it is called *a plea to the action. Cowel. Termes de la Ley.*

ACTION OF ABSTRACTED MULTURES, Is an action for multures against those who are thirled to a mill, and come not. *Scotch Dict.* An action to compel persons to grind at a mill according to their tenure.

ACTION FOR POYNDING OF THE GROUND, Is so called because it is founded upon some enfeoffment for an annuity (whether annual rent, life-rent, or feu duty, &c.) that affects the ground ; and the ground being thus debitor, it is called *debitum fundi*, for which both movables found upon the ground may be poynded, (distrained,) and these failing, the property affected by this servitude may be apprized or adjudged, even in prejudice of intervening singular successors. *Scotch Dict.*

ACTION IN THE SCOTCH LAW, Is a prosecution by any party of their right, in order to a judicial determination thereof. *Scotch Dict.*

ACTIONARE, *i. e. In jus vocare*, or to prosecute one in a *suit* at law. *Thorn's Chron.*

ACTON, *Acton*, *Aketon*, Fr. *Hauqueton.*] A coat of mail. *Du Fresne.*

ACTON BURNEL, The statute of 11 *Ed.* I. *ann.* 1283, ordaining the *statute merchant :* it was so termed from a place named *Acton-Burnel*, where it was made ; being a castle formerly belonging to the family of *Burnel*, and afterwards of *Lovel*, in *Shropshire. Cowel. Termes de la Ley.*

ACTOR. The proctor or advocate in civil courts or causes. *Actor dominicus*, was often used for the lord's bailiff or attorney. *Actor ecclesiæ* was the ancient forensic term for the advocate or pleading patron of a church. *Actor villæ* was the steward or head bailiff of a town or village. *Cowel.*

ACTS DONE, Are distinguished into *acts of God*, the *acts of the law*, and *acts of men.* The *act of God* shall prejudice no man : as where the law prescribeth means to perfect or settle any right or estate ; if by the *act of God* the means, in some circumstances, become impossible, no party shall receive any damage thereby. *Co. Lit.* 123. 1 *Rep.* 97. As in an action on the *case* a *bargeman* may justify, by pleading that there were several passengers in his barge, and a sudden *tempest* arising, all the goods in the barge were thrown overboard to save the lives of the passengers. See tit. *Carrier.*

The acts of the law are esteemed beyond the acts of man : and when to the perfection of a thing divers acts are required, the law hath most regard to the original act. 8 *Rep.* 78. The law will construe things to be lawfully done, when it standeth indifferent whether they should be lawful or not : but whatsoever is contrary to law is accounted not done. *Co. Lit.* 42. 3 *Rep.* 74. Our law doth favour substantial more than circumstantial *acts ;* and regards *deeds* and *acts* more than words : and the law doth not require unnecessary things. *Plowd.* 10.

As to *acts of men ;* that which a man doth by another, shall be said to be done by himself ; but personal things cannot be done by another. *Co. Lit.* 158. A man cannot do an *act* to himself, unless it be where he hath a double capacity ; no person shall be suffered to do any thing against his own *act ;* and every man's *acts* shall be construed most strongly against himself. *Plowd.* 140. But if many join in an *act*, and some may not lawfully do it, it shall be adjudged the *act* of him

who might lawfully do the same. *Dyer*, 192. *Acts* that men are forced by necessity and compulsion to do, are not regarded : and an *act* done between persons shall not injure a stranger not party or privy thereto. *Plowd.* 19. 6 *Rep.* 16.

Where mutual acts are to be done, who is to do the first act, see tit. *Condition.*

ACTS OF PARLIAMENT. See tit. *Statute.*

ACTUARY, *actuarius.*] A clerk that registers the acts and constitutions of the Convocation.

ADCREDULITARE. To purge one's self of an offence by oath. *Leges Inæ, c.* 36.

ADDITION. The title or estate, and place of abode given to a man besides his name. See tit. *Abatement*, I. 3. (*c.*)

ADELING, *Ethling*, or *Edling*, from the *Saxon ædelan*, noble or excellent.] A title of honour amongst the *Anglo-Saxons ;* properly belonging to the king's children ; it being usual for the *Saxons* to join the word *ling* to the paternal name, signifying a son, or the younger. King *Edward the Confessor* having no issue, and intending to make *Edgar*, his nephew, the heir of the kingdom, gave him the style and title of *Adeling*. It was also used amongst the *Saxons* for the nobles in general. *Spelm. Gloss. Lamb.*

ADEMPTION. A taking away of a legacy. See *Legacy.*

AD INQUIRENDUM. A judicial writ commanding inquiry to be made of any thing relating to a cause depending in the king's courts. It is granted upon many occasions for the better execution of justice. *Reg. Judic.* See tit. *Writ of Inquiry.*

ADJOURNMENT, *adjournamentum*, *Fr. adjournement.*] A putting off until another time or place. As *adjournment* in eyre, (by stat. 2 *Edw.* III. *c.* 11. and 25 *Edw.* III. *c.* 18.) is an appointment of a day, when the justices in eyre will sit again. A court, the parliament, and writs, &c. may be *adjourned ;* and the substance of the *adjournment* of courts is to give license to all parties that have any thing to do in court, to forbear their attendance till such a time. Every last day of the term, and every eve of a day in term, which is not *dies juridicus*, or a law day, the court is *adjourned.* 2 *Inst.* 26. The terms may be *adjourned* to some other place, and there the *King's Bench* and other courts at *Westminster* be held : and if the king puts out a proclamation for the *adjournment* of the term, this is a sufficient warrant to the keeper of the Great Seal to make out writs accordingly ; and proclamation is to be made, appointing all persons to keep their day, at the time and place to which, &c. 1 *And.* 279. 1 *Lev.* 176. Though by *Magna Charta* the Court of *Common Pleas* is to be held at *Westminster*, yet necessity will sometimes supersede the law, as in the case of a *plague*, a *civil war*, &c. In the first year of *Charles* I. a writ of *adjournment* was delivered to all the justices, to *adjourn* two returns of *Trinity* term : and in the same year, *Michaelmas* term was *adjourned* until *crastino animarum* to *Reading ;* and the king by proclamation signified his pleasure, that his court should be there held. *Cro. Car.* 13. 27. In the 17th of *Charles* II. the court of *B. R.* was adjourned to *Oxford*, because of the plague ; and from thence to *Windsor ;* and afterwards to *Westminster* again. 1 *Lev.* 176. 178.

On a foreign plea pleaded in *assise*, &c. the writ shall be *adjourned* into the *Common Pleas* to be tried ; and, after *adjournment*, the tenant may plead a new plea pursuant to the first ; but if he pleads in abatement a plea triable by the assise, on which it is *adjourned*, he cannot plead in bar afterwards, &c. 1 *Danv. Abr.* 249. The justices of assise

have power to *adjourn* the parties to *Westminster*, or to any other place; and by the express words of *Magna Charta*, (*cap.* 12.) they may *adjourn*, &c. into *C. B.* before the judges there. *Dyer*, 132.

If the judges of the court of *King's Bench*, &c. are divided in opinion, two against two, upon a demurrer or special verdict, (not on a motion,) the cause must be *adjourned* into the *Exchequer Chamber*, to be determined by all the judges of *England*. 3 *Mod.* 156. 5 *Mod.* 335.

ADIRATUS, strayed, lost. See *Bract. l.* 3. *tract.* 2. *c.* 32.

ADJUDICATION SPECIAL, Is when the lords of session, proportionably to the sums due, adjudge to the creditor some part of the creditor's lands, with a fifth part more, beside composition due to the superior, and the expenses for obtaining enfeoffment: but if the debitor do not consent to such an adjudication, in the terms of the act of *Parl.* 1672, all his lands and other heritable subjects are adjudged in the same manner as they were formerly apprized. *Scotch Dict.*

ADJUDICATION AFTER THE OLD FORM, Is when the *hæreditas jacens* (the heir having renounced) is adjudged to the creditor for payment of his money. *Scotch Dict.*

ADJUDICATION UPON OBLIGEMENT, Is when a man having obliged himself to enfeoff another in lands disponed by him, the lords adjudge upon his refusal to perform. *Scotch Dict.*

AD JURA REGIS. A writ brought by the king's clerk presented to a living, against those that endeavour to eject him, to the prejudice of the king's title. *Reg. of Writs*, 61.

AD LARGUM, At large: It is used in the following and other expressions: *title* at large, *assise* at large, *verdict* at large, to *vouch* at large, &c.

ADLEGIARE, or *aleier*, in *Fr.*] To purge himself of a crime by oath. See the laws of King *Alfred*, in *Brompt. Chron. cap.* 4. and 13.

ADMEASUREMENT, Writ of, *admensuratio.*] Is a writ brought for remedy against such persons as usurp more than their share. It lies in two cases; one is termed *admeasurement of dower*, (*admensuratio dotis*,) where a man's widow after his decease holdeth from the heir more land, &c. as dower, than of right belongs to her; and the other is *admeasurement of pasture*, (*admensuratio pasturæ*,) which lies between those that have common of pasture, where any one or more of them surcharge the common. *Reg. Orig.* 156. 171. In the first case the heir shall have this writ against the widow, whereby she shall be admeasured, and the heir restored to the overplus; and in the last case it may be brought against all the other commoners, and him that surcharged; for all the commoners shall be admeasured. *Terms de Ley*, 23. See tit. *Common* and *Dower*.

ADMINICLE, *adminiculum.*] Aid, help, or support. See stat. 1 *Edw.* IV. *c.* 1.

ADMINISTRATOR, *Lat.*] He that hath the goods of a man dying intestate committed to his charge by the ordinary, for which he is accountable when thereunto required. For matters relating to this title, and to administration in general, see tit. *Executor*.

ADMINISTRATRIX, *Lat.*] She that hath goods and chattels of an intestate committed to her charge, as an *administrator*.

ADMIRAL. *Admiralius*, *admirallus*, *admiralis*, *capitaneus*, or *custos maris*, from the *French amiral*, or from the *Saxon*, *aen mereal*, over all the sea; and in ancient time, the office of the *admiralty* was called *custodia maritimæ Angliæ*. *Co. Lit.* 260. Many other fanciful derivations are recapitulated in *Spelman's Glossary*, and see *Com. Dig.* tit. *Admiralty*. The term appears to have been first used *temp. Edw.* I. and

the first *Admiral of England*, by name, was *Richard Fitz Alan*, Earl of *Arundel*, 10 *Rich.* II.] A High Officer or Magistrate, having the government of the king's navy; and (in his court of *Admiralty*) the determining of all causes belonging to the sea, and offences committed thereon. The office is now usually executed by commissioners, who, by *stat.* 2 *Wm.* & *M. stat.* 2. c. 2. are declared to have the same authorities, jurisdictions and powers, as the *Lord High Admiral*, who is usually understood by this term in law, not adverting to the naval distinctions.

Under this head, therefore, shall be included all that relates as well to such ADMIRAL as to the COURT OF ADMIRALTY.

The warden of the *Cinque Ports* has the jurisdiction of admiral within those ports exempt from the admiralty of *England*. 4 *Inst.* 223. 2 *Inst.* 556. 2 *Jon.* 67. 1 *Jenk.* 85. It appears that anciently the *Admirals* of *England* had jurisdiction of all causes of merchants and mariners, happening not only upon the main sea, but in all foreign parts within the king's dominions, and without them, and were to judge them in a summary way, according to the laws of *Oleron*, and other sea laws. 4 *Inst.* 75. In the time of King *Edw.* I. and King *John*, all causes of merchants and mariners, and things arising upon the main sea, were tried before the Lord *Admiral*: but the first title of *Admiral* of *England*, expressly conferred upon a subject, was given by patent of King *Rich.* II. to the Earl of *Arundel* and *Surry*. In the reign of *Edw.* III. the court of *admiralty* was established, and *Rich.* II. limited its jurisdiction.

By the statute 13 *Rich.* II. *st.* 1. *c.* 5. it is enacted, that *upon complaint of encroachments made by the admirals and their deputies, the admirals and their deputies shall meddle with nothing done within the realm, but only with things done upon the sea.* For the construction of this statute, see 2 *Bulstr.* 323. 3 *Bulstr.* 205. 13 *Co.* 52.

By stat. 15 *Rich.* II. *c.* 3. it is declared, that *all contracts, pleas and quarrels, and other things done within the bodies of counties by land or water, and of wreck, the admiral shall have no conusance, but they shall be tried, &c. by the law of the land; but of the death of a man, and of mayhem done in great ships, being in the main stream of great rivers beneath the* points nearest *the sea, and in no other place of the same river, the admiral shall have conusance; and also to arrest ships in the great flotes, for the great voyages of the king and the realm, saving to the king his forfeitures; and shall have jurisdiction in such flotes during such voyages, only saving to lords, &c. their liberties.*

By the statute 2 *Hen.* IV. *c.* 11. reciting 13 *Rich.* II. *c.* 5. it is enacted, *that he that finds himself aggrieved against the form of the statute, shall have his action by writ grounded upon the case against him that so pursues in the admiralty, and recover double damages against him, and he shall incur the pain of* 10*l. if he be attainted.*

By stat. 27 *Hen.* VIII. *c.* 4. all offences of *piracy, robbery* and *murder*, done on the sea, or within the admiral's jurisdiction, shall be tried in such places of the realm as shall be limited in the king's commissions, directed to the lord admiral, and his lieutenant and deputies, and other persons, to determine such offences after the common course of law, as if the same offences had been done on land.

By the statute 28 *Hen.* VIII. *cap.* 15. "all treasons, felonies, robberies and murders, &c. upon the sea, or within the admiralty jurisdiction, shall also be tried in such shires and places in the realm, as shall be limited by the king's commission, as if done on land, and the consequences of the offences are the same. See 3 *Inst.* 111, 112. But

in cases which would be manslaugher at land, the jury is always directed to acquit. *Foster*, 288. See *Homicide*.

It was held, *Yelv.* 134. that by force of this statute, accessaries to robbery, &c. could not be tried; but this is remedied by 11 and 12 *Wm.* III. *cap.* 7. by which their aiders and comforters, and the receivers of their goods, are made accessaries, and to be tried as pirates, by 28 *Hen.* VIII. *cap.* 15. also the said statute 11 and 12 *Wm.* III. directs how pirates may be tried beyond sea, according to the civil law, by commission under the great seal of *England*. See tit. *Piracy*.

By the stat. 5 *Eliz. cap.* 5. several offences in the act mentioned, if done on the main sea, or coasts of the sea, being no part of the body of any county, and without the precinct, jurisdiction, and liberties of the cinque ports, and out of any haven and pier, shall be tried before the admiral or his deputy, and other justices of *oyer* and *terminer*, according to the statute of 28 *Hen.* VIII. *c.* 15.

By the statute 1 *Ann. cap.* 9. captains and mariners belonging to ships, and destroying the same at sea, shall be tried in such places as shall be limited by the king's commission, and according to 28 *Hen.* VIII. *c.* 15. The statute 10 *Ann. cap.* 10. directs how the trials shall be had of officers and soldiers, that either upon land out of *Great Britain*, or at sea, hold correspondence with a rebel enemy. See tit. *Piracy*, *Treason*.

And by the statute 4 *Geo.* I. *cap.* 11. all persons who shall commit any offence for which they ought to be adjudged pirates, felons or robbers, by 11 and 12 *Wm.* III. may be tried and adjudged for every such offence, according to the form of 28 *Hen.* VIII. *c.* 15. and shall be excluded from the benefit of clergy.

The jurisdiction of the lord admiral, therefore, is confined to the main sea, or coasts of the sea, not being within any county. Thus, the *admiralty* hath cognisance of the death or maim of a man, committed in any ship riding in great rivers, beneath the bridges thereof, next the sea: but by the common law, if a man be killed upon any arm of the sea, where the land is seen on both sides, the coroner is to inquire of it, and not the *admiral*; for the county may take cognisance of it; and where a county may inquire, the lord *admiral* hath no jurisdiction. 3 *Rep.* 107.

All ports and havens are *infra corpus comitatus*, and the *admiral* hath no jurisdiction of any thing done in them: between high and low-water mark, the common law and *admiral* have jurisdiction by turns; one upon the water, and the other upon the land. 3 *Inst.* 113. by the statutes for disciplining the navy, every commander, officer and soldier of ships of war, shall observe the commands of the *admiral*, &c. on pain of death, or other punishment. See tit. *Navy*.

Under these statutes the lord *admiral* hath power to grant commissions to inferior vice-*admirals*, &c. to call courts-martial for the trial of offences against the articles of war; and these courts determine by plurality of voices, &c. See tit. *Navy*.

The *admiralty* is said not to be a court of record, by reason it proceeds by the *civil* law. 4 *Inst.* 135. But the *admiralty* has jurisdiction where the common law can give no remedy; and all maritime causes, or causes arising wholly upon the sea, it hath cognisance of. *Vide*, as to the jurisdiction of the admiralty, 1 *Com. Dig.* tit. *Admiralty*. The *admiralty* hath jurisdiction in cases of freight, mariners' wages, breach of charter-parties, though made within the realm, if the penalty be not demanded: and likewise in case of building, mending, saving and victualling ships, &c. so as the suit be against the

ship, and not against the parties only. 2 *Cro.* 216. Mariners' wages are contracted on the credit of the ship, and they may all join in suits in the *admiralty*; whereas at common law they must all sever: the master of a ship contracts on the credit of the owners, and not of the ship; and therefore he cannot prosecute in the *admiralty* for his wages. 1 *Salk.* 33. It is allowed by the common lawyers and civilians, that the lord *admiral* hath cognisance of seamen's wages, and contracts, and debts for making ships; also of things done in navigable rivers, concerning damage done to persons, ships, goods, annoyances of free passage, &c. and of contracts, and other things done beyond sea, relating to navigation and trade by sea. *Wood's Inst.* 218. But if a contract be made beyond sea, for doing of an act, or payment of money within this kingdom; or the contract is upon the sea, and not for a marine cause, it shall be tried by a jury; for where part belongs to the common law, and part to the *admiral*, the common law shall be preferred. And contracts made beyond sea may be tried in *B. R.* and a fact be laid to be done in any place in *England*, and so tried here. 2 *Bulstr.* 322.

Where a contract is made in *England*, and there is a conversion beyond sea, the party may sue in the *admiralty*, or at common law. 4 *Leon.* 257. An obligation made at sea, it has been held, cannot be sued in the *admiral's* court, because it takes its course, and binds according to the common law. *Hob.* 12. The court of *admiralty* cannot hold plea of a matter arising from a contract made upon the land, though the contract was concerning things belonging to the ship: but the *admiralty* may hold plea for the seamen's wages, &c. because they become due for labour done on the sea; and the contract made upon land, is only to ascertain them. 3 *Lev.* 60. Though where there is a special agreement in writing, by which seamen are to receive their wages in any other manner than usual; or if the agreement at land be *under seal*, so as to be more than a parol contract, it is otherwise. 1 *Salk.* 31. See *Hob.* 79.

If the master pawns the ship on the high sea out of necessity for tackling or provision, without the consent of the owners, it shall bind them; but 'tis otherwise where the ship is pawned for the master's debt: the master can have no credit abroad, but upon the security of the vessel; and the *admiralty* gives remedy in these cases. 1 *Salk.* 35. The master hath a right to hypothecate the ship for any debt incurred on her account. *Vide Co. Lit.* 134. 140. Though the agreement is made, and the money lent at land. 1 Lord *Raym.* 152. *Benzen* v. *Jefferies.* Sale of goods (taken by piracy) in open market, is not binding by the *admiralty* law, the owner may therefore retake them; but at common law the sale is binding, of which the *admiralty* must take notice. 1 *Roll. Abr. Vide* 1 *Vent.* 308.

If a ship is taken by pirates upon the sea, and the master, to redeem the ship, contracts with the pirates to pay them 50*l.* and pawns his person for it, and the pirates carry him to the isle of *S.* and there he pays it with money borrowed, and gives bond for the money, he may sue in the admiralty for the 50*l.* because the original cause arose upon the sea, and what followed was but accessory and consequential. *Hard.* 183.

If goods delivered on shipboard are embezzled, all the mariners ought to contribute to the satisfaction of the party that lost his goods, by the maritime law, and the cause is to be tried in the *admiralty*. 1 *Lill.* 368. By the custom of the *admiralty*, goods may be attached in the hands of a third person, *in causa maritima & civili*, and they shall be delivered to the plaintiff, after defaults, on caution to restore them, if the debt, &c. be disproved in a year and a day; and if the party re-

fuse to deliver them, he may be imprisoned *quousque*, &c. *March. Rep.* 204.

The court of *admiralty* may cause a party to enter into bond in nature of caution or stipulation, like bail at common law; and if he render his body, the sureties are discharged; and execution shall be of the goods, or of the body, &c. not of the lands. *Godb.* 260. 1 *Sheph. Abr.* 129. See 1 *Salk.* 33. *T. Raym.* 78. 2 Lord *Raym.* 1286. *Fitz.* 197.

A person in execution, on judgment in the *admiral's* court, upon a contract made on the land in *New England*, was discharged, being out of the *admiralty* jurisdiction. 3 *Cro.* 603. 1 *Cro.* 685. And where sailors' clothes were bought in *St. Katherine's* parish near the *Tower*, *London*, which were delivered in the ship, on a suit in the *admiralty* for the money, prohibition was granted, for this was within the county: so of a ship lying at *Blackwall*, &c. *Owen*, 122. *Hughes's Abr.* 113. But the *admiralty* may proceed against a ship, and the sails and tackle, when they are on shore, although alleged to be detained at land; yet, upon alleging offer of a plea, claiming property therein, and refusal of the plea, on this suggestion a prohibition shall be had. 1 *Show.* 179.

If an *English* ship takes a *French* ship, the *French* being in enmity with us, and such ship is libelled against, and after due notice on the *exchange*, &c. declared a lawful prize, the king's proctor may exhibit a libel in the admiralty court, to compel the taker (who converted the lading to his own use) to answer the value of the prize to the king; although it was objected, that by the first sentence, the property was vested in the king, and that this second libel was in nature of an action of *trover*, of which the court of admiralty cannot hold plea. *Carth.* 399. [This must be understood of a capture without the authority of letters of marque or reprisal.]

If the owner of a ship victuals it, and furnishes it to sea, with letters of reprisal, and the master and mariners, when they are at sea, commit piracy upon a friend of the king, without the notice or assent of the owner, yet by this the owner shall lose his ship by the admiralty law, and our law ought to take notice thereof. 1 *Roll. Abr.* 530. But see 1 *Roll. Rep.* 285.

By the civil law and custom of merchants, if the ship be cast away, or perish through the mariners' defaults, they lose their wages; so if taken by pirates, or if they run away; for if it were not for this policy, they would forsake the ship in a storm, and yield her up to enemies in any danger. 1 *Sid.* 179. 1 *Mod.* 93. 1 *Vent.* 146.

The *admiralty* court may award execution upon land, though not hold plea of any thing arising on land. 4 *Inst.* 141. And upon letters missive or request, the *admiralty* here may award execution on a judgment given beyond sea, where an *Englishman* flies or comes over hither, by imprisonment of the party, who shall not be delivered by the common law. 1 *Roll. Abr.* 530. When sentence is given in a foreign *admiralty*, the party may libel for execution of that sentence here; because all courts of *admiralty* in *Europe* are governed by the civil law. *Sid.* 418. Sentences of any *admiralty* in another kingdom are to be credited, that ours may be credited there, and shall not be examined at law here; but the king may be petitioned, who may cause the complaint to be examined; and, if he finds just cause, may send to his ambassador where the sentence was given, to demand redress, and upon failure thereof, will grant letters of marque and reprisal. *Raym.* 473.

If one is sued in the *admiralty*, contrary to the statutes 13 *Rich.* II. stat. 1. *c.* 5. and 15 *Rich.* II. *c.* 3. he may have a *supersedeas*, to cause the judge to stay the proceedings, and also have action against the party suing.

10 *Rep.* 75. A ship being privately arrested by *admiralty* process only, and no suit, it was adjudged a prosecution within the meaning of the statutes; and double damages, &c. shall be recovered. 1 *Salk.* 31, 32.

By stat. 8 *Eliz. c.* 5. if an erroneous judgment is given in the admiralty, appeal may be had to delegates appointed by commission out of chancery, whose sentence shall be final. See 5 *Inst.* 330. But from the prize court, (see *post*,) appeal lies to commissioners consisting of the privy council. *Doug.* 614. Appeals may be brought from the inferior *admiralty* courts to the Lord High *Admiral*: but the Lord Warden of the *cinque ports* hath jurisdiction of *admiralty* exempt from the *admiralty* of *England*. A writ of error doth not lie upon a sentence in the admiralty, but an appeal. 4 *Inst.* 135. 339. There are also vice-admiralty courts in the king's foreign dominions, from which (except in case of prizes) appeals may be brought before the courts of admiralty in *England*, as well as to the king in council. 3 *Comm.* 69.

The admiral, of right, had anciently a tenth part of all prize goods, but which is taken away by stat. 13 *Geo.* II. *c.* 4. which vests the property of all ships taken and condemned as prize in the admiralty courts, in the admirals, captains, sailors, &c. being the captors, according to the proportions to be settled by the king's proclamation. See 45 *Geo.* III. *c.* 72. This statute also enables the admiralty to grant letters of marque. (See title *Privateers.*) For the mode of proceeding in condemning prizes, see the *st.* & stat. 33 *Geo.* III. *cc.* 34. 66. and *Doug.* 614. 4 *Term Rep.* 382. as to the commissioners of appeal.

By the stat. 22 *Geo.* II. *c.* 3. his majesty's commission to all the privy counsellors then and for the time being, and to the lord chief baron of the court of *exchequer*, the justices of the *king's bench* and *common pleas*, and barons of the said court of *exchequer*, then and for the time being, for hearing and determining appeals, from sentences in causes of prizes pronounced in the courts of *admiralty*, in any of his majesty's dominions, declared valid, although such chief baron, justices and barons are not of the privy council. But no sentence shall be valid, unless the major part of the commissioners present be of the privy council. See *Kyd's Com. Dig.* tit. *Admiralty*, and this *Dict.* tit. *Navy*.

By stat. 39 *Geo.* III. *c.* 37. all offences whatever committed on the high seas, shall be liable to the same punishment as if committed on shore, and shall be tried and adjudged in the same manner as felonies, &c. are directed by the 28 *Hen.* VIII. *c.* 15.

Persons tried for murder or manslaughter and found guilty of manslaughter only, shall be entitled to the benefit of clergy, and be subject to the same punishment as if committed on land, § 2.

39, 40 *Geo.* III. *c.* 80. § 35. offences committed upon the high seas, may be prosecuted within the nearest county.

43 *Geo.* III. *c.* 113. persons wilfully casting away any vessel, or *procuring it to be done*, declared felons without benefit of clergy; if committed within the body of the county to be tried as other felonies; upon the high seas as under 28 *Hen.* VIII. *c.* 15.

Powers of 33 *Hen.* VIII. *c.* 23. respecting murder, &c. extended to accessaries before the fact in murder, and to the offence of manslaughter. *Id.* § 6. See also 43 *Geo.* III. *c.* 79.

The *admiralty* have no jurisdiction to try offenders on the stat. 11 *Geo.* I. *c.* 29. for *procuring* the destruction of a ship, if there is no evidence of such destruction having been *procured* by the owners of such ship upon the high seas within the admiralty jurisdiction, but only *on shore* within the body of a *county*. *Rasterby* and *Macfarlane*,

East's Pleas of the Crown, (Addenda,) p. XXX. *Abbott on Merchant Ship*, 159. n. 1.

ADMISSION, *admissio.*] Is properly the ordinary's declaration that he approves of the parson presented to serve the cure of any church. *Co. Lit.* 344. a. When a patron of a church has presented to it, the bishop upon examination admits the clerk by saying *admitto te habilem. Co. Lit.* 344. a. Action on the case will not lie against the bishop, if he refuse to admit a clerk to be qualified according to the canons, (as for any crime or impediment, illiterature, &c.) but the remedy is by writ *quare non admisit*, or *admittendo clerico* brought in that county where the refusal was. 7 *Rep.* 3. As to the causes of refusal by the ordinary to admit to a benefice, see tit. *Parson*, *Quare Impedit.*

ADMITTANCE. See *Copyhold.*

ADMITTENDO CLERICO. Upon the right of presentation to a benefice being recovered in *quare impedit*, or on assise of *darrein presentment*, the execution is by this writ; directed, not to the sheriff, but to the bishop or his metropolitan, requiring them to *admit* and institute the clerk of the plaintiff. 3 *Comm.* 412. *Reg. Orig.* 31. 33. See tit. *Parson* and *Quare Impedit.*

If a person recovers an advowson, and six months pass; yet, if the church be void, the patron may have a writ to the bishop; and if the church is void when the writ comes to the bishop, the bishop is bound to *admit* his clerk. *Vide Hut.* 24. *Hob.* 152. 154. 2 *Inst.* 273. and 3 *Com. Dig.* Where a man recovers against another than the bishop, this writ shall go to the bishop; and the party may have an *alias* and a *pluries*, if the bishop do not execute the writ, and an *attachment* against the bishop, if need be. *New Nat. Br.* 84. In a *quare impedit* betwixt two strangers, if there appears to the court a title for the king, they shall award a writ unto the bishop for the king.

ADMITTENDO IN SOCIUM, A writ for associating certain persons to justices of assise. *Reg. Orig.* 206. Knights and other gentlemen of the county are usually associated with judges, in holding their *assises* on the circuits.

ADNICHILED, from the *Latin nihil*, or *nichil.*] Annulled, cancelled or made void. Stat. 28 *Hen.* VIII.

AD QUOD DAMNUM. A writ to inquire whether a grant intended to be made by the king, will be to the damage of him or others. *F. N. B.* 221, 222. and it ought to be issued before the king grants certain liberties; as a fair, market, &c. which may be prejudicial to others: it is directed to the sheriff. *Terms de Ley*, 25.

Stat. 27 *Ed.* I. stat. 2. § 1. ordains, *that such as would purchase new parks, shall have writs out of chancery to inquire concerning the same. In like manner they shall do that will purchase any fair, market, warren, or other liberty.* § 4.

This writ is likewise used to inquire of lands given in *mortmain* to any house of religion, &c. And it is a damage to the country, that a freeholder who hath sufficient lands to pass upon assises and jury, should alien his lands in mortmain, by which alienation his heir should not have sufficient estate after the death of the father, to be sworn in assises and juries. *F. N. B.* 221.

The writ of *ad quod damnum* is also had for the turning and changing of ancient highways, which may not be done without the king's license obtained by this writ, on inquisition found that such a change will not be detrimental to the public. *Terms de Ley*, 26. *Vaugh. Rep.* 314. Ways turned without this authority are not esteemed highways, so as to oblige the inhabitants of the hundred to make amends for

robberies; nor have the subjects an interest therein to justify going there. 3 *Cro.* 267. If any one change a highway without this authority, he may stop the way at his pleasure. See tit. *Highway.*

The river *Thames is a highway*, and cannot be diverted without an *ad quod damnum*; and to do such a thing ought to be by patent of the king. *Noy*, 105.

If there be an *ancient trench or ditch coming from the sea*, by which boats and vessels used to pass to the town, if the same be *stopped* in any part by outrageousness of the sea, and a man will *sue to the king to make a new trench, and to stop the ancient trench*, &c. they ought first to sue a writ of *ad quod damnum*; to inquire what damage it will be to the king or others. *F. N. B.* 225. *E.*

And if the king will grant to any city the *assise of bread and beer*, and the keeping of weights and measures, an *ad quod damnum* shall be first awarded, and when the same is certified, &c. then to make the grant. *F. N. B.* 225. *E.*

It appears by the writs in the register, that in ancient times, upon every grant, confirmation, &c. or license made by the king, a writ *ad quod damnum* was to be first awarded, to inquire of the truth thereof, and what damage the king might have by the same; but now the practice is contrary; and in the patents of common grants of license, a dispensation by *non obstante* is inserted.

ADRECTARE, *addressare, i. e. ad rectum, ire, recto stare.*] To do right, satisfy or make amends. *Gerve. Dorobenn. anno*, 1170.

AD TERMINUM QUI PRETERIIT. A writ of entry that lay for the lessor or his heirs, where a lease has been made of lands or tenements, for the term of life or years; and after the term is expired, the lands are withheld from the lessor by the tenant, or other person possessing the same. *F. N. B.* 201.

Now by stat. 4 *Geo.* II. *c.* 28. tenants wilfully holding over, after demand and notice in writing for delivering possession, shall *pay double* the yearly value. See tit. *Ejectment.*

ADVENT, *adventus.*] A time containing about a month preceding the feast of the nativity (the advent or arrival) of our *Saviour.* It begins from the *Sunday* that falls either upon *St. Andrew's* day, being the 30th of *November*, or next to it, and continues to the feast of *Christ's* nativity, commonly called *Christmas.* Our ancestors showed great reverence and devotion to this time, in regard to the approach of the solemn festival; for *in* adventu *domini nulla assisa demet capi.* But the statute *West.* 1. (3 *E.* I.) *c.* 51. ordained that, notwithstanding the usual solemnity and times of rest, it should be lawful (in respect of justice and charity, which ought at all times to be regarded) to take assises of *novel disseisin mort d'ancestor*, &c. in the time of *Advent, Septuagesima*, and *Lent.* This is also one of the seasons, from the beginning of which to the end of the octave of the *Epiphany*, the solemnizing of marriages is forbidden, without special license, as we may find from these old verses.

Conjugium adventus *prohibit*, Hilarique *relaxat*;
Septuagena *vetat*, *sed* Paschæ octavo *reducit*;
Rogatio *vetitat*, *concedit* Trina *potestas.*

AD VENTREM INSPICIENDUM. See *Ventre Inspiciendo.*

ADVERTISEMENTS. Under stat. 9 *Ann. c.* 6. § 5. and 10 *Ann. c.* 26. § 109. 100*l.* penalty is imposed on all persons (the latter particularly mentioning *Printers*) *publishing* the keeping of any office for illegal insurances on marriage, &c. or offices established under the pre-

tence of improving small sums. The several penalties also under the *Lottery* acts, (see this dictionary, tit. *Lottery*,) extend to printers and publishers of newspapers in setting the advertisements of illegal lottery adventures; and to distributors of hand-bills, &c. 4 *Term Rep.* 414. and several printers of papers who had incurred such penalties ignorantly, were indemnified by stat. 32 *Geo.* III. *c.* 61.

By stat. 25 *Geo.* II. *c.* 36. § 1. any person publicly advertising a reward *with no question asked*, for the return of things stolen or lost, or making use of words in such advertisement, purporting that such reward shall be given without seizing, or making inquiry after the person producing such thing so stolen or lost, or promising in any such advertisement to return to any person, who may have bought, or advanced money upon such thing, the money so paid or advanced, or any reward for the return of such thing; and any person (such as the printers of newspapers, &c.) printing or publishing such advertisement, shall forfeit 50*l.*

By stat. 21 *Geo.* III. *c.* 49. any person advertising or causing to be advertised any public entertainment or meeting for *debating* on the *Lord's* day, to which persons are to be admitted by money or tickets sold, and any person printing or publishing any such advertisement, shall forfeit 50*l.* for each offence. § 3. See *Unlawful Assemblies. Riot. Sunday.*

AD VITAM AUT CULPAM. An office is expressed to be so held, which is to determine only by the death or delinquency of the possessor; or which, in other words, is held *quamdiù se bene gesserit.* See stat. 28 *Geo.* II. *c.* 7. on *Scotch* Jurisdiction.

ADULTERY, *adulterium, quasi ad alterius thorum; Anno* 1 *Hen.* VII. *c.* 7. and in divers old authors termed *advowtry.*] The sin of incontinence between two married persons; or if but one of the persons be married, it is nevertheless *adultery:* but in this last case it is called single *adultery*, to distinguish it from the other, which is double. This crime was severely punished by the laws of *God*, and the ancient laws of the land: (See the laws of King *Edmund*, *c.* 4. Laws of *Canute*, *par.* 2. *c.* 6. 50. *Leg. H.* I. *c.* 12.) the *Julian law*, among the old *Romans*, made it death; but in most countries at this time the punishment is by fine, and sometimes banishment; in *England* it is punished ecclesiastically by penance, &c. It is a breach of the peace, and as such anciently indictable, but not now. *Salk.* 552. The usual mode of punishing adulterers at present is by action of *crim. con.* (as it is commonly expressed,) to recover damages; which are assessed by the jury, in proportion to the heinousness of the crime, and are frequently very heavy and severe.

Before the stat. 22 and 23 *Car.* II. *c.* 1. which makes malicious maiming felony, it was a question, whether cutting off the privy members of a man, taken in *adultery* with another man's wife, was felony or not? And it is now held that such provocation may justify the homicide of the adulterer by the injured husband, in the moment of injury. 1 *Hale*, 488. See tit. *Baron and Feme*, III.

ADVOCATE. The patron of a cause assisting his client with advice, and who pleads for him: it is the same in the civil and ecclesiastical law, as a counsellor at the common law. The ecclesiastical, or church *advocate*, was originally of two sorts; either an *advocate* of the causes and interest of the church, retained as a counsellor and pleader of its rights; or an *advocate*, *advocatus*, an *Advowee* or *Avowee*. *Blount. Fleta*, *lib.* 5. *c.* 14. *Britt. c.* 29. Both these offices at first belonged to the founders of churches and convents, and their heirs, who were bound to protect and defend their churches, as well as to nominate or

present to them. But when the patrons grew negligent in their duty, or were not of ability or interest in the courts of justice, then the religious began to retain law *advocates*, to solicit and prosecute their causes. *Vide Spelman.*

ADVOCATIONE DECIMARUM. A writ that lies for tithes, demanding the fourth part, or upwards, that belong to any church. *Reg. Orig.* 29.

ADVOW, or *Avow*, *advocare.*] To justify or maintain an act formerly done, see *Avowry*; it also signifies to call upon or produce; anciently when stolen goods were bought by one, and sold to another, it was lawful for the right owner to take them wherever they were found, and he in whose possession they were found, was bound *advocare*, *i. e.* to produce the seller to justify the sale; and so on till they found the thief. Afterwards the word was taken for any thing which a man acknowledged to be his own, or done by him, and in this sense it is mentioned in *Fleta*, *lib.* 1. *c.* 5. *par.* 4.

ADVOWSON, *Advocatio.*] The right of presentation to a church or benefice: and he who hath this right to present, is styled *patron*: because they that originally obtained the right of presentation to any church, were maintainers of, or benefactors to, the same church: it being presumed that he who founded the church, will *avow* and take it into his protection, and be a patron to defend it in its just rights. When the christian religion was first established in *England*, kings began to build cathedral churches, and to make bishops: and afterwards, in imitation of them, several lords of manors founded particular churches on some part of their own lands, and endowed them with glebe; reserving to themselves and their heirs, a right to present a fit person to the bishop, when the same should become void. See 2 *Comm.* 21. 23. and tit. *Nomination.*

Under this head shall be considered,

I. *The several kinds of advowson.*
II. *How advowsons may lapse.*
III. *How they may be gained by usurpation.*
IV. *Of the right of presentation.*

For the law relating to appropriations and impropriations of benefices, see tit. *Appropriation.*

I. Advowsons are of two kinds; *appendant*, and in *gross*. *Appendant*, is a right of presentation dependent upon a manor, lands, &c. and passes in a grant of the manor as incident to the same; and when manors were first created, and lands set apart to build a church on some part thereof, the *advowson* or right to present to that church became *appendant* to the manor. *Advowson* in *gross* is a right subsisting by itself, belonging to a *person*, and not to a manor, lands, &c. so that when an *advowson appendant* is severed by deed or grant from the corporeal inheritance to which it was appendant, then it become an *advowson* in *gross*. *Co. Lit.* 121, 122.

If he that is seised of a manor, to which an advowson is appendant, grants one or two acres of the manor, together with the advowson; the advowson is appendant to such acre; especially after the grantee hath presented. *Watson's Compleat Incumbent*, *c.* 7.

But this feoffment of the acre with the advowson, ought to be by *deed*, to make the advowson appendant; and the acre of land and the ad-

vowson ought to be granted by *the same clause* in the deed; for if one, having a manor with an advowson appendant, grant an acre parcel of the said manor, and by another clause in the same deed grants the advowson; the advowson in such case shall not pass as appendant to the acre; but if the grant had been of the *entire manor*, the advowson would have passed as appendant. So if a husband, seised in right of his wife of a manor, to which an advowson is appendant, doth alien the manor by acres to divers persons, saving one acre; the advowson shall be appendant to that acre. Or if a lessee for life of a manor to which an advowson belongs, alien one acre, with the advowson appendant, the advowson is thereby appendant to that acre. *Wats. c.* 7.

The right of advowson, though appendant to a manor, castle or the like, may be severed from it in other ways, and being severed, becomes *an advowson in gross*; and this may be effected divers ways: as, 1. If a manor or other thing to which it is appendant is granted, and the advowson excepted. 2. If the advowson is granted alone, without the thing to which it was appendant. 3. If an advowson appendant is presented to by the patron, as an advowson in gross. *Gibs.* 757.

A disappendancy may also be temporary; that is, the appendancy, though turned into gross, may return; as, 1. If the advowson is excepted in a lease of a manor for life; during the lease it is in gross, but when the lease expires it is appendant again. 2. If the advowson is granted for life, and another enfeoffed of the manor with the appurtenances; in such case, at the expiration of the grant, it shall be appendant; and so in other cases.

But with respect to the king, by the statute of *prærogativa regis*, 17 *Edw.* II. *c.* 15. *When the king giveth or granteth land, or a manor, with appurtenances; without he make express mention in his deed or writing, of advowson, the king reserveth to himself such advowsons, albeit that among other persons it hath been observed otherwise.*

Yet when he *restoreth*, as in case of the restitution of a bishop's temporalties; then advowsons pass without express mention, or any words equivalent thereto. 10 *Co.* 64.

The law, in the case of a common person, is thus set down by *Rolle*, out of the ancient books: If a man seised of a manor, to which an advowson is appendant, aliens that manor, without saying *with the appurtenances*, (and even without *naming* the advowson,) yet the advowson shall pass, for 'tis parcel of the manor. 2 *Roll. Abr.* 60.

An advowson being an inheritance incorporeal, and not lying in manual occupation, cannot pass by *livery*; but may be granted by *deed*, or by *will*, either for the inheritance, or for the right of one or more turns, or for as many as shall happen within a time limited.

But this general rule, with regard to advowsons in gross, next avoidances, and the like, is to be understood with two limitations.

First. That it extends not to ecclesiastical persons of any kind or degree, who are seised of advowsons in the right of their churches; nor to masters and fellows of colleges, nor to guardians of hospitals, who are seised in right of their houses; all these being restrained (the bishops by the 1 *Eliz. c.* 19. and the rest by the 13 *Eliz. c.* 10.) from making any grants but of things *corporeal*, of which a rent or annual profit may be reserved; and advowsons and next avoidances, which are *incorporeal* and lie in grant, cannot be of that sort; and therefore such grants, however confirmed, are void against the successor; though they have been adjudged to be good against the grantors, (as bishop, dean, master or guardian,) during their own times. See 45 *Geo.* III. *c.* 101.

Secondly, A grant of the next avoidance may be assigned before the avoidance happens. 2 *Roll. Abr.* 45, &c. But an avoidance cannot be granted by a common person after it is fallen : while the church is absolutely void. *Mod.* 89. *Dyer*, 129 *b.* 26 *a.* 283 *a.* and see 2 *Wils.* 197. and a grant of the *advowson* made after the church is actually fallen vacant is equally void ; not as is said in the old books, because it is a *chose in action ;* but because such grants might (indeed inevitably would) encourage simony. 2 *Burr.* 1510, 1511. See tit. *Simony*, and see *Kyd's Com. Dig.* tit. *Advowson.*

If two have a grant of the next avoidance, and one releaseth all right and title to the other while the church is void ; such release is void. But the king's grant of a void turn hath been adjudged to be good. 3 *Leon.* 196. *Dyer*, 283 *a. Hob.* 140.

If one be seised of an advowson in fee, and the church doth become void, the void turn is a chattel ; and if the patron dieth before he doth present, the avoidance doth not go to his heir but to his executor. *Wats. c.* 9.

But if the incumbent of a church be also seised in fee of the advowson of the same church, and die, his heir, and not his executors, shall present ; for although the advowson doth not descend to the heir at the death of the ancestor, and by his death the church become void, so that the avoidance may be said in this case to be severed from the advowson before it descend to the heir, and vested in the executor ; yet both the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred as the more ancient and worthy. *Wats. c.* 9. *fol.* 72. See *Watkins on Descents, p.* 62. 3 *Lev.* 47.

Tenant by the curtesy may be of an advowson, when the wife dies before avoidance. 1 *Inst.* 29. *a.*

By last will and testament, the right of presenting to the next avoidance, or the inheritance of an advowson, may be devised to any person ; and if such devise be made by the incumbent of the church, the inheritance of the advowson being in him, it is good, though he die incumbent ; for although the testament hath no effect but by the death of the testator, yet it hath an inception in his life-time. And so it is, though he appoint by his will who shall be presented by the executors, or that one executor shall present the other ; or doth devise that his executors shall grant the advowson to such a man. *Wats. c.* 10.

Advowsons are either *presentative*, *collative*, or *donative.*

An advowson *presentative* is, where the patron does present or offer his clerk to the bishop of the diocese, to be instituted in his church.

This may be done either by word or writing. The king may present by word, or in writing under any seal ; who, otherwise, cannot do any legal act, but by matter of record, or by letters patent under the great seal. But where a *corporation aggregate* doth present, it must be under seal. The presentation to a vicarage doth of common right belong to the parson. If a *feme covert* hath title to present, the presentation must be by husband and wife, and in both their names, except in case of the *queen* consort. *Wood's Inst.* 155. &c.

An advowson *collative* is that advowson which is lodged in the bishop ; for *collation* is the giving of a benefice by a bishop, when he is the original patron thereof, or he gains a right by *lapse.*

Collation differs from institution in this ; that institution is performed by the bishop upon the presentation of another, and *collation* is his own act of presentation ; and it differeth from a common presenta-

tion, as it is the giving of the church to the parson; and presentation is the giving or offering the parson to the church. But collation supplies the place of presentation and institution; and amounts to the same as institution, where the bishop is both patron and ordinary. 1 *Lill. Abr.* 273.

A bishop may either neglect to collate, or he may make his collation without title; but such a wrongful collation doth not put the true patron out of possession; for after the *collatee* of the bishop is instituted and inducted, the patron may present his clerk; collation in this case being to be intended only as a provisional incumbency to serve the church. 1 *Inst.* 344.

Where a bishop gives a benefice as patron, he collates by writ *jure pleno*; when by lapse, *jure devoluto*. The collation by lapse is in right of the patron. *F. N. B.* 31. See *post*, *Lapse*, II.

An advowson *donative* is, when the king or other patron (in whom the advowson of the church is lodged) does, by a single donation in writing, put the clerk into possession without presentation, institution, or induction. Donatives are either of churches parochial, chapels, prebends, &c. and may be exempt from all ordinary jurisdictions, so that the ordinary cannot visit them, and consequently cannot demand procurations. If the true patron of a church or chapel *donative* doth once present to the ordinary, and his clerk is admitted and instituted, it becomes a church *presentative*, and shall never have the privilege of a *donative* afterwards. Yet if a stranger presents to such a *donative*, and institution is given, all is void. 1 *Inst.* 158. See *contra*, 1 *Salk.* 541. 2 *Comm.* 23.

The right of *donation* descends to the heir (the ancestor dying seised, where the church became void in his life-time) and not to the executor; which it would had it been a *presentative* benefice. 2 *Wils.* 150, 151.

There is not any case in the books to exclude the heir of a *donative* from his turn in this case. And a patron of a *donative* can never be put out of possession by a *usurpation*. *Id. ibid.*

II. A *Lapse* is a title given to the ordinary, to collate to a church by the neglect of the patron to present to it within six months after avoidance. Or a *lapse* is a devolution of a right of presenting from the patron to the bishop; from the bishop to the archbishop; from the archbishop to the king. The term in which the title by *lapse* commences, from one to the other successively, is *six* months, or half a year, according to the calendar, not accounting twenty-eight days to the month, as in other cases, because this computation is by the ecclesiastical law; and because *tempus semestre*, in the stat. of *West. 2. chap. 5.* is intended of half a year, the whole year containing 365 days; which being divided, the half year for the patron to present is 182 days. The day in which the church becomes void, is not to be reckoned as part of the six months. *Wood's Inst.* 160. *Hob.* 30. 4 *Rep.* 17. 6 *Rep.* 62.

Where a patron presents his clerk before the bishop hath collated, the presentation is good, notwithstanding the six months are past, and shall bar the bishop, who cannot take any advantage of the *lapse*: and so if the *patron* makes his presentation before the archbishop hath collated, although *twelve* months are past; but if the *bishop* collates after twelve months, this bars not the archbishop. 2 *Roll. Abr.* 369. 2 *Inst.* 273. If a bishop doth not collate to benefices of his own gift, they lapse at the end of six months to the archbishop; and if the archbishop neglects to collate within six months to a benefice

of his gift, the king shall have it by *lapse*. *Doct.* and *Stud. c.* 36. And if a church continues void several years by *lapse*, the successor of the king may present. *Cro. Car.* 258. But if the king hath a title to present by *lapse*, and he suffers the patron to present, and the presentee dies, or resigns before the king hath presented, if the presentation is real, and not by covin, he hath lost his presentation; for lapse is but for the first and next turn, and by the death of the incumbent, a new title is given to the patron; though it hath been adjudged that the king in such case may present at any time as long as that presentee *is incumbent*. 2 *Cro.* 216. *Moor*, 244. When the patronage of the church is litigious, and one party doth recover against the other in a *quare impedit*, if the bishop be not named in the writ, and six months pass while the suit is depending, lapse shall incur to the bishop: if the bishop be named in the writ, then neither the bishop, archbishop, or king, can take the benefice by lapse: and yet it is said, if the patron, within the six months, brings a *quare impedit* against the bishop, and then the six months pass without any presentation by the patron, lapse shall incur to the bishop. 2 *Roll. Abr.* 365. 6 *Rep.* 52. 1 *Inst.* 344. *Hob.* 270.

Where the bishop is a disturber, or the church remains void above six months by his fault, there shall be no *lapse*. 1 *Inst.* 344. A clerk presented being refused by the bishop for any sufficient cause, as illiterature, ill life, &c. he is to give the patron *notice* of it, that another may be presented in due time, otherwise the bishop shall not collate by lapse; because he shall not take advantage of *his own wrong*, in not giving notice to the patron as he ought to do by law. *Dyer*, 292. And if an avoidance is by *resignation*, which must necessarily be to the bishop, by the *act* of the *incumbent*, or by *deprivation*, which is the *act* of the *law*; *lapse* shall not incur to the bishop till six months after *notice* given by him to the patron: when the church becomes void by the death of the incumbent, &c. the patron must present in six months without notice from the bishop, or shall lose his presentation by *lapse*. *Dyer*, 293. 327. 1 *Inst.* 135. 4 *Rep.* 75. And it is expressly provided, by stat. 13 *Eliz. c.* 12. that no title conferred by lapse shall accrue upon any deprivation *ipso facto*, but after six months' *notice* of such deprivation given by the ordinary to the patron.

In the cases of *deprivation* and *resignation*, where the patron is to have notice before the church can *lapse*, the patron is not bound to take notice from any body but the bishop himself, or other ordinary, which must be personally given to the party, if he live in the same county; and such notice must express in certain the cause of deprivation, &c. If the patron live in a foreign county, then the notice may be published in the parish church, and affixed on the church door. *Cro. Eliz.* 119. *Dyer*, 328. And this notice must be given, even though the patron himself prosecute the incumbent to deprivation. 6 *Rep.* 29.

There are *avoidances by act of parliament*, wherein there must be a judicial sentence pronounced to make the living void: if a man hath one benefice with cure, &c. and take another with cure, without any dispensation to hold two benfices, in such case the first is void by the statute 21 *H.* VIII. *c.* 13. if it was above the value of 8*l.* During an avoidance, it is said that the house and glebe of the benefice are in *abeyance*: but by the stat. 28 *H.* VIII. *c.* 11. the profits arising during the avoidance are given to the next incumbent towards payment of the first fruits; though the ordinary may receive the profits to provide for the service of the church, and shall be allowed the charges of supplying the cure, &c. for which purpose the churchwardens of the parish are usually appointed.

If a clerk is *instituted* to a benefice of the yearly value of 8*l.* and, before induction, accepts another benefice with cure, and is instituted, the first benefice is void by the stat. 21 *H.* VIII. *c.* 13. for he who is instituted only, is properly said to have accepted a benefice within the words of the act. 4 *Rep.* 78. See tit. *Cession.*

But if he is *inducted* into a second benefice, the first is void *in facto* and *jure*, and not voidable only, *quoad*, the patron, and until he presents another; and in such case the patron ought to take notice of the avoidance at his peril, and present within the six months. *Cro. Car.* 258.

In cases where there ought to be notice, if none is given by the bishop or archbishop in a year and a half, whereby lapse would come to the king if it had been given: here the lapse arises not to the king, where no title arose to the inferior ordinary. *Dyer*, 340. And it has been adjudged, that lapse is not an interest, like the patronage, but an office of trust reposed by law in the ordinary; and the end of it is, to provide the church a rector, in default of the patron: and *it cannot be granted over*; for the grant of the next *lapse* of a church, either before it falls, or after, is void. *F. N. B.* 34. Also if lapse incurs, and then the ordinary dies, the king shall present, and not the ordinary's executors, because it is rather an administration than an interest. 25 *E.* III. 4. A lapse may incur against an infant or *feme covert*, if they do not present within six months. 1 *Inst.* 246. But there is no lapse against the king, who may take his own time; and plenarty shall be no bar against the king's title, because, *nullum tempus occurrit regi.* 2 *Inst.* 273. *Dyer*, 351. By presentation and institution a lapse is prevented; though the clerk is never inducted: and a donative cannot lapse either to the ordinary or the king. 2 *Inst.* 273. See 2 *Comm.* 276. and 4 *Comm.* 106.

III. The *Usurpation* of a church benefice is when one that hath no right presents to the church; and his clerk is admitted and instituted into it, and hath quiet possession six months after institution before a *quare impedit* brought. It must commence upon a presentation, not a collation, because by collation the church is not full; but the right patron may bring his writ at any time to remove the usurper. 1 *Inst.* 227. 6 *Rep.* 30.

No one can usurp upon the king; but a usurpation may dispossess him of his presentation, so as he shall be obliged to bring a *quare impedit.* 3 *Salk.* 389. One coparcener or joint-tenant cannot usurp upon the other; but where there are two patrons of churches united, if one presents in the other's turn, it is a usurpation. *Dyer*, 259. A presentation which is void in law, as in case of simony, or to a church that is full, makes no usurpation. 2 *Rep.* 92.

In this case of usurpation the patron lost, by the common law, not only his *turn* of presentment, but also the perpetual inheritance of the advowson; so that he could not present again upon the next avoidance, unless, in the mean time, he recovered his right by a real action, viz. *a writ of right of advowson.* 3 *Comm.* 243. See further tit. *Darrein Presentment. Quare Impedit.*

But bishops in ancient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession; it was in substance enacted by stat. *Westm.* 2. (13 *E.* I.) *c.* 5. §. 2. "that if a possessory action be brought within six months after the avoidance, the patron shall (notwithstanding such usurpation and institu-

tion) recover that very presentation ;" which gives back to him the seisin of the advowson. Yet still, if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron, to recover it, was driven to the long and hazardous process of a writ of right. To remedy which it was farther enacted, by statute 7 *Ann. c.* 18. "that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right ; but that the true patron may present upon the next avoidance, as if no such usurpation had happened." So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation : that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence ; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy ; it cannot indeed be remedied after six months are past ; but during those six months it is only a species of disturbance. 3 *Comm.* 244.

IV. *Advowsons* were formerly most of them appendant to manors, and the patrons parochial barons ; the lordship of the manor, and patronage of the church, were seldom in different hands till *advowsons* were given to religious houses ; but of late times the lordship of the manor and the *advowson* of the church have been divided ; and now not only lords of manors, but mean persons, have, by purchase, the dignity of patrons of churches, to the great prejudice thereof. By the common law the right of patronage is a real right fixed in the patrons or founders, and their heirs, wherein they have as absolute a property as any other man hath in his lands and tenements : for *advowsons* are a temporal inheritance, and lay fee ; they may be granted by deed or will, and are assets in the hands of heirs or executors. *Co. Lit.* 119. A recovery may be suffered of an *advowson ;* a wife may be endowed of it ; a husband tenant by the curtesy ; and it may be forfeited by treason or felony. 1 *Rep.* 56. 10 *Rep.* 55. If an *advowson* descends to coparceners, and the church, after the death of their ancestors, becomes void, (by stat. *Westm.* 2. (13 *Edw.* I.) stat. 1. *c.* 5.) the eldest sister shall first present. And when coparceners, joint-tenants, &c. are seised of an *advowson*, and partition is made, to present by turns ; by stat. 7 *Ann. c.* 18. each shall be seised of their separate estate.

Presentation is properly the act of a patron *offering his clerk to the bishop of the diocese, to be instituted in a church or benefice of his gift*, which is void. 2 *Lill. Abr.* 351.

An *alien*-born cannot *present* to a benefice in his *own* right ; for if he purchases an advowson, and the church becomes void, the king shall present after office found that the patron is an alien. 2 *Vels.* 1290. And by stat. 7 *Rich.* II. *c.* 12. no alien shall purchase a benefice in this realm, nor occupy the same, without the king's license, on pain of a *præmunire.*

Papists are disabled to *present* to benefices, and the Universities are to *present*, &c. But a Popish recusant may grant away his patronage to another, who may make *presentation*, where there is no fraud. See stat. 3 *Jac.* I. *c.* 5. § 18, 19. 1 *Wm.* and *M. c.* 26. 12 *Ann. c.* 14. and 1 *Jon.* 19. But by stat. 11 *Geo.* II. *c.* 17. § 5. *grants* of *advowsons* by papists are void, unless made for a valuable consideration to a

protestant purchaser, and only for the benefit of protestants; and *devises* of *advowsons* by papists are also void.

A *guardian* by socage or by nurture cannot present to a vacant living in right of the infant heir, or in his name, because he can make no benefit of it, or account for it, though it is sometimes practised, and made good by time. Therefore the infant shall present of whatsoever age. Vide *Co. Lit.* 17. b. If a common patron presents first one clerk, and then *another*, the bishop may institute which he pleases; unless he revokes the presentation of one of them before he is admitted by the bishop. If there is a right of nomination in one, and a right of presentation in another, to the same benefice; he that has the right of nomination is the true patron, and the other is obliged to present the clerk which is nominated. 1 *Inst.* 156.

All persons who have ability to purchase or grant, have likewise ability to *present* to vacant benefices; but a dean and chapter cannot *present* the dean; nor may a clergyman who is a patron *present* himself, though he may pray to be admitted by the ordinary, and the admission shall be good.

Coparceners are but as one patron, and ought to agree in the *presentation* of the person; if they cannot agree, the eldest shall *present* first alone, and the bishop is obliged to admit his clerk, and afterwards the others in their order shall prefer their clerks; *joint-tenants* and *tenants in common*, must regularly join in *presentation*, and if either *present* alone, the bishop may refuse his clerk; as he may also the clerk *presented* by the major part of them; but if there are two joint-tenants of the next avoidance, one may *present* the other, and two joint-tenants may *present* a third, but not a stranger.

If a rector is made bishop, the king shall *present* to the rectory unless he grant to the bishop, before he is consecrated, a dispensation to hold it with his bishoprick; but if an incumbent of a church is made a bishop, and the king *presents* or grants that he should hold the church in *commendam*, which is *quasi a presentation*, a grantee of the next avoidance or *presentation* hath lost it, the king having the next *presentation*. See 2 *Stra.* 841. that this presentation is not confined to the life-time of the bishop *promoted*. If the king *present* to a church by *lapse*, where he ought to *present plenò jure*, and as patron of the church, such a *presentation* is not good; for the king is deceived in his grant, by mistaking his title, which may be prejudicial to him; the *presenting* by lapse entitling *only that presentation*: The lord chancellor *presents* to the king's benefices under 20*l.* &c. 2 *Roll. Abr.* 354. 3 *Inst.* 156. *Co. Lit.* 186. 2 *Nels. Abr.* 1288. 1290. 2 *Lill.* 351.

The king may reveal a *presentation* before his clerk is inducted; and this he may do by granting the *presentation* to another, which, without any farther signification of his mind, is a revocation of the first presentation. *Dyer*, 290. 360.

If two patrons present their clerks to a church, the bishop is to determine who shall be admitted by a *jus patronatûs*, &c. *Moor*, 499.

A clerk may be refused by the bishop, *if the patron is excommunicate*, and remains in contempt 40 days. 2 *Roll. Abr.* 355. As to refusal for the insufficiency of the clerk presented, see tit. *Parson*.

If the bishop refuses to admit the clerk presented, he must give notice of his refusal, with the cause of it, forthwith; and on such notice the patron must present another clerk, *within six months from the avoidance*, if he thinks the objection against his first clerk contains sufficient cause of refusal; but if not, he may bring his *quare impedit* against the bishop. 2 *Roll. Abr.* 364. See *ante*, *Lapse* II.

If a defendant, or any stranger, presents the clerk pending a *quare impedit*, and afterwards the plaintiff obtains judgment, he cannot, by virtue of that judgment, remove him, who was thus presented ; but he is to bring a *scire facias* against him to show cause *quare executionem non habet ;* and then, if it be found that he had no title, he shall be amoved. The way to prevent such a presentation, is to take out a *nè admittas* to the bishop ; and then the writ *quare incumbravit* lies, by virtue whereof the incumbent shall be amoved, and put to his *quare impedit*, let his title be what it will ; but if a *nè admittas* be not taken out, and another incumbent should come in by good title *pendente lite*, he shall hold it. *Sid.* 93. *Cro. Jac.* 93.

When a bishop hath a presentation in right of his bishoprick, and dies, neither his executor nor heir shall have the void turn, but the king, in whose hands are the temporalties ; and he hath a right to present on an avoidance after the seisure, on death of the bishop.

Tenant in tail of an advowson, and his son and heir, joined in the grant of the next presentation, tenant in tail died ; this grant was held void as to the son and heir, because he had nothing in the advowson at the time he joined with his father in the grant. *Hob.* 45.

If a presentation itself bears date while the church is full of another clerk, it is void ; and where two or more have a title to present by turn, one of them presents, his clerk is admitted, instituted and inducted, and afterwards deprived, he shall not present again, but that presentation shall serve his turn : though where the admission and institution of his clerk is void, there the turn shall not be served ; as if after induction he neglects to read the thirty-nine articles, &c. his institution is void by the stat. 13 *Eliz.* and the patron may present again. *F. N. B.* 33. 5 *Rep.* 102.

The right of presenting to a church may pass from one seised of the same by the patron's acknowledging of a statute, &c. which being extended, if the church becomes void, *during the conusee's estate*, the conusee may present. *Owen*, 49.

Where a common person is patron, he may present by parol, as well as by writing, to the bishop. *Co. Lit.* 120. A presentation doth not carry with it the formality of a deed ; but it is in the nature of a *letter missive* by which the clerk is offered to the bishop ; and it passeth no interest, as a grant doth, being no more than a recommendation of a clerk to the ordinary to be admitted. But where a plaintiff declared upon a grant of the next presentation, and on *oyer* of the deed, it appeared to be only a letter written by the patron to the father of the plaintiff, that he had given his son the next presentation ; adjudged that it would not pass by such letter, without a formal deed. *Owen*, 47.

Right of presentation may be forfeited in several cases ; as by attainder of the patron, or by *outlawry*, and then the king shall present : and if the outlawry be reversed where the advowson is forfeited by the outlawry, and the church becomes void after, the presentation is vested in the crown ; but if at the time of the outlawry the church was void, then the presentation was forfeited as *a chattel*, and on reversing the same, the party shall be restored to it. By *appropriation* without license from the crown, the right of presentation may be forfeited ; though the inheritance in this case is not forfeited, only the king shall have the presentation in nature of *a distress*, till the party hath paid a fine for his contempt. By alienation in fee of the advowson by a grantee for life of the next avoidance, a presentation is forfeited ; and after such alienation the grantor may present, but then he must enter for

the forfeiture of the grantee, *in the life-time* of the incumbent, to determine his estate before the presentation vests in him on the incumbent's death. And by simony it may be likewise forfeited and lost. *Moor*, 269. *Plowd.* 299. 2 *Roll. Abr.* 352. Stat. 31 *Eliz. c.* 6. § 5. See *Simony*, &c.

ADVOWSON OF THE MOIETY OF THE CHURCH, *advocatio medietatis ecclesiæ.*] Is where there are two several patrons and two several incumbents in one and the same church, the one of the one moiety, the other of the other moiety thereof. *Co. Lit.* 17. b. *Medietas advocationis*, a moiety of the *advowson*, is where two must join in the presentation, and there is but one incumbent. But see stat. 7 *Ann. c.* 18. mentioned in tit. *Advowson* IV.

ADVOWSON OF RELIGIOUS HOUSES. Where any persons founded any *house of religion*, they had thereby the *advowson* or patronage thereof, like unto those who built and endowed parish churches. And sometimes these patrons had the sole nomination of the abbot, or prior, &c. either by investiture or delivery of a pastoral staff: or by direct presentation to the diocesan; or if a free election were left to the *religious*, a *congé d'eslire*, or license for election, was first to be obtained of the patron, and the elect confirmed by him. *Kennet's Paroch. Antiq.* 147. 163.

ÆGYPTIANS. See *Egyptians.*

AERIE, *aeria accipitrum.*] An *airy* of goshawks, is the proper term for hawks, for that which of other birds we call a nest. And it is generally said to come from the *French* word *aire*, a hawk's nest. *Spelman* derives it from the *Saxon eghe*, an egg, softened into *eye*, (used to express a brood of pheasants,) and thence *eyrie*, or as above, *aerie*, a place of repository for eggs. The liberty of keeping these *aeries* of hawks was a privilege granted to great persons: and the preserving the *aeries* in the king's forests was one sort of tenure of lands by service.

ÆSTIMATIO CAPITIS, *pretium hominis.*] King *Athelstane* ordained that fines should be paid for offences committed against several persons according to their degrees and quality, by *estimation* of their *heads. Cress. Ch. Hist.* 834. *Leg. Hen.* I.

ÆTATE PROBANDA.] A writ that lay to inquire whether the king's tenant, holding in chief by chivalry, was of full age to receive his lands into his own hands. It was directed to the escheator of the county; but is now disused, since wards and liveries are taken away by the statute. *Reg. Orig.* 294.

AFFEERERS, *afferatores*, from the *Fr. affier*, to affirm, or *affeurer*, to set the price or assise.] Are those who, in courts-leet, upon oath, settle and moderate the fines and amercements; and they are also appointed for moderating amercements, in courts-baron. See tit. *Leet.*

AFFIANCE, from the *Latin Affidare*, *i. e. fidem dare.*] The plighting of troth between a man and a woman, upon agreement of marriage. *Lit. sect.* 39.

AFFIDARE, To plight one's faith, or give or swear fealty, *i. e.* fidelity. *Affidari* to be mustered and enrolled for soldiers. *M. S. Dom. de Farendon*, 22. 55.

AFFIDATIO DOMINORUM, An oath taken by the lords in parliament, *anno* 3 *Hen.* VI. *Rot. Parl.*

AFFIDATUS, A tenant by fealty.

AFFIDAVIT, An oath in writing; and to make *affidavit* of a thing, is to testify it upon oath. An *affidavit*, generally speaking, is an oath in writing, sworn before some person who hath authority to adminis-

ter such oath : and the true place of habitation, and true addition of every person who shall make an *affidavit*, is to be inserted in his *affidavit*. 1 *Lill. Abr.* 44. 46. *Affidavits* ought to set forth the matter of fact only which the party intends to prove by his *affidavit*; and not to declare the merits of the cause, of which the court is to judge. 21 *Car.* I. *B. R.* The plaintiff or defendant (having authority to take *affidavits*) may take *affidavit* in a cause depending; yet it will not be admitted in evidence at the trial, but only upon motions. 1 *Lill.* 44. When an *affidavit* hath been read in court, it ought to be filed, that the adverse party may see it, and take a copy. *Pasch.* 1655. An *affidavit* taken before a master in *Chancery*, will not be of any force in the court of *King's Bench*, or other courts, nor ought to be read there; for it ought to be made before one of the judges of the court wherein the cause is depending, or a commissioner in the country, appointed for taking *affidavits*. *Sty.* 455. By stat. 29 *Car.* II. *c.* 5. the judges, &c. of the courts at *Westminster*, by commission may empower persons in the several counties of *England*, to take *affidavits* concerning matters depending in their several courts, as masters in *Chancery* extraordinary used to do. Where *affidavits* are taken by commissioners in the country according to the statute 29 *Car.* II. and 'tis expressed to be in a cause depending between two certain persons, and there is no such depending, those *affidavits* cannot be read, because the commissioners have no authority to take them; (and for that reason the party cannot he convicted of perjury upon them;) but if there is such a cause in court and *affidavits* taken concerning some collateral matter, they may be read. *Salk.* 461.

Affidavits are usually for certifying the service of process, or other matters touching the proceedings in a cause; or in support of, or against motions, in cases where the court determines matters, &c. in a summary way.

If a person exhibits a bill in equity for the discovery of a deed, and prays relief thereupon, he must annex an affidavit to his bill, that he has not such deed in his possession, or that it is not in his power to come at it; for otherwise he takes away the jurisdiction of the common law courts, without showing any probable cause why he should sue in equity. 1 *Chan. Ca.* 11. 231. 1 *Vern.* 59. 180. 247.

But if he seeks discovery of the deed only, or that it may be produced at a trial at law, he need not annex such affidavit to his bill; for it is not to be presumed that in either of these cases he would do so absurd a thing, as exhibit a bill, if he had the deed in his possession. 1 *Vern.* 180. 247.

In bills of interpleader, the party who prefers it must make affidavit that he does not collude with either of the other parties. 1 *New Abr.* 66.

An affidavit must set forth the matter positively, and all material circumstances attending it, that the court may judge whether the deponent's conclusion be just or not. 1 *New. Abr.* 66.

And therefore on motion to put off a trial for want of a material witness, it must appear that sufficient endeavours were made use of to have him at the time appointed, and that he cannot possibly be present, though he may on further time given. 7 *Mod.* 121. *Comb.* 421, 422.

There being one *affidavit* against another relating to a judgment, the matter was referred to a trial at law upon a feigned issue, to satisfy the conscience of the court as to the fact alleged. *Comb.* 399.

See stat. 17 *Geo.* II. *c.* 7. for taking and swearing *affidavits* to be made use of in any of the courts of the county *palatine* of *Lancaster*.

The stat. 12 *Geo.* I. *c.* 29. requires the cause of action to be 10*l.* to hold to special bail; and both the statute and the established rules of the court require a *positive affidavit* to be made of the debt; and not couched in words of reference, except in the case of executors, assignees, &c. 1 *Term Rep.* 83. 4 *Term Rep.* 176. and *they* must swear to their *belief* of the debt.

The affidavit must be made by a person competent to be a witness, therefore a person convicted of *felony* is not admissible. 5 *Mod.* 74. *Salk.* 261. Nor a pick-pocket returned from transportation. *Barnes*, 79. Affidavits made by illiterate persons should be perfectly explained to them. See 4 *Term Rep.* 284.

Where there is a good cause of action and a proper affidavit, defendant may be held to bail; and the court (of *K. B.*) will not go out of the affidavit or prejudge the cause, by entering into the merits. 1 *Salk.* 100. Plaintiff therefore must stand or fall by this affidavit, it being the constant and uniform practice not to receive a supplemental or explanatory affidavit on the part of plaintiff; nor a counter or contradictory one on the part of defendant. 2 *Stra.* 1157. 1 *Wils.* 335.

But in *C. P.* where the first affidavit is defective, yet it is allowed to be supplied by another, on showing cause against a common appearance. *Barnes*, 100. 2 *Wils.* 224. 2 *Black. Rep.* 850.

See further tit. *Abatement; Bail;* and *Impey's Instructor Cler.* in *K. B.* and *C. P.*

AFFIDAVIT TO HOLD TO BAIL. An affidavit to hold to bail, stated that the debt arose on a *bill of exchange*, or order for, &c. drawn by *A.* upon and accepted by the defendant, payable to the plaintiff; upon this affidavit alone the court refused to order the bail-bond to be delivered up. *Wills* v. *Adcock*, *T. R.* 27.

But the instrument declared upon appearing not to be a bill of exchange, the court, *on reading the affidavit* and the declaration, ordered the bail-bond to be given up upon the defendant's filing common bail. *Ibid.*

In an affidavit to hold to bail, made by the plaintiff's agent, (the plaintiff himself being abroad,) it is sufficient to negative a tender of the debt in bank notes, "as the agent believes." *Munro* v. *Stinks*, 8 *T. R.* 284.

It is sufficient to state in an affidavit to hold to bail, that the defendant is indebted to the plaintiff in such a sum, "for money had and received on account of the plaintiff," without adding "received for the defendant." *Cofinger* v. *Beaton*, 8 *T. R.* 338.

A co-assignee of a debt arising out of bills of exchange in his possession, may sue in the name of the original creditor, and hold the defendant to bail on his own affidavit, swearing positively as to all the facts required, which are within his own knowledge, and to the best of his knowledge and belief as to such as are within the knowledge of his principal and co-assignees. *Cresswell* v. *Lovell*, 8 *T. R.* 418.

In an affidavit to hold to bail made by the assignee of a bankrupt, it is necessary to negative a tender of the debt in bank notes *to the bankrupt* before his bankruptcy; saying that no such tender was made to the assignee is not sufficient. *Martin* v. *Ranoe*, *ibid.* 455.

In an affidavit to hold to bail made by the plaintiff's clerk, (the plaintiff himself residing in *England*,) it is not sufficient to negative a tender of the debt in bank notes "to the knowledge and belief of the clerk." *Cass* v. *Levi*, *ibid.* 520.

The court will not discharge a defendant on a common appearance under 34 *Geo.* II. *c.* 9. § 7. on the ground of the plaintiff's residing in *Holland*. *Pieters and another* v. *Luytjes*, 1 *B.* and *P.* 1.

It is no objection to bail that they are indemnified. *Neat* v. *Allen*, *ibid.* 21.

Where bail are opposed and rejected, and the defendant is surrendered on the next day, he may justify new bail without paying the costs of the former opposition. *Holward* v. *Andrè*, *ibid.* 32.

If the principal be surrendered within four days after the return of that writ in which there is an effectual proceeding, it is sufficient. Thus if bail be served with process on his recognisance, and die before the *quarto die post*, and fresh process issue against his executors, they have till the *quarto die post* of the second writ to surrender the principal. *Meddowcroft, one, &c.* v. *Sutton and another.* 1 *B.* and *P.* 61.

Bail are not permitted to justify who have been indemnified by the defendant's attorney. *Reg. Gen. Hen.* 37 *Geo.* III. *Ibid.* 103.

The court rejected bail who had received a verbal promise of indemnity from the defendant's attorney, but gave time to put in fresh bail. *Greensill* v. *Hopley*, *ibid.*

Where bail in *C. B.* is taken under a judge's order, each of the bail is liable to double the sum ordered, as well as to double the sum sworn to, when taken by affidavit. *Dahl* v. *Johnson*, *ibid.* 205.

The court will not permit a defendant to justify bail after an action for an escape commenced against the sheriff, who has neglected to take a bail-bond. *Webb* v. *Matthew*, *ibid.* 225.

It is unnecessary to give bail in error on a judgment in debt, unless it appear that the action was brought on a specific contract. *Ablett* v. *Ellis*, *ibid.* 249.

The court refused to discharge a defendant out of custody, on the ground that the affidavit on which he had been holden to bail was entitled in the cause. *Clarke* v. *Cawthorne*, 7 *T. R.* 321.

In an affidavit to hold to bail in trover for a bill of exchange, it should be stated that the bill remains unpaid. *Ibid.*

In *E.* 37 *Geo.* III. similar rules had been obtained in *Levi* v. *Ross*, and *Gaunt* v. *Marsh*; on a similar objection, court inquired into the practice, and consulted the other judges; and when *Clarke* v. *Cawthorne* was disposed of, the court discharged the rules in both these cases; in support of which rules were cited *R.* v. *Jones*, 2 *Stra.* 704. *R.* v. *Pierson*, *And.* 313. *Bevan* v. *Bevan*, 3 *T. R.* 601. *R.* v. *Harrison*, 6 *T. R.* 642. n. Against the rules was cited *King*, *q. t.* v. *Coles*, 6 *T. R.* 640.

Such affidavits must now not be entitled. *Reg. Gen. T.* 37 *Geo.* III. 7 *T. R.* 454.

If a defendant, on being informed that a bailable writ has been issued against him, voluntarily give a bail-bond, he cannot afterwards object to the insufficiency of the affidavit to hold to bail. *Norton* v. *Danvers*, *ibid.* 375.

Such an objection cannot be taken advantage of after plea. *Levy* v. *Dufionte*, *ibid.* 376. n.

An affidavit to hold to bail sworn in *Ireland*, but made for the purpose of being used in this country, ought to contain all the essential requisites of such an affidavit made in *England*; amongst others, (according to a late act,) that the defendant had not made a tender of the money in notes of the bank of *England*. *Nesbitt* v. *Pym*, *ibid.* 376. n.

It is no objection to an affidavit to hold to bail, that it is not entitled "in the *King's Bench*," or that it appears to have been taken before

" *A. B.* commissioner," &c. without adding " of the court of *K. B.*" if in fact he were a commissioner of that court. *Kennet and Avon Canal Company* v. *Jones*, *ibid.* 451.

Affidavit to hold to bail in *trover*, stating, " That the plaintiff's cause of action against the defendant, was for converting and disposing of divers goods of the plaintiff, of the value of 250*l.* which he refused to deliver, though the plaintiff had demanded the same, and that neither the defendant, or any person on his behalf, had offered to pay to the plaintiff the 250*l.* or the value of the goods," was holden to be insufficient. *Woolley* v. *Thomas*, *ibid.* 550.

The plaintiff, in an affidavit to hold to bail, must give himself an addition, otherwise the defendant will be discharged on common bail. *Jarrett* v. *Dillon*, 1 *East*, 18.

An affidavit to hold to bail, made by the *agent* of the plaintiff expressly negativing a tender in bank notes of the debt to his principal as well as to himself, were not therein stated to reside abroad. *Knight* v. *Keyte*, 1 *East*, 415.

If an affidavit to hold to bail, made by the plaintiff's clerk, expressly negative a tender in bank notes, it is bad: for a clerk cannot have certain knowledge of a mere negative. *Smith* v. *Tyson*, 1 *B.* and *P.* 339.

Affidavit to hold to bail. By stat. 37 *Geo.* III. *c.* 45. " No person shall be holden to special bail, unless the affidavit to hold to bail contain therein, that no offer has been made to pay the sum of money in such affidavit mentioned, &c. in notes of the governor and company of the bank of *England*, expressed to be payable on demand, (fractional parts of the sum of 20*s.* only excepted,") and court of *K. B.* held an affidavit to hold to bail for 1190*l.* 11*s.* 3*d.* defective, on the grounds, that the tender of the debt in bank notes was not properly negatived, according to the provisions of the above act. *Jennings* v. *Mitchell*, 1 *East*, 17. But see now 43 *Geo.* III. *c.* 18. § 2. and this *Dict.* tit. *Bank of England.*

Where the principal resides here, it is not sufficient for his agent in an affidavit to hold to bail, to negative a tender of the debt in bank notes *to the best of his knowledge*, but such tender must be positively negatived. *Elliott* v. *Duggin*, 2 *East*, 24.

Affidavit to hold to bail for 16*l. and upwards*, held insufficient, as *non constat* but the tender negatived, (which was that no bank notes for 16*l. and upwards*, had been made,) may have been a fractional part of the sum due above 16*l.* for which no tender in bank notes *could* be made. *Ford* v. *Lover*, 3 *East*, 110. See tit. *Bail.*

AFFINAGE, Fr. *affinage.*] Refining of metal, *purgatio metalli*; hence, fine and refine.

To AFFIRM, *Affirmare.*] To ratify or confirm a former law or judgment: so is the substantive *affirmance* used stat. 8 *Hen.* VI. *c.* 12. And the verb itself, by *West. Symbol.* part 2. tit. *Fines*, § 152. 19 *Hen.* VII. *c.* 20. See also the next word.

AFFIRMATION. An indulgence allowed by law to the people called *Quakers*, who, in cases where an oath is required from others, may make a solemn *affirmation* that what they say is true. See *Quakers.*

AFFORARE, To affeer (which see;) to set a value or a price on a thing. *Du Cange.*

AFFORATUS, Appraised or valued, as things vendible in a fair or market. *Cartular. Glaston. MS. fol.* 58.

AFFORCIAMENT, *afforciamentum.*] A fortress, strong hold, or other fortification. *Pryn. Animad. on Coke, fol.* 184.

AFFORCIARE, To add, to increase, or make stronger. *Bract. lib.* 4. *c.* 19. *viz.* in case of disagreement of the jury, let the assise be increased.

AFFOREST, *afforestare.*] To turn ground into a forest. *Chart. de Forest. c.* 1. When forest ground is turned from forest to other uses, it is called *disafforested. Vide Forest.*

AFFRAY, Is derived from the *Fr.* word *effrayer*, to *affright*, and it formerly meant no more; as where persons appeared with armour or weapons not usually worn, to the terror of others. See stat. 2 *Edw.* III. *c.* 3. But now it signifies a skirmish or fighting between two or more, and there must be a stroke given, or offered, or a weapon drawn, otherwise it is not an *affray.* 3 *Inst.* 158. *An affray is a public offence to the terror of the king's subjects; and so called, because it affrighteth and maketh men afraid.* 3 *Inst.* 158.

From this last definition it seems clearly to follow, that there may be an *assault*, which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be to the terror of the people.

Also it is said, that no quarrelsome or threatening words whatsoever, shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth that the constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties.

Also, it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight. See, on this subject, *Leach's Hawkins*, 1. *c.* 63. and 2. *c.* 10. § 17. *c.* 15. § 8. *c.* 14. § 8.

But admitting that bare words do not, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain that, in some cases, there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at the common law, and is strictly prohibited by statute 2 *Edw.* III. *c.* 3. See tit. *Riding Armed.* To make an affray in any of the king's inferior courts of justice is highly finable. 3 *Inst.* 141. 12 *Co.* 71.

As to the power of constables and others in cases of *affray*, see this *Dict.* tit. *Constable* III. 1.

A justice of peace may commit *affrayers*, until they find sureties for the peace. And there is no doubt but that a justice of peace may and must do all such things to that purpose, which a private man or constable are either enabled or required by the law to do: but it is said, that he cannot without a warrant authorise the arrest of any person for an affray out of his own view; yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. See *Leach's Hawkins, P. C.* 1. *c.* 63.

It is inquirable in the court leet; and punishable by justices of peace in their sessions, by fine and imprisonment. And it differs from assault, in that it is a wrong to the public; whereas assault is of a private nature. *Lamb. lib.* 2. Yet indictment lies, as being a breach of the public peace. See *Quarrelling in a Church*, &c.

AFFREIGHTMENT, *affretamentum.*] The freight of a ship, from Fr. *fret*, freight. *Pat.* 11 *Hen.* IV. See *Charter-party.*

AFFRI, vel *Afra*, Bullocks, or horses or beasts of the plough. *Mon. Angl. par.* 2. *f.* 291. And in the county of *Northumberland*, the people to this day call a dull or slow horse, a false *aver* or *afer*. *Spelm. Gloss.*

AFRICAN COMPANY. In the ninth year of King *William* III. the trade to a great portion of *Africa* was in the hands of *The Royal African Company*, which, under a charter from *Charles* II. enjoyed an exclusive trade from the port of *Sallee*, in *South Barbary* to the *Cape of Good Hope*, both inclusive, with all the islands near adjoining to those coasts. A new arrangement of this trade was made by stat. 9 and 10 *Wm.* III. *c.* 26. by which the trade was opened; but this act continued in force only 13 years; and not being renewed, the whole trade reverted again to the exclusive claim of the company.

This *African* trade was put on a new footing by stat. 23 *Geo.* II. *c.* 31. which made it lawful for all the king's subjects freely to trade between the port of *Sallee*, in *South Barbary*, and the *Cape of Good Hope*. Thus was the trade taken out of the hands of the *Royal African Company*. The act then goes on to provide, that all persons trading to that coast, between *Cape Blanco* and the *Cape of Good Hope*, should be a body corporate, by the name of *The Company of Merchants trading to Africa*; the admission to which company was made very easy, namely, by the payment of only 40*s*. The trade between the port of *Sallee* and *Cape Blanco*, was left open to all persons whatsoever. By stat. 25 *Geo.* II. *c.* 40. (see stat. 24 *Geo.* II. c. 49.) all the forts, castles and factories on the coast, from the port of *Sallee* to the *Cape of Good Hope*, belonging to the old company, were transferred to, and vested in, the new company; for the like purpose of protecting and facilitating the trade. By stat. 4 *Geo.* III. *c.* 20. the fort of *Senegal*, lately ceded by *France* to *Great Britain*, was in like manner vested in the new company.

The fort of *Senegal* had been ceded to *France* by the peace of 1783; and the *French* King guaranteed to *Great Britain* the possession of fort *James*, and the river *Gambia*, both lying between the fort of *Sallee* and *Cape Rouge*. On that occasion it was thought more beneficial for the trade, that the forts, settlements and factories between those ports, which, by stat. 5 *Geo.* III. *c.* 44. (repealing the above act of 4 *Geo.* III. *c.* 20.) had been vested in the king, should be revested in the company; this was accordingly done by stat. 23 *Geo.* III. *c.* 65. The same freedom of trading there was, notwithstanding, continued to all the king's subjects.

By stat. 27 *Geo.* III. *c.* 19. § 11, 12. which regards this trade, some regulations were made as to importing from *Gibraltar*, merchandise the produce of the Emperor of *Morocco's* dominions.

AFRICAN SLAVE-TRADE. See this *Dict.* tit. *Slaves.*

AGALMA, The impression or image of any thing on a seal. *Chart. Edg. Reg. pro Westmonast. Eccles. anno* 698.

AGE, *ætas*, Fr. *age.*] In common acceptation signifies a man's life from his birth to any certain time, or the day of his death: it also hath relation to that part of time wherein men live. But in the law it is particularly used for those special times which enable persons of both sexes to do certain acts, which before, through want of years and judgment, they are prohibited to do. As for example; a man at twelve years of *age* ought to take the oath of allegiance to the king: at fourteen, which is his *age* of discretion, he may consent to marriage, and choose his guardian: and at twenty-one he may alien his lands, goods and chattels. A woman at nine years of age is dowable; at twelve she

may consent to marriage; at fourteen she is at years of discretion, and may choose a guardian; and at twenty-one she may alienate her lands, &c. *Co. Lit.* 78.

There are several other *ages* mentioned in our ancient books, relating to aid of the lord, wardship, &c. now of no use. *Co. Lit.* The *age* of twenty-one is the full *age* of man or woman; which enables them to contract and manage for themselves, in respect to their estates, until which time they cannot act with security to those who deal with them; for their acts are in most cases either void or voidable. *Perk.*

Fourteen is the *age* by law to be a witness; and in some cases a person of nine years of *age* hath been allowed to give evidence. 2 *Hawk. P. C. c.* 46. § 27. None may be a member of parliament under the *age* of twenty-one years; and no man can be ordained priest till twenty-four; nor be a bishop till thirty years of age. See tit. *Infant*; also tit. *Baron* and *Feme*, *Dower*, *Pleading*.

AGE-PRIER, *ætatem precari*, or *ætatis precatio*.] Is when an action being brought against a person under age for lands which he hath by descent, he, by petition or motion, shows the matter to the court, and prays that the action may stay till his full age, which the court generally agrees to. *Terms de Ley*, 30. See *Parol Demurrer*.

AGENFRIDA. The true lord or owner of any thing. *Leg. Inæ*, *c.* 50. *apud Brompt. c.* 45.

AGENHINE. See *Third-Night-Awn-hinde*.

AGENT AND PATIENT. When the same person is the doer of a thing, and the party to whom done: as where a woman endows herself of the best part of her husband's possessions, this being the sole act of herself to herself, makes her *agent and patient*. Also if a man be indebted unto another, and afterwards he makes the creditor his executor, and dies, the executor may retain so much of the goods of the deceased as will satisfy his debt; and by this retainer he is *agent and patient*, that is, the party to whom the debt is due, and the person that pays the same. But a man shall not be judge in his own cause, *quia iniquum est aliquem suæ rei esse judicem*. 8 *Rep.* 118. 138.

AGILD, free from penalties, not subject to the customary fine or imposition. Sax. *a gild*, *sine mulcta*. *Leges Aluredi*, *c.* 6.

AGILER, From the Sax. *a gilt*, (without fault,) an observer or informer. *Blount*.

AGILLARIUS, Anciently an hey-ward, herd-ward, or keeper of cattle in a common field, sworn at the lord's court by solemn oath. There were two sorts, one of the town or village, the other of the lord of the manor. *Cowel*. See *Kennet's Paroch. Antiq.* 534. 576.

AGIST, (from the Fr. *giste*, a bed or resting-place.) Signifies to take in and feed the cattle of strangers in the king's forest, and to gather up the money due for the same. *Chart. de Foresta*, 9 *Hen.* III. *c.* 9. The officers appointed for this purpose are called *agisters*, or *gist-takers*, and are made by the king's letters patent: there are four of them in every forest wherein the king hath any pawnage. *Manw. Forest-Laws*, *c.* 11 to 80. They are also called *agistators*, to take account of the cattle *agisted*.

AGISTMENT, *agistamentum*, from Fr. *geyser*, *gister*, (*jacere*,) because the beasts are *levant* and *couchant* during the time they are on the land.] Is where other men's cattle are taken into any ground, at a certain rate *per* week. It is so called, because the cattle are suffered *agiser*, that is, to be *levant* and *couchant* there: and many great farms are employed to this purpose. 2 *Inst.* 643. Our graziers call cattle which they thus take into keep *gisements*; and to *gise* or *juice* the

ground, is when the occupier thereof feeds it not with his own stock, but takes in the cattle of others to *agist* or pasture it. *Agistment* is likewise the profit of such feeding in a ground or field; and extends to the depasturing of barren cattle of the owner, for which tithes shall be paid to the parson. There is *agistment of sea-banks*, where lands are charged with a tribute to keep out the sea. *Terræ agistatæ* are lands whose owners are bound to keep up the sea-banks. *Spelm. in Romney Marsh.* See tit. *Tithes.*

AGITATIO ANIMALIUM IN FORESTA. The drift of beasts in the forest. *Leg. Forest.*

AGIUS, Gr. *i. e.* holy. *Mon. Angl.* p. 15. 17.

AGNUS DEI, A piece of white wax in a flat oval form, like a small cake, stamped with the figure of the lamb, and consecrated by the pope. By stat. 13 *Eliz. c.* 2. *Agnus Dei*, crosses, &c. are not permitted to be brought into this kingdom on pain of *præmunire.*

AGREEMENT, *agreamentum, aggregatio mentium.*] A joining together of two or more minds in any thing done, or to be done. *Plowd.* 17. The joint consent of two or more parties to a contract or bargain; or rather, the effect of such consent.

On this subject free use has been made of the new edition (1793) of "*A Treatise of Equity*," *vol.* 1. with the very copious and useful marginal notes and references, by Mr. *Fonblanque*. The Editor of this Dictionary had only an opportunity, on the present occasion, of applying to the first volume of that very useful performance. The subject seems to divide itself in the following manner:

I. Who may be parties to, or bound by, an agreement.
II. The various kinds of agreements; and of the assent and disagreement of parties.
III. Of the operation of the statute of frauds; and herein of evidence to explain agreements.
IV. Of compelling the performance of agreements; and herein of fraud in making them.

I. A person *non compos* is not capable of entering into any agreement. See tit. *Idiots and Lunaticks.*

Also an infant, for the same reason, is generally incapable of contracting, except for necessaries, &c. See tit. *Infant.*

A wife during the intermarriage is incapable of entering into any agreement *in pais*, being under power of her husband. See tit. *Baron and Feme.*

The ancestor seised in fee may, by his agreement, bind his heir; therefore if *A.* agrees to sell lands, and receives part of the purchase-money, but dies before a conveyance is executed, and a bill is brought against the heir, he will be decreed to convey, and the money shall go to the executor; especially if there are more debts due than the testator's personal estate is sufficient to pay. 2 *Vern.* 215. *Abr. Eq.* 265. But if tenant in tail agrees to convey, or bargains and sells the lands for valuable consideration, without fine or recovery, and dies before the fine or recovery be levied or suffered, the issue is not bound either in law or equity; for equity cannot set aside the statute *de donis*, which says, that *voluntas donatoris observetur*; nor can the court set up a new manner of conveyancing, and thereby supersede fines and recoveries; for thereby the king would lose the perquisites by fines, or the writs of entry and fines for alienation. *Hob.* 203. 1 *Chan. Ca.* 171. 1 *Lev.* 239. 2 *Vent.* 350. Yet,

If there be tenant in tail in equity as of a trust, or under an equitable agreement, and he for valuable consideration bargains and sells the land without fine or recovery, this shall bind his issue, because the statute *de donis* doth not extend to it, being an entail in equity, and a creature of the court. 1 *Chan. Ca.* 234. 2 *Chan. Ca.* 64. 1 *Vern.* 13. 440. 2 *Vern.* 133. 583. 72.

II. On this head shall be considered,

1st. An *Agreement* executed already at the beginning; as where money is paid for the thing agreed, or other satisfaction made. 2dly. An *agreement* after an act done by another; as where one doth such a thing, and another person *agrees* to it afterwards, which is executed also: and 3dly. An *agreement* executory, or to be performed *in futuro*. This last sort of *agreement* may be divided into two parts; one certain at the beginning, and the other when, the certainty not appearing at first, the parties *agree* that the thing shall be performed upon the certainty known. *Terms de Ley*, 31. See tit. *Condition, Contract, Covenant.*

Every *agreement* ought to be perfect, full and complete, being the mutual consent of the parties; and should be executed with a recompense, or be so certain as to give an action or other remedy thereon. *Plowd.* 5. Any thing under hand and seal, which imports an agreement, will amount to a covenant: and a *proviso*, by way of *agreement*, amounts likewise to a covenant; and action may be brought upon them. 1 *Lev.* 155.

If any estate in possession or reversion be made to me, I must *agree* to it before it will be settled; for I may refuse, and so avoid it: a release, deed, or bond is made and delivered to another to my use, this will vest in me without any agreement of mine; but, if I *disagree* to it, I make the deed void. *Dyer*, 167. And regularly, where a man hath once *disagreed* to the party himself, he can never after *agree*; and obligation being made to my use, and tendered to me, if I refuse it, and after *agree* again and will accept it; now this *agreement* afterwards will not make the obligation good, that was void by the refusal. *Co. Lit.* 79. 5 *Rep.* 119.

An *agreement* may be as well in the party's absence as in his presence; but a *disagreement* must be to the person himself to whom made. 2 *Rep.* 69. When an estate is made to a *feme covert*, it is good, till *disagreement*, without any *agreement* of the husband: though a new estate granted to the wife where she hath an estate before, as by the taking of a new lease, and making a surrender in law, will not vest till the husband *agree* to it. *Hob.* 204.

That an assent on the part of the person who takes, is also essential to all conveyances and contracts; for where a man is to be vested with an interest, his acceptance is necessary. See 2 *Ventr.* 198. 2 *Salk.* 618. 2 *Leon. p.* 72. *pl.* 97. 5 *Vin. Abr.* 508. *pl.* 1. See *Thompson* v. *Leach*, 2 *Ventr.* 198. in which this subject is very elaborately discussed by *Ventris*, J. See also *Butler* and *Baker's* case, 3 *Co.* 26.

III. Besides the bare words of an agreement, the common law, to prevent imposition, ordained certain ceremonies where an interest was to pass; and therefore appointed livery for things corporeal, and a deed for things incorporeal. Yet in equity, where there was a consideration, the want of ceremonies was not regarded. However, in former times, courts of equity were very cautious of relieving bare parol agreements for lands, not signed by the parties, nor any money paid; (2 *Freem.* 216.) although they would

sometimes give the party satisfaction for the loss he had sustained. And now by the stat. of 29 *Car.* II. *cap.* 3. commonly called the Statute of Frauds, if an agreement be by parol, and *not signed by the parties, or somebody lawfully authorised by them*, (*Pre. Ch.* 402.) if such agreement be not confessed in the answer, it cannot be carried into execution. But where, in his answer, the defendant allows the bargain to be complete, and does not insist on any fraud, there can be no danger of perjury; because he himself has taken away the necessity of proving it. (*Pre. Ch.* 208. 374. 1 *Vez.* 221. 441. *Amb.* 586.) So if it be carried into execution by one of the parties, (2 *Vern.* 455. *Pre. Ch.* 519. 2 *Freem.* 268. *Amb.* 586. 2 *Stra.* 783. *Bunb.* 65. 94. 9 *Mod.* 37. 1 *Vez.* 82. 221. 297. 441. 3 *Atk.* 4. 1 *Bro. Rep.* 404. 2 *Bro. Rep.* 566. *MSS. 4th July*, 1786,) as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part; for where there is a performance, the evidence of the bargain does not lie merely upon the words, but upon the fact performed. See 2 *Bro. Rep.* 566. And it is unconscionable, that the party that has received the advantage, should be admitted to say that such contract was never made. So, if the signing by the other party, or reducing the agreement into writing, be prevented by fraud, it may be good. *Pre. Ch.* 526. 5 *Vin. Abr.* 521. *pl.* 31. 1 *Vern.* 296. And although parol agreements are bound by the statute, and agreements are not to be part parol, and part in writing; yet a deposit, or collateral security, for the performance of the written agreement, is not within the purview of the statute. 2 *Vern.* 617. 1 *Bro. Rep.* 269. *19th April*, 1785. *MSS.* See *Treatise of Equity*, 1. 164—175.

It was determined, very soon after the passing of the statute of frauds, that an agreement, signed by one of the parties, should be binding on the party signing it. 2 *Ch. Ca.* 164. And in Sir *James Lowther* v. *Carill*, 1 *Vern.* 221. the court appears to have thought, that one of the parties making alterations in the draft, and sending it to the other to execute, who did execute it, would bring the case out of the statute. But the authority of this latter decision seems to be done away by Lord *Macclesfield's* decree in *Hawkins* v. *Holmes*, 1 *P. Wms.* 770. by which his lordship held, that unless in some particular cases, where there has been an execution of the contract, by entering upon and improving the premises, the party's signing the agreement is absolutely necessary for completing it; and that to put a different construction upon it would be to repeal it; and his lordship therefore held, that the defendant having altered the draft with his own hand, was not a signing to take it out of the statute; though the vendor afterwards executed the conveyance, and caused it to be registered. But this question received more particular consideration in the case of *Stokes* v. *Moore*, at *Serjeant's-Inn Hall*, *March* 1, 1786, in which case the court delivered their opinions, that the signature required by the statute is to have the effect of giving authenticity to the whole of the instrument; and where the name is inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found; as in the formal introduction to a will. [Thus, "This is the last will and testament of me, *A. B.*" written with the testator's own hand has been deemed a sufficient signing.] But it could not be imagined, that a name inserted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as the statute required; [Thus, in notes of an agreement, "Mr. *A.* to do so and so," though written by *A.* himself, not a sufficient signing;] upon which, as well as upon another ground, the

bill was dismissed. See Mr. *Cox's* note (1) to *Hawkins* v. *Holmes*, 1 *P. Wms.* 770.

If a defendant confess the agreement charged in the bill, there is certainly no danger of fraud or perjury in decreeing the performance of such agreement. But it is of considerable importance to determine whether the defendant be bound to confess or deny a merely parol agreement, not alleged to be in any part executed; or if he do confess it, whether he may not insist on the statute, in bar of the performance of it? See *Treatise of Equity*, *p.* 168. *note* (*d*), where this subject is very accurately and ably discussed. To allow a statute, having the prevention of frauds for its object, to be interposed in bar of the performance of a parol agreement, in part performed, were evidently to encourage one of the mischiefs which the legislature intended to prevent. It is therefore an established rule, that a parol agreement, *in part performed*, is not within the provisions of the statute. See *Whitchurch* v. *Bevis*, 2 *Bro. Rep.* 566.

As to what acts amount to a part performance, the general rule is, that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory, or ancillary to it. *Gunter* v. *Halsey*, *Amb.* 586. *Whitbread* v. *Brockhurst*, 1 *Bro. Rep.* 412. The giving of possession is therefore to be considered as an act of part performance, *Stewart* v. *Denton*, *MSS.* 4*th July*, 1786; but giving directions for conveyances, and going to view the estate, are not. *Clark* v. *Wright*, 1 *Atk.* 12. *Whaley* v. *Bagnal*, 6 *Bro. P. C.* 45. Payment of money is also said to be an act of part performance. *Lacon* v. *Martins*, 3 *Atk.* 4. But it seems that payment of a sum, by way of earnest, is not. *Seagood* v. *Meale*, *Pre. Ch.* 560. Lord *Pengal* v. *Ross*, 2 *Eq. Ca. Abr.* 46. *pl.* 12. *Simmons* v. *Cornelius*, 1 *Ch. Rep.* 128. But see *Voll* v. *Smith*, 3 *Ch. Rep.* 16. and *Anon.* 2 *Freem.* 128.

In the case of *Seagood* v. *Meale*, *Pre. Ch.* 561. it is said, that "where a man on promise of a lease to be made to him, lays out money in improvements, he shall oblige the lessor afterwards to execute the lease; because it was executed on the part of the lessee." This *dictum* is sanctioned by the spirit of equity, and seems to do away the decisions which require, even under the circumstance of premises being improved, an averment of its being part of the parol agreement that it should be reduced into writing.

A letter not only takes an agreement in consideration of marriage out of the statute, but also agreements respecting lands, &c. *Ford* v. *Compton*, 2 *Bro. Rep.* 32. *Tawney* v. *Crowther*, 2 *Bro. Rep.* 318. But whenever a letter is relied on as evidence of an agreement, it must be stamped before it can be read. *Ford* v. *Compton*. It must also distinctly furnish the terms of the agreement. *Seagood* v. *Meale*, *Pre. Ch.* 560. *Stra.* 426. *Clark* v. *Wright*, 1 *Atk.* 12. Or it must at least refer to some written instrument, in which the terms are set forth. *Tawney* v. *Crowther*. It must likewise appear, that the other party accepted such terms, and acted in contemplation of them.

Where an agreement in writing is executed, it were not only against the express provision of the statute of frauds, but also against the policy of the common law, to allow of parol evidence, for the purpose of adding to, or varying the terms of the agreement. 2 *Atk.* 383. 3 *Atk.* 8. *Bunb.* 65. 3 *Wils.* 275. But if it be alleged, that some material part of the agreement was omitted, by fraud, or that the intention of the parties was mistaken and misapprehended by the drawers of the deed, in such cases, it seems, evidence will be admis-

sible even though the agreement be executed. 2 *Atk.* 203. 3 *Vern.* 98. 2 *Vern.* 547. 2 *Ch. Ca.* 180. *à fortiori*, such evidence will be admissible where the agreement is executory. 3 *Atk.* 388. 1 *Ves.* 456. It may be material to observe, where evidence *dehors* the deed is admitted to show what was the consideration of the agreement, that the consideration to be proved must be consistent with the consideration stated. 3 *Term Rep.* 474. *Fulbeck's Parallel, ft.* 9. And if the deed specify the consideration to have been a sum of money, evidence is not admissible, in order to superadd another consideration, as natural love and affection, &c. 2 *P. Wms.* 204. 1 *Ves.* 128. Nor if the consideration fail, can evidence be admitted to support the conveyance as a gift. 2 *Ves.* 627. 1 *Atk.* 294. 3 *Bro. Rep.* 156. and though the deed specify a particular consideration and other *considerations*, generally, no consideration but that expressed shall be *intended*. *Cro. Eliz.* 343. but *qu.* whether other considerations might not be *proved*.

IV. It has been said that where the contract is good at law, equity will carry it into execution; but this proposition is too generally stated; for though equity will enforce the specific performance of fair and reasonable contracts where the party wants the thing in specie, and cannot have it in any other way; yet, if the breach of the contract can be, or was intended to be, compensated in damages, courts of equity will not interpose. See *Errington* v. *Annesly*, 2 *Bro. Rep.* 341. *Cudd* v. *Rutter*, 1 *P. Wms.* 570. *Cuppier* v. *Harris*, *Bunb.* 135. It is assuredly a general rule, that courts of equity will, under certain circumstances, enforce the specific performance of agreements, for the non-performance of which the party would be entitled to damages at law: but as the decreeing of specific performance is in the discretion of the court, it must not be considered as a universal rule; for if the plaintiff's title be involved in difficulties which cannot be immediately removed, equity will not compel the defendant to take a conveyance; though perhaps he might at law be subject to damages for not completing his purchase. See *Marlow* v. *Smith*, 2 *P. Wms.* 198. *Shapland* v. *Smith*, 1 *Bro. Rep.* 75. *Cooper* v. *Denne*, 21*st July*, 1792. *MSS.*

Qu. Whether courts of equity will decree an agreement entered into by letter, if a deed appear to have been afterwards framed, (but not executed,) varying the terms expressed in the letter? See *Coke* v. *Mascall*, 2 *Vern.* 34. Or if the terms be varied by parol. See *Jordan* v. *Sawkins*, 3 *Bro. Rep.* 388. And as a letter setting forth the terms of an agreement, takes the agreement out of the statute, it being a sufficient signing; so, it seems, it is a sufficient signing, if a person, knowing the contents, subscribe the deed as a witness only. *Welford* v. *Beazely*, 3 *Atk.* 503.

In the civil law, counter letters, and all secret acts which make any change in agreements, are of no manner of effect with respect to the interest of a third person. 1 *Vern.* 240. 348. 475. 2 *Vern.* 466. 1 *P. Wms.* 768. 2 *Ves.* 375. 1 *Bla. Rep.* 363. for this would be an infidelity contrary to good manners and the public interest. In cases of this nature it is not necessary that the fraud respect an article *expressly contracted for*; but any representation, misleading the parties contracting, on the subject of the contract, is within the principle which governs this class of cases. See 1 *Bro. Rep.* 543. and stated in Mr. *Cox's* note to *Roberts* v. *Roberts*, 3 *P. Wms.* 74.

The principle of the rule there laid down, though it has been most frequently applied to agreements in fraud of marriage, extends to

every other species of agreements: therefore, where a tradesman compounding his debts, privately agreed with some of his creditors to pay them the whole of their debts, by which they were induced to appear to accept of the composition; such private agreement was held to be a fraud on the other creditors. 2 *Vern.* 71. 602. 1 *Atk.* 105. and it seems that such fraud is now relievable at law. 2 *Term Rep.* 763. The case of *Lewis* v. *Chase*, 1 *P. Wms.* 620. is, however, irreconcilable with this principle; it may therefore be material to observe, that it is very much shaken, if not overruled, by several subsequent cases, particularly *Smith* v. *Bromley*, *Doug.* 670. But though private agreements in fraud of *third persons*, be void, yet if a bond or note be given by *A.* the more effectually to enable *B.* to bring about a match, &c. such bond or note may be recovered upon at law. *Montefiori* v. *Montefiori.* 1 *Bla. Rep.* 363. And a conveyance of land for such purpose, notwithstanding a defeasance, will be sustained in equity. 13 *Vin. Abr.* 525. 2 *Bro. P. C.* 88.

AGRI, Arable lands in the common fields. *Fortescue.*

AID. See tit. *Taxes; Tenure*, I. 8. II. 6.

AID-PRAYER, *auxilium petere.*] A word made use of in pleading, for a petition in court to call in help from another person that hath an interest in the thing contested; this gives strength to the party praying in *aid*, and to the other likewise, by giving him an opportunity of avoiding a prejudice growing towards his own right. As tenant for life, by the curtesy, for term of years, &c. being impleaded, may pray in *aid* of him in reversion; that is, desire the court that he may be called by writ to allege what he thinks proper for the maintenance of the right of the person calling him, and of his own. *F. N. B.* 50.

Aid shall be granted to the defendant in *ejectione firmæ*, when the title of the land is in question: lessee for years shall have *aid* in trespass; and tenants at will; but tenant in tail shall not have *aid* of him in remainder in fee; for he himself hath the inheritance. *Danv. Abr.* 292. In a writ of replevin, the avowry being for a real service, *aid* is granted before issue; and in action of trespass after issue joined, if there be cause, it shall be had for the defendant, though never for the plaintiff. *Jenk. Cent.* 64. *Fitz. Abr.* 7. There ought to be privity between a person that joins in *aid*, and the other to whom he is joined; otherwise joinder in *aid* shall not be suffered. *Danv.* 318. There is a prayer in *aid* of *patrons*, by parsons, vicars, &c. And between *coparceners*, where one coparcener shall have *aid* of the other to recover *pro rata. Co. Lit.* 341. b. And also servants having done any thing lawfully in right of their *masters*, shall have *aid* of them. *Terms de Ley*, 34.

AID OF THE KING, *auxilium regis.*] Is where the king's tenant prays *aid of the king*, on account of rent demanded of him by others. A city or borough, that holds a fee farm of the king, if any thing be demanded against them which belongs thereto, may pray in *aid of the king:* and the king's bailiffs, collectors or accountants, shall have *aid of the king.* In these cases the proceedings are stopped till the king's counsel are heard to say what they think fit, for avoiding the king's prejudice: and this *aid* shall not in any case be granted after issue; because the king ought not to rely upon the defence made by another. *Jenk. Cent.* 64. *Terms de Ley*, 35. See stats. 4 *Edw.* I. *c.* 1, 2. 14 *Edw.* III. stat. 1. *c.* 14. and 1 *Hen.* IV. *c.* 8. See also *Com. Dig.* tit. *Aide.*

AIDERS-*Aydowers*, (stat. 25 *Hen.* VIII. *c.* 22. and 8.) from *advoyer* an advocate, an abetter. See tit. *Accessary.*

AILE, or *aiel* of the *French aieul, avus.*] A writ which lies where a man's grandfather being seised of lands and tenements in fee-simple the day that he died, and a stranger abateth or entereth the same day, and dispossesses the heir of his inheritance. *F. N. B.* 222. See tit. *Assise of Mort d'ancestor.*

AL or ALD; from Saxon, *eald*, age.] This syllable in the beginning of the names of places, denotes antiquity; as *Aldborough*, *Aldworth*, &c. *Blount.*

ALANERARIUS. A manager and keeper of dogs, for the sport of hawking, from *alanus*, a dog known to the ancients. *Du Fresne.* But Mr. *Blount* renders it a *faul-coner.*

ALBA, the *alb.*] A surplice or white sacerdotal vest anciently used by officiating priests.

ALBA FIRMA. When quit-rents, payable to the *Crown* by freeholders of manors, were reserved in silver or white money, they were anciently called *white rents* or *blanch farms*, *reditus albi*; in contradistinction to rents reserved in work, grain, &c. which were called *reditus nigri*, or *black mail.* 2 *Inst.* 19. and *vide* 2 *Inst.* 10. where it seems used for a species of tenure. See tit. *Blanch firmes.*

In *Scotland* this kind of small payment is called *Blench-holding*, or *reditus albæ firmæ.* 2 *Comm.* 43.

ALBERGELIUM, *halsherga.*] An habergeon; a defence for the neck. *Hoveden*, 611.

ALBINATUS JUS. Is the *droit d' aubaine* in *France*, whereby the king, at the death of an alien, is entitled to all he is worth, unless he has peculiar exemption. *Comm.* 372. *Albinatus* is derived from *alibi natus*, *Spelm. Gloss.* 24. This was repealed by the laws of *France* in *June*, 1791.

ALBUM, see *Alba Firma.*

ALDER, the first; *as alder best*, is the best of all; *alder liefest*, the most dear.

ALDERMAN, *Sax. ealderman*, *Lat. aldermannus.*] Hath the same signification in general as senator, or senior: but at this day, and long since, those are called *aldermen* who are associates to the civil magistrates of a city or town corporate. See *Spelm. Gloss.* 25. *An alderman* ought to be an inhabitant of the place, and resident where he is chosen; and if he removes, he is incapable of doing his duty in the government of the city or place, for which he may be disfranchised. *Mod. Rep.* 36. *Alderman Langham* was a freeman of the city of *London*, and chosen *alderman* of a ward, and being summoned to the court of *aldermen* he appeared, and the oath to serve the office was tendered to him, but he refused to take it, in contempt of the court, &c. whereupon he was committed to *Newgate*; and it was held good. *March. Rep.* 179.

The *aldermen* of *London*, &c. are exempted from serving inferior offices; nor shall they be put upon assises, or serve on juries, so long as they continue to be *aldermen.* 2 *Cro.* 585. See tit. *London.*

In *Spelman's Glossary* we find that we had anciently a title of *aldermannus totius Angliæ*, mentioned in an inscription on a tomb in *Ramsey Abbey.* And this officer was in nature of Lord Chief Justice of *England.* *Spelm. Alderman* was one of the degrees of nobility among the *Saxons*, and signified an earl; sometimes, applied to a place, it was taken for a general, with a civil jurisdiction as well as military power; which title afterwards was used for a judge, but it literally imports no more than elder.

There was likewise *aldermannus hundredi*, (the alderman of the hundred,) which dignity was first introduced in the reign of *Hen.* I. *Du Fresne. Cowel.*

ALÆ ECCLESIÆ, the wings or side-isles of the church; from the *French*, *Les ailes de l' Esglise.*

ALDERNEY. See *Jersey.*

ALECENARIUM, a sort of hawk called a *tanner.* See *Putura.*

ALEHOUSES, are to be licensed by justices of peace, who take recognisances of alehouse-keepers not to suffer disorders in their houses, and they have power to put down *alehouses*, &c. But the act is not to restrain selling of *ale* in fairs. Stat. 5 and 6. *Edw.* VI. *c.* 25. *Alehouse-keepers* are liable to a penalty of 20*s.* for keeping *alehouses* without license; not exceeding 40*s.* nor under 10*s.* for selling *ale* in short measure; and 10*s.* for permitting tippling, &c. and persons retailing *ale* or beer, *alehouse-keepers*, &c. shall sell their *ale* by a full ale quart or pint, according to the *standard* in the *Exchequer*, marked from the said standard: and sub-commissioners, or collectors, of excise, are to provide substantial ale quarts and pints in every town in their divisions; and mayors and chief officers to mark measures, or forfeit 5*l.* by statute 1 *Jac.* I. *c.* 9. and see stat. 4 *Jac.* I. *c.* 5. 21 *Jac.* I. *c.* 7. 1 *Car.* I. *c.* 4. 3 *Car.* I. *c.* 4. 11 and 12 *Wm.* III. *c.* 15. See tit. *Inns*, *Brewers.*

By the stat. 26 *Geo.* II. *c.* 41. justices on granting licenses, are to take recognisances in 10*l.* with sureties in the like sum for the maintaining good order. Licenses to be granted to none, not licensed the preceding year, unless they produce certificates of their good character. License only to extend to that place for which it was granted. Licenses to be granted on the first of *September*, or within twenty days after, yearly, and to be for one year only; penalty for selling ale, &c. without a license, by this and subsequent acts, first offence 40*s.* second offence 4*l.* third offence 6*l.*

As to licenses see the above statutes and stat. 29 *Geo.* II. *c.* 12. 5 *Geo.* III. *c.* 46. 30 *Geo.* III. *c.* 38. 32 *Geo.* III. *c.* 59. by which last act no person can sell wine by retail to be drank in his own house, who has not also an ale license. See also 35 *Geo.* III. *c.* 113. tit. *Drunkenness.*

Stat. 38 *Geo.* III. *c.* 54. 9. 13. exempts persons from penalty of retailing without a license, who sell beer or ale in casks not less than five gallons, or in reputed quart bottles not less than two dozen, and not to be drank in their houses, and 39 *Geo.* III. *c.* 86. In any place where the corporate justices are, by 6 *Geo.* I. *c.* 21. and 26 *Geo.* II. *c.* 13. disqualified to grant licenses for retailing liquors, the justices for the county at large may grant them at the request of the chief magistrate.

By 41 *Geo.* III.(U. K.) *c.* 86. § 11. the provisions of 29 *Geo.* II. c. 12. shall, from 1 *Nov.* 1801, be repealed, and thereafter no person shall keep an alehouse, &c. unless annually licensed.

From said 1st *Nov.* 1801, persons selling ale, &c. by retail in *Scotland*, (except in fairs,) without license liable to penalty. *Id.*

ALER SANS JOUR, *Fr.*] To go without day; *viz.* to be finally dismissed the court, because there is no further day assigned for appearance. *Kitch.* 146.

ALE-SILVER, A rent of tribute annually paid to the lord mayor of *London*, by those that sell *ale* within the liberty of the city. *Antiq. Purvey.* 183.

ALESTAKE, A may-pole called *alestake*, because the country people drew much *ale* there: but it is not the common may-pole, but rather a long stake drove into the ground, with a sign on it, that *ale* was to be sold.

ALE-TASTER, Is an officer appointed in every court leet, sworn to look to the assise and goodness of *ale*, and beer, &c. within the precincts of the Lordship. *Kitch.* 46. In *London* there are *ale-conners*, who are officers appointed to *taste ale* and beer, &c. in the limits of the city.

ALFET. Sax. *Alfæth.*] A cauldron or furnace, wherein boiling water was put for a criminal to dip his arms in up to his elbow, and there hold it for some time. *Du Cange.* See tit. *Ordeal.*

ALIAS, A second or further writ, issued from the courts at *Westminster*, after a *capias*, &c. sued out without effect.

ALIAS DICTUS, Is the manner of description of a defendant, when sued on any specialty; as a bond, &c. where after his *name*, and common addition, then comes the *alias dict.* and describes him again by the very name and addition, whereby he is bound in the writing. *Dyer*, 50. *Jenk. Cent.* 119. See *Misnomer.*

ALIEN, *Alienus*, *Alienigena.*] Generally speaking, one born in a foreign country, out of the allegiance of the king. Under this head, shall be briefly introduced the present state of the law, in particular, as to I. *Aliens.* II. *Denizens.* III. *Naturalized Subjects.* IV. *Of the general effect of the Laws on Aliens.*

I. An ALIEN *born* may *purchase* lands or other estates, but not for his own use, for the king is thereupon entitled to them. 1 *Inst.* 2. and the notes there. But under the stat. 13 *Geo.* III. *c.* 14. aliens are enabled to lend money on the security of mortgages of estates in the *West India Colonies*, and may have every remedy to recover the money lent, except foreclosing the mortgage and obtaining possession of the land; which is positively prohibited by the statute. Nor shall a woman alien, wife of a natural born subject, be endowed, 7 *Rep.* 25. a. 1 *Inst.* 31. b. but see the note there *contra*. Nor a *Jewess* wife of a husband converted to the christian religion. *Id. ib.* See this *Dict.* tit. *Dower*. An alien may however acquire a property in goods, money and other *personal* estate, or may hire a house for his habitation. 7 *Rep.* 17. For personal estate is of a transitory or movable nature, and this indulgence is necessary for the advancement of trade. Aliens also may trade as freely as other people, only they are subject to certain higher duties at the *Custom-House*; and there also some obsolete statutes. (1 *Rich.* III. *c.* 9. 14 *Hen.* VIII. *c.* 2. 21 *Hen.* VIII. *c.* 16. 22 *Hen.* VIII. *c.* 13. 32 *Hen.* VIII. *c.* 16.) prohibiting alien artificers to work for themselves in this kingdom, and making void all leases of houses or shops to aliens; [see tit. *Artificers*;] but it is generally held that these were virtually repealed by stat. 5 *Eliz. c.* 7. prohibiting the importation of some foreign manufactures; see, however, 1 *Inst.* 2. *in note*. Also an alien may bring an action concerning personal property; and may make a will and dispose of his personal estate. *Lutw.* 34. These rights of aliens must be understood of alien friends only; for alien enemies have no rights, no privileges, unless by the king's special favour during the time of war. 1 *Comm.* 372. and see *Cro. Eliz.* 683. *Skin.* 370. *Anstr. Rep. Scac.* 462.

Where it is said that an alien is one born out of the king's dominions or allegiance, this must be understood with some restrictions. The common law was absolutely so, with only a very few exceptions; so

that a particular act of parliament, (stat. 29 *Car.* II. *c.* 6.) was necessary after the restoration to naturalize children of *English* subjects, born in foreign parts during the rebellion. This maxim of law proceeded on a general principle that every man owes *natural allegiance* where he is born, and cannot owe two such allegiances at once. Yet the children of the king's ambassadors born abroad were always held to be natural born subjects, 7 *Rep.* 11. § 18. the father owing no *local* allegiance to the foreign prince, and representing the king of *England*; and by the stat. 25 *Edw.* III. *st.* 2. it is declared to be the law of the crown of *England*, that the king's children *wherever born*, are of ability to inherit the crown; and to encourage foreign commerce it is enacted by the same statute, that all children born abroad, provided *both* their parents were at the time of the child's birth, in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in *England*. See *Cro. Car.* 601. *Mar.* 91. *Jenk. Cent.* 3.

By several more modern statutes, (7 *Ann. c.* 5. 10 *Ann. c.* 5. 4 *Geo.* II. *c.* 21. and 13 *Geo.* III. *c.* 21.) these restrictions are still further taken off; so that all children born out of the king's ligeance, whose *fathers* were natural born subjects, and the children of such children, (*i. e.* children whose *grandfathers* by the father's side were natural born subjects,) though their mothers were aliens, are now deemed to be natural born subjects themselves to all intents and purposes, unless their said ancestor were attainted, or banished beyond sea for high treason; or were at the birth of such children in the service of a prince at enmity with *Great Britain*. See stat. 4 *Geo.* II. c. 21. [The issue of an *English woman* by an alien, born abroad is an alien. 1 *Vent.* 422. 4 *Term Rep.* 300. solemnly decided.] But *grandchildren* of such ancestors shall not be privileged in respect of the aliens' duty, except they be protestants and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

The children of aliens born here in *England*, are, generally speaking, natural-born subjects, and entitled to all the privileges of such. 1 *Comm.* 373. See tit. *Descent*.

Aliens residing in any place surrendered to his majesty, may act as merchants or factors, on taking oath of allegiance. 37 *Geo.* III. *c.* 63. § 5. *This act does not abridge the rights of the East-India Company.* See also 45 *Geo.* III. *c.* 32. All lands, &c. held in *Great Britain* and its dependencies, by *American* citizens on 28th *October*, 1795, shall be enjoyed agreeably to the 9th article of the treaty of amity, commerce and navigation. See 37 *Geo.* III. *c.* 97. § 24.

II. A Denizen is an alien born, but who has obtained, *ex donatione regis*, letters patent to make him an *English* subject; a high and incommunicable branch of the royal prerogative. 7 *Rep.* 25. A denizen is in a kind of middle state between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but could not take by inheritance; 11 *Rep.* 67. for his parent through whom he must claim, being an alien had no inheritable blood; and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen born *before* denization could not inherit to him; but his issue born *after* might, to the exclusion of that born before. 1 *Inst.* 8. *Vaugh.* 285. But now, by stat. 11 and 12 *Wm.* III. *c.* 6. all persons being *natural-born* subjects, may inherit as heirs to their ancestors, though those ancestors were aliens. See also stat. 25 *Geo.* II. *c.* 39. by which this

statute of *Wm.* III. is restrained to persons in being at the death of the ancestor; and the estate is devested from daughters in favour of after-born sons. Both these acts are extended by stat. 16 *Geo.* III. *c.* 52. to *Scotland*. See more particularly tit. *Descent*.

A denizen is not excused from paying the alien's duty, and some other mercantile burthens. See stat. 22 *Hen.* VIII. *c.* 8. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c. from the crown. Stat. 12 *Wm.* III. *c.* 2.

III. NATURALIZATION cannot be performed but by act of parliament; for by this an alien is put in the same state as if he had been born in the king's ligeance; except only that he is (by the stat 12 *Wm.* III. *c.* 2.) incapable, as well as a denizen, of being a member of the privy council or parliament, holding offices, grants, &c. No bill for naturalization can be received without such disabling clause in it; (stat. 1 *Geo.* I. *c.* 4.) nor without a clause disabling the person from obtaining any immunity in trade thereby, in any foreign country, unless he shall have resided in *Great Britain* for seven years next after the commencement of the session in which he is naturalized; (stat. 14 *Geo.* III. *c.* 84.) neither can any person be naturalized or restored in blood unless he hath received the Sacrament of the Lord's Supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament. (Stat. 7. *Jac.* I. *c.* 2.) But these provisions have been usually dispensed with by special acts of parliament previous to bills of naturalization of any foreign princes or princesses. See statutes 4 *Ann.* *c.* 1. 7 *Geo.* II. *c.* 3. 9 *Geo.* II. *c.* 24. 4 *Geo.* III. *c.* 4. &c.

These are the principal distinctions between *Aliens*, *Denizens*, and *Natives*; distinctions which it hath been frequently endeavoured within the present century to lay almost totally aside by one general naturalization act for all foreign protestants. An attempt which was once carried into execution by stat. 7 *Ann.* *c.* 5. but this, after three years' experience, was repealed by stat. 10 *Ann.* *c.* 5. except the clause for naturalizing the children of *English* parents born abroad. However, every foreign seaman, who in time of war, serves two years on board a *British* ship, by virtue of the king's proclamation, is by stat. 13 *Geo.* II. *c.* 3. *ipso facto* naturalized, under the like restrictions as in stat. 12. *Wm.* III. *c.* 2. And all foreign protestants and *Jews*, upon their residing seven years in any of the *American* colonies, without being absent above two months at a time, and all foreign protestants serving two years in a military capacity there, and none of these falling within the incapacities declared by stat. 4 *Geo.* II. *c.* 21. (*viz.* attaint, &c.) shall, on taking the oath of allegiance and abjuration, or in some cases an affirmation to the same effect, be naturalized to all intents and purposes as if they had been born in this kingdom; except as to sitting in parliament or the privy council, and holding offices or grants of land, from the crown, in *Great Britain* or *Ireland*. See statutes 13 *Geo.* II. *c.* 7. 20 *Geo.* II. *c.* 44. 2 *Geo.* III. *c.* 25. 13 *Geo.* III. *c.* 25. 20 *Geo.* III. *c.* 20. They therefore are admissible to all other privileges which protestants or *Jews* born in this kingdom are entitled to. What those privileges are with respect to *Jews* in particular was the subject of very high debate about the time of the famous *Jew bill*, stat. 26 *Geo.* II. *c.* 26. which enabled all *Jews* to prefer bills of naturalization in parliament without receiving the sacra-

ment, as ordained by stat. 7 *Jac.* I. *c.* 2. but this act continued only a few months, and was then repealed by stat. 27 *Geo.* II. *c.* 1.

IV. An *alien* enemy coming into this kingdom, and taken in war, shall suffer death by the martial law; and not be indicted at the common law, for the indictment must conclude *contra ligeantiam suam*, &c. and such was never in the protection of the king. *Molloy de Jur. Marit.* 417. *Aliens* living under the protection of the king, may have the benefit of a general pardon. *Hob.* 271. No *alien* shall be returned on any jury, nor be sworn for trial of issues between subject and subject, &c. but where an *alien* is party in a cause depending, the inquest of jurors are to be half denizens and half subjects; but in cases of high treason this is not allowed. 2 *Inst.* 17. See stat. 27 *Edw.* III. *c.* 8. that where both parties are aliens the inquest shall be all aliens; and stat. 28 *Edw.* III. *c.* 13. as to trials between denizens and aliens. See also 1 *Com. Dig.* tit. *Alien.* (C. 8.)

Though aliens are subject to the laws, and in enormous offences (as murder, &c.) are liable in the ordinary course of justice, yet it may be too harsh to punish them on a local statute. Thus, a *French* prisoner, indicted for privately stealing from a shop, was acquitted of that by the direction of the judge, and found guilty of larceny only. *Forst.* 188.

A very great influx of foreigners into *England* having been caused in the years 1792 and 1793, by the troubles on the Continent, certain acts were passed, stat. 33 *Geo.* III. *c.* 4. and 34 *Geo.* III. *c.* 43. 67. commonly called the Alien Acts, compelling the masters of ships arriving from foreign parts, under certain penalties, to give an account at every port of the number and names of every foreigner on board to the custom-house officers; appointing justices and others to grant passports to such aliens; and giving the king power to restrain and to send them out of the kingdom on pain of transportation, and on their return, of death. The same act also directed an account to be delivered of the arms of aliens, which, if required, are to be delivered up, and aliens were not to go from one place to another in the kingdom without passports. These regulations were from time to time altered and amended by various acts, the last, in preceding the war, being 43 *Geo.* III. *c.* 155.

By the various acts of parliament abovementioned, most, if not all, of the niceties of the old law relative to aliens are obviated, and reduced to plain and intelligible rules. See 1 *Comm.* 366—375. 1 *Inst.* 2. and 8. and the notes there; and 7 *Rep. Calvin's* case. As to descents between aliens collaterals, *Collingwood* v. *Pace*, 1 *Vent.* 413. 1 *Sid.* 193. and this *Dictionary*, tit. *Descent.* As to pleading alienage, see tit. *Abatement.* And for further matter on the whole of the subject, *Com. Dig.* tit. *Alien.*

ALIENATION, from *alienare*, to alien.] A transferring the property of a thing to another: it chiefly relates to lands and tenements; as to *alien* land in fee, is to sell the fee-simple thereof, &c. And to *alien* in mortmain, is to make over lands or tenements to a religious house or body politic. Fines for *alienations* are taken away by stat. 12 *Car.* II. *c.* 24. except fines due by particular customs of manors. All persons who have a right to lands may generally *alien* them to others: but some *alienations* are forbidden: as an *alienation* by a particular tenant, such as tenant for life, &c. which incurs a forfeiture of the estate. *Co. Lit.* 118. For if lessee for life, by livery, *alien* in fee, or make a lease for the life of another, or gift in tail, it is a

forfeiture of his estate: so if tenant in dower, tenant for another's life, tenant for years, &c. do *alien* for a greater estate than they lawfully may make. *Co. Lit.* 233. 251. Conditions in feoffments, &c. that the feoffee shall not *alien*, are void. *Co. Lit.* 206. *Hob.* 261. And it is the same where a man, possessed of a lease for years, or other thing, gives and sells his whole property therein, upon such condition: but one may grant an estate in fee, on condition that the grantee shall not *alien* to a particular person, &c. And where a reversion is in the donor of an estate, he may restrain an *alienation* by condition. *Lit.* 361. *Wood's Inst.* 141. Estates in tail, for life, or years, where the whole interest is not parted with, may be made with condition not to *alien* to others, for the preservation of the lands granted in the hands of the first grantee.

ALIMONY, *alimonia*, Nourishment or maintenance.] In a legal sense, it is taken for that allowance which a married woman sues for and is entitled to, upon separation from her husband. *Terms de Ley*, 38. See tit. *Baron and Feme*, XI.

ALLAUNDS, *ab alanis, Scythiæ gente*, Hare-hounds.

ALLAY, Lat. *allaya.*] The mixture of other metals with silver or gold. This *allay* is to augment the weight of the silver or gold, so as it may defray the charge of coinage, and to make it the more fusile. A pound weight of standard gold, by the present standard in the mint, is twenty-two carats fine, and two carats *allay*: and a pound weight of right standard silver consists of eleven ounces two penny weight of fine silver, and eighteen penny weight of *allay*. *Lowndes's Essay upon Coins, p.* 19. and 9 *Hen.* V. stat. 1. *c.* 11. *c.* 4.

ALLEGIANCE, *allegiantia*, formerly called *ligeance*, from the Latin *alligare* and *ligare*; *i. e. ligamen fidei.*] The *natural* and *lawful* and *faithful obedience* which every subject owes to his prince. It is either perpetual, where one is a subject born, or where one hath the right of a subject by naturalization, &c. or it is temporary, by reason of residence in the king's dominions. To subjects born it is an incident inseparable; and, as soon as born, they owe by birth-right obedience to their sovereign: and it cannot be confined to any kingdom, but follows the subject wheresoever he goeth. The subjects are hence called *liege people*, and are bound by this *allegiance* to go with the king in his wars, as well within as without the kingdom. 1 *Inst.* 129. a. 2 *Inst.* 741. 7 *Co.* 4. *Calvin's* case.

By the common law all persons above the age of twelve years were required to take the oath of *allegiance* in courts-leet.

And there are several statutes requiring the oath of *allegiance* and supremacy, &c. to be taken under penalties: justices of peace may summon persons above the age of eighteen years to take these oaths. 1 *Eliz. cap.* 1. 1 *Wm.* and *M. c.* 1. 8. 1 *Ann.* stat. 1. *c.* 22. For the other statutes respecting allegiance, see 5 *Eliz. c.* 1. § 5. 3 *Jac.* I. *c.* 4. 7 *Jac.* I. *c.* 6. 25 *Car.* II. *c.* 2. 7 and 8 *Wm.* III. *c.* 24. 27. 13 and 14 *Wm.* III. *c.* 6. 1 *Ann. c.* 22. 6 *Ann. c.* 14. 8 *Ann. c.* 15. 1 *Geo.* I. *c.* 13. 2 *Geo.* II. *c.* 31. 6 *Geo.* III. *c.* 53. And see tit. OATHS, and *Kyd's Com. Dig.* tit. *Allegiance.* By the stat. 3 *Jac.* I. *c.* 4. § 22, 23. &c. if any natural born subject be withdrawn from his allegiance, and reconciled to the Pope or see of *Rome*, or shall promise obedience to any *other Prince or State*, he, his procurers, counsellors, aiders, and maintainers, shall incur the guilt of *High Treason*. See tit. *Foreign Service, Treason.*

ALLEGIARE, To defend or justify by due course of law. *Leges Alured. cap.* 4. *Spelm.*

ALLER. This word is used to make what is added to signify superlatively; as *aller good* is the greatest good. See *Alder. Aller sans jour*, see *Aler.*

ALLEVIARE, To levy or pay an accustomed fine. *Cowel.*

ALLOCATION, *allocatio.*] In a legal sense, an allowance made upon account in the *Exchequer*; or more properly a placing or adding to a thing.

ALLOCATIONE FACIENDA, A writ for allowing to an accountant such sums of money as he hath lawfully expended in his office; directed to the lord treasurer and barons of the *Exchequer*, upon application made. *Reg. Orig.* 206.

ALLOCATO COMITATU, A new writ of *exigent* allowed, before any other *county court* holden, on the former not being fully served or complied with, &c. *Fitz. Exig.* 14.

ALLOCATUR, It is allowed. A practical term applied to the certificate of allowance of costs by the master on taxation, &c. See tit. *Costs* IV.

ALLODIAL. Dict. This is where an inheritance is held without any acknowledgment to any lord or superior; and therefore is of another nature from that which is feodal. *Allodial* lands are free lands, which a man enjoys without paying any fine, rent, or service to any other. *Alodium.* In Domesday book it signifies *a free manor*; and *alodarii* Lords Paramount. *Kent. Co. Litt.* 1. 5. and see 2 *Comm.* 45. &c. and this Dict. tit. *Tenure.*

ALLUMINOR, from the *Fr. allumer*, to enlighten.] One who anciently illuminated, coloured or painted upon paper or parchment, particularly the initial letters of ancient charters and deeds. The word is used stat. 1 *Rich.* III. *c.* 9.

ALLUSION. See tit. *Occupancy.*

ALMANACK, Is part of the law of *England*, of which the courts must take notice, in the returns of writs, &c. but the *almanack* to go by is that annexed to the *Book of Common Prayer.* 6 *Mod.* 41. 81. See tit. *Year.*

The diversity of fixed and moveable feasts was condemned *per tot. cur.* for we know neither the one nor the other but by the *almanacks*, and we are to take notice of the course of the moon. 6 *Mod.* 150. 160. *Pasch.* 3 *Ann. B. R.* in the case of *Harvey* v. *Broad, ibid.* 196. *S. C.* and *Holt, Ch. J.* said, that at the council of *Nice* they made a calculation moveable for *Easter* for ever, and that is received here in *England*, and become part of the law; and so in the calendar established by act of parliament. 2 *Salk.* 626. *pl.* 8. *S. C.* accordingly; *per cur.*

Whether such a day of the month was on a *Sunday* or not, and so not a *dies juridicus*, is triable by the country or the almanack. *Dyer*, 182. *pl.* 55. But,

It was said that the court might judicially take notice of almanacks, and be informed by them; and cited *Robert's* case in the time of Lord *Catline*; and *Coke* said, that so was the case of *Galery* v. *Banbury*, and judgment accordingly. 1 *Leon.* 242. *pl.* 328. *Pasch.* 29. *Eliz. B. R. Page* v. *Fawcett. Cro. Eliz.* 227. *pl.* 12. *S. C.* and held that examination by almanacks was sufficient, and a trial *per pais* not necessary, though the error assigned, *viz.* that the 16th *Feb.* on which day judgment was said to be given, was on a *Sunday*, was an error in

fact; and the judgment was reversed. Almanacks are liable to a stamp duty under several statutes.

ALMARIA, for *Armaria*. The archives, or as they are sometimes styled, *muniments* of a church or library. *Gervas. Dorob. in Rich.* II.

ALMNER, or ALMONER, *elcemosynarius.*] An officer of the king's house, whose business it is to distribute the king's *alms* every day. He ought to admonish the king to bestow his alms, especially upon saints' days and holidays; and he is likewise to visit the sick, widows that are poor, prisoners, and other necessitous people, and to relieve them under their wants; for which purpose he hath the forfeitures of deodands, and the goods of *fel' os de se*, allowed him by the king. *Fleta, lib.* 2. *c.* 22. The lord *almoner* has the disposition of the king's dish of meat, after it comes from the table, which he may give to whom he pleases; and he distributes four-pence in money, a two-penny loaf of bread, and a gallon of beer; or instead thereof, three pence daily at the court-gate to twenty-four poor persons of the king's parish, to each of them that allowance. This officer is usually some bishop.

ALMSFEOH, or *almesfeoh*, Saxon for *alms money:* It has been taken for what we call *Peter-Pence*, first given by *Inna*, king of the *West Saxons*, and anciently paid in *England* on the first of *August*. It was likewise called *romefeoh*, *romescot*, and *heorthpening*. *Selden's Hist. Tithes*, 217.

ALMUTIUM, A cap made with goats or lambs' skins, the part covering the head being square, and the other part hanging behind to cover the neck and shoulders. *Monasticon*, tom. 3. p. 36. *W. Thorn.* 1330.

ALNAGE, *Fr. aulnage.*] A measure, particularly the measuring with an ell.

ALNAGER, or *aulnager*, Fr. *alner*, Lat. *ulniger.*] Is properly a measure by the ell; and the word *aulne* in *French* signifieth *an ell*.

An *aulnager* was heretofore a public sworn officer of the king's, whose place it was to examine into the assise of cloths made throughout the land, and to fix seals upon them; and another branch of his office was to collect a subsidy or *aulnage* duty granted to the king on all cloths sold. He had his power by stat. 25 *Edw.* III. stat. 4. *c.* 1. and several other ancient statutes; which appointed his fees, and inflicted a punishment for putting his seal to deceitful cloth, &c. *viz.* a forfeiture of his office, and the value. 27 *Edw.* III. stat. 1. *c.* 4. 3 *Rich.* II. *c.* 2. There were afterwards three officers belonging to the regulation of clothing, who bear the distinct names of *searcher*, *measurer*, and *aulnager*; all which were formerly comprised in one person. 4 *Inst.* 31. *Cowel.*

By 11 and 12. *Wm.* III. *c.* 20. Alnage duties are taken away.

ALNETUM. A place where *alders* grow; or a grove of *alder trees*. *Domesday Book.*

ALODIUM. See *Allodium.*

ALOVERIUM, *A Purse. Fleta, lib.* 2. *c.* 82. *par.* 2.

ALTARAGE, *altaragium.*] The offerings made upon the *altar*, and also the profit that arises to the priest by reason of the *altar*, *obventio altaris*. *Mich.* 21 *Eliz.* It was declared that by *altarage* is meant tithes of wool, lambs, colts, calves, pigs, chickens, butter, cheese, fruits, herbs, and other small tithes, with the offerings due: the case of the vicar of *West Haddon*, in *Northamptonshire*. But the word *altarage* at first is thought to signify no more than the casual profits arising to the priest from the people's voluntary oblations at the *altar*;

out of which a portion was assigned by the parson to the vicar: since that our parsons have generally contented themselves with the greater profits of glebe, and tenths of corn and hay; and have left the small tithes to the officiating priests: and hence it is that vicarages are endowed with them. *Terms de Ley*, 39. 2 *Cro.* 516.

It seems to be certain that the religious, when they allotted the altarage in part, or in whole, to the vicar or chaplain, did mean only the customary and voluntary offerings at the altar, for some divine office or service of the priest, and not any share of the standing tithes, whether predial or mixt. *Kenn. Paroch. Antiq. Gloss.*

In the case of *Franklyn*, and the master and brethren of *St. Cross*, T. 1721, it was decreed, that where *altaragium* is mentioned in old endowments, and supported by usage, it will extend to small tithes, but not otherwise. *Bunb.* 79.

ALTERATION, *alteratio*. Is the changing of a thing: and when witnesses are examined upon exhibits, &c. they ought to remain in the office, and not to be taken back into private hands, by whom they may be altered. *Hob.* 254.

ALTO and BASSO, *Ponere se in arbitrio in alto & basso*, means the absolute submission of all differences.

AMABYR, vel AMVABYR. A custom in the honour of *Clun*, belonging to the earls of *Arundel: Pretium virginitatis domino solvendum.* LL. *eccl. Gul. Howeli Dha, regis Walliæ.* This custom *Henry* Earl of *Arundel* released to his tenants, *Anno* 3 and 4 *Phil.* and *M.*

AMBACTUS, A servant or client. *Cowel.*

AMBASSADOR, *legatus.*] A person sent by one sovereign [power] to another with authority, by letters of credence, to treat on affairs of state. 4 *Inst.* 153. And *ambassadors* are either ordinary or extraordinary; the ordinary *ambassadors* are those who reside in the place whither sent; and the time of their return being indefinite, so is their business uncertain, arising from emergent occasions; and commonly the protection and affairs of the merchants is their greatest care: the extraordinary *ambassadors* are made *pro tempore*, and employed upon some particular great affairs, as condolements, congratulations, or for overtures of marriage, &c. Their equipage is generally very magnificent; and they may return without requesting of leave, unless there be a restraining clause in their commission. *Molloy*, 144.

An agent represents the affairs only of his master; but an *ambassador* ought to represent the greatness of his master, and his affairs. *Ibid.* By the laws of nations, none under the quality of a sovereign prince can send any *ambassador*; a king that is deprived of his kingdom and royalty, hath lost his right of legation. No subject, though ever so great, can send or receive an *ambassador*; and if a viceroy does it, he will be guilty of high treason: the electors and princes of *Germany*, have the privilege of sending and reception of *ambassadors*; but it is limited only to matters touching their own territories, and not of the state of the empire. It is said there can be no *ambassador* without letters of credence from his sovereign, to another that hath sovereign authority: and if a person be sent from a king or absolute potentate, though in his letters of credence he is termed an agent, yet he is an ambassador, he being for the public. 4 *Inst.* 153.

Ambassadors may, by a precaution, be warned not to come to the place where sent; and if they then do it, they shall be taken for enemies; but being once admitted, even with enemies in arms, they shall have the protection of the laws of nations, and be preserved as princes. *Moll.* 146. If a banished man be sent as an *ambassador* to

the place from whence he is banished, he may not be detained or molested there. 4 *Inst.* 153. But if he be not *received* or *admitted* as ambassador, he has no privilege as such; and an ambassador may be refused in respect of him by whom sent; or in respect of the person sent; as if he is notoriously flagitious; or if he be disagreeable to the state to which he is sent. An ambassador ought not however to be refused without cause. See *Grotius* and *Molloy*, cited *Comm. Dig.* tit. *Ambassador*. The killing of an *ambassador* has been adjudged high treason. 3 *Inst.* 8. Some *ambassadors* are allowed, by concession, to have jurisdiction over their own families; and their houses permitted to be sanctuaries; but where persons, who have greatly offended, fly to their houses, after demand and refusal to deliver them up, they may be taken from thence. *Ambassadors* cannot be defended when they commit any thing against the state, or the person of the king with whom they reside. 4 *Inst.* 152. An *ambassador*, guilty of treason against the king's life, may be condemned and executed; but for other treasons he shall be sent home, with demand to punish him, or to send him back to be punished. 4 *Inst.* 152. 1 *Roll. Rep.* 185.

If a foreign *ambassador* commits any crime here, which is *contra jus gentium*, as treason, felony, &c. or any other crime against the law of nations, he loseth the privilege of an *ambassador*, and is subject to punishment as a private alien; and he need not be remanded to his sovereign, but of curtesy. *Danv. Abr.* 327. But if a thing be only *malum prohibitum* by an act of parliament, private law, or custom of the realm, and it is not *contra jus gentium*, an *ambassador* shall not be bound by them. 4 *Inst.* 153. And it is said *ambassadors* may be excused of practices against the state where they reside, (except it be in point of conspiracy, which is against the law of nations,) because it doth not appear whether they have it *in mandatis;* and then they are excused by necessity of obedience. *Bac. Max.* 26.

By the civil law, the person of an *ambassador* may not be arrested; and the moveable goods of *ambassadors*, which are accounted an accession to their persons, cannot be seized on, as a pledge, nor for payment of debts, though by leave of the king or state where they are resident; but on refusal of payment, letters of request are to go to his master, &c. *Molloy*, 157. *Danv.* 328. The law of nations touching *ambassadors* in its full extent, is part of the law of *England;* and the act 7 *Ann. c.* 12. is only declaratory. *Barbuit's* case, *Rep. temp.* Ld. *Talb.* 281. and see 3 *Burr.* 1748.

By our statute law, (stat. 7 *Ann. c.* 12.) an *ambassador*, or public minister, or his domestic servants, registered in the secretary's office, and thence transmitted to the sheriff's office of *London* and *Middlesex*, are not to be *arrested;* if they are, the process shall be void, and the persons suing out and executing it, shall suffer such penalties and corporal punishments as the lord chancellor or either of the chief justices shall think fit. Also the goods of an *ambassador*, shall not be distrained. *Stat. ibid.* See 1 *Comm.* 254. The persons claiming privilege as servants of an *ambassador*, must be such as are really and *bona fide* retained and registered in that capacity; and the act itself expressly prohibits its extension to merchants and traders liable to the statutes of bankruptcy. See *Fitzgib.* 200. *Stra.* 797. 1 *Wils.* 20. 78, 79. 3 *Wils.* 33. 2 *Stra.* 797. 2 Ld. *Raym.* 1524. 3 *Burr.* 1676. 4 *Burr.* 2016, 2017. and *Comm. Dig.* tit. *Ambassador*.

AMBIDEXTER, Lat. One that plays on both sides. In a legal sense, it is taken for a juror or embraceor, who takes money of the parties for giving his verdict; see tit. *Juries*, stat. 5 *Edw.* III.

AMBRA, Sax. *amber*, Lat. *amphora.*] A vessel among the *Saxons*; it contained a measure of salt, butter, meal, beer, &c. *Leg. Inæ West. Sax.*

AMBRY, The place where the arms, plate, vessels, and every thing which belonged to house-keeping were kept; and probably the *ambry* at *Westminster* is so called, because formerly set apart for that use: or rather the *aumonery*, from the *Latin eleemosynaria*, a house adjoining to an abbey, in which the charities were laid up for the poor.

AMENABLE, Fr. *amener.* To bring or lead unto; or *amainable*, from the Fr. *Main*, a hand.] Signifies tractable, that may be led or governed; and in our books it is commonly applied to a woman, that is governable by her husband. *Cowel Interp.* It also, in the modern sense, signifies to be responsible, or subject to answer, &c. in a court of justice.

AMENDMENT, *emendatio.*] The correction of an error committed in any process, which may be *amended* after judgment; and if there be any error in giving the judgment, the party is driven to his writ of error; though where the fault appears to be in the clerk who writ the record, it may be *amended. Terms de Ley*, 39.

At common law there was little room for amendments, which appears by the several statutes of *amendments and jeofails*, and likewise by the constitution of the courts; for, says *Britton*, the judges are to record the parols [or pleas] deduced before them in judgment; also, says he, *Edw.* I. granted to the justices to record the pleas pleaded before them, but they are not to erase their records, nor amend them, nor record against their inrollment, nor any way suffer their records to be a warrant to justify their own misdoings, nor erase their words, nor amend them, nor record against their inrollment. This ordinance of *Edw.* I. was so rigidly observed, that when justice *Hengham*, in his reign, moved with compassion for the circumstances of a poor man who was fined 13*s.* 4*d.* erased the record, and made it 6*s.* 8*d.* he was fined 800 marks, with which, it is said, a clock-house at *Westminster* was built, and furnished with a clock; but as to the clock, it has been denied by authors of credit, clocks not being in use till a century afterwards. Notwithstanding what is mentioned above, there were some cases that were amendable at common law.

Original writs are not *amendable* at common law, for if the writ be not good, the party may have another; judicial writs may and have been often *amended.* 8 *Rep.* 157.

Whatever at common law *might be* amended *in civil cases*, *was at* common law *amendable in criminal cases*, and so it is at this day: resolved by *Holt*, Ch. J. *Powell*, and *Powis*, J. 1 *Salk.* 51. *pl.* 14.

Though *misawarding of process on the roll* might be amended at common law the *same term*, because it was the act of the court; yet if any clerk at common law issued out an *erroneous process on a right award of the court*, that was never amended in any case at the common law. 1 *Salk.* 51. *pl.* 14.

Anciently all pleas were *ore tenus* at the bar; and then if any error was spied in them, it was presently amended. Since that custom is changed, the motion, to amend, because all in paper, succeeded in the room of it; and it is a motion that the court cannot refuse; but they may refuse it if the party desiring it *refuse to pay costs*, or the amendment desired should amount to a *new plea.* 10 *Mod.* 88.

Mistakes are now effectually helped by the statutes of amendment and *jeofails*; the latter so called, because when a pleader perceived any slip in the form of his proceeding, and acknowledges such error,

(*jeo faile*, or *j'ai failli*;) he is at liberty by those statutes to amend it, which amendment is seldom actually made, but the benefit of the act is attained by the courts overlooking the exception. 2 *Stra.* 1011. These statutes are in the whole, 12 in number, and are here recapitulated chronologically, by which all trifling exceptions are so thoroughly guarded against, that writs of error cannot since be maintained, but for some material mistake assigned. 3 *Comm.* 407. which see, and *Buller's Ni. Pri.* (ed. 1793.) 320. and for a more extended view of the cases, in which amendments may or may not be made. See *Comm. Dig.* tit. *Amendment.*

By stat. 14 *Edw.* III. c. 6. no process shall be annulled or discontinued, by the misprision of the clerk in mistaking in writing one syllable or one letter too much or too little; but it shall be amended.

The judges afterwards construed this statute so favourably, that they *extended it to a word*; but they were not so well agreed, whether they could make these amendments, as well *after* as *before*, judgment: for they thought their authority was determined by the judgment; therefore by stat. 9 *Hen.* V. c. 4. it is declared that the judges shall have the same power, as well after as before judgment, as long as the record in process is before them. *Gilb. H. C. P.* 110.

This statute is confirmed by statute 4 *Hen.* VI. c. 3. with an exception, that it shall not extend to process on outlawry, or to records or processes in *Wales*. But according to 2 *Sand.* 40. this last exception, and the like exception in 8 *Hen.* VI. c. 15. seem to be annulled by the statute 27 *Hen.* VIII. c. 26. by which it is enacted, that the laws of *England* shall be used, practised, and executed in *Wales*.

Though the foregoing statutes gave the judges a greater power than they had before, yet it was found that they were too much cramped, having authority to amend nothing but *process*, which they did not construe in a large signification, so as to comprehend the whole proceedings in real and personal actions, and criminal and common pleas, but confined it to the *mesne process and jury process*; 8 Co. 157. a. And therefore, to enlarge the authority of the courts, the statute 8 *Hen.* VI. c. 12. gives power to amend what they shall think in their discretion to be the misprision of their clerks, in any record, process and plea, warrant of attorney, writ, panel, or return. *Gilb. H. C. P.* 110.

There are only two statutes of amendments, *viz.* 14 *Edw.* III. stat. 1. c. 6. and 8 *Hen.* VI. c. 12. and 15. the rest are reckoned to be statutes of *jeofails*, and not of amendments; *per Powell*, J. 1 *Salk.* 51. *pl.* 14. *Mich.* 3 *Ann. B. R.* in the case of *The Queen* v. *Tutchin*. And *ibid.* he held that the 8 *Hen.* VI. was only to enlarge the subject matter of 14 *Edw.* III. and that 14 *Edw.* III. extends only to process out of the roll, *viz.* writs that issue out of the record, and not to proceedings in the roll itself: but that the 14 *Edw.* III. extends not to the king, because of these words, (*challenge of the party*,) and that the statute 8 *Hen.* VI. has always been construed in limitation of the act of *Edw.* III. and the exception in the statute of *Hen.* VI. was only *ex abundanti cautela*; and all judges and sages of the law in all ages have taken it not to extend to the crown; and the cases on the other side are not to be relied upon.

By stat. 8 *Hen.* VI. c. 15. "The king's justices, before whom any misprision shall be found, be it in any records and processes depending before them, as well by way of error as otherwise, or in the returns of the same, by sheriffs, coroners, bailiffs of franchises, or any other, by misprision of the clerks of any of the said courts, or of the

sheriffs, coroners, their clerks, or other officers, clerks, or other ministers whatsoever, in writing one letter or one syllable too much or too little, shall have power to amend the same."

As these statutes only extend to what the justices should interpret the misprision of their clerks and other officers, it was found by experience, that many just causes were overthrown *for want of form*, and other failings, not aided by this statute, though they were good in substance, and therefore the statutes of *jeofail* were made. *Gilb. H. C. P.* 111.

By stat. 32 *Hen.* VIII. *c.* 30. it is enacted, "That if the jury have once passed upon the issue, though afterwards there be found a *jeofaile* in the proceedings, yet judgment shall be given according to the verdict." The stat. 18 *Eliz. c.* 14. ordains, "That after verdict given in any court of record, there shall be no stay of judgment, or reversal, for want of form in a writ, count, plaint, &c. or for want of any writ original or judicial; or by reason of insufficient returns of sheriffs," &c. By stat. 21 *Jac.* I. *c.* 13. "If a verdict shall be given in any court of record, the judgment shall not be stayed or reversed for variance in form between the original writ or bill and the declaration, &c. or for want of averment of the party's being living, so as the person is proved to be in life; or for that the *venire facias* is in part misawarded; for misnomer of jurors, if proved to be the persons returned; want of returns of writs, so as a panel of jurors be returned and annexed to the writs; or for that the return officer's name is not set to the return, if proof can be made that the writ was returned by such officer," &c.

The stat. 16 and 17 *Car.* II. *c.* 8. (called by *Twisden*, J. an omnipotent act, 1 *Vent.* 100. and made perpetual by stat. 22 and 23 *Car.* II. *c.* 4.) enacts, "That judgment shall not be stayed or reversed after verdict in the courts of record at *Westminster*, &c. for *default in form*; or for that there are not pledges to prosecute upon the return of the original writ, or because the name of the sheriff is not returned upon it, for default of alleging and bringing into court of any bond, bill or deed, or of alleging or bringing in letters testamentary, or of administration; or for the omission of *vi* and *armis*, or *contra pacem*, mistaking the christian name or surname of either party, or the sum of money, day, month, or year, &c. in any declaration or pleading, being rightly named in any record, &c. preceding; nor for want of the averment of *hoc paratus est verificare*, or for not alleging *prout patet per recordum*, for want of profert of deeds, (stat. 4 and 5 *Ann.*) see *Willes's Rep.* 125. *n.* (*d*), for that there is no right *venire*, if the cause was tried by a jury of the proper county or place; nor shall any judgment after verdict, by confession, *cognovit actionem*, &c. be reversed for want of *misericordia* or *capiatur*, or by reason that either of them are entered, the one for the other, &c. but all such defects, *not being against the right of the matter of the suit*, or *whereby the issue or trial are altered*, shall be *amended* by the judges; though not in suits of *appeal*, of *felony*, *indictments*, and *informations*, on *penal statutes*, which are excepted out of the act.

By stat. 4 and 5 *Ann. c.* 16. all the statutes of *jeofails* shall extend to judgments entered by confession, *nil dicit*, or *non sum informatus* in any court of record, and no such judgment shall be reversed, nor any judgment or writ of inquiry of damages thereon shall be stayed for any defect which would have been aided by those statutes, if a verdict had been given, so as there be an original writ filed, &c. By stat. 9 *Ann. c.* 20. § 7. this act, and all other statutes of *jeofails*, are

extended to writs of *mandamus* and *informations* in the nature of a *quo warranto*. The statutes of amendment and *jeofails* not being construed to extend to criminal proceedings, or on penal statutes in general. *Bull. N. P.* 325. 2 *Mod.* 144. But a *mandamus* may not be amended after return. 4 *Term Rep.* 689. The stat. 5 *Geo.* I. *c.* 13. ordains, that, after verdict given, judgment shall not be stayed or reversed for defect in form or substance in any bill or writ, or for variance therein from the declaration, or any other proceedings. 25 *Geo.* III. *c.* 80. § 17. *Imp. K. B.* 173. (1).

An action for a false return of a member of parliament on the stat. 7 and 8 *Wm.* III. for double damages, is remedial, though founded on a law that is penal, so within the statutes of *jeofails*. 1 *Wils.* 125.

By the foregoing statutes (from 14 *Edw.* III. *c.* 6. to 8 *Hen.* VI. *c.* 15.) the faults and mistakes of clerks are in many cases *amendable*: the misprision of a clerk in matter of fact is *amendable*; though not in matter of law. *Palm.* 258. If there be a mistake in the legal form of the writ, it is not *amendable*: there is a diversity between the negligence and ignorance of the clerk that makes out writs; for his negligence, (as if he have the copy of a bond, and do not pursue it,) this shall be *amended*; but his ignorance in the legal course of original writs is not *amendable*. 8 *Rep.* 159. A party's name was mistaken in an original writ; and it appearing to the court that the cursitor's instructions were right, the writ was *amended* in court; and they *amended* all the proceedings after. 2 *Vent.* 152. *Cro. Car.* 74. If a thing, which the plaintiff ought to have entered himself, being a matter of substance, be totally omitted, this shall not be *amended*; but otherwise it is, if omitted only in part, and misentered. *Danv. Abr.* 346. By the common law a writ of error, returned and filed, could not be *amended*; because it would alter the record: but now by stat. 5 *Geo.* I. the writs of error, wherein there shall be any variance from the original record, or other defect, may be *amended* by the court where returnable. See tit. *Error*.

In an *assumpsit*, the defendant pleads *Not Guilty*, thereupon issue is joined, and found for the plaintiff, he shall have judgment, though it is an improper issue in this action; for as there is a deceit alleged, Not Guilty is an answer thereto, and it is but an issue *misjoined*, which is aided by statute. *Cro. Eliz.* 407. If in debt upon a *single bill*, the defendant pleads *payment, without an acquittance*, and issue is joined and found for the plaintiff, though the payment without acquittance is no plea to a single bill, he shall have judgment, because the issue was joined upon an affirmative and a negative and a verdict for the plaintiff. *Mich.* 37 and 38 *Eliz.* 5 *Rep.* 43. An ill plea and issue may be aided by the statute of *jeofails*, after a verdict: and if an issue joined be uncertain and confused, a verdict will help it. *Cro. Car.* 316. *Hob.* 113. The statutes likewise help when there is no original, and where there is no bill upon the file, it is aided after verdict by statute, but when there is an original, which is ill, that is not aided. *Cro. Jac.* 185. 480. *Cro. Car.* 282. The statute of *jeofails*, 16 and 17 *Car.* II. helps a mistrial in a proper county, but not where the county is mistaken. 1 *Mod.* 24.

When the award of a writ of inquiry on the roll is good, the writ shall be *amended* by the roll. *Carth.* 70. The court cannot *amend* to make a new writ; or to alter a good writ, and adapt it to another purpose, &c. only when the writ is bad and vitious on the face of it. *Mod. Cas.* 263. 316. *Annaly*, 367.

With respect to *declarations*, a declaration grounded on an original writ may not be *amended*, if the writ be erroneous: though if it be on a bill of *Middlesex*, or a *latitat*, it is *amendable*. 1 *Lill. Abr.* 67.

A plaintiff may *amend* his declaration in matter of form after a general issue pleaded, before entry thereof, without payment of costs; if he *amend* in substance he is to pay costs, or give imparlance; and if he *amend* after a special plea, though he would give imparlance, he must pay costs. 1 *Lill.* 58. 1 *Wils.* 78. *Imp. K. B.* 181. A declaration in ejectment, laid the demise before the time; this was not *amendable*, for it would alter the issue, and make a new title in the plaintiff. 1 *Salk.* 48. The plaintiff declared on the statute of *Winton*, for a robbery done to himself, when it should have been of his servants; he had leave to *amend*. 3 *Lev.* 347. If a defendant pleads a plea to the right, or in abatement, the plaintiff may *amend* his declaration; but not where he demurs, for this fault may be the cause of the demurrer. 1 *Salk.* 50. A demurrer may be *amended* after the parties have joined in demurrer, if it be only in paper. *Sty.* 48. Where a plea shall be *amended*, when in paper, or on record, &c. see the statute 4 *Geo.* II. *c.* 26.

As to the amendments of *records*, &c. an issue entered upon record with leave of the court, may be *amended*; but not in a material thing, or in that which will deface the record. 1 *Lill. Abr.* 61. A record may be *amended* by the court in a small matter, after issue joined, so as the plea be not altered. *Danv. Abr.* 338. See the stat. 8 *Hen.* VI. *c.* 12. 15. *ante*. If on a writ of error a record is *amended* in another court in affirmance of the judgment, it must be *amended* in the court where judgment was given. *Hardr.* 505. Where the record of *Nisi Prius* does not agree with the original record, it may be *amended* after verdict, provided it do not change the issue: but a record shall not be *amended* to attaint the jury, or prejudice the authority of the judge. A general or special verdict may be *amended* by the notes of the clerk of assise in civil causes; but not in criminal actions. 1 *Salk.* 47. The issue roll shall be *amended* by the imparlance roll which is precedent; but a roll may not be *amended* after verdict, when there is nothing to *amend* it by; though surplusage may be rejected, and so make it good. *Cro. Car.* 92. 1 *Sid.* 135.

In an action on the statute of *usury*, a verdict was given for the plaintiff, and taken on one of the counts in the declaration. The other counts being found for defendant. Motion in *arrest* of *judgment*. The principal cause was, the *christian* name of one of the persons mentioned in that count (rightly named, in that count, before) was mistaken in the *issue roll*, which had been carried in, whereby the count was rendered absurd, and bad. The court gave leave to file a *right bill*, (the proceedings being by *bill*,) and afterwards amended the *issue roll* by the bill. The *Nisi Prius* roll was right. *Gardner, qui tam*, v. *Brown*, *B. R. Trin.* term, 15 *Geo.* III. This was done as an *amendment* at *common law*.

A mistake of the clerk in entering a judgment; as where it was that the defendant recovered, instead of the plaintiff, &c. was ordered to be *amended*. *Cro. Jac.* 631. *Hutt.* 41. A judgment may be *amended* by the paper book signed by the master. 1 *Salk.* 50. At common law, the judges may *amend* their judgments of the same term; and by statute, of another term. 8 *Rep.* 156. 14 *Edw.* III. If judgments are not well entered, on payment of costs they will be ordered to be so: when judgments are entered, 'tis said the defects therein, being the act of the court, and not the misprision of the clerk, are not

amendable. *Golsb*. 104. Mistakes in returns of writs, fines and recoveries made by mutual assent of parties may be amended. 5 *Rep*. 45. Judgment shall not be staid after verdict, for that an original wants form, or varies from the record in point of form, which are *amendable*. 5 *Rep*. 45. After verdict given in any court of record there shall be no stay of judgment for want of form in any writ, or insufficient returns of sheriffs, variance in form between the original writ and declaration, &c. stat. 32 *Hen*. VIII. 18 *Eliz*. *Vide* 5 *Geo*. I. *c*. 13. The *postea* may be amended by the judge's notes. 1 *Wils*. 33. 2 *Stra*. 1197. *S. C*. As to amendments in informations by the attorney-general, see 4 *Term Rep*. 457, 458.

Amendments are usually made in *affirmance* of judgments; and seldom or never to destroy them: and where *amendments* were at common law, the party was to pay a fine for leave to *amend*. 3 *Salk*. 29.

A bill of *Middlesex*, filed of record as of 24 *Geo*. III. when it ought to have been of the 25th, may be amended agreeable to the truth. *Green* v. *Remet*, 1 *Term Rep*. 782. There is a distinction between amending those mistakes which are occasioned by the act of the party, and those which are occasioned by the act of the clerk. As in the case of execution, if the clerk enter judgment *de bonis propriis*, instead of *de bonis testatoris*, and error is brought, the court of *K. B*. will order the entry to be amended, even if the record is sent back from the Exchequer chamber. *Ibid. per Buller*, J.

After argument on demurrer, and before the court gave judgment, leave was given to amend. *Stra*. 954.

Pleas and replications may also be amended in the same manner. Ld. *Raym*. 1441.

After verdict found on some issues, and demurrer argued as to others, application made to withdraw the demurrer and plead, court refused. 1 *Burr*. 316.

The court will not allow plea to be amended after demurrer when the plaintiff has lost a trial. *Rep. in temp. Hard*. 171.

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

If the award of the writ of inquiry on the roll be right, the teste of the writ, if wrong, shall be amended by it. *Johnson* v. *Toulmin*, 4 *East*, 173.

AMERCIAMENT, *amerciamentum*, (from the Fr. *merci*.) signifies the pecuniary punishment of an offender against the king or other lord in his court, that is found to be in *misericordia*, *i. e*. to have offended, and to stand at the *mercy* of the king or lord. The author of *Terms de Ley* saith, that *amerciament* is properly a penalty assessed by the peers or equals of the party *amerced*, for the offence done; for which he putteth himself at the mercy of the lord. *Terms de Ley*, 40. And by the statute of *Magna Charta*, *c*. 14. a freeman is not to be *amerced* for a small fault, but proportionable to the offence, and that by his peers. 9 *Hen*. III. *c*. 4. *Amerciaments* are a more merciful penalty than a fine; for which if they are too grievous, a release may be sued by an ancient writ founded on *Magna Charta*, called *moderata misericordia*. See *New Nat. Brev*. 167. *F. N. B*. 76. The difference between *amerciaments* and fines, is this; fines are said to be punishments certain, and grow expressly from some statute; but *amerciaments* are such as are arbitrarily imposed. *Kitch*. 78. Also fines are imposed and assessed by the court; *amerciaments* by the country; and

no court can impose a fine, but a court of record: other courts can only *amerce*. 8 *Rep.* 39. 41.

A court-leet can *amerce* for public nuisances only. 1 *Saund.* 135. For a fine and all *amerciaments* in a court-leet, a distress is incident of common right; but for *amerciament* in a court-baron, distress may not be taken but by prescription. 11 *Rep.* 45. When an *amerciament* is agreed on, the lord may have an action of debt, or distrain for it, and impound the distress, or sell it at his pleasure; but he cannot imprison for it. 8 *Rep.* 41. 45. *Vide* the case of the *Duke of Bedford* v. *Alcock*, *B. R.* 1 *Wils.* 248. See tit. *Leet.*

There is also *amercement* in pleas in the courts of record, when a defendant delays to tender the thing demanded by the king's writs, on the first day. *Co. Lit.* 116. And in all personal actions without force, as in debt, detinue, &c. if the plaintiff be nonsuited, barred, or his writ abate for matter of form, he shall be *amerced:* but if on judicial process, founded on a judgment and record, the plaintiff be nonsuited, barred, &c. he shall not be *amerced.* 1 *Nels. Abr.* 206. And an infant, if nonsuited, is not to be *amerced. Jenk. Cent.* 258. The *capias pro fine* is taken away by 5 *Wm.* and *M. c.* 12.

The *amerciament* of the sheriff, or other officer of the king, for misconduct, is called *amerciament* royal. *Terms de Ley. Amerciaments* are likewise in several other cases. See tit. *Fines for Offences.*

AMESSE, see *Amictus.*

AMI, *vide Amy.*

AMICIA, see *almutium.*

AMICTUS, The uppermost of the six garments worn by priests, tied round the neck, and covering the breast and heart—Amictus, *alba*, *cingulum*, *stola*, *manipulus et planeta.*—These were the six garments of priests.

AMICUS CURIÆ. If a judge is doubtful or mistaken in matter of law, a stander-by may inform the court, as *amicus curiæ.* 2 *Co. Inst.* 178. In some cases, a thing is to be made appear by suggestion on the roll by motion; sometimes by pleading, and sometimes as *amicus curiæ.* 2 *Keb.* 548. Any one as *amicus curiæ* may move to quash a vitious indictment; for if there were a trial and verdict, judgment must be arrested. *Comb.* 13. A counsel urged, that he might, as *amicus curiæ*, inform the court of an error in proceedings, to prevent giving false judgment; but was denied, unless the party was present. 2 *Show. Rep.* 297.

AMITTERE LEGEM TERRÆ, or LIBERAM LEGEM, To lose and be deprived of the liberty of swearing in any court: as to become infamous, renders a person incapable of being an evidence. *Vide Glanvil, lib.* 2. And see the statute 5 *Eliz. c.* 9. against perjury. So a man that is outlawed, &c. is said *to lose his law, i. e.* is put out of the protection of the law, at least so far as relates to the suing in any of his majesty's courts of justice, though he may be sued.

AMMOBRAGIUM, A service suggested by *Spelman* to be the same as *Chevage;* which see.

AMNESTY, *amnestia*, *oblivio.*] An act of pardon or *oblivion*, such as was granted at the restoration by King *Charles* II.

AMNITUM INSULÆ, Isles upon the west coast of *Britain. Blount.*

AMORTIZATION, *amortizatio*, Fr. *amortissement.*] An alienation of lands or tenements in mortmain, *viz.* to any corporation or fraternity, and their successors, &c. And the right of *amortization* is a

privilege or license of taking in mortmain. In the statute *de libertatibus perquirendis; anno* 27 *Edw.* I. stat. 2. the word *amortisement* is used.

AMORTISE, Fr. *amortir.*] To alien lands in mortmain.

AMPLIATION, *ampliatio.*] An enlargement; in law a referring of judgment till the cause is further examined.

AMY, *amicus.*] In law *prochein amy* is the next friend to be trusted for an infant. And infants are to *sue* by *prochein amy* (*i. e.* next friend) or *guardian*, and *defend* by *guardian*. *Alien amy* is a foreigner here, subject to some prince in friendship with us.

AN, JOUR and WASTE. See *Year, Day and Waste.*

ANCESTOR, *antecessor*, or *predecessor.*] One that has gone before in a family; but the law makes a difference between what we commonly call an ancestor and a predecessor; the one being applied to a natural person and his ancestors, and the other to a body politic and their predecessors. *Co. Lit.* 78. b.

ANCESTREL, What relates to or hath been done by one's ancestors; as *homage ancestrel*, &c.

ANCHOR, Is a measure of brandy, &c. containing ten gallons. *Lex Mercat.*

ANCHORAGE, *ancoragium.*] A duty taken of ships for the use of the haven where they cast anchor. *MS. Arth. Trevor, Arm.* The ground in ports and havens belonging to the king, no person can let any anchor fall thereon, without paying therefor to the king's officers.

ANCIENTS, Gentlemen of the *Inns* of *Court.* In *Gray's Inn* the society consists of *benchers, ancients, barristers, and students* under the bar; and here the *ancients* are of the oldest barristers. In the *Middle Temple*, such as have gone through, or are past their readings, are termed *ancients:* the inns of *Chancery* consist of *ancients* and students or clerks; and from the *ancients* one is yearly chosen the principal or treasurer.

ANCIENT DEMESNE, or *demain; vetus patrimonium domini.*] Is a tenure whereby all the manors belonging to the crown in the days of *St. Edward* and *William*, called the *Conqueror*, were held. The number and names of all manors, after a survey made of them, were written in the book of *Domesday;* and those which by that book appear to have at that time belonged to the crown, and are contained under the title *terra regis*, are called *ancient demesne. Kitch.* 98. The lands which were in the possession of *Edward the Confessor*, and were given away by him, are not at this day ancient demesne, nor any others, except those writ down in the book of *Domesday;* and therefore, whether such lands are ancient demesne or not, is to be tried only by that book. 1 *Salk.* 57. 4 *Inst.* 269. *Hob.* 188. 1 *Brownl.* 43. *F. N. B.* 16. *D.*

But if the question is, whether lands be parcel of a manor which is ancient demesne, this shall be tried by a jury. For 'parcel or not parcel' is matter of fact, 9 *Rep. case of the Abbot of Strata Marcella. Salk.* 56. 774. and see 2 *Burr.* 1046.

Fitzherbert tells us, that tenants in *ancient demesne* had their tenures from ploughing the king's lands, and other works towards the maintenance of the king's freehold, on which account they had liberties granted them. *F. N. B.* 14. 228. And there were two sorts of these tenures and tenants; one that held their lands freely by charter; the other by copy of court roll, according to the custom of the manor. *Brit.* c. 66. The tenants holding by charter cannot be impleaded out of their manor; for if they are, they may abate the writ by pleading their tenure: they are free from toll, for all things bought and sold con-

cerning their substance and husbandry. And they may not be impanelled upon any inquest. *F. N. B.* 14. If tenants in *ancient demesne* are returned on juries, they may have a writ *de non ponendis in assisis*, &c. and attachment against the sheriff. 1 *Rep.* 105. And if they are disturbed by taking duties of toll, or by being distrained to do unaccustomed services, &c. they may have writs of *monstraverunt*, to be discharged. See *F. N. B.* 14. *New Nat. Brev.* 32. 35. 4 *Inst.* 269. These tenants are free as to their persons; and their privileges are supposed to commence by act of parliament; for they cannot be created by grant at this day. 1 *Salk.* 57.

Lands in *ancient demesne* are extendible upon a statute merchant, staple or elegit. 4 *Inst.* 270. No lands ought to be accounted *ancient demesne* but such as are held in socage; and whether it be *ancient demesne* or not, shall be tried by the book of *Domesday*. A lessee for years cannot plead in *ancient demesne:* nor can a lord in action against him, plead *ancient demesne*, for the land is frank-fee in his hands. *Danv. Abr.* 660.

In real actions, ejectment, replevin, &c. *ancient demesne* is a good plea; but not in actions merely personal. *Danv.* 658. If in *ancient demesne* a writ of right close be brought, and prosecuted in nature of a *formedon*, a fine levied there by the custom, is a bar: and if this judgment be reversed in *C. B.* that court shall only adjudge that the plaintiff be restored to his action in the *court of ancient demesne;* unless there is some other cause, which takes away its jurisdiction. *Jenk. Cent.* 87. *Dyer*, 373. See the statutes 9 *Hen.* IV. *c.* 5. and 8 *Hen.* VI. *c.* 26. to prevent depriving lords in *ancient demesne* of their jurisdiction by collusion.

A fine in the king's courts will change *ancient demesne* to frank-fee at common law; so if the lord enfeoffs another of the tenancy; or if the land comes to the king, &c. 4 *Inst.* 270. See *Fine*. But if the lord be not a party, he may have a writ of *deceit*, and avoid the fine or recovery; for lands in ancient demesne were not originally within the jurisdiction of the courts of *Westminster;* but the tenants thereof enjoy this amongst other privileges, not to be called from the business of the plough by any foreign litigation. 1 *Roll. Abr.* 327. If the lord be party, then the lands become frank-fee, and are within the jurisdiction of the courts of *Westminster*, for the privilege of ancient demesne being established for the benefit of lord and tenant, they may destroy it at pleasure. 2 *Roll. Abr.* 324. 1 *Salk.* 57.

With respect to *pleading*, it is to be observed, that in all actions wherein, if the demandant recover, the lands would be frank-fee, ancient demesne is a good plea. 1 *Roll. Abr.* 322.

Therefore in all actions real, or where the realty may come in question, ancient demesne is a good plea; as *assise*, writ of *ward of land*, writ of *account* against a bailiff of a manor, writ of *account* against a guardian, &c. See 4 *Inst.* 270. 1 *Roll. Abr.* 322, 323.

In *replevin*, ancient demesne is a good plea; because by intendment the freehold will come in question. *Godb.* 64. 1 *Bulst.* 108.

In an *ejectione firmæ*, ancient demesne is a good plea; for by common intendment the right and title of the lands will come in question; and if in this action it should not be a good plea, the ancient privileges of those tenants would be lost, inasmuch as most titles at this day are tried by *ejectment*. *Hob.* 47. 1 *Bulst.* 108. *Hett.* 177. *Cro. Eliz.* 826.

But in all actions merely personal, as *debt* upon a lease, *trespass quare clausum fregit*, &c. ancient demesne is no plea. *Hob.* 47. 5 *Cro.* 105. For further matter, see *Kyd's Com. Dig.* tit. *Ancient Demesne*.

ANCIENTY, Fr. *Ancienté, Lat. Antiquitas.*] Eldership or seniority. This word is used in the stat. of *Ireland*, 14 *Hen.* III.

ANDENA, A swath in mowing: it likewise signifies as much ground as a man can stride over at once.

ANELACIUS, A short knife or dagger. *Mat. Paris*, 277.

ANFELDTYHDE, or according to *Somner*, *Anfealtihle*, a simple accusation; for the *Saxons* had two sorts of accusations, *viz. simplex* and *triplex:* that was called single, when the oath of the criminal and two more was sufficient to discharge him; but his own oath, and the oaths of five more were required to free him *à triplici accusatione. Blount.* See *Leg. Adelstani, c.* 19. *apud Brompton.*

ANGARIA, Fr. *Angaire;* interpreted *Personal Service.*] A troublesome vexatious duty or service which tenants were obliged to pay their lords; and they performed it in their own persons. Impressing of ships. *Blount.* See also *Spelman and Cowel;* the former of whom gives some fanciful derivations under this word; and *vide Perangaria.* It seems that it may be easily and rationally derived from *Angor.* Lat.

ANGELICA VESTIS, A monkish garment which laymen put on a little before their deaths, that they might have the benefit of the prayers of the monks. It was from them called *angelicus*, because they were called *angeli*, who by their prayers *animæ saluti succurrebant.* And the word *succurrendum*, in our old books, is understood of one who had put on the habit, and was near death. *Monasticon*, 1 *tom. p.* 632.

ANGEL, An ancient *English* coin value 10*s.*

ANGILD, *Angildum.*] The bare single valuation or compensation of a criminal: from the Sax. *An* one, and *gild*, payment, mulct, or fine. *Twigild* was the double mulct or fine; and *trigild* the treble, according to the rated ability of the person. *Laws of Ina, c.* 20. *Spelm.*

ANHLOTE, A single tribute or tax. The words *anhlote* and *anscot* are mentioned in the laws of *William the Conqueror;* and their sense is, that every one should pay, according to the custom of the country, his part and share, as scot and lot, &c. *Leg. W.* I. *c.* 64.

ANIENS, Fr.] Void, being of no force. *F. N. B.* 214.

ANN or ANNAL, is half a year's stipend, over and above what is owing for the incumbency due to a minister's relict, child, or nearest of kin after his decease. *Scotch Dict.*

ANNALES, Yearlings, or young cattle from one to two years old.

ANNATS, *Annates.*] This word has the same meaning with first fruits, stat. 25 *Hen.* VIII. *c.* 20. The reason of the name is, because the rate of the first fruits paid for spiritual livings, is after the value of one *year's* profit.

ANNEALING OF TILE, stat. 17 *Edw.* IV. *c.* 4. From the Saxon *Onælan, Accendere*, signifies the burning or hardening of tile.

ANNIENTED, from the *Fr. Anéantir.*] Abrogated, frustrated, or brought to nothing. *Lit. sect.* 741.

ANNIVERSARY DAYS, *Dies Anniversarii.*] Solemn days appointed to be celebrated yearly in commemoration of the death or martyrdom of saints: or the days whereon, at the return of every year, men were wont to pray for the souls of their deceased friends, according to the custom of the *Roman Catholics*, mentioned in the statute of 1 *Edw.* VI. *c.* 14. This was in use among our ancient *Saxons*, as may be seen in *Lib. Rames. sect.* 134. The *anniversary*, or yearly return of the day of the death of any person, which the religious registered in their *obitual* or *martyrology*, and annually observ-

ed in gratitude to their founders and benefactors, was by their forefathers called a *year-day* and a *mind-day*, *i. e.* a memorial day.

ANNI NUBILES. See tit. *Age*.

ANNO DOMINI The computation of time from the incarnation of our Saviour; which is generally inserted in the dates of all public writings, with an addition of the year of the king's reign, &c. The *Romans* began their *æra* of time from the building of *Rome*; the *Grecians* computed by *Olympiads*, and the *Christians* reckon from the birth of *Jesus Christ*.

ANNOISANCE, ANNOYANCE, or *Noisance*, *Nuisance*, thus termed in stat. 22 *Hen.* VIII. *c.* 5. *Vide* tit. *Nuisance* and *Highways*.

ANNUA PENSIONE, An ancient writ for providing the king's chaplain unpreferred with a pension. It was brought where the king had due to him an *annual pension* from an *abbot* or prior, for any of his chaplains whom he should nominate (being unprovided of livings) to demand the same of such abbot or prior. *Terms de Ley*, 43. *Reg. Orig.* 165. 307.

ANNUALE, ANNUALIA, A yearly stipend, anciently assigned to a priest for celebrating an anniversary, or for saying continued masses one year, for the soul of a deceased person.

ANNUITY, *Annuus redditus*; A yearly payment of a certain sum of money, granted to another for life, for years, or in fee, to be received of the grantor or his heirs, so that no freehold be charged therewith; whereof a man shall never have assise or other action, but a writ of *annuity*. *Terms de Ley*, 44. *Reg. Orig.* 158. *Co. Lit.* 144. b.

To make a good grant of an *annuity*, no particular technical mode of expression is necessary. For if a man grants *an annuity to another, to be received out of his coffers*, or *to be received out of a bag of money*, or *to be received of a stranger*, yet this is sufficient to charge his person, and the subsequent words shall be rejected. 1 *Roll. Abr.* 227.

If a man grant a rent out of land, in which he has nothing, *proviso that he be not charged for this in a writ of annuity*, it shall be a good annuity; for the proviso, being repugnant, is void. *Co. Lit.* 146. a. 2 *Bulst.* 149. See 6 *Co.* 58. b.

If a man grant a *rent-charge out of his land*, the grantee has an election to take it as a rent; or as an annuity. *Lit.* § 219. 2 *Bulst.* 148. 2 *Comm.* 40.

The treatise called *Doctor and Student*, *dial.* 1. *cap.* 3. shows several differences between a rent and an *annuity*, *viz.* that every rent is issuing out of land; but an *annuity* chargeth the person only, as the grantor and his heirs, who have assets by descent.

If no lands are bound for the payment of an *annuity*, a distress may not be taken for it. *Dyer*, 65.

But if an *annuity* issue out of land, (which of late it often doth,) the grantee may bring a writ of annuity, and make it personal, or an assise, or distrain, &c. so as to make it real. *Co. Lit.* 144. And if the grantee take a distress, yet he may afterwards have a writ of *annuity*, and discharge the land, if he do not avow the taking, which is in nature of an action. 1 *Inst.* 145. But if the grantee of a rent bring an assise for it, he shall never after have writ of *annuity*; he having elected this to be a rent; so if the grantee of an *annuity* avow the taking of a distress in a court of record. *Danv. Abr.* 486. And if the grantee

purchase part of the land out of which an *annuity* is issuing, he shall never after have a writ of *annuity*. *Co. Lit.* 148.

Where a rent-charge, issuing out of lands, granted by tenant for life, &c. determines by the act of God; as an interest was vested in the grantee, it is in his election to make it a rent-charge, and so charge the lands therewith, or a personal thing to charge the person of the grantor in *annuity*. 2 *Rep.* 36. *A.* seised of lands in fee, he and *B.* grant an *annuity* or rent-charge to another; this *prima facie* is the grant of *A.* and confirmation of *B.* But the grantee may have a writ of *annuity* against both. If two men grant an *annuity* of 20*l. per ann.* although the persons be several, if the deed of grant be not for them severally, yet the grantee shall have but one *annuity* against them. *Co. Lit.* 144.

When a man recovers in a writ of *annuity* he shall not have a new writ of *annuity* for the arrears due after the recovery, but a *scire facias* upon the judgment, the judgment being always executory. 2 *Rep.* 37. No writ of *annuity* lieth for arrearages only when an *annuity* is determined, but for the *annuity* and arrearages. *Co. Lit.* 285. Though, if a rent-charge be granted out of a lease for years, it hath been adjudged that the grantee may bring *annuity* when the lease is ended. *Moor, cap.* 450. Where an *annuity* is granted to one for life, during the term he shall have a writ of *annuity*; and when that is determined, then his executors may have action of debt: for the realty is resolved into the personalty. 4 *Rep.* 49. *New. Nat. Brev.* 287.

If the annuitant of an *annuity* payable half-yearly, since the last term of payment, die before the half-year is completed, nothing is due for the time he lives. 3 *Atk.* 260. So if a grant be made to *A.* for life, to be paid at the feast of *Easter*, or within twenty days after, and he die after *Easter* within twenty days, it has been said his executor shall not have it, for the *last day* was the time of payment. *Dal.* 1.

Upon a rent created by way of reservation, no writ of *annuity* lies. *Danv.* 483. Writ of *annuity* may not be had against the grantor's heir, unless the grant be for him and his heirs; and there must be assets to bind the heir, by grant of *annuity* by his ancestor, when he is named. *Co. Lit.* 144. 1 *Roll. Abr.* 226. But it is otherwise in case of the grant of a rent out of land, or a grant of a rent whereof the grantor is seised, for this charges the land, but an annuity charges the person only. *Br. Charge, pl.* 54.

An *annuity* granted by a bishop, with confirmation of dean and chapter, shall bind the successor of the bishop. *New Nat. Brev.* 340. If the king grant an *annuity*, it must be expressed by whose hands the grantee shall receive it, as the king's bailiff, &c. or the grant will be void; for the king may not be sued, and no person is bound to pay it if not expressed in the patent. *New Nat. Brev.* 341. If, where an *annuity* is granted *pro decimis*, the grantor is disturbed of his tithes, the *annuity* ceaseth; and so it is where any *annuity* is granted to a person *pro consilio*, and the grantee refuseth to give counsel; for where the cause and consideration of the grant amounts to a condition, and the one ceases, the other shall determine. *Co. Lit.* 204.

There are now very few, if any, grants of *annuities*, without a covenant for payment, expressed or implied; and therefore where a distress cannot be made, or is not approved of, the grantee may bring an action of *covenant*, and recover the arrears in damages, with costs of suit. And that action is now usually brought, real actions and writs of *annuity* being much out of use.

ANNUITIES FOR LIFE. To guard against the fraudulent and oppressive practices of usurious money-lenders, exercised on young heirs and other necessitous persons entitled to property in expectancy, the legislature found it necessary to interpose by the following act.

By stat. 17 *Geo.* III. *c.* 26. a memorial of every deed, bond, or other assurance, whereby any annuity or rent-charge shall be granted *for life, or for term of years, or greater estate determinable on lives*, shall, within twenty days of the execution (exclusive of the day of execution ; 5 *Term Rep.* 283.) be inrolled in chancery ; such memorial to contain the date of the deed, the names of all the parties, and for whom any of them are trustees, and of *all* the witnesses ; and to set forth the annual sum to be paid, and the name of the person for whose life the annuity is granted, and the consideration ; otherwise every such deed and assurance shall be void. § 1, 2.

In every deed, &c. whereby an annuity shall be granted, the consideration really, (*which shall be in* MONEY *only*,) and also the name of the person by whom, and on whose behalf, the consideration shall be advanced, shall be set forth in words at length, otherwise such deed shall be *void*. § 3.

If any part of the consideration shall be (*directly or indirectly*) returned to, or retained by, the party advancing the same, or if the consideration, or any part, shall be in goods, the annuitant may apply to the court in which any action is brought, to stay proceedings, and the court may order the assurance to be cancelled, and any judgment obtained to be vacated. § 4.

All contracts for the purchase of any annuity with any *infant* under 21 years of age shall be UTTERLY VOID ; notwithstanding any attempt to confirm the same on the infant's coming of age. And all persons soliciting infants to grant annuities, or advancing money to them on condition of their granting annuities when of age, or engaging them by *oath* or promise not to plead infancy. And solicitors or brokers demanding gratuities for procuring money (beyond 10*s.* *per cent.*) shall all be judged guilty of *misdemeanors*, and liable to fine, imprisonment and corporal punishment. § 6, 7.

This act does not extend to any annuity given by will or marriage settlement, or for the advancement of a child ; nor to any secured on lands of equal annual value, whereof the grantor is seised in fee-simple or fee-tail *in possession*, or secured by actual transfer in the funds, the dividends being of equal value with the annuity ; nor to any *voluntary* annuity without pecuniary consideration, nor to annuities granted by corporations, or under act of parliament ; nor where the annuity does not exceed 10*l.* unless there be more than one to the same grantor, nor in trust for the same person. § 8.

A deed, not registered according to the directions of the above act, is absolutely void, and not merely voidable. 2 *Term Rep.* 603. See also 4 *Term Rep.* 463. 494. 500. 694. 790. 824.

Notes given as part of the consideration (which if actually given *bonâ fide* are to be understood as *money*) must be circumstantially set out in the memorial, that the court may see whether a full consideration was given or not. 3 *Term Rep.* 288. The redemption of a former annuity, at a higher price than it was purchased at, is a good consideration. 5 *Term Rep.* 283.

If the *security* be set aside for want of complying with the formalities of the act, the consideration, if fair and legal, may be recovered back by the grantee in action of *assumpsit*, against the person *actually*

receiving such consideration money, but not against a surety. 1 *Term Rep.* 732. 2 *Term Rep.* 366.

How far the act extends to annuities granted previous to its passing, see 1 *Term Rep.* 267, 268.

Where the grantee of an annuity, set aside for a defective registry, brings an action for money had and received, to recover back the consideration money paid for it, the grantor may, under a plea of set-off, set off the payments made in respect of such annuity, though for more than six years, unless the plaintiff reply the statute of limitations. *Hicks* v. *Hicks*, *M.* 43 *Geo.* III. 3 *East*, 16.

Where a rule *nisi* is obtained in *B. R.* for setting aside an annuity, the several objections thereto intended to be insisted on by counsel at the time of making such rule absolute, must be stated in the said rule *nisi*. *Reg. Gen. T.* 42 *Geo.* III.

For further matter relative to annuities in general, as well as those for life, see *Com. Dig.* tit. *Annuity*. See stat. 33 *Geo.* III. *c.* 14. as to the *Royal Exchange Assurance Annuity Company*; 39 *Geo.* III. *c.* 83. as to *Globe Insurance Company and Annuity*, &c.

ANNUITIES PUBLIC. See tit. *National Debt*.

ANNUITIES OF TEINDS, (or Tithes,) are ten *shillings* out of the boll of teind wheat, eight *shillings* out of the boll of beer, six *shillings* out of the boll of rye, oats and pease, allowed to the king yearly out of the teinds not paid to bishops, or set apart for other pious uses. *Scotch Dict.*

ANSEL, or *Ansul*. See *Aunsel-Weight*.

ANSWER. See tit. *Chancery*, *Equity*.

ANTEJURAMENTUM, and *Præjuramentum*. By our ancestors called *juramentum calumniæ*; in which both the accuser and the accused were to make this oath before any trial or purgation, *viz.* the accuser was to swear that he would prosecute the criminal; and the accused was to make oath on the very day that he was to undergo the ordeal, that he was innocent of the crime of which we was charged. *Leg. Athelstan, apud Lambard*, 23. If the accuser failed to take this oath, the criminal was discharged; and if the accused did not take his, he was intended to be guilty, and not admitted to purge himself. *Leg. Hen.* I. *c.* 66.

ANTIENT DEMESNE. See *Ancient Demesne*.

ANTISTITIUM, A word used for monastery in our old histories. *Blount*.

ANTITHETARIUS, Signifies where a man endeavours to discharge himself of the fact of which he is accused, by recriminating and charging the accuser with the same fact. This word is mentioned in the title of a chapter in the laws of *Canutus*, *cap.* 47.

APATISATIO, An agreement or compact made with another. *Upton*, *lib.* 2. *c.* 12.

APORIARE, To bring to poverty. *Walsingham*, in *Rich.* II. In another sense, to shun or avoid.

APOSTARE, To violate: *apostare leges*, and *apostatare leges*, wilfully to break or transgress, to apostatize from the laws. See *Leg. Edw. Confessoris*, *c.* 35.

APOSTATA CAPIENDO, A writ that formerly lay against one who, having entered and professed some order of religion, broke out again, and wandered up and down the country contrary to the rules of his order; it was directed to the sheriff for the apprehension of the offender, and delivery of him again to his abbot or prior. *Reg. Orig.* 71. 267.

APOTHECARIES, are exempted from serving offices. See tit. *Constable*, *Churchwarden*. Their medicines are to be searched and examined by the physicians chosen by the college of physicians, and if faulty, shall be burnt, &c. 32 *Hen.* VIII. *c.* 40. 1 *M. st.* 2. *c.* 9. See also statutes 10 *Ann. c.* 14. 10 *Geo.* I. *c.* 20. And *apothecaries* to the army are to make up their chests of medicines at *Apothecaries' Hall*, there to be opened, viewed, &c. under the penalty of 40*l.* See *Physicians*.

APPARATOR, or APPARITOR, A messenger that serves the process of the spiritual court. His duty is to cite the offenders to appear; to arrest them; and to execute the sentence or decree of the judges, &c. See stat. 21 *Hen.* VIII. *c.* 5.

If a monition be awarded to an apparitor, to summon a man, and he, upon the return of the monition, avers that he had summoned him, when in truth he had not, and the defendant be thereupon excommunicated; an action on the case at common law will lie against the apparitor for the falsehood committed by him in his office, besides the punishment inflicted on him by the ecclesiastical court for such breach of trust. *Ayl. Parerg.* 70. 2 *Bulst.* 264.

APPARATOR COMITATUS, An officer formerly called by this name; for which the sheriffs of *Buckinghamshire* had a considerable yearly allowance; and in the reign of Queen *Elizabeth*, there was an order of court for making that allowance; but the custom and reason of it are now altered. *Hale's Sher. Acco.* 104.

APPARLEMENT, from the Fr. *Pareillement*, *i. e.* in like manner.] A resemblance or likelihood; as *apparlement* of war. Stat. 2 *Rich.* II. *st.* 1. *c.* 6.

APPARURA, Furniture and implements. *Carrucarum apparura* is plough tackle, or all the implements belonging to a plough. *Blount.*

APPEAL, *Is used in two senses.*

1. It signifies the removal of a cause from an inferior court or judge to a superior. From the French verb *neuter*, APPELLER, of the same signification. As relative to this sense see the proper titles in this *Dictionary*. It may be well also in this place to observe the difference between an appeal from a court of equity, and a writ of error from a court of law. *First*, the former may be brought upon any interlocutory matter; the latter upon nothing but only a definitive judgment. *Secondly*, that on writs of error the House of Lords pronounces the judgment; on appeals it gives direction to the court below to rectify its own decree. 3 *Comm.* 55. See tit. *Writ of Error*, *Audita Querela*, &c.

2. When spoken of as a criminal prosecution, it denotes an accusation by a private subject against another for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the public. And in this sense it is derived from the *French* verb *active*, APPELLER, to call upon, summon, or challenge one. 4 *Comm.* 312. Or the accusation of a felon at common law by one of his accomplices, which accomplice was then called an approver. (See tit. *Accessary.*) *Co. Lit.* 287. See also *Bract. lib.* 3. *Brit. c.* 22. 25. *Staundf. lib.* 2. *c.* 6.

CRIMINAL APPEALS are either *capital* or *not capital*. But of the latter sort, appeals *de pace*, *de plagis*, *de imprisonamento*, and of *mayhem*, are now become *obsolete*, being turned into actions of trespass long since. *Leach's Hawk. P. C.* 2. 235. Of the last however a few words shall be said hereafter. Capital appeals are either of *Treason* or *Felony*. The latter may be subdivided into, 1. *Appeals of Death*, or,

as they are otherwise called, *Appeals of Murder*. 2. Appeals of *Larceny* or *Robbery*. 3. Appeals of *Rape*. 4. Appeals of *Arson*, which last are now entirely obsolete. 1 *Inst.* 288. a. and see 2 *Hawk. P. C.* c. 23.

This private process for the punishment of public crimes, probably had its origin in those times, when a private pecuniary satisfaction, or *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offences. As, therefore, during the continuance of this custom, a process was certainly given, for recovering the weregild by the party to whom it was due; it seems that when these offences, by degrees, grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation. 4 *Comm.* 313, 314.

It was also anciently permitted (as above hinted) for one subject to appeal another of *high treason*, either in the courts of common law (*Brit. c.* 22.) or in parliament; or for treasons committed beyond the seas, in the court of the high constable and marshal. The cognisance of appeals in the latter still continues in force; and so late as 1631, there was a trial by battle awarded in the court of chivalry on such appeal of treason; [By *Donald* Lord *Rae* against *David Ramsey*. *Rushw.* vol. 2. part. 2. p. 112.] But the cognisance of appeals for treason in the common law courts was virtually abolished by stat. 5 *Edw.* III. *c.* 9. and 25 *Edw.* III. [stat. 5. *c.* 4.] (1 *Hale*, *P. C.* 349. 359.) and in parliament expressly by stat. 1 *Hen.* IV. *c.* 14. See 4 *Comm.* 314.

On this subject Mr. *Kydd*, the ingenious editor of *Comyn's Digest*, makes the following useful remark. It does not appear that the appeal of treason is taken away by this statute (1 *Hen.* IV. *c.* 14.) or any other. The stat. 5 *Edw.* III. *c.* 9. only says that none shall be attached, &c. against the form of the great charter, and the laws of the land. The stat. 25 *Edw.* III. [stat. 5.] *c.* 4. goes a little farther, and says, "that none shall be taken by petition or suggestion to the king or to his council, but by indictment or presentment, or by process made by *writ original* at the common law." It is conceived that a writ of appeal *is* a writ original; (2 *Hawk.* 232. 5 *Burr.* 2643.) therefore if an appeal of treason was part of the common law, these statutes do manifestly not take it away. The stat. 1 *Hen.* IV. *c.* 14. applying only to appeals in parliament. See *Com. Dig.* tit. *Appeal*, (A. 1.)

However, as there has been no instance of any such appeal, before any court of common law, either since the making the stat. 1 *Hen.* IV. *c.* 14. nor for many years before, the law relating to such appeals seems wholly obsolete at this day. *Leach's Hawk. P. C.* 2. *c.* 23. § 29.

An *Appeal of Felony* may be brought for crimes committed either against the parties themselves, or their relations. The crimes against the parties themselves are *Larceny*, *Rape*, *Maihem*, and *Arson*. The *only* crime against one's relation, for which an appeal can be brought, is that of killing him, either by murder or manslaughter. 4 *Comm.* 314. (But this seems an unguarded assertion in the learned commentator, as an appeal is given to the *husband next of kin*, &c. by stat. in case of Rape. See *post*, III. *Appeal of Rape*.)

Appeal of Death cannot be brought by every relation, but only by the wife for the death of her husband. *Magna Charta*, *cap.* 34. or by the heir male for the death of his ancestor; which heirship was also confined by an ordinance of King *Henry* the first, to the four nearest degrees of blood. *Mirr. c.* 2. § 7. It is given to the wife on account of the loss of her husband; therefore if she marries again before or

pending her appeal, it is lost and gone ; (2 *Inst.* 68. 317.) or if she marries after judgment, she shall not demand execution. (2 *Hawk. P. C.* 243. by which it seems that the *court* may award execution *ex officio—sed dubitatur.*) The heir must also be heir male, and such a one as was the next heir *by the course of the common law* at the *time* of the *killing* of the ancestor, (*H. P. C.* 182.) But this rule has three exceptions. 1st. If the person killed leaves an innocent wife, she *only*; and not the heir, shall have the appeal. 2d. If there be no wife, and the heir be accused of the murder, the person who, next to him, would have been heir male, shall bring the appeal. 3d. If the wife kill her husband, the heir may appeal her of the death, (1 *Leon.* 326. 1 *Inst.* 33.) And by the stat. of *Glocester*, 6 *Edw.* I. *c.* 9. all appeals of death must be sued within a year and a day after the completion of the felony, by the death of the party ; which seems to be only declaratory of the old common law. 4 *Comm.* 314, 315.

These several appeals may be brought previous to any indictment ; and if the appellee be *acquitted* thereon, he cannot be afterwards indicted of the same offence. 2 *Hawk. P. C. c.* 35. § 15. [But if the appellant does not prosecute his appeal, or if he release to the appellant, the appellee *may* be indicted. 3 *Inst.* 131. *Staundf.* 147, 148.] But if a man be acquitted on an *indictment* for murder, or found guilty, and pardoned by the king, still he ought not (in strictness) to go at large, but be imprisoned, or let to bail, till the year and day be past, by virtue of stat. 3 *Hen.* VII. *c.* 1. in order to be furthering to answer an appeal for the same felony, though if he has been found guilty of manslaughter, on an indictment, and has had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed. 4 *Comm.* 315. (X.)

If the defendant on an indictment is convicted of manslaughter, and allowed his clergy, some of the books say the heir may lodge an *appeal* immediately before clergy had : and others say clergy ought to be granted, and that it is unreasonable an *appeal* should interpose presently to prevent judgment. 3 *Inst.* 131. If a person, immediately after the verdict of manslaughter, put in an *appeal* of murder, and before the *appeal* is arraigned, the defendant demands his benefit of clergy ; this is a good bar to *appeal*, and praying of clergy is having of clergy, though the court delay calling the party to judgment, &c. 1 *Salk.* 60. 62. *Kel.* 93. But formerly it was held, that the court might delay the calling a convict to judgment, and thereby hinder him from his clergy, and make him liable to an *appeal*, especially if the *appeal* were depending ; and where the record of a conviction of manslaughter is erroneous, or insufficient, &c. the offender cannot plead the conviction and clergy had therein, in bar of an *appeal* or second indictment, &c. 2 *Hawk. P. C. c.* 36. § 12. 14.

If the appellee be acquitted, the appellor (by stat. *Westm.* 2. 13 *Edw.* I. *c.* 12.) shall suffer one year's imprisonment, and pay a fine to the king, besides damages to the party ; and if the appellor be incapable to make restitution in damages, his abettors shall do it for him, and also be liable to imprisonment. This provision, as was foreseen by the author of *Fleta*, (*lib.* 1. *c.* 34. § 48.) proved a great discouragement to appeals ; so that thenceforward they ceased to be in common use. 4 *Comm.* 316.

If the appellee be found guilty, he shall suffer the same judgment as if he had been convicted by indictment; but with this remarkable difference ; that, on an indictment, the king may pardon and remit the execution ; but on an appeal, being the suit of a private subject,

to make atonement for the private wrong, the king can no more pardon it than he can remit the damages recovered in an action of battery. 4 *Comm.* 316. See 2 *Hawk. P. C. c.* 37. § 35. *Jenk.* 160. *pl.* 4. [But by the express provision of stat. 4 and 5 *Wm. & M. c.* 8. an accomplice convicting two others guilty of *robbery*, shall have the king's pardon, which shall be a good bar to an *Appeal of Robbery*.]

The punishment of the offender may however be remitted and discharged by the concurrence of all parties interested in the appeal. 1 *Hale's P. C.* See 4 *Comm.* 316. in *n.*

Having said thus much on the subject of appeals in general, the following miscellaneous matter may serve for further elucidation on, I. Appeals of Death; II. Appeals of Maihem; III. Appeals of Rape; IV. Appeals of Robbery. The student who wishes for the most ample information on this subject, must apply to *Hawkins's P. C.* vol. 2. and *Com. Dig.* tit. *Appeal.*

I. For the proceedings on an appeal of Death, see the case of *Bigby, Widow*, v. *Kennedy*, 5 *Burr.* 2643. where they are detailed much at length, and with great exactness.

At the common law, a woman as well as a man might have an appeal of death of any of her ancestors, and therefore the *son of a woman* shall at this day have an appeal, if he be heir at the death of the ancestor, for the son is not disabled, but the mother only; for the statute of *Mag. Chart. c.* 34. says *propter appellum fœminæ.* 2 *Inst.* 68. The husband shall not have appeal for the death of his wife, but the heir only. *Danv. Abr.* 1. 488.

The *judges* are so far *bound to take notice of this statute*, that if a woman brings an appeal of death of her father, or of any other besides her husband, they ought *ex officio* to abate it, though the defendant takes no exception to it. 2 *Hawk. P. C. cap.* 23. § 42.

A feme shall have appeal where she shall have no dower, as where she elopes from her baron. *Br. Appeal, pl.* 17. cites 50 *Edw.* III. 15. *per Ingleby.*

The wife is to be a wife *de facto*, to be entitled to *appeal.* 2 *Inst.* 68. 317. Where a woman has judgment in *appeal*, of the death of her husband, she cannot have execution if she do not personally pray it: a judge went to a woman great with child, to know if she would have execution? She said, yes, and the *appellee* was hanged. *Jenk. Cent.* 137.

An ideot, or a person born deaf and dumb, or one attainted of treason or felony, or outlawed in a personal action, so long as such attainder or outlawry continues in force, cannot bring any appeal whatsoever. *H. P. C.* 183. 2 *Hawk. P. C. c.* 23. § 30.

The *appellant* is to commence his *appeal* in person: but he may proceed by attorney, having a special warrant of attorney filed. 1 *Salk.* 60. The *appeal* must be brought in a year and a day after the death of the person murdered: and the count must set forth the fact, and the length and depth of the wound, the year, day, hour, place, where done, and with what weapon, &c. And that the party died in a year and a day. 2 *Inst.* 665. and stat. 6 *Edw.* I. *c.* 9. principal and accessaries before and after are to be joined in *appeal. Danv. Abr.* 493. And this is to be observed, though the accessary is guilty in another county. Stat. 3 *Hen.* VII. *c.* 1.

An *appeal* is prosecuted two ways; either by writ or bill: *appeal* by writ is, when a writ is purchased out of *chancery* by one for an

other, to the intent he may *appeal* a third person of some felony committed by him, finding pledges that he shall do it: *appeal* by bill is, where a man, of himself, gives up his accusation in writing, offering to undergo the burden of *appealing* the person therein named. *Bracton.*

This *appeal* may be brought by bill before the justices in the *King's Bench;* before justices of gaol delivery, and commissioners of *oyer* and *terminer*, &c. or before the sheriff and coroner, in the county court: but the sheriff and coroner have only power to take and enter the *appeal* and count, for it must be removed by *certiorari* into *B. R.*

In *appeal* by original, principals and accessaries are generally charged alike without distinction, till the plaintiff counts: but 'tis otherwise in *appeals* by bill. *Danv.* 494.

There is but one *appeal* against the principal and accessary: if the principal is acquitted, it shall acquit the accessary; and both shall have damages against the appellant on a false *appeal*, or the accessary may bring a writ of conspiracy. 2 *Inst.* 383.

If the defendant in *appeal* is attaint, or acquit; or the plaintiff nonsuit after appearance, which is peremptory, no other *appeal* lies. *H. P. C.* 188. If there be an indictment and *appeal* depending at the same time against the same person, the *appeal* shall be tried first, if the appellant be ready. *Kel.* 107. Otherwise the king would destroy the suit of the party. *Jenk.* 160. *pl.* 4.

The case of other appeals than of murder, as of robbery, rape, &c. are not within stat. 3 *Hen.* VII. *c.* 1. and therefore *auterfoits acquit*, upon an indictment within the year, stands at common law a good bar to an appeal of robbery, or any offence other than murder or manslaughter; and yet the judges at this day never forbear to proceed upon an indictment of robbery, rape or other offence, though within the year, because appeals of robbery especially are very rare, and of little use, since the statute of 21 *Hen.* VIII. *c.* 11. gives restitution to the prosecutor as effectually as upon an appeal. 2 *Hale's Hist. P. C.* 250.

A charter of pardon is no bar of an *appeal;* and if the party be outlawed, &c. in *appeal*, and the king pardon him, a *scire facias* shall issue against the appellant, who may pray execution, notwithstanding such pardon; but if returned *sci. fec.* and he appears not, then the *appellee* shall, upon the pardon, be discharged. *H. P. C.* 251. A peer in *appeal* of murder shall not be tried by his peers, but by a common jury; though he shall upon an indictment for murder. *Vide* stat. 3 *Hen.* VII. *c.* 1. directing appeals before the sheriff and coroners, or at king's bench, or gaol delivery; and stat. 1 *Hen.* IV. *c.* 14. (mentioned before) that no appeals are to be pursued in parliament.

And where *appeal* of death is brought, the defendant cannot justify *se defendendo;* but must plead not guilty, and the jury are to find the special matter. *Bro. App.* 122. 3 *Salk.* 37.

The court *ex officio* will quash the writ for apparent faults appearing on the face of the writ; as where the sense is defective for want of a material word, or where it wants those words of art which the law has appropriated for the description of the offence. 2 *Hawk. P. C. c.* 23. § 97.

Also the court will abate the writ when the declaration varies from the writ in some material point, either as to the reign of the king, or as to the county wherein the fact is laid, &c. 2 *Hawk. P. C. c.* 23. § 98.

A release of all manner of actions, or of all actions criminal, or of all actions concerning pleas of the crown, or of all appeals, or of all demands, is a good bar of any appeal; but a release of all personal actions does not bar an appeal of felony, being an action of a higher nature. *Cro. Jac.* 283. *Yelv.* 204. 2 *Hawk. P. C. c.* 23. § 135.

If the appellee pleads a special plea, which does not amount to a confession of the fact, he must, at the same time, plead over to the felony, except in special cases; as where such plea would be prejudicial to him, or where his plea declines the jurisdiction of the court. 2 *Hawk. P. C. c.* 23. § 137. *Carth.* 56.

In *appeal of murder* brought by the *wife* for the death of her *husband;* the appellee pleaded that she was never *lawfully married* to her husband, but did not plead *over to the felony;* adjudged, that this plea being to be tried by the *ordinary upon his certificate*, whether the marriage was *lawful or not*, in such case the defendant need not plead over to the *felony;* but where the plea is triable by the *common law*, he must plead *over to the felony. Cro. Eliz.* 224.

II. *Appeal of Maihem*, Is the accusing one that hath *maimed* another: but this being generally no felony, it is in a manner but an action of trespass; and nothing is recovered by it but damages. In an action of assault and *maiming*, the court may increase damages, on view of the *maihem*, &c. And though *maihem* is not felony, in *appeals* and indictments of *maihem*, the words *felonicè maihemiavit* are necessary. 3 *Inst.* 63. *Bracton* calls *appeal of maihem*, *appellum de plagis & maihemio*, and writes a whole chapter upon it. *Lib.* 3. *tract.* 2. *c.* 24. In an *appeal of maihem*, the defendant pleads that the plaintiff had brought an action of trespass against him for the same wounding, and had recovered, and damages given, &c. and this was a good plea in bar of the *appeal;* because in both actions damages only are to be recovered. 4 *Rep.* 43. And where there is recovery in assault and battery, &c. the jury give damages according to the hurt which was done, and it shall be intended a *maihem* at that time; and therefore *appeal of maihem* doth not lie. *Hob.* 94. 1 *Leon.* 318. In *appeal of maihem*, the appellant ought not to plead in abatement of the writ, and likewise over to the *maihem;* if he doth, he will lose the benefit of his plea to the writ. *Moor*, 457. See 2 *Hawk. P. C. c.* 23. § 16—28.

III. *Appeal of Rape*, Lies where a rape is committed on the body of a woman. 3 *Inst.* 30. A *feme covert*, without her husband, may bring *appeal of rape:* and stat. 6 *Rich.* II. *c.* 6. gives power, where a woman is ravished, and afterwards consents to it, for a husband, or a father, or next of kin, there being no husband, to bring *appeal of rape:* also the criminal, in such case, may be attainted at the suit of the king. 3 *Inst.* 131. 6 *Rich.* II. *c.* 6.

If a woman be ravished by her next of kin, and consents to him, and has neither husband nor father, the next of kin to him shall have the appeal; for he has disabled himself by the rape, whereby he becomes a felon. 2 *Inst.* 434. *Hale's Hist. P. C.* 632. *S. P.* cites 28 *Hen.* VI. *Corone*, 459. 2 *Hawk. P. C. c.* 23. § 64. *S. P.*

If there be no husband, nor father, then the appeal is given to the heir, whether male or female. *Hale's P. C.* 186.

This statute, as to the husband, shall be construed strictly, and be intended of a husband in possession, though there be good cause of divorce; for he is her husband till a divorce be had. See *Br. Parliament, pl.* 89. cites 11 *Hen.* IV. 13, 14. 2 *Hawk. P. C. c.* 23. § 62. says,

that *ne unques accouple*, &c, is a good plea, and shall be tried by the bishop's certificate, who, if the marriage were unlawful by reason of a *pre-contract*, ought to certify against the appellant.

The statute of *Westm.* 1. *c.* 13. which reduced the crime of *rape* to a trespass, enacts, that *appeal of rape* shall be brought within forty days; but by stat. *Westm.* 2. *c.* 34. which makes this offence felony, no time is limited for the prosecution; so that it may be brought in any reasonable time. *H. P. C.* 186. *Appeal of rape* is to be commenced in the county where committed: and if a woman be assaulted in one county, and ravished in another, the *appeal of rape* lies in that county where she was ravished. *H. P. C.* 186. It is held, that though formerly the defendant might have his clergy, 'tis taken away by the stat. 18 *Eliz. c.* 7. *Dyer*, 201. See further on this subject, 2 *Hawk. P. C. c.* 23. § 58—73.

IV. *Appeal of Robbery*, or *Larceny*. A remedy given by the common law, where a person is *robbed* of his goods, &c. to have restitution of the goods stolen: as they could not be restored on indictment at the king's suit, this *appeal* was judged necessary. 3 *Inst.* 242. If a man *robbed* make *fresh pursuit* after, and apprehend and prosecute the felon, he may bring *appeal of robbery* at any time afterwards. *Staundf.* 62.

An *infant* shall have an appeal of *robbery*. *St. P. C.* 60. *b. cap.* 9.

Appeal of *felony* lies against a *feme covert* without her *baron*. *St. P. C.* 62. *cap.* 11.

So it lies against an *infant*; and so of all others who may commit felony. *St. P. C.* 62. *cap.* 11.

A woman at this day may have an appeal of robbery, &c. for she is not restrained thereof. 2. *Inst.* 68.

Adjudged that an *appeal of robbery* may be brought by the party *robbed* twenty years after the offence committed, and that he shall not be bound to bring it within a year and a day, as he must do in *appeal* of murder, 4 *Leon.* 16.

But the courts of law would now scarce permit a prosecution after such a length of time, unless good cause could be shown why it had not been sooner commenced, as that the offender had fled the kingdom, and was but just returned, &c.

If one man *robs* several persons, every one of them may have *appeal*: likewise if the *robber* be attainted at the suit of one, he shall be tried at the suit of the rest, so as their *appeals* were commenced before the attainder. *Danv. Abr.* 494. In *appeal of robbery*, the plaintiff must declare of all the things whereof he is *robbed*, or they shall be forfeited to the king; for the *appellant* can have restitution for no more than is mentioned in his *appeal*. 3 *Inst.* 227. By the Year-book 21 *Edw.* I. 16. restitution of goods was granted upon an outlawry, in *appeal of robbery*: but a person having preferred an indictment against a *robber*, and afterwards an *appeal*, on which he was outlawed, the plaintiff moved to have restitution of his goods, and it was denied. 2 *Leon.* 108.

If the count or declaration in *appeal of burglary* be sufficient, and the defendent is convicted at the suit of the party upon the *appeal*: he shall not be again impeached for the same offence at the king's suit. 4 *Rep.* 39. By stat. 21 *Hen.* VIII. *c.* 11. the like restitution of stolen goods may be had on *indictments* after attainder, as on *appeals*: and *appeals of robbery* are now much out of use. By stat. 4 and 5 *Wm.* and *M. c.* 8. an accomplice convicting others, guilty of robbery, shall have the king's pardon which the act declares shall be good bar to an appeal.

See tit. *Accessary*. See further 2 *Hawk. P. C. c.* 23. § 44—57. and this Dict. tit. *Robbery*, *Restitution*.

APPEAL TO ROME. At the reformation in the reign of *Hen.* VIII. the kingdom entirely renounced the authority of the see of *Rome*; and therefore by the several statutes 24 *Hen.* VIII *c.* 12. and 25 *Hen.* VIII. *c.* 19. and 21. to appeal to *Rome* from any of the king's courts, (which though illegal before, had at times been connived at.) to sue to *Rome* for any license or dispensation; or to obey any process from thence are made liable to the pains of *præmunire*; and by stat. 5 *Eliz. c.* 1. to defend the pope's jurisdiction in this realm is a *præmunire* for the first offence, and high treason for the second. See tit. *Papists*.

Where an *appeal* in an *ecclesiastical cause* is made before the bishop, or his commissary, it may be removed to the archbishop; and if before an archdeacon, to the court of arches, and from the arches to the archbishop; and when the cause concerns the king, *appeal* may be brought in fifteen days from any of the said courts to the prelates in convocation, stat. 24 *Hen.* VIII. *c.* 12. And the stat. 25 *Hen.* VIII. *c.* 19. gives *appeals* from the archbishop's courts to the *king* in *chancery*, who thereupon appoints commissioners finally to determine the cause; and this is called the court of delegates: there is also a court of commissioners of review; which commission the king may grant as supreme head, to review the definitive sentence given on *appeal* in the court of delegates.

APPEARANCE, In the law signifieth the defendant's filing common or special bail, when he is served with copy of, or arrested on, any process out of the courts of *Westminster*; and there can be no *appearance* in the court of *B. R.* but by special or common bail. There are four ways for defendants to *appear* to actions; in person, or by attorney, by persons of full age; and by guardians, or next friends, by infants. *Show.* 165.

By the common law, the plaintiff or defendant, demandant or tenant, could not appear by attorney without the king's special warrant by writ or letters patent, but ought to follow his suit in his own proper person; by reason whereof there were but few suits. *Co. Lit.* 128. 2 *Inst.* 249. But it is now the common course for the plaintiff or defendant, in all manner of actions where there may be an attorney, to appear by attorney, and put in his warrant without any writ from the king for that purpose. And therefore, generally, in all actions real, personal and mixt, the demandant or plaintiff, tenant or defendant, may appear by attorney. *F. N. B.* 26.

But in every case, where the party stands in contempt, the court will not admit him to appear by attorney, but oblige him to appear in person. As if he comes in by *capi corpus* upon an *exigent*. *F. N. B.* Or, if he be outlawed. 2 *Cro.* 462. 616.

But by stat. 4 and 5 *Wm.* and *M. c.* 18. persons outlawed in any case, except for treason or felony, may *appear* by attorney to reverse the same without bail; except where special bail shall be ordered by the court.

In all cases, where process issues forth to take the party's body, if a common *appearance* only, and not special bail is required, there every such party may *appear* in court in his proper person, and file common bail. 1 *Lill. Abr.* 85. *Hil.* 22 *Car. B. R.*

In a capital criminal case the party must always appear in person, and cannot plead by attorney: also in criminal offences, where an act of parliament requires that the party should appear in person; and likewise in appeal, or on attachment. 2 *Hawk. P. C. c.* 22. § 1.

On an indictment, information or action, for any crime whatsoever under the degree of capital, the defendant may, by the favour of the court, appear by attorney; and this he may do as well before plea pleaded, as in the proceeding after, till conviction. 1 *Lev.* 146. *Keilw.* 165. *Dyer*, 346. *Cro. Jac.* 462.

If husband and wife are sued, the husband is to make attorney for her. 2 *Saund.* 213. and see *Barnes*, 412.

If an idiot doth sue or defend, he cannot appear by guardian, *prochein amy*, or attorney, but must appear in proper person; but otherwise of him who becomes *non compos mentis*; for he shall appear by guardian if within age, or by attorney, if of full age. *Co. Lit.* 135. b. 2 *Inst.* 390. 4 *Co.* 124.

A *corporation aggregate* of many persons cannot appear in person, but by attorney, and such appearance is good. 10 *Rep.* 32. in the case of *Sutton's Hospital.*

If a man is bound to *appear* in court on the first day of the term, it shall be intended the first day in common understanding, *viz.* the first day in full term. 1 *Lill.* 83. 2 *Leon.* 4.

If the *plaintiff* files common bail for defendant, he only can deliver a declaration by the bye. *R. M. T.* 10 *Geo.* II.

But when *defendant* has filed *common* or *special bail* for himself, any person may *deliver* or *file* a declaration against him by the *bye*, at any time during the term wherein the process against the defendant is *ret. sedente curia*; and the practice has been, that the plaintiff, at whose suit the process is, might declare against the defendant, in as many actions as he thinks fit, before the end of the next term, after the return of the process. *Impey's Pract. K. B.* 177. 4 *Burr.* 2180.

Attorneys subscribing warrants to *appear*, are liable to attachment upon *non-appearance*. And where an attorney promises to appear for his client, the court will compel him to *appear* and put in common bail, in such time as is usual by the course of the court; and that although the attorney say he hath no warrant for *appearance*: nor shall repealing a warrant of attorney to delay proceedings, excuse the attorney for his not *appearing* who may be compelled by the court. See *Impey's Pract. K. B.* 189. cites *R. M.* 1654. The defendant's attorney is to file his warrant the same term he *appears*, and the plaintiff the term he declares, under penalties by stat. 4 and 5 *Ann. c.* 16.

An attorney is not compellable to appear for any one, unless he take his fee, or back the warrant; after which the court will compel him to appear. 1 *Salk.* 87.

If an attorney appears, and judgment is entered against his client, the court will not set aside the judgment, though the attorney had no warrant, if the attorney be able and responsible; for the judgment is regular, and the plaintiff is not to suffer when in no default; but if the attorney be not responsible or suspicious, the judgment will be set aside; for otherwise the defendant has no remedy, and any one may be undone by that means. 1 *Salk.* 86.

Attachment denied by the court against an attorney, who appeared for the plaintiff without a warrant; but said an action on the case lies. *Comb.* 2.

In actions by original, *appearances* must be entered with the filazer of the county; and if by bill, they shall be entered with the prothonotary: and by stat. 5 *Geo.* II. *c.* 27. where defendant is served with a copy of the process, *appearances* and common bail are to be entered and filed by him within eight days after the return of the process. And if defendant does not appear, plaintiff may on affidavit of the service of process enter a common appearance for defendant and proceed

thereon, stat. 12 *Geo.* I. c. 29. and by stat. 25 *Geo.* III. c. 80. § 22. a common appearance may be filed by plaintiff without entering or filing of record, a memorandum or minute for defendant.

An *appearance* entered by plaintiff for defendant in a wrong name may be amended after declaration. 3 *Wils.* 49.

An *appearance* by defendant cures all errors and defects in process. *Barnes*, 163. 167. 3 *Wils.* 141. *Lutw.* 954. *Jenk. Cent.* 57.

In what cases common appearance will be ordered, see *Impey's Pract. K. B.* 189. and this *Dict.* tit. *Bail*, *Arrest*, &c.

On two *nihils* returned upon a *scire* and *alias scire facias*, they amount to a *scire feci*, and the plaintiff giving rule, the defendant is to *appear*, or judgment shall be had against him by default, and where a defendant doth not plead after *appearance*, judgment may be had against him. *Sty.* 208.

A wife may appear without her husband. 1 *Wils.* 264. A man may appear before the return of a *capias ad respondendum*. *Id.* 39. For the appearance is to the suit.

Appearance in person and by attorney are very different. *Vide* 1 *Sid.* 93. 392. 392. 4 *Rep.* 71. 1 *Lev.* 80. *Ray.* 59.

As to *appearance* by guardian and next friend, *vide Infants*, &c.

APPEARAND HEIR. Is any person who has a right to succeed in a heritable subject, but is not actually entered; though in the more strict acceptation of the word, it is understood only of descendants. *Scotch Dict.*

APPENDANT, *appendens.*] Is a thing of inheritance, belonging to another inheritance that is *more worthy*. As an advowson, common court, &c. may be *appendant* to a manor: common of fishing *appendant* to a freehold: land *appendant* to an office: a seat in a church to a house, &c. but land is not *appendant* to land, both being corporeal, and one thing *corporeal* may not be *appendant* to another that is *corporeal*; but an *incorporeal* thing may be *appendant* to it. *Co. Lit.* 121. 4 *Rep.* 86. *Danv. Abr.* 500. A forest may be *appendant* to an honour; and waifs and estrays to a leet. *Co. Lit.* 367. And *incorporeal* things, advowsons, ways, courts, commons, and the like, are properly parcel of, and *appendant* to, *corporeal* things; as houses, lands, manors, &c. *Plowd.* 170. 4 *Rep.* 38. If one disseise me of common *appendant* belonging to my manor, and during the disseisin I sell the manor; by this the common is extinct for ever. 4 *Edw.* III. 21. 11 *Rep.* 47. *Common* of *estovers* cannot be *appendant* to *land*; but to a *house* to be spent there. *Co. Lit.* 120. By the grant of a *messuage*, the *orchard* and *garden* will pass as *appendant*.

Appendants are ever by prescription, and this makes a distinction between appendants and appurtenances, for appurtenances may be created in some cases at this day; as if a man at this day grant to a man and his heirs, common in such a moor for his beasts, levant or couchant *upon his manor*: or if he grant to another common of estovers or turbary in fee-simple, to be burnt or spent *within his manor*; by these grants these commons are appurtenant to the manor, and shall pass by the grant thereof; in the civil law it is called *adjunctum*. *Co. Lit.* 121. b.

A way may be *quasi* appendant to a *house*, &c. and as such pass by grant thereof. *Cro. Jac.* 190.

What things may be appendant. *Vide Plowd. Com.* 103. b. 104. b. 170. See also tit. *Appurtenances*.

APPENDITIA, The *appendages* or pertinences of an estate. Hence our pentices or pent-houses, are called *appenditia domus*, &c.

APPENAGE, or *apennage*, Fr.] Is derived from *appendendo ;* or the *German* word *apanage*, signifying a portion. It is used for a child's part or portion ; and is properly the portion of the king's younger children in *France*. *Spelm. Gloss.*

APPENSURA, The payment of money at the scale or by weight. *Hist. Elien.* edit. *Gale*, *l.* 2. *c.* 19.

APPLES. A duty is granted on all *apples* imported into *Great Britain*. By what measure apples are to be sold, see 1 *Ann.* stat. 1. *c.* 15.

APPODIARE, A word used in old historians, which signifies to lean on, or prop up any thing, &c. *Walsingham, anno* 1271. *Mat. Paris. Chron. Aulæ Regiæ, anno* 1321.

APPONERE, To pledge or pawn, *Neubrigensis, lib.* 1. *c.* 2.

APPORTIONMENT, *apportionamentum.*] Is a dividing of a rent, &c. into parts, according as the land out of which it issues is divided among two or more. If a stranger recovers part of the land, a lessee shall pay, having regard to that recovered, and what remains in his hands. Where the lessor recovers part of the land, or enters for a forfeiture into part thereof the rent shall be *apportioned*. *Co. Lit.* 148. If a man leases three acres, rendering rent, and afterwards grants away one acre, the rent shall be *apportioned*. *Co. Lit.* 144. Lessee for years leases for years, rendering rent, and after devises this rent to three persons, this rent may be *apportioned*. *Danv. Abr.* 505. If a lessee for life or years under rent surrenders part of the land, the *rent* shall be *apportioned :* but where the grantee of a rent-charge *purchases* part of the land, there all is extinct at law. *Moor*, 231. But he shall have relief in equity. *Fonblanque's Treatise of Equity*, 1. 379. A *rent-charge*, issuing out of land, may not be *apportioned :* nor shall things *entire*, as if one holds lands by service to pay yearly to the lord, at such a feast, a horse, &c. *Co. Lit.* 149. But if part of the land, out of which a rent-charge issues, *descends* to the grantee of the rent, this shall be *apportioned*. *Danv.* 507.

A grantee of rent releases part of the rent to the grantor ; this doth not extinguish the residue, but it shall be *apportioned :* for here the grantee dealeth not with the *land*, only the rent. *Co. Lit.* 148. On partition of lands out of which a rent is issuing, the rent shall be *apportioned*. *Danv. Abr.* 507. And where lands held by lease, rendering *rent*, are extended upon *elegit*, one moiety of the *rent* shall be *apportioned* to the lessor. *Ibid.* 509. If part of lands leased is surrounded by fresh water, there shall be no *apportionment* of rent ; but if it be surrounded with the sea, there shall be an *apportionment* of the rent. *Dyer*, 56.

The stat. 11 *Geo.* II. *c.* 19. § 15. has, in certain cases, altered the law as to the apportioning of rents, in point of time ; it being thereby enacted, "that if any tenant for life, shall happen to die before, or on the day on which any rent was reserved, or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of any such tenant for life, that the executors or administrators of such tenant for life, shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, tenements and hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due as afore-

said, making all just allowances, or a proportionable part thereof respectively."

Before this statute the rent, by the death of a tenant for life, was lost; for the law would not suffer his representative to bring an action for the use and occupation, much less if there was a lease, and the remainder-man had no right, because the rent was not due in his time; nor could equity relieve against this hardship by apportioning the rent. 1 *P. Wms.* 392. The legislature having, however, by the above statute, interposed in favour of tenants for life, its provisions have, by an equitable construction, been extended to tenants in tail. *Amb. Rep.* 198. 2 *Bro. Ch. Rep.* 659.

But though the executor of tenant for life is now entitled to an apportionment of the rent, yet the dividends of money directed to be laid out in lands, and in the mean time to be invested in government securities, and the interest and dividends to be applied, as the rents and profits would in case it were laid out in land, were held not to be apportionable, though tenant for life died in the middle of the half year. 3 *Atk.* 502. *Amb. Rep.* 279. 2 *Vez.* 672. and the authority of the case on the will of Lord Ch. J. *Holt*, 3 *Vin. Abr.* 18. *pl.* 3. was denied. But where the money is laid out in mortgage till a purchase could be made, the interest is apportionable. 2 *P. Wms.* 176. This distinction, however, may be referred to interest on a mortgage, being in fact *due* from *day to day*, and so not properly an apportionment: whereas the dividends accruing from the public funds are made payable on certain days, and therefore not apportionable; and upon the principle of this distinction the Master of the Rolls decreed an apportionment of maintenance-money, it being for the daily subsistence of the infant. 2 *P. Wms.* 501. See also Mr. *Cox's* note (1). And the principle extending to a separate maintenance for a *feme covert*, such apportionment has, in such case, been allowed at law. 2 *Black. Rep.* 1016. *Qu.* Whether equity would not apportion dividends of money in the funds, directed to be applied for the maintenance of an infant, or secured by the husband as a separate provision for his wife, as it would be difficult for them to find credit for necessaries, if the payment depended on their living to the end of a quarter? That equity will not in general apportion dividends, see 3 *Bro. Ch. Rep.* 99.

As to apportionment of fines paid on renewal of leases by tenant for life, see 1 *Bro. Ch. Rep.* 440. 2 *Bro. Ch. Rep.* 243. and the cases there referred to.

In what cases eviction of part of the land is a ground for apportionment, see *Co. Lit.* 148. See *Fonblanque's Treat. of Equity*, 376.

A man *purchases* part of the land where he hath *common appendant*, the common shall be *apportioned:* of *common appurtenant* it is otherwise, and if by the act of the party, the common is extinct. 8 *Rep.* 79. *Common appendant* and *appurtenant* may be *apportioned* on alienation of part of the land to which it is appendant or appurtenant. *Wood's Inst.* 199. If where a person has *common of pasture sans number*, part of the land descends to him, this being entire and uncertain cannot be *apportioned:* but if it had been *common certain*, it should have been *apportioned. Co. Lit.* 149.

APPORTUM, from the Fr. *apport.*] Signifies properly the revenue or profit which a thing brings in to the owner; and it was commonly used for a corody or pension. It hath also been applied to an augmentation given to an abbot out of the profits of a manor for his better support.

APPOSAL OF SHERIFFS, The charging them with money received upon their accounts in the exchequer. *Stat.* 22 and 23 *Car.* II. *c.* 22.

APPRAISERS of goods, are to be sworn to make true *appraisement*; and, valuing the goods too high, shall be obliged to take them at the price *appraised*. Stat. 11 *Edw.* I. Stat. *Acton Burnel.* See *Auctioneers.*

APPRENDRE, [Fr.] A fee or profit *apprendre*, is fee or profit to be taken or received. Stat. 2 and 3 *Edw.* VI. *cap.* 8.

APPRENTICE, *apprenticius*, Fr. *apprenti*, from *apprendre*, to learn.] A young person bound by indentures to a tradesman or artificer, who, upon certain covenants, is to teach him his mystery or trade.

It will be proper under this head to consider,

I. *Who may be bound apprentices, and in what manner; and who are compellable to receive them.*

II. *How they are to be provided for and governed during their apprenticeship, and in what manner they are to be assigned, &c.*

III. *What trades may not be exercised without having served an apprenticeship.*

IV. *For what offences they are punishable, and how.*

Of apprentices acquiring settlement, see tit. *Settlement.*

[For more full matter relative to apprentices, particularly parish apprentices, see Mr. *Const's* edition of *Bott's Poor Laws.*]

I. It seems clearly agreed, that, by the common law, infants, or persons under the age of twenty-one years, cannot bind themselves apprentices, in such a manner as to entitle their masters to an action of covenant, or other action against *them* for departing from their service, or other breaches of their indentures; which makes it necessary, according to the usual practice, to get some of their friends to be bound for the faithful discharge of their offices, according to the terms agreed on. 11 *Co.* 89. b. 2 *Inst.* 379. 580. 3 *Leon.* 63. 7 *Mod.* 15. And notwithstanding stat. 5 *Eliz. c.* 4. enacts, that although persons bound apprentices shall be within age at the time of making their indentures, they shall be bound to serve for the years in their indentures contained, as if they were at full age at the time of making of them: it hath been held, that although an infant may voluntarily bind himself an apprentice, and, if he continue an apprentice for seven years, he may have the benefit to use his trade; yet neither at the common law, nor by any words of the above mentioned statute, can a covenant or obligation of an infant, for his apprenticeship, bind him; but if he misbehave himself, the master may correct him in his service, or complain to a justice of peace, to have him punished according to the statute: but no remedy lieth against an infant upon such covenant. *Cro. Car.* 179. *Cro. Jac.* 174. *S. P.*

But if any one entices an apprentice from his master's service, or harbours him after notice, the master may maintain a special action on the case against the person so doing. *Vide* 1 *Salk.* 380.

By the custom of *London*, an infant unmarried, and above the age of fourteen, may bind himself apprentice to a freeman of *London*, by indenture, with proper covenants; which covenants, by the *custom of London*, shall be as binding as if he were of full age. *Moor.* 134. 2 *Bulst.* 192. 2 *Roll. Rep.* 305. *Palm.* 361. 1 *Mod.* 271. 2 *Keb.* 687.

But a waterman's apprentice is not, within the custom of *London*, to bind himself, being under twenty-one. 6 *Mod.* 69.

A freeman's widow may take a maid *apprentice* for seven years, and inroll her as a youth; if she be above fourteen years old: and if an exchange woman, that hath a husband free of *London*, take such *apprentice*, she shall be bound to the husband; and may be made free, at the end of the *apprenticeship*, if she be then unmarried. *Lex Londinen*, 48.

By stat. 5 *Eliz. c.* 4. § 35. the justices may compel certain persons under age to be bound as apprentices, and on refusal may commit them, &c. And by stat. 43 *Eliz. c.* 2. and 18 *Geo.* III. *c.* 47. churchwardens and overseers of the poor may bind out the children of the poor to be *apprentices*, with the consent of two justices; if boys, till 21; if girls, till that age or marriage. And if any person refuse to accept a poor *apprentice*, he shall forfeit 10*l.* Stat. 8 and 9 *Wm.* III. *c.* 30. § 5. Also justices of peace and churchwardens, &c. may put out poor boys *apprentice* to the sea-service. Stat. 2 and 3 *Ann. c.* 6. and 4 *Ann. c.* 19. And by stat. 7 *Jac.* I. *c.* 3. apprentices bound out by public charities are regulated See tit. *Chimney-Sweepers*. And see 42 *Geo.* III. *c.* 73. as to regulating apprentices' health and morals in cotton mills, &c.

As to the manner of their being bound;

By the stat. 5 *Eliz. c.* 4 § 25. an apprentice must be bound by deed indented; and this must be complied with for all purposes except for the obtaining a settlement.

Indentures must also be inrolled in all towns corporate under stat. 5 *Eliz. c.* 5. and 5 *Geo.* II. *c.* 46. and in *London*, by the custom, in the chamberlain's office there.

In *London*, if the indentures be not inrolled before the chamberlain within a year, upon a petition to the mayor and aldermen, &c. a *scire facias* shall issue to the master, to show cause why not inrolled; and if it was through the master's default, the apprentice may sue out his indentures, and be discharged; otherwise if through the fault of the apprentice, as if he would not come to present himself before the chamberlain, &c. for it cannot be inrolled, unless the apprentice be in court and acknowledge it. 2 *Roll. Rep.* 305. *Palm.* 361. 1 *Mod.* 271.

Indentures are likewise to be stamped, and are chargeable with several duties by act of parliament.

By stat. 8 *Ann. c.* 9. made perpetual by stat. 9 *Ann. c.* 21. a duty of 6*d.* in the pound under 50*l.* and 12*d.* in the pound for sums exceeding it, given with *apprentices* (except poor *apprentices*) is granted. And if the full sum agreed be not inserted, or the duty not paid, indentures shall be void, and *apprentices* not capable of following trades; and the masters are liable to 50*l.* penalty.

See *Jackson* v. *Warwick*, 7 *Term Rep.* 121. No action can be maintained by the plaintiff, on a note given to him by the defendant, as an apprentice fee with his son, who was to be bound to the plaintiff, if it appear that the indenture executed was void by 8 *Ann. c.* 9. for want of the insertion of such premium therein, and a proper stamp in respect to the same; although the plaintiff did in fact maintain the apprentice for some time, and until he absconded.

There are several statutes allowing further time to pay the duties and stamp indentures, through neglect omitted, &c. And acts of indemnity of this nature are usually passed at intervals of two or three years.

The payment of the duties on apprentice fees is enforced by several acts, 18 *Geo.* II. *c.* 22. and 20 *Geo.* II. *c.* 45. the former of which provides, that if the apprentice shall pay the duties, on the neglect of the master, he may recover back the apprentice fee; and the latter, that if no suit is commenced, and the master shall pay double duties within two years after the end of the apprenticeship, the indentures shall be valid, or the apprentice may pay them, and in such case recover double the *apprentice fee*, by action, from his master.

The stats. 5 *Eliz. c.* 4. and 5. direct who shall take apprentices, and direct that every *cloth-worker*, *fuller*, *shearman*, *weaver*, *taylor*, or *shoemaker*, taking *three* apprentices, shall have *one* journeyman, and for every other apprentice above three, also *one* journeyman, § 33. Stat. 1 *Jac.* I. *c.* 17. allows only *two* apprentices at a time to *hatters* and *felt-makers*; (except a son apprentice;) and stat. 13 and 14 *Car.* II. *c.* 5. allows only *two* to *Norwich-weavers*, who must then have also two journeymen.

As by the stat. of 5 *Eliz. c.* 4. the justices of the peace, have a power of imposing an apprentice on a master, in consequence thereof an indictment lies for disobedience to their orders, either in not receiving, or receiving and after turning off, or not providing for such apprentice; for though an act of parliament prescribe an easier way of proceeding by complaint; yet that does not exclude the remedy by indictment. 6 *Mod.* 163. 1 *Salk.* 381.

II. The justices of peace may discharge an apprentice not only on the default of the master, but also on his own default; for in such case it is but reasonable that the contracts, which were made by their authority, should be dissolved by the same power. *Skin.* 108. 5 *Mod.* 139. 2 *Salk.* 471.

And under the said stat. 5 *Eliz. c.* 4. justices, or the sessions, may hear and determine disputes between masters and apprentices; and the sessions may discharge the apprentice, and vacate the indentures, or correct the apprentice.

An order of justices on the master to return money is good, though it is not averred that he had any with the apprentice; for the order being to *return* money, is as necessary a proof of the receipt of it, as if it had been expressly alleged: and the court held, that the justices had jurisdiction to oblige the master to refund. *Trin.* 7 *Geo.* II. in *B. R. The King* v. *Amies*; though an order of this nature has been quashed. *Bott*, (by *Const.*) i. 513.

By the stat. 20 *Geo.* II. *c.* 19. any two justices, upon complaint of any *apprentice* put out by the *parish*, or with whom no more than 5*l.* was paid, of any misusage, refusal of necessary provisions, cruelty, or other ill-treatment by his master, may summon the master to appear before them; and upon proof of the complaint on oath, to their satisfaction, (whether the master be present or not, if service of the summons be proved,) to discharge such *apprentice* by warrant or certificate, for which no fee shall be paid: (and by stat. 33 *Geo.* III. *c.* 55. may *fine* the master for such ill usage:) and on complaint of the master against any such *apprentice*, touching any misdemeanor, miscarriage, or ill behaviour, the justices may punish the offender by commitment to the house of correction, there to be corrected and kept to hard labour, not exceeding a calendar month; or otherwise by discharging such offender. Either party may appeal to the sessions, and the determination there is to be final. By 31 *Geo.* II. *c.* 11. this act is extended to servants in husbandry, though hired for less than a year.

By stat. 6 *Geo.* III. *c.* 25. apprentices (with whom less than 10*l.* premium is paid) absenting themselves during their apprenticeship, shall serve an equal time beyond their term. In *London*, apprentices are all under the control of the chamberlain, whose jurisdiction is saved in the several statutes. The stat. 33 *Geo.* III. *c.* 57. makes some additional regulations as to the punishing and relieving parish apprentices.

With regard to the *assigning* of apprentices, it hath been held, that an apprentice is not assignable. He cannot be bound nor discharged without deed. 1 *Salk.* 68. *pl.* 7. *Mich.* 13 *Wm.* III. *B. R.*

But though an apprentice is not *assignable*, yet such assignment *amounts to a contract between the two masters*, that the child should serve the latter. 1 *Salk.* 68. *pl.* 7. *Mich.* 13 *Wm.* III. *B. R. Custer* v. *Eccles Parish.*

By the custom of the city of *London*, also an *apprentice* may be turned over from one master to another; and if the master refuse to make the *apprentice* free at the end of the term, the chamberlain may make him free; in other corporations there must be a *mandamus* to the mayor, &c. to make him free in such case. *Danv. Abr.* 421. *Wood's Inst.* 51.

But it hath been held, that though justices of peace have a jurisdiction of discharging apprentices, and may bind them to other masters, that they cannot turn them over; and therefore an order that an apprentice, whose master was dead, should serve the remainder of his time with his master's widow's second husband, was quashed; because the justices have nothing to do about turning over an apprentice; and though he applied to them, that could not give them a jurisdiction. *Comb.* 324.

It seems agreed, that if a man be bound to instruct an apprentice in a trade for seven years, and the master dies, that the condition is dispensed with, being a thing personal; but if he be bound further, that in the mean time he will find him in meat, drink, and clothing and other necessaries, here the death of the master doth not dispense with the condition, but his executors shall be bound to perform it as far as they have assets. 1 *Sid.* 216. 1 *Keb.* 761. 820. 1 *Lev.* 177.

But if a person is bound apprentice by a justice of peace, and the master happens to die before the term expired, the justices have no power to oblige his executor, by their order, to receive such apprentice and maintain him: for by this method the executor is deprived of the liberty of pleading *plene administravit*, (which he may do, in case covenant be brought against him,) and must maintain the apprentice, whether he hath assets or not. *Carth.* 231. 1 *Salk.* 66. 1 *Show.* 405. It is said, however, that the executor or administrator may bind him to another master for the remaining part of his time. *Burn.*

But it is said, that in this case of the master's dying, by the custom of *London* the executor must put the apprentice to another master of the same trade. 1 *Salk.* 66. *per Holt*, Ch. J.

By stat. 32 *Geo.* III. *c.* 57. in case of the *death* (§ 3.) or *insolvency* (§ 8.) of the master or mistress of a parish apprentice, (with a premium not exceeding 5*l.*) the justices shall, by indorsement on the indenture, direct the apprentice to serve another master, &c. and so *totics quoties*. And masters, &c. of apprentices under stat. 8 and 9 *Wm.* III. *c.* 30. may with consent of two justices assign them.

Whatever an apprentice gains is for the use of his master; and whether he was legally bound or no, is not material, if he was an apprentice *de facto*. *Salk.* 68. For enticing an apprentice to embezzle

goods, indictment will lie. 1 *Salk.* 380. A master may be indicted for not providing for, or for turning away, an apprentice. If a master gives an apprentice license to leave him it cannot afterwards be recalled. *Mod. Cas.* 70. If an apprentice marries, without the master's privity, that will not justify his turning him away, but he must sue his covenant. 2 *Vern.* 492. By the custom of the city of *London* a freeman may turn away his apprentice for gaming. *Ibid.* 241. Though if a master turns an apprentice away on account of negligence, &c. equity may decree him to refund part of the money given with him. 1 *Vern. Rep.* 460. As no apprentice can be made without writing; so none may be discharged by his master, but by writing under his hand, and with the allowance of a justice of peace, by statute. *Dalt.* 121.

III. By the common law no man may be prohibited to work in any lawful trade, or in more trades than one, at his pleasure. 11 *Co.* 53.

So that without an act of parliament no man may be restrained, either from working in any lawful trade, or using divers mysteries or trades; therefore an act of parliament made to restrain any person herein, must be taken strictly, and not favourably as acts made in affirmance of the common law. *Burn.*

It is enacted by the 5 *Eliz. cap.* 4. § 31. "that it shall not be lawful to any person or persons, other than such as *now* do lawfully use or exercise any art, mystery, or manual occupation, to set up, occupy, or exercise any craft, mystery, or occupation *now* used or occupied within the realm of *England* or *Wales*, except he shall have been brought up therein seven years, at the least, as an apprentice; nor to set any person on work in such mystery, art, or occupation, being not a workman at this day, except he shall have been apprentice, as is aforesaid; or else, having served *as an* apprentice, as is aforesaid, shall or will become a journeyman, or hired by the year; upon pain that every person willingly offending, or doing the contrary, shall forfeit and lose for every default, forty shillings for every month."

It hath been ruled, that there are many trades within the general words and equity of this act, besides those which are particularly enumerated therein; yet it seems agreed, and hath frequently been adjudged, that in every indictment, &c. it must be alleged, that it was a trade *at the time of making the statute*, for the words thereof are, *any craft, mystery, or occupation*, now *used*, &c. from whence it seems to follow, that a new manufacture, which to all other purposes may be called a trade, is yet not a trade within this statute. 2 *Salk.* 611. *Palm.* 528. 1 *Sid.* 175.

Also it seems agreed, that the act only extends to such trades as imply mystery and craft, and *require skill and experience*; that therefore *merchants*, *husbandmen*, *gardeners*, &c. are not within the statute; and on this foundation it hath been held, that a *hemp-dresser* is not within the statute, as not requiring much learning or skill, and being what every husbandman doth use for his necessary occasions. 8 *Co.* 130. 2 *Bulst.* 190. *Cro. Car.* 499.

It is clearly agreed, that the following the common trade of a *brewer*, *baker*, or *cook*, is within the statute, as unskilfulness herein may be very prejudicial to the lives and healths of his majesty's subjects; but it is, at the same time, agreed, that the exercising of any of these trades in a man's own house or family, or in a private person's house, is not within the restraint of the statutes. 11 *Co.* 54. a. *Cro. Car.* 499. *Hob.* 183. 211. *Moor*, 886. 8 *Co.* 129. *Palm.* 542. *Lit. Rep.* 251. *Bridg.* 141.

It hath been held, that this statute doth not restrain a man from using several trades, so as he had been an apprentice to all; wherefore it indemnifies all petty chapmen in little towns and villages, because their masters kept the same mixed trades there before. *Carth.* 163.

A man may exercise as many trades as he hath worked at, or served as an apprentice to, for seven years. 2 *Wils.* 168.

It hath been resolved, that there is no occasion for any actual binding, but that the *following a trade* for seven years, is a sufficient qualification within the statute. 1 *Salk.* 67. 2 *Salk.* 613.

By stats. 2 and 3 *P.* and *M.* c. 11. and 5 *Eliz.* c. 4. aliens and denizens are restrained to use any handicraft or trade therein mentioned, unless they have served seven years apprenticeship within the realm, under the penalty of 40*s. per* month. *Hutt.* 132. But it hath been adjudged, that if an apprentice serve seven years beyond sea, he shall be excused from the penalties of the statute. 5 *Eliz.* c. 4. And so, if he serves seven years, though he was never bound. 1 *Salk.* 76.

So it hath been held, that serving five years to a trade out of *England*, and two in *England*, is sufficient to satisfy the statute; but that there must be a service of a *full time*; and therefore, serving five years in any country where, by the law of the country, more is not required, will not qualify a man to use the trade in *England*. *Cases in Law and Eq.* 70.

By the statute 31 *Eliz. cap.* 6. § 7. it is enacted, "that all suits for using a trade, without having been brought up in it, shall be sued and prosecuted in the general quarter sessions of the peace, or assises, in the same county where the offence shall be committed; or otherwise inquired of, heard, and determined in the assises, or general quarter sessions of the peace, in the same county where such offence shall be committed, or in the leet within which it shall happen."

In the construction of this statute it hath been held, that it restrains not a suit in the king's bench or exchequer, for such offence happening in the same county where these courts are sitting; for the negative words of the statute are not, that such suits shall not be brought in *any other court*, but that they shall not be brought in *any other county*; and the prerogative of these high courts shall not be restrained without express words. *Cro. Jac.* 178. *Hob.* 184. 1 *Salk.* 373.

But where the offence is a different county, such suits in these, or any other courts out of the proper county, seem to be within the express words of the statute. *Hob.* 184. 327. *Cro. Jac.* 85.

Infants voluntarily binding themselves apprentice, and continuing seven years, shall have the benefit of their trades; but a bond for their service shall not bind them. *Cro. Car.* 179. See the several statutes enabling *soldiers* and *mariners* to exercise trades.

By 13 *Geo.* II. c. 17. apprentices in the *Greenland* Whale Fishery (if apprenticed above the age of fourteen, and not exceeding eighteen) are exempted from being impressed for three years of such apprenticeship. See 26 *Geo.* III. c. 41. § 2. 29 *Geo.* III. c. 53. § 5. 42 *Geo.* III. c. 22. and *Ex parte Brocke*, *H.* 1805. 6 *East*, 238.

The court will not, at the prayer of the master, grant a *habeas corpus* to bring up an apprentice impressed, he being willing to enter into the king's service. *Ex parte Landsdown*, *E.* 44 *Geo.* III. 5 *East*, 38.

The captain of a ship of war detaining an apprentice who had been impressed, after notice by such apprentice, is liable in an action by the master to recover wages for the service of such apprentice. *Eades* v. *Vandeput*, *M.* 25 *Geo* III *East*, 39. n.

IV. At common law, a servant or apprentice, without any regard to age, may be guilty of felony in feloniously taking away the goods of their master, though they were goods *under their charge*, as a shepherd, butler, &c. and may at this day, for any such offence, be indicted, as for felony, at common law ; but at common law, if a man had *delivered goods to his servant to keep*, or *carry* for him, and he carried them away *animo furandi*, this was considered only a breach of trust, but not felony. 1 *Hale's Hist. P. C.* 505. 666.

But now, by the statute of 21 *Hen.* VIII. *cap.* 7. it is enacted, that servants guilty of a breach of trust in embezzling money, goods, &c. delivered to them to the value of 40*s.* or above, are guilty of felony ; with a proviso, nevertheless, that the act do not extend to apprentices, nor to persons under the age of eighteen years.

By stat. 12 *Ann. st.* 1. *cap.* 7. clergy is taken from persons stealing in any house or out-house, to the value of 40*s.* except as to apprentices under the age of *fifteen* years robbing their masters. 1 *Hale's P. C.* 666, 667. See 1 *Hawk. P. C. c.* 33. § 11—16. See tit. *Servants.*

APPROPRIATION, *appropriatio*, from the Fr. *approprier.*] The annexing of an ecclesiastical benefice to the proper and perpetual use of some religious house, bishoprick, college, or spiritual person, to enjoy for ever ; in the same way as *impropriation* is the annexing a benefice to the use of a lay person or corporation ; that which is an appropriation in the hands of religious persons being usually called an impropriation in the hands of the laity. See *Com. Dig.* tit. *Advowson*, (D. E.) It is computed that there are in *England* 3845 impropriations.

This contrivance seems to have sprung from the policy of monastic orders. At the first establishment of parochial clergy, the tithes of the parish were distributed in four parts—one for the bishop ; one to maintain the fabrick of the church ; a third for the poor ; and the fourth for the incumbent. The sees of the bishops becoming amply endowed, their shares sunk into the others ; and the monasteries inferring that a small part was enough for the officiating priests, *appropriated* as many benefices as they could by any means obtain, to their own use ; undertaking to keep the church in repair, and to have it constantly served. But in order to complete such appropriation effectually, the king's license and consent of the bishop must first be obtained ; because they might both, some time or other, have an interest by *lapse* in the benefice ; if it were not in the hands of a corporation, which never dies. The consent of the patron is also necessarily implied, because the appropriation could originally be made to none but to such spiritual corporation as is also the patron of the church ; the whole being indeed nothing else but an allowance for the patron to retain the tithes and glebe in their own hands, without presenting any clerk. *Plowd.* 496—500.

When the appropriation is thus made, the appropriators and their *successors* are perpetual parsons of the church ; and must sue and be sued in all matters concerning the rights of the church by the name of parsons. *Hob.* 307. An appropriation cannot be granted over. *Ibid.*

This appropriation may be severed, and the church become disappropriate, two ways. 1st. If the patron or appropriator present a clerk, who is instituted and inducted to the parsonage ; for such incumbent is to all intents and purposes complete parson ; and the appropriation being once severed, can never be reunited again, unless by a repetition of the same solemnities. *Co. Lit.* 46. 7 *Rep.* 13. And

when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a *sine-cure*; because he has no cure of souls, having a vicar under him, to whom that cure is committed; though this is not the only mode of creating *sine-cures*. See 2 *Burn's Ecc. Law*, 347. Also if the corporation, to which the benefice is annexed, is dissolved, the parsonage becomes disappropriate at common law. 1 *Comm.* 386. See the note there.

In this manner may appropriations be made at this day; and thus were most, if not all, now existing, originally made. At the dissolution of the monasteries by stat. 27 *Hen.* VIII. *c.* 28. and 31 *Hen.* VIII. *c.* 13. the appropriations belonging to those religious houses (being more than one-third of all the parishes in *England*) would at common law have been disappropriated; had not a clause been inserted in those statutes to give them to *the king*, in the same manner as the alien priories had before been. 2 *Inst.* 584. and from hence have sprung all the lay impropriations or secular parsonages in the kingdom; they having been afterwards granted out from time to time by the crown. See 1 *Comm.* 384. &c. 11 *Rep.* 11. *Gibs.* 719. See also tit. *Parson*, *Vicar*.

APPROPRIARE COMMUNIAM, To inclose or appropriate any parcel of land that was before open common, and thus to discommon it.

APPROVE, *approbare*.] To augment a thing to the utmost; to approve land is to make the best benefit of it, by increasing the rent, &c. 2 *Inst.* 474.

APPROVEMENT, Is where a man hath common in the lord's waste, and the lord makes an inclosure of part of the waste for himself, leaving sufficient common, with egress and regress for the commoners. *Reg. Jud.* 8, 9. See tit. *Common*.

The word Approvement is also used for the profits of the lands themselves. *Cromp. Jurisd.* 152. And the statute of *Merton*, 20 *Hen.* III. *c.* 4. makes mention of land newly approved. *F. N. B.* 71. Approvement is also the same with improvement.

APPROVER, or PROVER, *approbator*.] One that confessing felony committed by himself, appealed or accused others to be guilty of the same crime. See tit. *Accessary*, II. 5. He is called *approver*, because he must *prove* what he hath alleged; and that proof was anciently by battle, or the country, at the election of him that appealed: and the form of this accusation may be found in *Cromp. Just.* 250. See also *Bracton*, *lib.* 3. *Staundf. Pl. Cor.* 52. If a person indicted of treason or felony, not disabled to accuse, upon his arraignment, before any plea pleaded, and before competent judges, confesseth the indictment, and takes an oath to reveal all treasons and felonies that he knoweth of; and therefore prays a coroner to enter his appeal, or accusation, against those that are partners in the crime contained in the indictment; such a one is an *approver*. 3 *Inst.* 129. *H. P. C.* 192.

When a person hath once pleaded not guilty, he cannot be an approver. 3 *Inst.* 129. And persons attainted of treason or felony shall not be approvers; their accusation will not then be of such credit as to put a man upon his trial. 2 *Hawk.* 205. Vide 5 *Hen.* IV. *cap.* 2. as to charters of pardon.

Infants under age of discretion may not be approvers: and it being in the discretion of the court to suffer one to be an approver, this method of late hath seldom been practised. See tit. *Accessary*, II. 5. tit. *Appeal*; and *Leach's Hawk. P. C.* ii. *c.* 24. See tit. *Prover*.

APPROVERS. In old statutes, bailiffs of lords in their franchises are called their *approvers:* and approvers in the marches of *Wales* were such as had license *de vendre et acheter* beasts, &c. But by the statute 2 *Edw.* III. *c.* 12. approvers are such as are sent into counties to increase the farms of hundreds, &c. held by sheriffs. Such persons as have the letting of the king's demesnes in small manors, are called approvers of the king (*approbatores regis*) stat. 51 *Hen.* III. *st.* 5. And in the stat. 1 *Edw.* III. *st.* 1. *c.* 8. sheriffs are called the king's approvers.

APPRUARE, To take to his own use or profit. Stat. *Wm.* II. *c.* 20.

APPRYSING, Is when, by letters, a debitor is charged to appear before a messenger, (who, in that case, represents the sheriff,) to hear the lands specified in the letters apprysed by an inquest, and declared to belong to the creditor for payment of his debts. *Scotch Dict.*

APPURTENANCES, *pertinentia*, derived from the *French appartenir*, to belong to.] Signify things both corporeal and incorporeal appertaining to another thing as principal: as hamlets to a chief manor; and common of pasture, piscary, &c. Also liberties and services of tenants. *Brit. cap.* 39. If a man grant common of estovers to be burnt in his manor, these are appurtenant to the manor; for things appurtenant may be granted at this day. *Co. Lit.* 121. Common appurtenant may be to a house, pasture, &c. Out-houses, yards, orchards, and gardens are appurtenant to a messuage; but lands cannot *properly* be said to be appurtenant to a messuage. 1 *Lill. Abr.* 91. And one messuage cannot be appurtenant to another. *Ibid.* Lands cannot, in the true sense of the words *cum pertinentiis*, be appurtenant to the house; but the word *pertinens* may be taken in the sense of usually letten or occupied with the house. *Plowd.* 170. See *Cro. Eliz.* 704. *contrà;* but it seems now settled, that lands will not pass by the word *appurtenances*, but only such things which do properly belong to the house. *Palm.* 375. *Godb.* 352. *S. C. Cro. Car.* 57. *Hutt.* 85. *S. C. Lit. Rep.* 8. *S. C.*

Lands, a common, &c. may be appurtenant to a house; though not a way. 3 *Salk.* 40. Grant of a manor, without the words *cum pertinentiis*, 'tis said will pass all things belonging to the manor. *Owen's Rep.* 31. Where a person hath a messuage, &c. to which estovers are *appurtenant*, and it is blown down or burnt by the act of God; if the owner re-edify it, in the same place and manner as before, he shall have the ancient appurtenances. 4 *Rep.* 86. A turbary may be appurtenant to a house; so a seat in a church, &c. but not to land; for the things must agree in nature and quality. 3 *Salk.* 40. *Vide* tit. *Appendant*, and see *Plowd. Com.* 103. b. 104. b. 170. Also vide *Com. Dig.* (1 V.) tit. *Appendant* and *Appurtenant.*

AQUAGE, aquagium, *quasi aquæ agium*, i. e. *æquæductus* and *aquægangium.*] A water-course.——In some instances used for toll paid for water-carriage. See *Ewage.*

ARACE, *angl.* To rase or erase, from the French *arracher*, *evellere. Blount.*

ARAHO, *In araho conjurare, i. e.* To make oath in the church, or some other holy place; for, according to the *Rituarian* laws, all oaths were made in the church upon the relicks of saints. *Spelm.*

ARATIA, Arable grounds. *Cowel.*

ARATRUM TERRÆ, As much land as can be tilled with one plough. *Aratura terræ* is the service which the tenant is to do for his lord in ploughing his land. See *Arura.*

ARBITRATION, ARBITRATOR, and ARBITRAMENT. See tit. *Award.*

ARCA CYROGRAPHICA, *sive cyrographhorum Judæorum.* This was a common chest, with three locks and keys, kept by certain Christians and Jews, wherein all the contracts, mortgages, and obligations belonging to the Jews were kept, to prevent fraud ; and this by order of King *Rich.* I. *Hoveden's Annals, p.* 745.

ARCHBISHOP, *archiepiscopus.*] The chief of the clergy in his province. See tit. *Bishops.*

ARCHDEACON, *archidiaconus.*] Is one that hath ecclesiastical dignity and jurisdiction over the clergy and laity, next after the bishop, throughout the diocese, or in some part of it only. *Archdeacons* had anciently a superintendant power over all the parochial clergy in every deanery in their precincts ; they being the chiefs of the deacons ; though they have no original jurisdiction, but what they have got is from the bishop, either by prescription or composition ; and Sir *Simon Degg* tells us, that it appears an *archdeacon* is a mere substitute to the bishop ; and what authority he hath is derived from him, his chief office being to visit and inquire, and *episcopo nunciare*, &c. In ancient times *archdeacons* were employed in servile duties of collecting and distributing alms and offerings ; but at length, by a personal attendance on the bishops, and a delegation to examine and report some causes, and commissions to visit the remoter parts of the dioceses, they became, as it were, overseers of the church ; and, by degrees, advanced into considerable dignity and power. *Lanfranc*, archbishop of *Canterbury*, was the first prelate in *England* who instituted an *archdeacon* in his diocese, which was about the year 1075. And an *archdeacon* is now allowed to be an ordinary, as he hath a part of the episcopal power lodged with him. He visits his jurisdiction once every year: and he hath a court where he may inflict penance, suspend, or excommunicate persons, prove wills, grant administrations, and hear causes ecclesiastical, &c. subject to appeal to the bishop of the diocese, under stat. 24 *Hen.* VIII. *c.* 12. It is one part of the office of an *archdeacon*, to examine candidates for holy orders, and to induct clerks within his jurisdiction, upon receipt of the bishop's mandate. 2 *Cro.* 556. 1 *Lev.* 193. *Wood's Inst.* 30.

Archdeaconries are commonly given by bishops, who do therefore prefer to the same by collation : but if an archdeaconry be in the gift of a layman, the patron doth present to the bishop, who institutes in like manner as to another benefice ; and then the dean and chapter do induct him, that is, after some ceremonies, place him in a stall in the cathedral church to which he belongeth, whereby he is said to have a place in the choir. *Wats. c.* 15.

Archdeacons, by stat. 13 and 14 *Car.* II. *c.* 4. are to read the Common Prayer and declare their assent thereunto, as other persons admitted to ecclesiastical benefices ; and also must subscribe the same before the ordinary ; but they are not obliged, by stat. 13 *Eliz. c.* 12. to subscribe and read the thirty-nine articles ; for although an archdeaconry be a benefice with cure, yet it is not such a benefice with cure as seems to be intended by that statute, which relates only to such benefices with cure as have particular churches belonging to them. *Wats. c.* 15. And they are to take the oaths at the sessions, as other persons qualifying for offices.

The judge of the archdeacon's court (where he doth preside himself) is called the official. *Wood's Inst.* 30.

Where the archdeacon hath a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there, and hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted; for the statute intends that no suit shall be *per saltum*: but if the archdeacon hath not a peculiar, then the bishop and he have a concurrent jurisdiction, and the party may commence his suit either in the archdeacon's court or the bishop's, and he hath election to choose which he pleaseth: and if he commence in the bishop's court, no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there. Ld. *Raym.* 123.

An archdeacon is a ministerial officer, and cannot refuse a churchwarden elected by the parish. *Rex* v. *Martin Rice*, Ld. *Raym.* 138.

ARCHERY, A service of keeping a bow, for the use of the lord to defend his castle. *Co. Litt.* § 157.

ARCHES COURT, *curia de arcubus.*] The chief and most ancient consistory court belonging to the archbishop of *Canterbury* for the debating of spiritual causes. It is so called from the church in *London*, commonly called *St. Mary Le Bow*, (*de Arcubus*,) where it was formerly held; which church is named *Bow Church* from the steeple which is raised by pillars, built *archwise*, like so many bent bows. *Cowel.*

The judge of this court is styled the Dean of the *Arches*, or Official of the *Arches* court; he hath extraordinary jurisdiction in all ecclesiastical causes, except what belong to the prerogative court; also all manner of appeals from bishops or their chancellors or commissaries, deans and chapters, archdeacons, &c. first or last are directed hither: he hath ordinary jurisdiction throughout the whole province of *Canterbury*, in case of appeals; so that upon any appeal made, he, without any farther examination of the cause, sends out his citation to the appellee, and his inhibition to the judge from whom the appeal was made. Of this, see more, 4 *Inst.* 337. But he cannot cite any person out of the diocese of another, unless it be on appeal, &c. Stat. 23 *Hen.* VIII. *c.* 9.

In another sense the dean of the *arches* has a peculiar jurisdiction of thirteen parishes in *London*, called a deanery, (being exempt from the authority of the bishop of *London*,) of which the parish of *Bow* is the principal. The persons concerned in this court, are the judge, advocates, registers, proctors, &c. And the foundation of a suit in these courts, is a citation for the defendant to appear; then the libel is exhibited, which contains the action, to which the defendant must answer; whereupon the suit is contested, proofs are produced, and the cause determined by the judge, upon hearing the advocates on the law and fact; when follows the sentence or decree thereupon.

This court, as also the court of peculiars, the admiralty court, the prerogative court, and the court of delegates, (for the most part,) is now held in the hall belonging to the college of Civilians, commonly called Doctors Commons. *Floy.* 21.

From this court the appeal is to the king in chancery; by stat. 25 *Hen.* VIII. *c.* 19.

ARCHIVES, *archiva*, from *arca*, a chest.] The *Rolls*, or any place where ancient records, charters and evidences, belonging to the crown and kingdom, are kept; also the *Chancery*, *Exchequer-office*, &c. And it hath been sometimes used for repositories in libraries. It is used in common speech for the records themselves.

ARENTARE, To rent out, or let at a certain rent. *Consuetud. Domûs de Farendon, MS. fol.* 53.

ARERIESMENT, Surprise, affrightment. To the great *arerie-ment* and *estonyement* of the common law. *Rot. Parl.* 21 *Edw.* III.

ARGENTUM ALBUM, Silver coin, or pieces of bullion, that anciently passed for money. See *Alba Firma.*

ARGENTUM DEI, God's money; *i. e.* money given in earnest upon the making of any bargain; hence comes *arles*, earnest.

ARGIL, or ARGOIL, Clay, lime, and sometimes gravel; also the lees of wine, gathered to a certain hardness. *Law Fr. Dict.*

ARGUMENTOSUS, *ingenious*, mentioned by our historian *Neubrigensis, lib.* 1. *c.* 14.

ARIERBAN, The edict of the ancient *French* and *German* kings, &c. commanding all their tenants to come into the army; if they refuse, then to be deprived of their estates. See *Spelm.* in v. *Aribannum*, &c.

ARIETUM LEVATIO, An old sportive exercise, supposed to be the same with running at the *quintain.* See *Stevens's Shakspeare, edit.* 1793, *vol.* 6. *p.* 27. 175.

ARMA DARE, To dub or make a knight. Arma *capere*, or *suscipere*, to be made a knight. *Kennet's Paroch. Antiq. p.* 288. *Walsingham, p.* 507. The word *arma*, in these places, signifies only a sword; but sometimes a knight was made by giving him the whole armour. *Ordericus Vitalis, lib.* 8. *de Henrico*, &c.

ARMA LIBERA, A sword and a lance which were usually given to a servant when he was made free. *Leg. Will. cap.* 65.

ARMA MOLUTA, Sharp weapons that cut, opposed to such as are blunt, which only break or bruise. *Bract. lib.* 3. They are called *arma emolita* by *Fleta, lib.* 1. *c.* 33. *par.* 6.

ARMA REVERSATA, A punishment when a man was convicted of treason or felony; thus our historian *Knighton*, speaking of *Hugh Spencer*, tells us, *Primo vestierunt eum uno vestimento cum* armis *suis* reversatis. *Lib.* 3. *p.* 2546.

ARMARIA. *Vide Almaria.*

ARMIGER, *Esquire.* A title of dignity belonging to such gentlemen as bear arms; and these are either by *curtesy*, as sons of noblemen, eldest sons of knights, &c. Or by *creation*, such as the king's servants, &c. The word *armiger* has been also applied to the higher servants in convents. *Paroch. Antiq.* 576. See tit. *Esquire*, and *Spelman* in v.

ARMISCARA, Is a sort of punishment decreed or imposed on an offender by the judge. *Malmsb. lib.* 3. *p.* 97. *Walsingham, p.* 430. At first it was to carry a saddle at his back, in token of subjection. *Brampton* says, that, in the year 1176, the king of the *Scots* promised King *Hen.* II. at *York*, *Lanceam et sellam suam super altare Sancti* Petri *ad perpetuam hujus subjectionis memoriam offerre.* See *Spelm.* in v.

ARMORIAL BEARINGS. By various acts, 38 *Geo.* III. *c.* 53. 39 *Geo.* III. *c.* 8. 41 *Geo.* III. (U. K.) *c.* 69. 43 *Geo.* III. *c.* 161. the last of which only is at present in force, a duty (now under the management of commissioners of taxes) is imposed on armorial bearings, whether borne on plate or carriages, &c.

ARMOUR and ARMS, In the understanding of law, are extended to any thing that a man wears for his defence, or takes into his hands, or useth in anger, to strike or cast at another. *Cromp. Just.* 65. *Arms* are also what we call in Latin *insignia*, ensigns of honour; as to the

original of which, it was to distinguish commanders in war; for the ancient defensive *armour* being a coat of mail, &c. which covered the persons, they could not be distinguished, and therefore a certain badge was painted on their shields, which was called *arms*; but not made hereditary in families till the time of King *Rich.* I. on his expedition to regain *Jerusalem* from the *Turks*; and, besides shields with *arms*, they had a silk coat drawn over their *armour*, and afterwards a stiff coat, on which their *arms* were painted all over, now the herald's coat of *arms*. *Sid.* 352.

By stat. 13 *Rich.* II. *st.* 1. *c.* 2. the constable (Lord High Constable) shall have cognisance of contracts touching deeds of arms done out of the realm: but it seems he cannot punish for painting coats of arms, &c. See 2 *Hawk. P. C. c.* 4. § 5—8. and this *Dict.* tit. *Constable*.

By the common law it is an offence for persons to go or ride *armed* with dangerous and unusual weapons: but gentlemen may wear common *armour*, according to their quality, &c. 3 *Inst.* 160.

By stat. 7 *Edw.* I. *st.* 1. the king may prohibit force of *arms*, and punish offenders according to law; and herein every subject is bound to be aiding. And by stat. 2 *Edw.* III. *c.* 3. enforced by stats. 7 *Rich.* II. *c.* 13. and 20 *Rich.* II. *c.* 1. none shall come with force and arms before the king's justices, nor ride, nor go *armed* in affray of the peace, on pain to forfeit their *armour*, and suffer imprisonment, &c.

Under these statutes none may wear (unusual) armour publicly, upon pretence of protecting his *person*; but a man may assemble his neighbours to protect his *house* without transgressing the act. 1 *Hawk. P. C.* 267. But no wearing of arms is within the statute unless they are such as terrify; therefore the weapons of fashion, as swords, &c. or privy coats of mail, *may* be worn. *Id. ib.* And one may arm to suppress riots or dangerous insurrections. *Id.* 268.

By the Bill of Rights, 1 *Wm. & M.* stat. 2. *c.* 2. it is declared, that "the subjects which are Protestants, may have arms for their defence suitable to their conditions, as allowed by law." See stat. 33 *Hen.* VIII. *c.* 6. and tit. *Game* and *Constable* III. 2.

Embezzling the king's armour felony; stat. 31 *Eliz. c.* 4. Armour may be exported, unless prohibited by proclamation; stat. 12 *Car.* II. *c.* 4. Importing arms or ammunition prohibited; 1 *Jac.* II. *c.* 8.

ARNALDIA, *arnoldia*. A disease that makes the hair fall off like the *alopiecia*, or like a distemper in foxes. *Rog. Hoveden, fl.* 693.

ARNALIA, *arable grounds*. This word is mentioned in *Domesday*, tit. *Essex*.

AROMATARIUS, *Latin.*] A word often used for a *grocer*, but held not good in law proceedings. 1 *Vent.* 142.

ARPEN, or *Arpent*, An acre or furlong of ground: and according to the old *French* account in Domesday-book, 100 perches make an *arpent*. The most ordinary acre, called *l'arpent de France*, is one hundred perches square: but some account it but half an acre.

ARPENTATOR, A measurer or surveyor of land.

ARQUEBUSS, Fr. *Arquebuse.*] A short hand-gun, a caliver, or pistol; mentioned in some of our ancient statutes. *Law Fr. Dict.*

ARRACK. A duty and excise is payable for *arrack* imported from the *East Indies*. See tit. *Navigation Acts*.

ARRAIATIO PEDITUM, Is used in *Pat.* 1. *Edw.* II. for the *arraying* of foot soldiers.

ARRAIERS, *Arraiatores.*] Such officers as had the care of the soldiers' *armour*, and whose business it was to see them duly accoutred. In several reigns, commissioners have been appointed for this purpose.

ARRAIGN, from the Fr. *arranger*, To set a thing in order; hath the same signification in law: but the true derivation is from the *French arraisonner*, i. e. *ad rationem ponere.*] To call a man to answer in form of law. A prisoner is *arraigned*, when he is indicted and brought to trial; and to *arraign* a writ of assise, is to cause the demandant to be called to make the plaint, in such manner as the tenant may be obliged to answer. *Co. Lit.* 262. But no man is properly *arraigned* but at the suit of the king, upon an indictment found against him, or other record wherewith he is to be charged; and this *arraignment* is to take care that the prisoner do appear to be tried and hold up his hand at the bar, for the certainty of the person, and plead a sufficient plea to the indictment. *Co. Lit.* 262, 263.

The prisoner is to hold up his hand only in treason and felony; but this is merely a ceremony: if he owns that he is the person, it is sufficient without it; and then upon his *arraignment* his fetters are to be taken off; and he is to be treated with all the humanity imaginable. 2 *Inst.* 315. 3 *Inst.* 35. A peer need not hold up his hand. 4 *St. Trials*, 211. 508.

Prisoners are now generally tried in their irons, because taking them off is usually attended with great pain and trouble.

An attainder of high treason has been reversed for the omission of an arraignment. 2 *Hawk. P. C.* 438. which see for further matter as to *Arraignment.*

If in action of slander for calling one thief, the defendant justifies that the plaintiff stole goods, and issue is thereon taken: if it be found for the defendant in *B. R.* and for felony in the same county where the court sits, or before justices of assise, &c. he shall be forthwith *arraigned* upon this verdict of twelve men, as on an indictment. 2 *Hale's Hist. P. C.* 151.

The pleas upon *arraignment* are either the general issue, not guilty; plea in abatement, or in bar; and the prisoner may demur to the indictment: he may also confess the fact; but then the court has nothing more to do than to proceed to judgment against him.

For the solemnity of the *arraignment* and trial of a prisoner, see *Dalt. chap.* 185. *fo.* 515.

ARRAY, *arraya* sive *arraiamentum.*] An old *French* word, signifying the ranking or setting forth of a jury of men impanelled upon a cause. And when we say to *array* a panel, that is, to set forth the men impanelled one by another. *F. N. B.* 157. *To challenge the array* of the panel, is at once to except against all the persons *arrayed* or impanelled, in respect of partiality, &c. *Co. Lit.* 156. If the sheriff be of affinity to either of the parties; or if any one or more of the jurors are returned at the nomination of either party; or for any other partiality; the *array* shall be *quashed.* The word *array* also relates, in a particular manner, to military order, as to conduct persons armed, &c. *Stat.* 13 and 14 *Car.* II. *cap.* 3.

ARREARAGES, *arreragia*, from the French *arriere*, *retro*, behind.] Money unpaid at the due time, as rent behind; the remainder due on account; or a sum of money remaining in the hands of an accountant.

ARRECTATUS, One suspected of any crime. *Offic. Coronat. Spelm. Gloss.*

ARRECTED, Reckoned, considered. 1 *Inst.* 173. b. and n.

ARRENATUS, *Arraigned*, accused. *Rot. Parl.* 21 *Edw.* I.

ARRENTATION, from the Spanish *arrendar*, *ad certum, redditum dimittere.*] The licensing the owner of lands in the forest, to enclose

them with a low hedge and small ditch, according to the assise of the forest, under a yearly rent: *saving the arrentations* is saving a power to give such licenses. *Ordin. Forestæ*, 34 *Edw.* I. stat. 5.

ARREST, *arrestum*, from the Fr. *arrêter*, to stop, or stay.] A restraint of a man's person, obliging him to be obedient to the law: and it is defined to be the execution of the command of some court of record or officer of justice. An *arrest* is the beginning of imprisonment, where a man is first taken, and restrained of his liberty, by power or colour of a lawful warrant: also it signifies the decree of a court, by which a person is *arrested*. 2 *Shep. Abr.* 299.

ARRESTS *are either in* civil *or* criminal *cases*.

An arrest in a *civil cause* is defined to be the apprehending or restraining one's person by process in execution of the command of some court, or officers of justice. *Wood's Inst.* 575.

There are several statutes, securing the liberty of the subject, against unlawful arrests and suits. See *Magna Charta*, *c.* 29. 3 *Edw.* I. *c.* 35. and see tit. *Barrator*.

Some persons are also privileged from arrests, *viz.* peers of the realm, members of parliament, peeresses by birth, 1 *Inst.* 131. 2 *Inst.* 50. 4 *Bacon's Abr.* 228.) peers of *Scotland*, (2 *Stra.* 990.) a peeress by marriage, (*Co. Lit.* 16. 6 *Co.* 53. *Dyer*, 79.) members of convocation actually attending thereon, (stat. 8 *Hen.* VI. *c.* 1.) bishops, ambassadors, or the domestic servant of an ambassador, *really and bonâ fide in that capacity*. (Stat. 7 *Ann. c.* 12. 3 *Wils.* 32. 2 *Str.* 797. 2 Ld. *Raym.* 1524. 4 *Burr.* 2016, 2017. 3 *Burr.* 1676.) the king's servants, (1 *Raym.* 152. 8 *Mod.* 12.) marshal, warden of the *Fleet*, (1 *Vent.* 65.) clerks, attorneys, and all other persons attending the courts of justice, (4 *Inst.* 72. 2 *Inst.* 551. 12 *Mod.* 163.) clergymen performing divine service, and not merely staying in the church with a fraudulent design, (stats. 50 *Edw.* III. *c.* 5. 1 *Rich.* II. *c.* 16.) suitors, (*Bro. Privil.* 57.) witnesses subpœnaed, and other persons necessarily attending any court of record upon business. (Sir *T. Raym.* 101. 1 *Vent.* 11. *Rules in Chan.* 217. 3 *Inst.* 141.) A bankrupt coming to surrender, or within forty-two days after his surrender, (stat. 5 *Geo.* II. *c.* 30. § 5. and see *Cowp.* 156. but not an extent at the suit of the crown. 2 *Bl. Rep.* 1142.) witnesses properly summoned before commissioners of bankrupt, or other commissioners under the great seal, (1 *Atk.* 54.) but not creditors coming to prove their debts, (4 *Term Rep.* 377.) heirs, executors, or administrators, *R. M.* 1654. except on personal contracts by themselves, (1 *Term Rep.* 716.) or in cases of *devastavit*, (1 *Salk.* 98.) sailor or volunteer soldier: unless the debt is twenty pounds.) Stat. 1 *Geo.* II. *c.* 14. § 15. 31 *Geo.* III. *c.* 13. § 65. See *Barnes*, 114. 1 *Str.* 2. 7. 1 *Black. Rep.* 29, 30. Officers of courts are allowed these privileges only where they sue or are sued in their own right; not if as executors or administrators, nor in joint actions. *Hob.* 177. *Dyer*, 24. *pl.* 150. 2 *Sid.* 157. *Latch.* 199. *Godb.* 10. 2 *Roll. Abr.* 274. See 3 *Comm. c.* 19. *pl.* 289. that no arrests can be made in the king's presence, &c.

But this privilege does not extend to *Irish* or other *foreign peers*, (2 *Inst.* 48. 3 *Inst.* 70.) or to *peeresses by marriage*, if they afterwards intermarry with commoners. *Co. Lit.* 16. 2 *Inst.* 50. 7 *Co.* 15, 16.

And though the *servants* of *peers necessarily employed* about their persons and estates, could not formerly be arrested; (2 *Str.* 1065. 1 *Wils.* 278.) yet this privilege seems to have been taken away by the stat. 10 *Geo.* III. *c.* 50. § 2.

Members of corporations aggregate, and *hundredors*, not being liable to a *capias*, cannot be arrested in their corporate capacity, or on the statutes of hue and cry, &c. *Bro. tit. Corp.* 43. 3 *Keb.* 126, 127. Corporations must be made to appear by *distringas*. *Finch.* 353. 3 *Salk.* 46.

In an action against *husband and wife*, the husband alone is liable to be arrested, and shall not be discharged until he have put in bail for himself and wife; 1 *Vent.* 49. 1 *Mod.* 8. and if she is arrested, she shall be discharged on common bail. 1 *Term Rep.* 486. 1 *Salk.* 115. See tit. *Bail.*

A clerk of the court ought not to be arrested for any thing which is not criminal, because he is supposed to be always present in court to answer the plaintiff. 1 *Lill.* 94. Arrests are not to be made within the liberty of the king's palace: nor may the king's servants be *arrested* in any place without notice first given to the lord chamberlain, that he remove them, or make them pay their debts. *Vide* tit. *Ambassador.*

There is this difference between arrests in civil and criminal cases; that none shall be arrested for debt, trespass, &c. or other cause of action, but by virtue of a precept or commandment out of some court: but for treason, felony, or breach of the peace, any man may arrest without warrant or precept. *Terms de Ley*, 54.

The abuses of gaolers' and sheriffs' officers towards their prisoners, are well restrained and guarded against by stat. 32 *Geo.* II. *c.* 28. the chief provisions of which are, that an officer shall not carry his prisoner to any tavern, &c. without his consent, nor charge him for any liquor but such as he shall freely call for, nor demand for caption or attendance any other than his legal fee, nor exact any gratuity-money, nor carry his prisoner to gaol within twenty-four hours after his arrest, unless the prisoner refuses to go to some safe house (except his own) *of his own choosing*. Nor shall any officer take for the diet, lodging or expenses of his prisoner more than shall be allowed by an order of sessions. Bailiffs to show a copy of the act to prisoners, and to permit perusal thereof; and the prisoner to send for his own victuals, bedding, &c.

Sheriffs and their officers to take no reward for doing their office but according to law. Stats. 3 *Edw.* I. *c.* 26. 20 *Edw.* III. *c.* 6. 1 *Hen.* IV. *c.* 11. *Co. Lit.* 368. 23 *Hen.* VI. *c.* 9. *Plowd.* 465.

The fees now allowed by the Master for arrests on mesne process in town are 10*s.* 6*d.* on capias, bill, latitat, &c. and 1 guinea if by original, and also in the country 1 guinea, and 1*s.* per mile. *Impey's Sheriff*, 122.

By stat. 29 *Car.* II. *c.* 7. no writ, process, warrant, &c. (except in cases of treason, felony, or for breach of the peace,) shall be served on a *Sunday*; on pain that the person serving them shall be liable to the suit of the party grieved, and answer damages, as if the same had been done without writ: an action of false imprisonment lies for arrest on a *Sunday*, and the arrest is void. 1 *Salk.* 78. A defendant was arrested on a *Sunday* by a writ out of the *Marshalsea*; and the court of *B. R.* being moved to discharge him, it was denied; and he was directed to bring action of false imprisonment. 5 *Mod. Rep.* 95. The defendant being taken upon a *Sunday*, without any warrant, and locked up all that day; on *Monday* morning a writ was got against him, by which he was arrested; it was ruled, that he might have an action of false imprisonment, and that an attachment should go against those who took him on the *Sunday*. *Mod. Cas.* 96. Attachments have

been often granted against bailiffs for making arrests on *Sunday*: but affidavit is usually made, that the party might be taken upon another day. 1 *Mod.* 56. A person may be retaken on a *Sunday*, where arrested the day before, &c. *Mod. Cas.* 231. And a man may be taken on a *Sunday* on an escape warrant: or on fresh pursuit when taken the day before. 2 Ld. *Raym.* 1028. 2 *Salk.* 626. when he goes at large out of the rules of the *King's Bench* or *Fleet* prison, &c. Stat. 5 *Ann. c.* 9. Also bail may take the principal on a *Sunday*, and confine him till *Monday*, and then render him. 1 *Atk.* 239. 6 *Mod.* 251. A party cannot be arrested on a *Sunday* on an attachment for non-performance of an award, it being only in the nature of a civil execution. 1 *Term Rep.* 266. denies 1 *Atk.* 581.

By stats. 12 *Geo.* I. *c.* 29. and 5 *Geo.* II. *c.* 27. both made perpetual by stat. 21 *Geo.* II. *c.* 3. no person can be arrested, or held to bail, on a writ sued out of the *superior* courts, unless the cause of action be 10*l.* or upwards.

By 37 *Geo.* III. *c.* 45. (for the restraining of payments in cash by the bank of *England*, and amended by 43 *Geo.* III. *c.* 18. and continued in force during the war,) no person to be held to special bail, unless affidavit required to be made by 12 *Geo.* I. *c.* 29. also add that there had been no offer to pay in bank notes, or partly in notes, and partly in cash; otherwise proceedings to be had as if no affidavit had been made to hold to special bail.

By 43 *Geo.* III. *c.* 46. for the more effectual prevention of frivolous and vexatious arrests, &c. the plaintiff shall not be entitled to costs, if he does not recover the amount of the sum for which defendant was held to bail, &c. § 3. Nor to costs on action on the judgment, § 4. The defendant may justify bail in vacation, § 6.

See 43 *Geo.* III. *c.* 53. for rendering process in the courts of *Ireland* more beneficial, and to prevent vexatious and frivolous arrests, &c. there.

And now by stat. 19 *Geo.* III. *c.* 70. no person can be *arrested* or held to bail upon process out of any *inferior* court for less than 10*l.* but proceedings are to be had in inferior courts according to the directions of 12 *Geo.* I. *c.* 29. extended by 19 *Geo.* III. to debts under 10*l.* See also 33 *Geo.* III. *c.* 1.

By § 3. of 19 *Geo.* III. *c.* 70. so much of all acts of parliament for the recovery of debts within certain districts, as gives power to *arrest debtors* for less than 10*l.* is repealed. And by § 4. when final judgment is obtained in such suits, and defendant cannot be found within the jurisdiction, the superior courts may issue execution.

By stat. 11 and 12 *Wm.* III. *c.* 9. no person is to be held to bail in *Wales* on process out of the courts at *Westminster* for less than 20*l.*

In trover the defendant may be held to bail of course. 2 *Str.* 1122. *Cowp.* 529. For this is more an action of property than a *tort*. 1 *Wils.* 23.

In an action of debt on a judgment, whether after verdict or by default, defendant cannot be arrested if he was previously held to bail in the original action. *Say.* 160.

It is now settled both in *K. B.* and *C. P.* that a defendant may be arrested in an action on a judgment for 10*l.* for damages and *costs*, though the original debt alone were under 10*l.* 4 *Term Rep.* 570. on the authority of 2 *Black. Rep.* 1274. (though it had been otherwise ruled in *K. B.* 2 *Burr.* 1389. 4 *Burr.* 2117. 5 *Burr.* 2660. *Cowp.* 128.

Bail cannot be had in an action on the *second judgment*, where bail has been given on the first. 2 *Str.* 782.

In what cases special bail shall be required. See tit. *Bail.*

Formerly one great obstruction to public justice, civil as well as criminal, was the number of privileged places, such as the *Mint*, *Savoy*, &c. under pretence of their being ancient palaces; but these sanctuaries for iniquity are now abolished, and the opposing any process therein is made highly penal by stat. 8 and 9 *Wm.* III. *c.* 27. § 15. 9 *Geo.* I. *c.* 28. § 1. and 11 *Geo.* I. *c.* 22. by which persons opposing the execution of the process or abusing the officer, if he receives any bodily hurt, are declared guilty of felony. See tit. *Privileged Places.*

When a person is apprehended for debt, &c. he is said to be arrested: and writs express *arrest* by two several words, *capias* and *attachias*, to take and catch hold of a man; for an officer must actually lay hold of a person, besides saying he arrests him, or it will be no lawful arrest. 1 *Lill. Abr.* 96. If a bailiff be kept off from making an arrest, he shall have an action of assault: and where the person arrested makes resistance, or assaults the bailiff, he may justify beating of him. If a bailiff *touches* a man, which is an *arrest*, and he makes his escape, it is a rescous, and attachment may be had against him. 1 *Salk.* 79. If a bailiff lays hold of one by the hand, (whom he had a warrant to arrest,) as he holds it out at the window, this is such a taking of him, that the bailiff may justify the breaking open of the house to carry him away. 1 *Vent.* 306.

When a person has committed treason or felony, &c. doors may be broke open to arrest the offender; but not in civil cases, except it be in pursuit of one arrested: or where a house is recovered by real action, or in ejectment, to deliver possession to the person recovering. *Plowd.* 5 *Rep.* 91. Action of trespass, &c. lies for breaking open a house to make arrest in a civil action. *Mod. Cas.* 105. But if it appears a bailiff found an outer door, &c. open, he may open the inner door to make an arrest. *Comb.* 327.

In the case of *Lee* v. *General Gansel*, the court of *King's Bench* determined, that the chamber door of a lodger is not to be considered as his *outer* door; but that the street door being open, the officers had a right to force open the chamber door, the defendant being in the room and refusing to open it. *Cowp.* 1.

Also it is enacted by 3 and 4 *Jac.* I. *par.* 35. that upon any lawful writ, warrant or process awarded to any sheriff or other officer, for the taking of any popish recusant, standing excommunicated for such recusancy, it shall be lawful, if need be, to break any house. 2 *Hawk. P. C. c.* 14. § 10.

But it hath been resolved, that where justices of peace are, by virtue of a statute, authorised to require persons to come before them to take certain oaths prescribed by such statute, the officer cannot lawfully break open the doors. 2 *Hawk. P. C. c.* 14. § 11.

An arrest in the night, as well as the day, is lawful. 9 *Rep.* 66. And every one is bound by the common law to assist not only the sheriff in the execution of writs, and making arrests, &c. but also his bailiff that hath his warrant to do it. 2 *Inst.* 193. A bailiff upon an arrest ought to show at whose suit, out of that court the writ issues, and for what cause, &c. *when the party arrested submits himself to the arrest:* a bailiff, sworn and known, need not show his warrant, though the party demands it; nor is any other special bailiff bound to show his warrant unless it be demanded, 9 *Rep.* 68, 69. *Cro. Jac.* 485. If an action is entered in one of the *compters* of *London*, a city serjeant

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If a wrong person is arrested ; or one for felony, where no felony is done, &c. it will be false imprisonment.

By *Glynn*, Ch. J. *Mich.* 1658. if one be arrested by the sheriff of the county, within a liberty, without a *non omittas*, yet the arrest is good ; for the sheriff is sheriff of the whole county, but the bailiff of the liberty may have his action against the sheriff, for entering of his liberty. But upon a *quo minus*, a sheriff may enter any liberty, and execute it *impune*. *Pract. Reg.* 72.

With regard to arrests in *criminal cases*, it hath already been observed, that for *treason*, *felony*, *or breach of the peace*, any person may arrest without warrant or precept. But the king cannot command any one by word of mouth to be arrested ; for he must do it by writ, or order of his courts, according to law : nor may the king arrest any man for suspicion of treason, or felony, as his subjects may ; because if he doth wrong, the party cannot have an action against him. 2 *Inst.* 186.

Arrests by *private persons* are in some cases *commanded*. Persons present at the committing of a felony must use their endeavours to apprehend the offender, under penalty of fine and imprisonment. 3 *Inst.* 117. 4 *Inst.* 177.

And for this cause, by the common law, if any homicide be committed, or dangerous wound given, whether with, or without malice, or even by misadventure or self-defence, in any town, or in the lanes or fields thereof, in the day time, and the offender escape, the town shall be amerced, and if out of a town, the hundred shall be amerced. 3 *Inst.* 53.

And since the statute of *Winchester*, *c.* 5. which ordains that walled towns should be kept shut from sun-setting to sun-rising ; if the fact happen in any such town by night or by day, and the offender escape, the town shall be amerced. 3 *Inst.* 53.

And, as private persons are bound to apprehend all those who shall be guilty of any of the crimes above mentioned in their view, so also are they, with the utmost diligence, to pursue and endeavour to take all those who shall be guilty thereof, out of their view, upon a hue and cry levied against them. 3 *Inst.* 117.

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With regard to arrests by *public officers*, they may be made either with or without process.

Arrests without process may be made by *watchmen*, *constables*, *bailiffs of towns*, or *justices of peace*. For the power of *watchmen*, see stat. *Winchester*, c. 4. It has been holden, that this statute was made in affirmance of the common law, and that every private person may by the common law arrest any *suspicious night walker*, and detain him till he give a good account of himself. 2 *Hawk. P. C. c.* 13. § 6.

As to arrests by *constables*, see tit. *Constable* III. 1, 2.

'Tis the better opinion at this day, that any constable, or even a private person to whom a warrant shall be directed from a justice of peace, to arrest a particular person for felony, or any other misdemeanor within his jurisdiction, may lawfully execute it, whether the person mentioned in it be, in truth, guilty or innocent; and whether he were before indicted of the same offence or not, and whether any felony were in truth committed or not: for however the justice himself may be punishable for granting such a warrant without sufficient grounds, it is reasonable that he alone be answerable for it, and not the officer, who is not to examine or dispute the reasonableness of his proceedings. 2 *Hawk. P. C. c.* 13. § 11.

The doctrine of *general warrants* (*i. e.* to apprehend all the authors and publishers of libels, or generally all persons suspected of any particular crime, without mentioning the name of the person accused) seems exploded as illegal. See *Leach's Hawk. P. C.* 2. *c.* 13. § 10. and the note there, as to *Wilkes's* case. But it is to be observed that the term *general warrant*, used by *Hawkins* in that place, does not seem to mean a warrant, without the name of the *party* being specified, but one which does not contain the specific *charge* against the party. See the case of *Money* v. *Leach*, and also 4 *Comm.* 65. 291.

The great point gained by these determinations, was the rescuing persons from the malice or ignorance of the *inferior* ministers of justice.

With regard to arrests by *bailiffs* of *towns*, their power is founded on the above-mentioned statute of *Winchester*, *c.* 4. And as to arrests by *justices* of *peace*, arrests by their command are either by word of mouth or by warrant.

A justice of peace may, by word of mouth, authorise any one to arrest another, who shall be guilty of an actual breach of the peace in his presence, or shall be engaged in a riot in his absence. 2 *Hawk. P. C. c.* 13. § 14. *Dalt. c.* 117.

And a justice of peace may lawfully grant a warrant for apprehending or arresting persons charged with treason, felony, *præmunire*, or any other offence against the peace; and, generally, wherever a statute gives one or more justices of peace a jurisdiction over any offence, any one justice of peace may, by his warrant, cause such offenders to be arrested and brought before him. 2 *Hawk. P. C. c.* 13. § 15.

But it is said, that, anciently, no one justice of peace could legally make out a warrant for an offence against a penal statute, or other misdemeanor, cognisable only by a sessions of two or more justices; for that one single justice of peace hath no jurisdiction of such offence, and regularly those only who have jurisdiction over a cause, can award process concerning it. Yet the long, constant, universal, and uncontrolled practice of justices of peace, seems to have altered the law in this particular, and to have given them an authority, in relation to such arrests, not now to be disputed. *Id.* § 16.

A justice of peace may justify the granting a warrant for the arrest of any person upon strong grounds of suspicion of felony or misdemeanor, but he seems to be punishable, as well at the suit of the king, as of the party grieved, if he grant any such warrant groundlessly, or maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty. *Id.* § 18.

Every warrant ought to be under the hand and seal of the justice of peace, and specify the day it was made out: if it be for the peace or good behaviour, it is advisable to set forth the *special cause* upon which it is granted; but if it be for treason or felony, or other offences of an enormous nature, it is said that it is not necessary to set forth the special cause, and it seems to be rather discretionary than necessary to set it forth in any case. *Id.* § 21—25.

The warrant may be directed to the sheriff, bailiff, constable, or to any indifferent person by name, who is no officer; for, though the justice may authorise any one to be his officer, whom he pleases to make such, yet it is most advisable to direct to the constable of the precinct wherein it is to be executed; for that no other constable, and *à fortiori*, no private person, is compellable to serve it. *Id.* § 27.

A bailiff or constable, if they be sworn, and commonly known to be officers, and act within their own precincts, need not show their warrant to the party, notwithstanding he demand the sight of it; but that these and all other persons whatsoever, making an arrest, ought to acquaint the party with the substance of their warrant; and all private persons to whom such warrants shall be directed, and even officers, if they be not sworn and commonly known, and even these, if they act out of their own precincts, must show their warrants, if demanded. *Id.* § 28.

And therefore stat. 27 *Geo.* II. *c.* 20. provides, that in all cases where a justice is empowered, by statute, to issue a warrant of distress for levying a penalty, the officer executing such warrant, if required, shall show the same to the defendant, and suffer a copy to be taken.

The sheriff, having such warrant directed to him, may authorise others to execute it; but every other person, to whom it is directed, must personally execute it; yet, it seems, that any one may lawfully *assist* him. *Id.* § 29.

After presentment, or indictment found in felony, &c. the first process is a *capias*, to arrest and imprison the offender: and if the offender cannot be taken, an *exigent* is awarded in order to outlawry. *H. P. C.* 209. For further matter, see tit. *Debtors*.

ARREST OF JUDGMENT. To move in *arrest of judgment*, is to show cause why judgment should be stayed, notwithstanding verdict given. Judgment may be arrested for good cause in criminal cases, as well as civil; if the indictment be insufficient, &c. 3 *Inst.* 210.

Arrests of judgment arise from intrinsic causes appearing upon the face of the record; for a judgment can never be arrested but for that which appears on the face of the record itself. Ld. *Raym.* 232. Motions in arrest of judgment may be made at any time before judgment signed. *Doug.* 747. *Str.* 845. *Sunday* is no day, 4 *Burr.* 21. 30. nor a *dies non*. It is a rule to show cause, therefore needs no notice to be given, nor yet an affidavit to ground it on, as it arises out of the record; and after judgment upon demurrer, there can be no such motion made, as the court will not suffer any one to tell them that the judgment they gave on mature deliberation is wrong. It is otherwise indeed in the case of judgment by default, for that is not given in so

solemn a manner; or if the fault arises on the writ of inquiry or verdict, for then the party could not allege it before. *Str.* 425.

It may be made after motion for a new trial discharged, *Doug.* 716. 1 *Burr.* 334. and if arrested, each party pays his own costs. *Cowp.* 407.

After verdict, a man may allege any thing in the record in arrest of judgment, which may be assigned for error after judgment. 2 *Roll. Abr.* 716. And judgment after verdict shall not be arrested for an objection that would have been good on demurrer. 3 *Burr.* 1725. For further matter, see tit. *Amendment*, *Judgment*; and for causes of arrest of judgment, see 3 *Comm.* 393, 394. tit. *Judgment*.

ARREST OF ENQUEST is to plead in arrest of taking the enquest, upon the former issue, and to show cause why an enquest should not be taken. *Bro.* tit. *Replead.*

ARRESTANDIS BONIS NE DISSIPENTUR, A writ which lay for a man whose cattle or goods are taken by another, who, during the contest, doth or is like to make them away, not being of ability to render satisfaction. *Reg. Orig.* 126.

ARRESTANDO IPSUM QUI PECUNIAM RECEPIT, &c. Is a writ that lay for apprehending a person who hath taken the king's prest-money to serve in wars, and hides himself when he should go. *Reg. Orig.* 24.

ARRESTMENT, Is the command of a judge, discharging any person, in whose hands the debitor's moveables are, to pay or deliver up the same, till the creditor, who hath procured the arrestment to be laid on, be satisfied, either by caution or payment, according to the respective grounds of arrestment. *Scotch Dict.* It is process in the nature of an attachment, whereby the person, in whose hands any part of the personal estate of the debtor is lodged, is enjoined (*i. e.* prohibited) from delivering or paying the same, till the creditor so *arresting* is paid, or the debtor gives security to answer the demand.

ARRESTO FACTO SUPER BONIS MERCATORUM ALIENIGENORUM, A writ that lay for a denizen against the goods of *aliens* found within this kingdom, in recompense of goods taken from him in a foreign country, after denial of restitution. *Reg. Orig.* 129. This the ancient civilians called *clarigatio*; but by the moderns it is termed *reprisalia*.

ARRETTED, *arrectatus*, *quasi*, *ad rectum vocatus.*] Is where a man is convened before a judge, and charged with a crime. *Staundf. Pl. Co.* 45. And it is sometimes used for imputed or laid unto; as no folly may be *arretted* to one under age. *Littleton*, *cap. Remitter. Chaucer* useth the verb *arretteth*, that is, lays blame, as it is interpreted. *Bracton* says, *ad rectum habere malefactorem*, *i. e.* to have the malefactor forthcoming, so as he may be charged, and put to his trial. *Bract. lib.* 3. *tract.* 2. *cap.* 10. And in another place *rectatus de morte hominis*, charged with the death of a man.

ARROWS. By an ancient statute, all heads for *arrows* shall be well brazed, and hardened at the point with steel, on pain of forfeiture and imprisonment; and to be marked with the mark of the maker. Stat. 7 *Hen.* IV. *c.* 7.

ARRURA. In the black book of *Hereford*, *De Operationibus* Arruræ, signifies days' work of ploughing; for anciently customary tenants were bound to plough certain days for their lord. *Una arrura*, one day's work at the plough: and in *Wiltshire*, earing is a day's ploughing. *Paroch. Antiq. p.* 41. See *Arratrum terræ*.

ARSON, from *ardeo*, to burn.] House-burning, which is felony at common law. 3 *Inst.* 66. It must be maliciously, voluntarily, and an actual burning: not putting fire only into a house, or any part of it, without burning; but if part of the house is burnt, or if the fire doth burn, and then goeth out of itself, it is felony. 2 *Inst.* 188. *H. P. C.* 85. and it must be the house of another; for if a man burns his own house only, though with intention to burn others, it was not at common law felony, but a great misdemeanor, punishable with fine, pillory, &c. But a pauper may be guilty of this offence by burning the public workhouse. *Leach's Hawk. P. C.* 1. *c.* 39. § 3. and in note.

If a house is fired by negligence or mischance, it cannot amount to *arson*. 3 *Inst.* 67. *H. P. C.* 85. Where one burns the house of another, if it be not wilful and malicious, it is not felony, but only trespass: therefore if *A.* shoot unlawfully in a gun at the cattle or poultry of *B.* and by means thereof sets another's house on fire, this is not *arson*; for though the act he was doing was unlawful, yet he had no intent to burn the house. 1 *Hale's Hist. P. C.* 569. Stat. 23 *Hen.* VIII. *c.* 1. takes away benefit of clergy from principals and accomplices burning dwelling-houses or barns where corn is. By stat. 43 *Eliz. c.* 13. to burn corn in the four northern counties is felony without clergy. And the stat. 22 and 23 *Car.* II. *c.* 7. makes it felony to set barns, stables, stacks of corn, hay, &c. on fire in the night-time, or any out-houses or buildings; but the offender may be transported for seven years.

By 9 *Geo.* I. *c.* 22. (made perpetual by 31 *Geo.* II. *c.* 42.) setting fire to any house, barn, or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood, or to rescue any offender, is made felony without benefit of clergy. *Leach's Hawk. P. C.* 1. *c.* 58. *App.* 4. § 3. *Parcel* of corn not sufficient description. 4 *Comm.* 246. n.

As to other *malicious burnings*; by stat. 37 *Hen.* VIII. *c.* 6. § 4. to burn any cart loaded with fuel, incurs 10*l.* penalty, and treble damages. By stat. 4 and 5 *Wm.* & *M. c.* 23. to burn the covert for red or black game, one month's imprisonment; and by stat. 28 *Geo.* II. *c.* 19. to burn the covert for deer or game, a penalty between 40*s.* and 5*l.* By stat. 1 *Geo.* I. *c.* 48. to burn any wood or coppice is felony. By stat. 10 *Geo.* II. *c.* 32. to set fire to a coal mine, felony without clergy. By stat. 9 *Geo.* III. *c.* 29. to burn any mill, felony without clergy, if prosecuted within eighteen months. See *Burning*.

The offence of *arson* was denied the benefit of clergy, by stat. 21 *Hen.* VIII. *c.* 1. but that stat. was repealed by stat. 1 *Edw.* VI. *c.* 12. and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference from the stat. 4 and 5 *P.* & *M. c.* 4. which expressly denied it to the accessory before the fact; though now it is expressly denied to the principal in all cases within the stat. 9 *Geo.* I. *c.* 22. 4 *Comm.* 223. which see, and *Leach's Hawk. P. C. vol.* 1. and 2. and tit. *Burning*.

ARSER IN LE MAIN, Burning in the hand, is the punishment of criminals that have the benefit of clergy. *Terms de Ley.*

ARSURA, The trial of money by fire after it was coined. In *Domesday* we read, *reddit* 50*l. ad* arsuram, which is meant of lawful and approved money, whose allay was tried by fire.

ART AND PART, Is a term used in *Scotland* and the north of *England*; when one charged with a crime, in committing the same, was both a contriver of, and acted his part in it.

ARTHEL, A *British* word, and more truly written *arddelw*, or, according to the *South Welsh*, *ardhel*, signifying to avouch; as if a man were taken with stolen goods in his hand, he was to be allowed a lawful *arthel* (or vouchee) to clear him of the felony: it was part of the law of *Howel Dha*: according to whose laws every tenant, holding of any other than of the prince or the lord of the fee, paid a fine *pro defensione regiâ*, which was called *arian ardhel*. The privilege of *arthel* occasioning a delay and exemption of criminals from justice, provision was made against it by stat. 28 *Hen.* VIII. *c.* 6. *Blount.*

ARTICULI CLERI, (*articles of the clergy,*) Are statutes containing certain *articles* relating to the church and clergy, and causes ecclesiastical. 9 *Edw.* II. stat. 1.

ARTICULUS, An *article* or complaint, exhibited by way of libel, in a court christian. Sometimes the religious bound themselves to obey the ordinary without such formal process. *Paroch. Antiq. p.* 344.

ARTIFICERS, see tit. *Manufactures* and *Manufacturers.*

A stranger *artificer* in *London*, &c. shall not keep above two strangers servants: but he may have as many *English* servants and apprentices as he can get, stat. 21 *Hen.* VIII. *c.* 16. *Artificers* in wool, iron, steel, brass, or other metal, &c. persons contracting with them to go out of this kingdom into a foreign country, shall be fined not exceeding 100*l.* and be imprisoned three months: and *English artificers* going abroad, not returning in six months after warning given by our ambassadors, &c. shall be disabled to hold lands by descent or devise, be incapable to take any legacy, &c. and deemed aliens. Stat. 5 *Geo.* I. *c.* 27.

By the stat. 23 *Geo.* II. *c.* 13. persons convicted of seducing artificers in the manufactures of *Great Britain* or *Ireland*, out of the dominions of the crown of *Great Britain*, to forfeit 500*l.* and to be imprisoned for twelve months; for the second offence to forfeit 1,000*l.* and be imprisoned two years. See also stat. 14 *Geo.* III. *c.* 71. 15 *Geo.* III. *c.* 5. and 21 *Geo.* III. *c.* 37. by which heavy penalties are inflicted on masters of ships assisting in such seduction.

ARUNDEL. See *Honour.*

ARUNDINETUM, A ground or place where reeds grow. 1 *Inst.* 4. And it is mentioned in the book of *Domesday.*

ARVIL-SUPPER, A feast or entertainment made at funerals in the north part of *England*: *arvil bread* is the bread delivered to the poor at funeral solemnities. *Cowel.* And *arvil*, *arval*, *arfal*, are used for the burial or funeral rites.

ASCESTERIUM, *Archisterium*, *arcisterium*, *acisterium*, *alcysterium*, *architrium*, from the *Greek.*] A monastery. It often occurs in old histories. *Du Cange.*

ASPORTATION. See *Robbery*, *Felony.*

ASSACH, or *Assath*, Was a custom of purgation used of old in *Wales*, by which the party accused did clear himself by the oaths of 300 men. It is mentioned in ancient *MSS.* and prevailed till the time of *Hen.* V. by which it is prohibited and punished. 1 *Hen.* V. *c.* 6. *Spelm.* and see stat. 27 *Hen.* VIII. *c.* 7.

ASSART, *Assartum*, from the Fr. *Assartir*, to make plain.] Assartum *est quod redactum est ad culturam. Fleta, lib.* 4. *c.* 21. And the word *assartum* is by *Spelman* derived from *exertum*, to pull up by the roots: for sometimes it is wrote *essart.* Others derive it from *exaratum* or *exartum*, which signifies to plow or cut up. *Manwood*, in his *Forest Laws*, says, it is an offence committed in the forest, by

pulling up the woods by the roots, that are thickets and coverts for the deer, and making the ground plain as arable land; this is esteemed the greatest trespass that can be done in the forest to vert or venison, as it contains in it waste and more; for whereas waste of the forest is but the felling down the coverts which may grow up again, *assart* is a plucking them up by the roots, and utterly destroying them, so that they can never afterwards spring up again. See the Red Book in the Exchequer. But this is no offence if done with license; and a man may, by writ of *ad quod damnum*, sue out a license to *assart* ground in the forest, and make it several for tillage. *Reg. Orig.* 257. Hence are lands called *assarted:* and formerly *assart rents* were paid to the crown for forest lands *assarted*. See stat. 22 *Car.* II. *c.* 6. *Assartments* seem to be used in the same sense in *Rot. Parl.* Of *assarts* you may read more in *Cromp. Juris. p.* 203. And *Charta de Foresta, anno* 9 *Hen.* III. *c.* 4. *Manwood, part* 1. *p.* 171.

ASSAULT, *Assultus*, from the Fr. *Assayler*.] An *attempt* or *offer*, with force and violence, to do a corporeal hurt to another; as by striking *at* him, with or without a weapon. But no words whatsoever, be they ever so provoking, can amount to an assault, notwithstanding the many ancient opinions to the contrary. 1 *Hawk. P. C. c.* 62. § 1. See also *Lamb. Eiren. lib.* 1. *c.* 3. 22 *Lib. Ass. pl.* 60.

Assault does not always necessarily imply a hitting, or blow; because, in trespass for assault and *battery*, a man may be found guilty of the assault, and excused of the battery. 1 *Hawk. P. C.* 263. But every *battery* includes an *assault;* therefore if the assault be ill laid, and the battery good, it is sufficient. *Id. ib.*

If a person in anger lift up or stretch forth his arm, and offer to strike another; or menace any one with any staff or weapon, it is trespass and assault in law: and if a man threaten to beat another person, or lie in wait to do it, if the other is hindered in his business, and receives loss thereby, action lies for the injury. *Lamb. lib.* 1. 22 *Ass. pl.* 60.

Any injury whatsoever, be it never so small, being *actually done* to the person of a man, in an angry or revengeful, or rude or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him, are *batteries* in the eye of the law. 1 *Hawk. P. C.* 263, 264. From the Fr. *battre*, to beat or strike.

In many cases a man may justify an assault; thus, to lay hands gently upon another, not in anger, is no foundation of an action of trespass and assault: the defendant may justify *molliter manus imposuit* in defence of his person or goods; or of his wife, father, mother, or master; or for the maintenance of justice. *Bract.* 9 *Edw.* IV. 35 *Hen.* VI. *c.* 51.

A servant, &c. may justify an assault in defence of a master, &c. but not *è contra*. Ld. *Raym.*

If an officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him, he may justify it; so if a parent, in a reasonable manner, chastise his child, or master his servant, being actually in his service at that time, or a schoolmaster his scholar, or a gaoler his prisoner, or even a husband his wife, (for reasonable and proper cause,) or if one confine a friend who is mad, and bind and beat him, &c. in such manner as is proper in his circumstances; or if a man force a sword from one who offers to kill another; or if a man gently lays his hand on another, and thereby stay him from inciting a dog against a third person; if I beat one (without wounding him, or throwing at him a dangerous

weapon) who wrongfully endeavours with violence to dispossess me of my lands or goods, or the goods of another delivered to me to be kept for him, and who *will not desist upon my laying my hand gently on him*, and disturbing him; or if a man beat, wound, or maim one who makes an assault upon his person, or that of his wife, parent, child, or master; or if a man fight with or beat one who attempts to kill any stranger, if the beating was actually necessary to obtain the good end proposed, or rendered necessary in self-defence; in all these cases it seems the party may justify the assault and battery. See 1 *Hawk. P. C.* 259. and the several authorities there cited.

And on an indictment the party may plead not guilty, and give the special matter in evidence; but in an action he must plead it specially. 6 *Mod.* 172. Supposing it matter of *justification*. If of *excuse*, it is said it may be given in *evidence* on the *general issue*. *Bull. N. P.* 17.

Also in cases of assault, for the assault of the wife, child, or servant, the husband, father, and master may have action of trespass, *per quod servitium amisit*. In case of a *wife*, husband and wife should join in the action for the personal abuse of the wife; (the husband not having sustained any damage.) If the husband has been damnified, as by tearing her cloaths, &c. or loss of her assistance, &c. in his domestic concerns, for that peculiar injury to himself he alone must sue.

As to *parent* and *child*, *master* and *servant*, unless injury accrues to the *parent* or *master*, the *child* or *servant* may sue.

For an assault, the wrong-doer is subject both to an action at the suit of the party, wherein he shall render damages; and also to an indictment at the suit of the king, wherein he shall be fined according to the heinousness of the offence. 1 *Hawk.* 263.

But if both are depending at one time, unless in very particular cases, the attorney-general will, on application, grant a *nolle prosequi*, if the party will not discontinue his action.

Stat. 8 and 9 *Wm.* III. *c.* 11. enacts, that where there are several defendants to any action of assault, &c. and one or more acquitted, the person so acquitted shall recover costs of suit; unless the judge certify that there was a reasonable cause for making such person a defendant or defendants to such action.

If any person assaults a privy councillor in the execution of his office, it is felony. Stat. 9 *Ann. c.* 16.

Stat. 6 *Geo.* I. *c.* 23. § 11. If any person shall wilfully and maliciously assault any person in the public streets or highways, with an intent to tear, spoil, cut, burn, or deface, and shall tear, spoil, cut, burn, or deface the garments, &c. of such person, it is felony; and the offender may be transported for seven years.

Assaulting persons in a forcible manner, with intent to commit robbery, is made felony and transportation, by stat. 7 *Geo.* II. *c.* 21. And assaulting or threatening a counsellor at law, or attorney, employed in a cause against a man; or a juror giving verdict against him; his adversary for suing him, &c. is punishable, on an indictment, by fine and imprisonment, for the contempt. 1 *Hawk.* 58. There are other assaults punishable in a precise peculiar manner, *viz.* stat. 5 *Hen.* IV. *c.* 6. and 11 *Hen.* VI. *c.* 11. render assaults on members of parliament more than usually penal, upon non-surrender on proclamation. Stat. 9 *Edw.* II. stat. 1. *c.* 3. gives a double *criminal* process against those who assault clergymen, indictment for the temporal offence; and process in the ecclesiastical court for the spiritual

one. By stat. 5 *Eliz. c.* 4. servants assaulting their master, mistress or overseer, may be imprisoned twelve months on conviction before two justices: By stat. 9 *Ann. c.* 14. § 8. to assault, beat or challenge another, on account of money won by gaming, incurs forfeiture of goods, and two years' imprisonment. See *The King* v. *Darley*, 4 *East*, 174. where defendant was convicted on this statute. By stat. 9 *Geo.* I. *c.* 22. to assault another by wilfully shooting *at* him, is felony without clergy. By stat. 12 *Geo.* I. *c.* 34. assaulting a master wool-comber or weaver, &c. for not complying with the demands of workmen, is felony, punishable by transportation for seven years. See tit. *Contempt*, *Striking*.

ASSAY *of weights and measures*, (from the Fr. *essay*, *i. e.* a proof or trial.) Is the examination of weights and measures by clerks of markets, &c. *Reg. Orig.* 279.

ASSAYER OF THE KING, *Assayator regis.*] An officer of the king's mint, for the trial of silver; he is indifferently appointed between the master of the mint and the merchants that bring silver thither for exchange. See tit. *Gold and Silver*; and *Money*.

ASSAYERS, Of plate made by *goldsmiths*, &c. See tit. *Goldsmiths*.

ASSAYSIARE, To associate, to take as fellow judges; a word used in old charters. *Cart. Abbat. Glast. MS.* § 57.

ASSECURARE, *Adsecurare.*] To make secure by pledges, or any solemn interposition of faith. In the charter of peace between *Hen.* II. and his sons, this word is mentioned. *Hoveden*, *anno* 1174.

ASSEDATION, Possession by a tack or lease, &c. *Scotch Dict.*

ASSEMBLY UNLAWFUL, See tit. *Riot*.

ASSENT, or consent. To a legacy of goods, the *assent* of the executor is necessary. See tit. *Executor* and *Legacy*.

Assent of *Dean* and *Chapter* in making leases of church lands; *vide Leases*. Of the major part of *corporations* in making by-laws. *Vide By-Laws*. Of *assents* to *agreement*, see tit. *Agreement*. See also other proper titles.

ASSESSORS, Those that *assess* public taxes. There are assessments of parish duties, for raising money for the poor, repairing of highways, &c. made and levied by rate on the inhabitants; as well as assessments of public taxes, &c. See *Assisors*.

ASSETS, Fr. *Assez*, *i. e. Satis.*] Goods *enough* to discharge that burden which is cast upon the executor or heir, in satisfying the debts and legacies of the testator or ancestor. *Bro.* tit. *Assets*.

Assets are *real*, or *personal*; where a man hath lands in fee-simple, and dies seised thereof, the lands which come to his heirs are assets *real*: and where he dies possessed of any *personal* estate, the goods which come to the executors are assets personal.

Assets are also divided into *assets per descent*, and *assets inter maines*.

Assets by *descent*, is where a person is bound in an obligation, and dies seised of lands which descend to the heir, the land shall be assets, and the heir shall be charged as far as the land to him descended shall extend.

Assets inter maines, is when a man indebted makes executors, and leaves them sufficient to pay his debts and legacies; or where some commodity or profit ariseth to them in right of the testator, which are called *assets in their hands*. *Terms de Ley*, 56. 77.

As to assets by *descent*, it is to be observed, that by the common law, if an heir had sold or aliened the lands which were assets, before the obligation of his ancestor was put in suit, he was to be dis-

charged, and the debt was lost; but by stat. 3 *Wm. & M. c.* 14. made perpetual by 6 *Wm.* III. *c.* 14. the heir is made liable to the value of the land by him sold, in action of debt brought against him by the obligee, who shall recover to the value of the said land, as if the debt was the proper debt of the heir; but the land which is sold or aliened *bonâ fide* before the action brought, shall not be liable to execution upon a judgment recovered against the heir in any such action.

And by stat. 29 *Car.* II. *c.* 3. § 10. lands of *cestuy que trust* shall be assets by descent; and by the same stat. § 12. estates *pur autre vie* shall be assets in the hands of the heir, if it come to him by reason of a special occupancy; and where there is no special occupant, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

Where a man binds himself and his heirs in a bond; and dies leaving issue two sons, if the eldest son enters on the lands by descent as heir to the father, and die without issue; and then the youngest son enters, he shall be charged with assets as heir to the father. *Dyer*, 368. Lands which come to the heir by *purchase* shall not be assets; for it is only lands by *descent* that are assets. 1 *Danv. Abr.* 577.

A reversion in fee, depending upon an estate-tail, is not assets; because it lies in the will of the tenant in tail to dock and bar it by fine, &c. 6 *Rep.* 56. But after the tail is spent it is assets. 3 *Mod.* 257. And a reversion on an estate for life or years shall be assets. A reversion expectant upon the determination of an estate for life is assets, and ought to be pleaded specially by the heir; and the plaintiff in such case may take judgment of it *cum acciderit*. *Dyer*, 371. *Carth.* 129. An advowson is assets; but not a presentation to a church actually void, which may not be sold. *Co. Lit.* 374.

And lands by descent in ancient demesne will be assets in debt. But a copyhold estate descending to an heir is not assets: nor is any *right* to an estate assets, without possession, &c. till recovered and reduced into possession. *Danv.* 577.

An *annuity* is no assets, for it is only a *chose in action*. *Br. Assets per Descent, pl.* 26.

Equity of redemption of an estate mortgaged, and a term for years to attend the inheritance are assets. 3 *Leon.* 32. An heir may plead *riens per descent*, but the plaintiff may reply that he had lands from his ancestor; and special matter may be given in evidence, &c. 5 *Rep.* 60. A special judgment against assets shall only have relation to, and bind the land for, the time of filing the original writ or bill. *Carth.* 245. See tit. *Heir*; and *Com. Dig.* tit. *Assets*.

Assets also are either legal or equitable; of the former, some have been specified above; for the latter, see *Com. Dig.* tit. *Chancery*. (2 *Geo.* I.) &c.

As to assets *inter maines*, see tit. *Executor*, V. 5.

ASSEWIARE, To draw or drain water from marsh grounds. *Mon. Ang.* 2 vol. f. 334.

ASSIDERE, or *Assedare*, To tax equally; to *assess*. *Mat. Paris. anno* 1232. Sometimes it hath been used to *assign* an annual rent, to be paid out of a particular farm, &c.

To ASSIGN, *assignare*.] Hath various significations; one general, as to set over a right to another, or appoint a deputy, &c. another special, to set forth or point at; as to assign error, assign false judg-

ment, waste, &c. And in assigning of error, it must be shown where the error is committed; in false judgment, wherein the judgment is unjust; in waste, wherein especially the waste is done. *F. N. B.* 19. 112. *Reg. Orig.* 72. Also justices are said to be *assigned* to take assises, stat. 11 *Hen.* VI. *c.* 2.

ASSIGNATION, Is when simply any thing is ceded, yielded, and assigned to another; of which intimation must be made. *Scotch Dict.*

ASSIGNS, or ASSIGNEES, *assignatus*, Lat.] Those who are *assigned*, deputed or appointed by the act of the party, or the operation of law, to do any act, or enjoy any benefit, on their own accounts and risks; an assignee being one that possesses a thing in his own right; but a deputy he that acts in the right of another. *Perkins.* Assignee by deed is when a lessee of a term, &c. sells and assigns the same to another, that other is his assignee by deed; assignee in law is he whom the law so makes, without any appointment of the person; as an executor is assignee in law to the testator. *Dyer*, 6. But if there be assignee in deed, assignee in law is not allowed: if one covenant to do a thing to *J. S.* or his assigns by a day, and before that day he dies; if before the day he name any assignee, the thing must be done to his assignee named: otherwise to his executor or administrator, who is assignee in law. 27 *Hen.* VIII. 2.

He is called assignee, who hath the whole estate of the assignor: and an assignee, though not named in a condition, may pay the money to save the land; but he shall not receive any money, unless he be named. *Co. Lit.* 215. Assignees may take advantage of forfeitures on conditions, when they are incident to the reversion, as for rent, &c. 1 *And.* 82. What covenants affect or benefit assignees, see tit. *Covenant*, *Condition.*

Under the word *assigns* shall be included the assignee of an assignee *in perpetuum*, the heir of an assignee, or the assignee of an heir. *Co. Lit.* 384. b. *Plowd.* 173. 5 *Co.* 16, 17. b. So the assignee of an assignee's executor. 2 *Show.* 57. And a devisee. 2 *Show.* 39. *Godb.* 161. But if an obligation be, *to pay such persons as he shall name by his will or writing*; there must be an express nomination, and his executor shall not take as assignee. *Mo.* 855. An administrator is an assignee. *Moor*, 44.

ASSIGNMENT, *Assignatio.*] The setting over or transferring the interest a man hath in any thing to another.

Herein shall be considered principally what things are assignable. As to what covenants, &c. affect or benefit *assignees*, see tit. *Condition*, *Covenant.*

Assignments may be made of lands in fee, for life, or years: of an annuity, rent-charge, judgment, statute, &c. but as to lands, they are usually of leases and estates for years, &c. And by the statute of frauds, stat. 29 *Car.* II. *c.* 3. no estate of freehold, or term for years, shall be assigned but by deed in writing, signed by the parties; except by operation of law. A possibility, right of entry, title for condition broken, a trust, or thing in action, cannot be granted or assigned over. *Co. Lit.* 214.

But though a bond, being a *chose in action*, cannot be assigned over so as to enable the assignee to sue in his own name, yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it. *Co. Lit.* 232. And in the assignment of bonds, &c. is always contained a power of attorney to receive and sue in the assignor's name.

Also in equity a bond is assignable for a valuable consideration paid, and the assignee alone becomes entitled to the money; so that if the obligor, after notice of the assignment, pays the money to the obligee, he will be compelled to pay it over again. 2 *Vern.* 595. In the case of a policy of insurance the court of *K. B.* will so far take notice of an assignment, as to permit an action to be brought in the name of the assignor. 1 *Term Rep.* 26. And the assignor who has become a bankrupt may sue the debtor for the benefit of the assignee. *Id.* 619. 4 *Term Rep.* 690.

As to bare rights and possibilities, see *Com. Dig.* tit. *Assignment.* (C).

Though a possibility or contingent interest, be not *grantable* at law, yet (whether in real or personal estate) it is *transmissible* and *devisable*; *Cro. Jac.* 509. 1 *P. Wms.* 566. *Forrester*, 117. 8 *Vin. Abr.* 112. *pl.* 38. 2 *Atk.* 616. 1 *Ves.* 236. *Pollexf.* 44. 3 *Term Rep.* 88. 2 *Burr.* 1131. 1 *Bro. Rep.* 181. *Fearn's Con. Rem.* 444. The cases in the books, (1 *C. R.* 18. 1 *Ch. Cas.* 8. *Pollexf.* 31. 44. 1 *P. Wms.* 572. 3 *P. Wms.* 132. 2 *Freem.* 250. 9 *Mod.* 101. 2 *P. Wms.* 608.) abundantly prove, that interests in contingency, respecting personal estates are assignable in equity; but it may be material to observe, that in the case of assignments of such interests, equity requires the assignee to show that he gave a valuable consideration for the interest assigned; and therefore will not interpose to assist volunteers. But courts of equity will establish assignments of contingent interests against executors, administrators, or heirs at law, even where such assignments are made, not for consideration of money, but in consideration of love and affection, and advancement of children. 1 *Ves.* 409. See *Fonblanque's Treatise of Equity*, 1. 203.

An assignee must take the security assigned, subject to the same equity that it was in the hands of the obligee; as if on a marriage treaty the intended husband enters into a marriage-brokage bond, which is afterwards assigned to creditors, yet it still remains liable to the same equity, and is not to be carried into execution against the obligor. 2 *Vern.* 428.

Where there is a bond for the performance of the covenants in a lease, if the lessee assigns the lease, he may likewise assign the bond; but this must be before any of the *covenants are broken*; but if any of the covenants are broken, and the lessee afterwards assigns the lease and bond, and the assignee puts the bond in suit, for those breaches, it is maintenance. *Godb.* 81.

Statute 7 *Jac.* I. *c.* 15. enacts, *That a debtor to the king shall not assign any debts to him, but such as did originally grow due to the debtor*; afterwards there was a debtor to the husband in 2,000*l.* by a statute; the husband made his wife executrix, and died; she married again one *G. D.* who was indebted to the king, and then the husband and wife assigned this statute to the king, in satisfaction of the debt due to him; adjudged, that the *assignment* was good, for though the second husband had the *statute in right of his wife*, and, by consequence, the debt was not *originally* due to him; yet, because he might *release* the statute, it is the same thing as if it had been *originally* taken in his name. 2 *Cro.* 324.

An *office of trust* is not grantable or assignable to another; and therefore it was adjudged, that the office of a *filazer*, which was an office of trust, could not be assigned; nor could it be extended upon a statute. *Dyer*, 7.

A *bare power* is not assignable, but where it is coupled with an interest it may be assigned. 2 *Jon.* 206. 2 *Mod.* 317.

Arrears of rent, &c. is a *chose in action*, and not assignable. See *Skin.* 6.

It hath been doubted if a *lease for years*, *before entry* and possession, be assignable. See *Show.* 291.

A lessee out of possession cannot make any assignment of his term off the land; but must first enter, and recontinue his possession; or seal and deliver the deed upon the land, which puts the assignee into actual possession. *Dalis.* 81. But it has been adjudged that where lessee *for years* of the *crown* is put out of his estate by a stranger, yet he may assign the term, though he is not in possession; because the reversion being in the crown, he cannot lawfully be put out of possession, but at his own will. *Cro. Eliz.* 275.

If lessee for years *assign* all his term in his lease to another, he cannot reserve a right in the *assignment*; for he hath no interest in the thing by reason of which the rent reserved should be paid; and where there is no reversion there can be no distress; but debt may lie upon it, as on a contract. 1 *Lill. Abr.* 99. Where the executor of a lessee *assigns* the term, *debt* will not lie against him for rent incurred after the *assignment*; because there is neither privity of contract, nor estate between the lessor and executor: but if the lessee himself *assigns* his lease, the privity of contract remains between him and the lessor, although the privity of estate is gone by the *assignment*, and he shall be chargeable during his life; but after his death the privity of contract is likewise determined. 3 *Rep.* 14. 24. Although a lessee make an *assignment* over of his term, yet *debt* lies against him by the lessor or his heir; (not having *accepted* rent from the *assignee*;) but where a lessee *assigns* his term, and the lessor his reversion, the privity is determined, and *debt* doth not lie for the reversioner against the first lessee. *Moor*, 472. Vide *Barker* v. *Dormer*, 1 *Sho.* 191.

A man made a lease, provided that the lessee or his *assigns* should not alien the premises without license of the lessor, &c. who after gave license to the lessee to alien; by this the lessee or his assigns may alien *in infinitum*. 4 *Rep.* 119.

Adjudged, that some things in respect of their nature are not assignable, or to be granted over; as for instance, if the donee in tail holdeth of the donor by *fealty*, he cannot assign it over to another, because *fealty* is incident to, and inseparable from, the reversion; so if the *founder of a college* grant his foundation, though it be to the king, the grant is void, because it is inseparable from his blood. 11 *Rep.* 66. *b.* in *Magdalen College's* case.

Several things are assignable by acts of parliament, which seem not assignable in their own nature; as promissory notes and bills of exchange by stat. 3 and 4 *Ann. c.* 9. bail-bonds by the sheriff, by 4 and 5 *Ann. c.* 16. a judge's certificate for taking and prosecuting a felon to conviction, by 10 and 11 *Wm.* III. *c.* 23. a bankrupt's effects by the several statutes of bankruptcy.

A lease was made for years of lands, excepting the woods; the lessor grants the trees to the lessee, and he assigns the land over to another; the trees do not pass by this assignment to the assignee. *Goldsb.* 188.

Where tenant for years *assigns* his estate, no consideration is necessary; for the tenant being subject to payment of rent, &c. is sufficient to vest an estate in the assignees: in other cases some consideration must be paid. 1 *Mod.* 263. The words required in assignments are,

grant, assign and set over; which may amount to a grant, feoffment, lease, release, confirmation, &c. 1 *Inst.* 301. In these deeds the assignor is to covenant to save harmless from former grants, &c. That he is owner of the land, and hath power to assign; that the assignee shall quietly enjoy, and to make further assurance; and the assignee covenants to pay the rent, and perform the covenants, &c.

FORM *of an* ASSIGNMENT *of a* BOND.

TO all *to whom these presents shall come, greeting:* Whereas A. B. *of*, &c. *in and by one bond or obligation, bearing date*, &c. *became bound to* C. D. *of*, &c. *in the penal sum of*, &c. *conditioned for the payment of*, &c. *and interest at a day long since passed, as by the said bond and condition thereof may appear:* And whereas *there now remains due to the said* C. D. *for principal and interest on the said bond, the sum of*, &c. Now know ye, *That the said* C. D. *for and in consideration of the said sum of*, &c. *of lawful* British *money to him in hand paid by* E. F. *of*, &c. *the receipt whereof the said* C. D. *doth hereby acknowledge; he the said* C. D. hath *assigned and set over, and by these presents doth assign and set over, unto the said* E. F. *the said recited bond or obligation, and the money thereupon due and owing, and all his right and interest of, in, and to the same.* And *the said* C. D. *for the consideration aforesaid*, hath *made, constituted and appointed, and by these presents* doth *make, constitute and appoint, the said* E. F. *his executors and administrators, his true and lawful attorney and attorneys irrevocable, for him and in his name, and in the name and names of his executors and administrators, but for the sole and proper use and benefit of the said* E. F. *his executors, administrators and assigns, to ask, require, demand and receive of the said* A. B. *his heirs, executors and administrators, the money due on the said bond; and on non-payment thereof, he the said* A. B. *his heirs, executors and administrators, to sue for and recover the same; and on payment thereof to deliver up and cancel the said bond, and give sufficient releases and discharges therefore, and one or more attorney or attorneys under him to constitute; and whatsoever the said* E. F. *or his attorney or attorneys, shall lawfully do in the premises, the said* C. D. *doth hereby allow and affirm.* And *the said* C. D. *doth covenant with the said* E. F. *that he the said* C. D. *hath not received, nor will receive the said money due on the said bond, or any part thereof; neither shall or will release or discharge the same, or any part thereof; but will own and allow of all lawful proceedings for recovery thereof; he the said* E. F. *saving the said* C. D. *harmless, of and from any costs, that may happen to him thereby.* In witness, &c.

ASSIMULARE, To put highways together: it is mentioned *in Leg. Hen.* I. *c.* 8.

ASSISA CADERE. This word signifies to be nonsuited; as when there is such a plain and legal insufficiency in a suit, that the complainant can proceed no further on it. *Fleta, lib.* 4. *c.* 15. *Bracton, lib.* 2. *c.* 7.

ASSISA CADIT IN JURATAM, Is where a thing in controversy is so doubtful, that it must necessarily be tried by a jury. *Fleta, lib.* 4. *c.* 15. See post, *Attaint.*

ASSISA CONTINUANDA, A writ directed to the justices of *assise* for the continuation of a cause, when certain records alleged cannot be produced in time by the party that has occasion to use them. *Reg. Orig.* 217.

ASSISA PROROGANDA, Is a writ directed to the justices assigned to take *assises*, for the stay of proceedings, by reason of the party's being employed in the king's business. *Reg. Orig.* 208.

ASSISA PANIS & CEREVISÆ (or *cerevisie.*) The stat. 51 *Hen.* III. for setting the price of bread and ale is so entitled.

ASSISE, Fr. *Assis.*] According to our ancient books is defined to be an assembly of knights, and other substantial men, with the justice, in a certain place, and at a certain time appointed. *Custum. Normand. cap.* 24. This word is properly derived from the *Latin* verb *assideo*, to sit together; and is also taken for the court, place, or time, when and where the writs and processes of assise are handled or taken. And in this signification assise is general; as when the justices go their several circuits with commission to take all assises; or special, where a special commission is granted to certain persons (formerly oftentimes done) for taking an assise upon one or two disseisins only. *Bract. lib.* 3.

Concerning the general assise, all the counties of *England* are divided into six circuits; and two judges are assigned by the king's commission to every circuit, who hold their assises twice a year in every county; (except *Middlesex*, where the king's courts of record do sit, and where his courts for his counties palatine are held;) and these judges have *five* several commissions.

1. Of *oyer and terminer*, directed to them and many other gentlemen of the county, by which they are empowered to try treasons, felonies, &c. and this is the largest commission they have.

2. *Of gaol delivery*, directed to the judges and the clerk of assise associate, which gives them power to try every prisoner in the gaol committed for any offence whatsoever, but none but prisoners in the gaol; so that one way or other they rid the gaol of all the prisoners in it.

3. *Of assise*, directed to themselves only, and the clerk of assise, to take assises, and do right upon writs of assise brought before them by such as are wrongfully thrust out of their lands and possessions; which writs were heretofore frequent, but now men's possessions are sooner recovered by ejectments, &c.

4. *Of nisi prius*, directed to the judges and clerk of assise, by which civil causes, grown to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the court above, the judges there give judgment.

These causes by the course of the courts are usually appointed to be tried at *Westminster* in some *Easter* or *Michaelmas* term, by a jury returned from the county wherein the cause of action arises: but with this proviso, *nisi prius, unless before* the day prefixed, the judges of assise come into the county in question. This they are sure to do in the preceding vacation.

5. *A commission of the peace*, in every county of the circuits; and all justices of the peace of the county are bound to be present at the assises; and sheriffs are also to give their attendance on the judges, or they shall be fined. *Bacon's Elem.* 15, 16. &c. 3 *Comm.* 60. 269.

There is a commission of the peace, *oyer and terminer* and gaol delivery of *Newgate*, held eight times in a year, for the city of *London* and county of *Middlesex*, at *Justice Hall* in the *Old Bailey*, where the lord mayor is the chief judge.

In *Wales* there are but two circuits, *North* and *South Wales*; for each of which the king appoints two persons learned in the laws to be

judges; stat. 18 *Eliz. c.* 8. If justices sit by force of a commission, and do not adjourn the commission, it is determined. 4 *Inst.* 265.

See 19 *Geo.* III. *c.* 74. § 70. as to judges' lodgings on assises in *Great Britain*, made perpetual by 39 *Geo.* III. *c.* 46. See also 41 *Geo.* III. (U. K.) *c.* 88. providing for judges' lodgings on assises in *Ireland*.

The constitution of the justices of assise was begun by *Hen.* II. though somewhat different from what they now are: and by *Magna Charta* justices shall be sent through every county once a year, who, with the knights of the respective shires, shall take assises of novel disseisin, &c. in their proper shires, and what cannot be determined there shall be ended by them in some other place in their circuit; and if it be too difficult for them, it shall be referred to the justices of the bench, there to be ended. 9 *Hen.* III. *c.* 12.

There are several statutes as to holding the assises at particular places in certain counties. See *Circuits*, *Nisi Prius*, *Judges*, *Justices*.

ASSISE is likewise used for a *jury*, where assises of novel disseisin are tried; the panels of assises shall be arrayed and a copy indented delivered by the sheriff, &c. to the plaintiffs and defendants six days before the sessions, &c. if demanded, on pain of 40*l.* by stat. 6 *Hen.* VI. *cap.* 2. And assise is taken for a writ for recovery of possession of things immoveable, whereof any one and his ancestors have been disseised. Likewise, in another sense, it signifies an *ordinance*, or statute, as *Assisa Panis et Cervisiæ*. *Reg. Orig.* 279.

ASSISE OF NOVEL DISSEISIN, *Assisa novæ disseisinæ*.] See *Disseisin*.

An assise of *novel disseisin* is a remedy *maximè festinum*, for the recovery of lands or tenements, of which the party was disseised. 2 *Inst.* 410. And it is called *novel disseisin*, because the justices in *eyre* went their circuits from seven years to seven years; and no assise was allowed before them which commenced before the last circuit, which was called an *ancient* assise; and that which was upon a *disseisin* since the last circuit, an assise of *novel disseisin*. *Co. Lit.* 153. b.

An assise is called *festinum remedium*. 1. Because the tenant shall not be essoined. 2. Shall not cast a protection. 3. Shall not pray in aid of the king. 4. Shall not vouch any stranger, except he be present, and will enter presently into warranty; so of receipt. 5. The parol shall not demur for the nonage of the plaintiff or defendant. 8 *Co.* 50. *Booth*, 262.

It lies where tenant in fee-simple, fee tail, or for term of life, is put out and disseised of his lands, or tenements, rents, common of pasture, common way, or of an office, toll, &c. *Glanv. lib.* 10. *Reg. Orig.* 197. Assise must be of an actual freehold in lands, &c. and not a freehold in law: it lieth of common of pasture, where the commoner hath a freehold in it, and the lord or other persons feed it so hard, that all the grass is eat up: but then the plaintiff must count and set forth how long the land was fed, and allege *per quod proficuum suum ibidem amisit*, &c. 9 *Rep.* 113. One may have an assise of land and *rent*, or of several rents, and offices and profits in his soil, all in one writ: and if it be of a rent-charge, or rent-seck, it shall be general *de libero tenemento* in such a place, and all the lands and tenements of the tenants charged ought to be named in the writ; but in assise for rent service it is otherwise. *Dyer*, 31. An assise may be brought for an office held for life; but then it must be an office of profit, not of charge only: of the toll of a mill, or market, assise lieth; though it may not be brought of suit to a mill. 8 *Rep.* 46, 47.

An assise was brought of the office of a *filazer*, of the court of Common Pleas, and the demandant counted *de libero tenemento*, and alleged seisin, by taking money for a *capias*, and the *post* was put in *view* where the officer sate. *Dyer*, 114.

An assise lieth of the office of *register of the admiralty*, and the demandant laid a prescription to it, *viz. quod quilibet hujusmodi persona*, who should be named by the admiral, should be registered of the admiralty for life. *Dyer*, 153.

It lieth of offices of *woodward*, *park-keeper*, and *keeper of chases*, *warrener*, &c. but these are not at common law; but by the statute of *Westm.* 2. *c.* 25. because they are of profits to be taken in *alieno solo*: it likewise lieth of all other offices and bailiwicks in fee. 8 *Rep.* 47.

In an assise of a *new office*, it ought to be showed what profits belong to it; but it is otherwise of an ancient office, because it is presumed, that the profit thereof is sufficiently known. 8 *Rep.* 45. 49.

Tenants in common shall each have a several assise for his moiety, or part, because they are seised by *several titles*; but *twenty joint-tenants* shall have but one assise in all their names, because they have but one *joint title*; so if there are three joint-tenants, and one of them releaseth all his right to one of his companions, and then the other two are disseised of the whole, they shall have but one assise in both their names, for the two parts, because they had a *joint title* to it at the time of the disseisin, and he to whom the release was given shall have an assise in his own name, because of that part he is *tenant in common*. *Co. Lit.* 196.

If lessee for years, or tenant at will, be ousted, the lessor, or he in remainder, may have assise, because the freehold was in him at the time of the disseisin. *Kel.* 109. Assise lies for tithes, by stat. 32 *Hen.* VIII. *c.* 7. *Cro. Eliz.* 559. But not for an annuity, pension, &c. In some cases an assise will lie where ejectment will not. Ejectment will not lie *de piscariâ*, by reason the sheriff cannot deliver possession of it; but an assise will lie for it, as it may be viewed by the recognitors. *Cro. Car.* 534. Assise will sometimes lie where trespass *vi et armis* doth not. *Vide* 8 *Rep.* 47. 1 *Nels. Abr.* 276.

By *Magna Charta*, 9 *Hen.* III. *cap.* 12. *assises of novel disseisin*, &c. shall be taken in the proper counties, by the king's justices: and for estovers of wood, profit taken in woods, corn to be received yearly in a certain place; and for toll, tonnage, &c. and of offices in fee, an assise shall be; also for common of turbary, and of fishing, appendant to freehold, &c.

In an assise, the plaintiff must prove his title, then his seisin and disseisin: but seisin of part of a rent is sufficient to have assise of the whole: and if a man, who hath title to enter, set his foot upon the land, and is ousted, that is a sufficient seisin.

As the writ of assise restores the party to the actual seisin of his freehold, for so are the words of the writ, *viz. facias tenementum illud seisiri*, &c. consequently the party that brings the writ must found it upon an actual seisin, which he has been devested of, for otherwise this remedy is not commensurate to his case. See 2 *Roll. Abr.* 463.

Therefore, if there be lord and tenant by rent-service, and the lord grants the services to another, and the tenant *attorns* by a penny, this being given by way of *attornment*, is not sufficient seisin to ground an assise on; *secus* if the penny had been given by way of *seisin* of the rent. *Lit.* § 565. *Co. Lit.* 315. 4 *Co.* 9. 10 *Co.* 127.

The first process in this action is an original writ issued out of chancery, directed to the sheriff, commanding him to return a jury, who are called the recognitors of the assise. An assise is to be arraigned on the day the writ is returnable, on which day the defendant is to count, and the tenant is to appear and plead instantly. *Sty. Reg.* 88.

If in an assise no tenant of the freehold be mentioned, the defendant may plead it; and where one defendant pleads no tenant of the freehold named in the writ, if this is found, the writ shall abate *quoad* all. *Dyer*, 207.

On such a plea of the defendant, the plaintiff says that he hath made a feoffment to persons unknown, and he himself hath continually taken the profits; if then they are at issue upon the taking the profits, and it be found against the defendant, it shall not be inquired of the points of the assise, for the disseisin is acknowledged. 1 *Danv. Abr.* 584. And if the deed of the ancestor of the plaintiff be pleaded in bar, and this is denied, and found for the plaintiff, the assise shall not inquire of the points of the writ, but only of the damages. *Ibid.* 585.

In this suit, if the defendant fail to make good the exception which he pleads, he shall be adjudged a disseisor, without taking the assise; and shall pay the plaintiff double damages, and be imprisoned a year. Stat. 13 *Edw.* I. *cap.* 25. In assise the tenant pleads in bar, and the plaintiff makes title, but the tenant doth neither answer nor traverse the title; in this case the assise shall be awarded at large. *Cro. Eliz.* 559. And if any other title is found for the plaintiff, he shall recover. *Bro. Assi.* 281. If a tenant pleads in abatement in an assise, he must at the same time plead over in bar; and no imparlance shall be allowed without good cause: and where there are several defendants, and any of them do not appear the first day, the assise shall be taken against them by default. *Pasch.* 5 *Wm.* III.

If assise be brought against a lessee, he may not plead *assisa non*; for that is the form of the plea in bar for tenant of the freehold: he ought to plead the special matter, *viz.* his lease, the reversion in the plaintiff, and that he is possessed, and so in without wrong. *Jenk. Cent.* 142. An assise is to be first arraigned, and the plaintiff's counsel prays the court that the defendant may be called; whereupon he is called; and if the defendant appears, then his counsel demand *over* of the writ of assise, and the return of it; which is granted; and then he prays leave to imparl to a short time after, and the jury is adjourned to that day: at the day given by the court, the defendant is again called, and, upon his appearance, he pleads to the assise; and upon this an issue is joined between the parties, and the jurors are sworn to try the issue, the counsel proceeding to give them their evidence: after the trial the court gives judgment, and the plaintiff recovering is to have writ of *seisin*, &c. 1 *Lill. Abr.* 105, 106.

The jurors that are to try the *assise* are to view the thing in demand: by writ of *assise* the sheriff is commanded, *Quod faciat duodecim liberos et legales homines de vicineto, &c. Videre tenementum illud, et nomina eorum imbreviari, et quod summoneat eos per bonas summonitiones, quod sint coram justitiariis, &c. parati inde facere recognitionem, &c.*

By *Westm.* 2. *cap.* 25. a certificate of assise is given, which is a writ for the party grieved, by a verdict of judgment given against him in an assise, when he had something to plead, as a record or release, which could not have been pleaded by his bailiff; or when the assise was taken against himself by default, to have the deed tried,

and the record brought in before the justices, and the former jury summoned to appear before him at a certain day and place, for a further examination and trial of the matter. See *Booth*, 215. 287. 4 *Co.* 4. b. 2 *Inst.* 26. *F. N. B.* 181. 3 *Comm.* 389.

The plaint need not be so certain in *assise* as in other writs: the judgment being to recover *per visum recognitorum*; and if the plaint be but so certain as that the recognitors may put the demandant into possession, it is sufficient. *Dyer*, 84.

To prevent frequent and vexatious disseisins, it is enacted by the statute of *Merton*, 20 *Hen.* III. *c.* 3. that if a person disseised recover seisin of the land again, by assise of *novel disseisin*, and be again disseised of the same tenements by the same disseisor, he shall have a writ of *redisseisin*; and, if he recover therein, the *redisseisor* shall be imprisoned; and by the statute of *Marlberge*, 52 *Hen.* III. *c.* 8. shall also pay a fine to the king: to which the stat. *Westm.* 2. (13 *Edw.* I.) *c.* 26. hath superadded double damages to the party aggrieved. In like manner, by the same statute of *Merton*, when any lands or tenements are recovered by assise of *mort d'ancestor*, or other jury, or any judgment of the court, if the party be afterwards disseised by the same person against whom judgment was obtained, he shall have a writ of *post-disseisin* against him; which subjects the *post-disseisor* to the same penalties as a *redisseisor*. The reason of all which, as given by Sir *Edward Coke*, (2 *Inst.* 83, 84.) is because such proceeding is a contempt of the king's court, and in despite of the law. 3 *Comm.* 188. See *Reg. Orig.* 208. *F. N. B.* 190. *Co. Lit.* 154. 2 *Inst. Com.* on stat. *Wm.* II. *New Nat. Br.* 417. 420.

For proceedings in writ of *assise of novel disseisin*, see *Plowd.* 411, 412.

The court of *Common Pleas* or *King's Bench* may hold plea of *assises* of land in the county of *Middlesex*, by writ out of *Chancery*. 1 *Lill. Abr.* 105. And in cities and corporations an *assise of fresh force* lies for recovery of possession of lands, within forty days after the *disseisin*, as the ordinary *assise* in the county. *F. N. B.* 7.

ASSISE OF MORT D'ANCESTOR, *Assisa mortis antecessoris.*] Is a writ that lay where a man's father, mother, brother, sister, uncle, aunt, &c. died seised of lands, tenements, rents, &c. that were held in fee, and after their death a stranger abated. *Reg. Orig.* 223. It is good as well against the abator, as any other in possession of the land; but it lies not against brothers or sisters, &c. where there is privity of blood between the person prosecuting and them. *Co. Lit.* 242. And it must be brought within the time limited by the statute of limitations, [50 years, 3 *Comm.* 189.] or the right may be lost by negligence.

If tenant by the curtesy alien his wife's inheritance, and dieth, the heir of the wife shall have an *assise of mort d'ancestor*, if he have not assets by descent from the tenant by the curtesy; and the same shall be as well where the wife was not seised of land the day of her death, as where she was seised thereof. *New Nat. Br.* 489. A warden of a college, &c. shall have *assise of mort d'ancestor* of rent where his predecessor was seised. And a man may have *assise of mort d'ancestor* of rents, against several persons in several counties; having, in the end of the writ, several summons against the tenants: and the process in this writ is summons against the party; and if he makes default at the day of the *assise* returned, then the plaintiff ought to sue out a resummons; and if he makes default again, the *assise* shall be taken, &c. *Bro. Assis.* 88. In a *mort d'ancestor*, if the tenant says

the plaintiff is not next heir, and this is found against him, the points of the writ shall be inquired of: and in this case the *assise* may find, that though the plaintiff be the next heir, yet he is not next heir as to this land; for this is in regard of their inquiry at large. *Bro. Mort d'An.* 47. 1 *Danv. Abr.* 584. Damages shall be recovered in the *assise of mort d'ancestor*; but it lieth not of an estate tail, only where the *ancestor* was seised in demesne as of fee. *Bro. Assis.* If a man be barred in *assise of novel disseisin*, upon showing a descent, or other special matter, he may have *mort d'ancestor*, or writ of *entry sur disseisin*, &c. 4 *Rep.* 43.

If the abatement happened on the death of one's grandfather or grandmother, then an assise of *mort d'ancestor* no longer lies, but a writ of *ayle*, or *de avo*; if, on the death of the great-grandfather or great-grandmother, then a writ of *besayle*, or *de proavo*; but if it mounts one degree higher, to the *tresayle*, or grandfather's grandfather, or if the abatement happened upon the death of any collateral relation, other than those before mentioned, the writ is called a writ of *cosinage* or *de consanguineo*. *Finch, L.* 266, 267. And the same points shall be inquired of in all these actions *ancestral*, as in an assise of *mort d'ancestor*, they being of the very same nature. Stat. *Westm.* 2. (13 *Edw.* I.) *c.* 20. though they differ in this point of form, that these *ancestral* writs (like all other writs of *præcipe*) expressly assert a title in the demandant, (*viz.* the seisin of the ancestor at his death, and his own right of inheritance,) the assise asserts nothing directly, but only prays an inquiry whether those points be so. 2 *Inst.* 399. There is also another ancestral writ, denominated a *nuper obiit*, to establish an equal division of the land in question, where, on the death of an ancestor, who has several heirs or coheiresses one enters and holds the others out of possession. *F. N. B.* 197. *Finch, L.* 293. *Reg. Orig.* 226. *New Nat. Br.* 437, 438. *Booth on Real Actions.* But a man is not allowed to have any of these actions ancestral for an abatement, consequent on the death of any collateral relation, beyond the fourth degree; (*Hale* on *F. N. B.* 221.) though in the lineal ascent he may proceed *ad infinitum*. (*Fitzh. Abr.* tit. *Cosinage*, 15.) 3 *Comm.* 186.

It was always held to be law, that, where lands were devisable in a man's last will by the custom of the place, there an assise of *mort d'ancestor* did not lie. For, where lands were so devisable, the right of possession could never be determined by a process, which inquired only of these two points, the seisin of the ancestor, and the heirship of the demandant. And hence it may be reasonable to conclude, that when the statute of wills, 32 *Hen.* VIII. *c.* 1. made all socage lands devisable, an assise of *mort d'ancestor* could no longer be brought of lands held in socage. See 1 *Leon.* 267. and that now, since the stat. 12 *Car.* II. *c.* 24. (which converts all tenures, a few only excepted, into free and common socage,) no assise of *mort d'ancestor* can be brought of any lands in the kingdom; but that, in case of abatements, recourse must be properly had to the writs of entry. 3 *Comm.* 187.

It is to be observed, moreover, that these writs are now almost obsolete, being in a great measure superseded by the action of ejectment, which answers almost all the purposes of real actions; except in some very peculiar cases.

ASSISE OF NUISANCE. See *Nuisance*.

ASSISE OF DARREIN PRESENTMENT. See tit. *Darrein Presentment*.

ASSISE DE UTRUM, or *assisa juris utrum.*] See tit. *Juris utrum.*

ASSISE OF THE FOREST, *Assisa de Foresta.*] Is a statute touching orders to be observed in the king's forest. *Manwood*, 35. The statute of view of frank pledge, *anno* 18 *Edw.* II. is also called the *assise of the king :* and the statute of bread and ale, 51 *Hen.* III. is termed the *assise of bread and ale.* And these are so called, because they set down and appoint a certain measure, or order, in the things they contain. There is further an *assise of nuisance*, *assisa nocumenti*, where a man maketh a nuisance to the freehold of another, to redress the same. And besides *Littleton's* division of assises, there are others mentioned by other writers, *viz. assise at large*, brought by an infant to inquire of a disseisin, and whether his *ancestor* were of full age, good memory, &c. when he made the deed pleaded, whereby he claims his right.

Assise in point of assise ; assisa in modum assisæ.] Which is when the tenant, as it were, setting foot to foot with the demandant, without any thing further, pleads directly to the writ no wrong, no disseisin.

Assise out of the point of assise, is where the tenant pleadeth something by exception ; as a foreign release, or foreign matter, triable in a foreign county ; which must be tried by a jury, before the principal cause can proceed.

Assise of right of damages, is when the tenant confesseth an ouster, and referring it to a demurrer in law, whether it were rightly done or not, is adjudged to have done wrong ; whereupon the demandant shall have a writ of assise to recover damages. *Bract. lib.* 4. *F. N. B.* 105. Assises are likewise awarded by default of tenants, &c. Of the grand assise, see tit. *Jury*. For further particulars relative to assise in general, see *Com. Dig.* and *ante*, tit. *Assise.*

ASSISORS, *Assisores.*] *Sunt qui assisas condunt aut taxationes imponunt.* In *Scotland*, (according to *Skene*,) they are the same with our jurors ; and their oath is this :

> *We shall leil suith say,*
> *And na suith conceal, for nathing we may,*
> *So far as we are charged upon this* assise,
> *Be* [by] *God himself, and be* [by] *our part of Paradise,*
> *And as we will answer to God, upon*
> *The dreadful day of dome.*

ASSISUS, Rented or farmed out for such an assise, or certain assessed rent in money or provisions. *Terra assisa* was commonly opposed to *terra dominica ;* this last being held in domain, and occupied by the lord, the other let out to inferior tenants. And hence comes the word to assess or allot the proportion and rates in taxes and payments by *assessors.*

ASSITHMENT, A weregild or compensation, by a pecuniary mulct : from the preposition *ad*, and the Sax. *sithe*, *vice : quod vice supplicii ad expiandum, delictum solvitur. Blount.*

ASSOCIATION, *associatio.*] Is a writ or patent sent by the king, either at his own motion, or at the suit of a party, plaintiff, to the justices appointed to take assises, or of *oyer* and *terminer*, &c. to have others *associated* unto them. And this is usual where a justice of assise dies ; and a writ is issued to the justices alive to admit the person associated ; also where a justice is disabled, this is practised. *F.*

N. B. 185. *Reg. Orig.* 201. 206. 223. The clerk of the assise is usually associate of course; in other cases, some learned serjeants at law are appointed. It hath been holden, that an association, after another association allowed and admitted, doth not lie; nor are the justices then to admit other association in that writ afterwards, so long as that writ and commission stand in force. *Bro. Assis.* 386. *Mich.* 32 *Hen.* VI. The king may make an association unto the sheriff upon a writ of *re-disseisin*, as well as upon assise of *novel disseisin*. *New Nat. Br.* 416, 417. See *ante*, tit. *Assise*.

ASSOCIATION OF PARLIAMENT. In the reign of King *Wm.* III. the parliament entered into a solemn association to defend his majesty's person and government against all plots and conspiracies: and all persons bearing offices, civil or military, were enjoined to subscribe the association, to stand by King *William* on pain of forfeitures and penalties, &c. stat. 7 and 8 *Wm.* III. *cap.* 27. made void by stat. 1 *Ann. st.* 1. *c.* 22. § 2.

ASSOILE, *absolvere.*] To deliver from excommunication. *Staundf. Pl. Cr.* 72. In stat. 1 *Hen.* IV. *c.* 10. mention being made of King *Edw.* III. it is added, whom God *assoil.*

ASSUMPSIT, from the Lat. *Assumo.*] It is taken for a voluntary promise, by which a man assumes or takes upon him to perform or pay any thing to another: it comprehends any verbal promise, made upon consideration, and the civilians express it diversely, according to the nature of the promise, calling it sometimes *pactum*, sometimes *promissionem*, or *constitutum*, &c. *Terms de Ley.* An action upon the case *on assumpsit* (or as it is also expressed, *on promises*) is an action the law gives the party injured by the breach or non-performance of a contract legally entered into; it is founded on a contract either *express* or *implied* by law; and gives the party damages in proportion to the loss he has sustained by the violation of the contract. 4 *Co.* 92. *Moor*, 667.

Here it is to be considered,

I. *In what cases an assumpsit is or is not the proper action.*
II. *What words will create an assumpsit.*
III. *What consideration is sufficient.*
IV. *Of the proceedings.*

I. In every action upon assumpsit, there ought to be a consideration, promise, and breach of promise. 1 *Leon.* 405. For

The law distinguishes between a general *indebitatus assumpsit* and a *special assumpsit*: for though they come under the denomination of *actions on the case*, and the party is to be recompensed in damages alike in both, yet the first seems to be of a superior nature, and will lie in no case but where debt will lie; but for a particular undertaking, or collateral promise to discharge the debt or duty of another, a special *assumpsit* must be brought. 1 *New Abr.* 163.

Action on the case on assumpsit lies, for not making a good estate of land sold, according to promise; not paying money upon a bargain and sale, according to agreement; not delivering goods upon promise, on demand; this is by express assumpsit; an implied assumpsit is where goods are sold, or work is done, &c. without any price agreed upon; in an *action on the case* by *quantum meruit*, or *quantum valebat*, the law implies a promise and satisfaction to the value.

When one becomes legally indebted to another for goods sold, the law implies a promise that he will pay this debt; and if it be not

paid, *indebitatus assumpsit* lies. 1 *Danv. Abr.* 26. And *indebitatus assumpsit* lies for goods sold and delivered to a stranger, *ad requisitionem* of the defendant. *Ibid.* 27. But on *indebitatus assumpsit* for goods sold, you must prove a price agreed on, otherwise the action will not lie; though this is helped by laying a *quantum meruit*, with the *indebit. assumpsit*, wherein if you fail in proof of the price agreed on, you may recover the value. *Wood's Inst.* 536.

If *A.* and *B.* having dealings with each other, make up their accounts, and *B.* is found in arrear, and promises to pay the balance, an *assumpsit* lies against him, on *insimul computassent*, and *A.* need not bring a writ of account. *Cro. Jac.* 69. *Yelv.* 70. *S. P.* 1 *Roll. Abr. 7. S. P.* 1 *Roll. Rep.* 396. *Bulst.* 208. *Moor*, 854.

So if *A.* gives money, or delivers goods to *B.* to merchandise therewith, and *B.* promises to render an account, *assumpsit* lies on this express promise, as well as account. 1 *Salk.* 9.

So if a tenant, being in arrear for rents, settles an account of arrears with his landlord, and promises to pay him the sum in which he is found in arrear, an *assumpsit* lies on this promise. 1 *Roll. Abr.* 9. *Bro. Account*, 81. *Raym.* 211. 2 *Keb.* 813. *Vide Sty.* 131. 283. *Cro. Jac.* 602. So, on a balanced account between two partners, though including *items* not connected with the partnership. 2 *Term Rep.* 479. 483.

But if the obligor in a bond, without any new consideration, as forbearance, &c. promises to pay the money, an assumpsit will not lie, but the obligee must still pursue his remedy by action of debt. 1 *Roll. Abr.* 8. *Hutt.* 34. *Cro. Eliz.* 240. seems *contra.*

Where a man comes to buy goods, and they agree upon a price and a day for the payment, and the buyer takes them away, an *assumpsit* for the money is the proper action, for *trover* will not lie for the goods, because the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due. 1 *New Abr.* 167.

If a man and a woman, being unmarried, mutually promise to marry each other, and afterwards the man marries another woman, by which he renders himself incapable of performing his contract, an *assumpsit* lies, in which the woman shall recover damages. *Carter*, 233.

An *indebitatus assumpsit* lies for money by custom due for scavage; adjudged upon a special verdict, by which it was found that the sum demanded was due by custom, but that there was no express promise to pay it. 2 *Lev.* 174.

If one receives my rent, under pretence of title, I may have an *indebitatus assumpsit* against him. 2 *Mod.* 263.

If a *feme sole* marries a man, who, in truth, is married to another woman, and he makes a lease of her lands, and receives the rents, she may bring an *indebitatus assumpsit* against him for so much money received to her use; adjudged after verdict. 1 *Salk.* 28.

Where action is brought upon a *contract*, if the plaintiff mistakes the sum agreed upon, he fails in his action; but if he brings it upon the *promise in law*, arising from the debt there, though he mistakes the sum, he shall recover. *Alleyn*, 29. Every contract made between parties, implies a mutual promise for performance: and yet an action may be brought on a reciprocal promise by one against the other, although he who brings it hath not performed on his side. *Dyer*, 30. 75. When an *assumpsit* or promise is the ground of the action, it must be precisely set forth. 3 *Lev.* 319. If a promise be made with-

out limitation of time for its performance, reasonable time shall be allowed, if there be an immediate consideration for it; and not time during life. 1 *Lill. Abr.* 112. On promise to deliver a thing such a day, the party is bound to do it without request. 1 *Lev.* 284. But if a promise be to do any thing upon request, the request is necessary to entitle the plaintiff to the action on which it shall arise. 1 *Lev.* 48. Though in every *indebitatus assumpsit*, it is alleged the defendant promised to pay *on request*, and that he was *requested* and *refused* payment, yet no request is ever proved. The time for the performance of the promise being elapsed, and the promise not performed, the law presumes request, unless in a particular case where a thing is not to be done, until *request*. Every executory contract, and debt that is not upon record, or on a specialty, which may be turned into damage, imports in it an *assumpsit* in law, and one may have debt or action on the case upon it at his election; for when a man doth *agree* to pay money, or to deliver any thing, he thereby *promiseth* to pay or deliver it. *Plowd.* 128. 1 *Cro.* 94.

Every contract executory implies an *assumpsit* to pay money at the day agreed, or immediately, if no time be limited. *Mo.* 667.

The *assumpsit* in an agreement that will be binding and give action, must be complete and perfect, and duly pursued and observed: and if the party that makes the *assumpsit*, and he to whom it is made, agree together, and a bond is given and taken for what it promised; by this the *assumpsit* is discharged. Also where an *assumpsit* is to stand to an award, if the award made be void, it will make the *assumpsit* void. *Yelv.* 87. 2 *Leon. ca.* 223. 1 *Leon.* 170. *Indeb. assump.* lies by a *prothonotary against an attorney*, for fees, for work done for defendant as attorney. *Holt's Rep.* 20.

Indebitatus assumpsit lies for a *customary fine*, *super mortem domini*. *Show.* 35. *Indebitatus assumpsit* lies *upon a personal contract* for a sum in gross, as *pro rebus venditis; per Holt*, Ch. J. *Show.* 36.

Indebitatus lies for *fees for being knighted*. *Snow.* 78.

Indebitatus assumpsit lies for money *paid by mistake*, on an account or *deceit*; but not for money *paid knowingly on illegal consideration*, as a usurious bond. *Salk.* 22.

Assumpsit lies in many cases where *debt* lies, and in many where debt doth not lie. 2 *Burr.* 1005. which see for many cases where assumpsit will lie; as also 1 *Term Rep.* 286.

Indebitatus assumpsit lies on a *judgment* of a foreign court, without declaring upon, or proving the grounds or cause of action; and if the judgment was obtained unfairly, defendant must show it. *Doug.* 1. 4.

Though *assumpsit* lies not for rent usually reserved on leases, yet if a man promise to pay, without a lease, so much a week as long as *A. B.* &c. permits him to enjoy a warehouse, &c. which is a special cause of promise, this action will lie. 2 *Cro.* 592. Now, by 11 *Geo.* II. *c.* 19. § 14. where the demise is not by *deed*, the landlord may recover his rent in an *action on the case*, for *use and occupation*.

Where a person pays money upon a mistake; or if he receives more from another in a reckoning than he ought, or more fees than should be taken, an *assumpsit* lies. 1 *Salk.* 22. *Comb.* 447. If a man receives money for the use of another person, *assumpsit* may be had against him, which supplies the place of action of account: and where money was deposited on a wager, an *indebitatus* lay for money received to a man's use. *Show.* 117.

If where a promise is made, one part of it is against law, and another part of it lawful, this is ground sufficient for *assumpsit*. 4 *Rep.* 94.

The person to whom a promise is made, shall have the *action*; and not those who are strangers, or for whose benefit it is intended. *Danv.* 64. Nor shall action be brought against one for what another receives, nor at his request, &c. 1 *Salk.* 23. But if a man delivers money to *A. B.* to my use, I may have an *action on the case* against him for this money. If a man accounts, and, upon the account, is found in arrear to a certain sum, and presently, in consideration thereof, assumes to pay the debt at a day, *action on the case* lies for this after the day. *Yelv.* 70. And on a promise to pay a sum of money at so much a month, an *action on the case* may be brought before the whole is payable; for it is grounded upon the promise, which is broken by every non-payment, and damages may be recovered. 2 *Cro.* 504. See tit. *Debt*.

II. Some agreements, though never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by the memory of witnesses. To prevent which, the statute of frauds and perjuries, 29 *Car.* II. *c.* 3. enacts, that in the five following cases *no verbal promise* shall be sufficient to ground an action upon, but at the least some *note* or *memorandum* of it shall be made *in writing*, and *signed* by the *party* to be charged therewith. 1. *Where an executor or administrator promises to answer damages out of his own estate.* 2. *Where a man undertakes to answer for the debt, default, or miscarriage of another.* 3. *Where any agreement is made, upon consideration of marriage.* 4. *Where any contract or sale is made of lands, tenements or hereditaments, or any interest therein.* 5. *And lastly, where there is any agreement that is not to be performed within a year from the making thereof.* In all these cases a mere *verbal assumpsit* is void. See 2 *Comm.* 448. n.

The same statute provides that no contract for sale of goods for the price of 10*l.* or upwards shall be good, except the buyer actually receive part of the goods sold, or give earnest; or there be some note or memorandum in writing, of the bargain being made by the parties or their agents.

A letter written by a party is a sufficient memorandum. 3 *Burr.* 1663. And see tit. *Agreement*.

A parol promise of marriage between parties is not within the statute. *Str.* 34. 5 *Mod.* 411. *Salk.* 24.

As to promises for the debt, &c. of another.

If a person, for whose use goods are furnished, *be liable at all*, any other promise by a third person to pay that debt, must be in writing. 2 *Term Rep.* 80.

And there is no distinction between a promise to pay for goods furnished to a third person, made *before* they are delivered, and one after. 2 *Term Rep.* 80. *Cowp.* 227.

But if the credit was given to the promiser *originally*, and the party furnishing the goods cannot recover against the person for whose use they were furnished, then the person promising is liable; as if one say "let *A.* have goods, and I will pay you;" or, "look to me for payment." *Com. Dig.* tit. *Action upon the Case on Assumpsit.* (F. 3.)

The intent of the parties by and to whom the promise or *assumpsit* is made, is more to be regarded than the form of words, and this intent and meaning is to be followed, not in the letter, but the substance of it: if a promise be to provide wedding cloaths for a woman, this shall be taken for such cloaths to be worn on the wedding or feast-day, according to the dignity of the person. *Poph.* 182. *Yelv.* 87. 3 *Cro.* 53.

All promises and contracts are to receive a favourable interpretation; and such construction is to be made, where any obscurity appears, as will best answer the intent of the parties; otherwise a person, by obscure wording of his contract, might find means to evade and elude the force of it. Hence it is a general rule, that all promises shall be taken most strongly against the promiser, and are not to be rejected, if they can by any means be reduced to a certainty.

If a man promises another, in consideration that he will assign to him a certain term, to pay him 10*l.* this is a good *assumpsit*, though the time of assignment and payment be not appointed; for the 10*l.* shall be paid in a convenient time, after the assignment, which also must be done in a convenient time, and he shall not have time during his life. 1 *Roll. Abr.* 14, 15.

If there be an agreement to enter into an obligation for performance of a thing of a certain value, without mentioning in what sum, it shall be according to the value. 1 *Sid.* 240.

III. The consideration is the ground of the common *action on the case*: and no action on the case lieth against a man for a promise where there is no *consideration* why he should make the promise. 1 *Danv.* 53.

A consideration altogether executed and past was anciently held not to be sufficient to maintain an *assumpsit*, but this doctrine is denied by the court of *K. B.* 3 *Burr.* 1671. See also *Cro. Eliz.* 282. by which it appears that though the consideration were executed, it would be sufficient if laid at plaintiff's request.

If an infant promise after full age to pay a debt incurred in his infancy, this will bind him. 1 *Term Rep.* 648.

If *A. undertakes* to do a thing *without hire*, as to take brandies out of one cellar, and to lay them down in another cellar, no action lies for the *non-feasance*; but if he *enters on the doing it*, action lies for a *misfeasance*, if it be through his own neglect or *mismanagement*, because it is a deceit; but *not* if by *mere accident*; *per Holt.* 1 *Salk.* 26. *Vide* 3 *Salk.* 11.

Where the *doing a thing will be a good consideration*, *a promise to do* that thing will be so too; *per Holt*, Ch. J. 12 *Mod.* 459.

Parting with my note to the defendant is a good consideration. 7 *Mod.* 12, 13.

An *assumpsit* may be upon a general consideration; but it doth not lie where the plaintiff has an obligation to pay the money, which is a stronger *lien* than *assumpsit*; nor when the party has a recognisance for the duty, &c. *Jenk. Cent.* 293.

Love or *friendship* are not considerations to ground actions upon. 2 *Leon.* 30. Also idle and insignificant considerations are looked upon as none at all; for wherever a person promises without a benefit arising to the promiser, or loss to the promisee, it is looked upon as a void promise. 2 *Bulst.* 269.

Lastly, it is to be observed, that *considerations* may be *void* as being *against law*, for if they are wicked and ill in themselves, or unlawful, by being prohibited by some act of parliament, they are void; therefore if an officer, who, by the duty of his office, is obliged to execute

writs, promises, in consideration of money paid him, to serve a certain process, an *assumpsit* will not lie on this promise; for the receipt of the money was extortion, and the consideration is unlawful. 1 *Roll. Abr.* 16.

Implied contracts are such as do not arise from the express determination of any court, or the positive direction of any statute, but from natural reason, and the just construction of law; which extends to all presumptive *undertakings* and *assumpsits*: which, though never perhaps actually made, yet constantly arise, upon this general implication and intendment of the courts of judicature, *that every man hath engaged to perform what his duty or justice requires.* Thus, if I employ a person to transact any business for me, or perform any work, the law implies that I undertook, or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury, by bringing his action on the case upon this *implied assumpsit*; wherein he is at liberty to suggest, that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury: who will assess such a sum in damages as they think he really merited. This is called an *assumpsit* upon a *quantum meruit*. There is also an *implied assumpsit* on a *quantum valebat*, which is very similar to the former; being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

Another species of *implied assumpsit* is, when one has *had and received* money belonging to another, without any valuable consideration given on the receiver's part; for the law construes this to be money had and received for the use of the owner only; *and implies*, that the *person* so receiving, *promised and undertook to account for it to the true proprietor*: And if he *unjustly detains it*, an *action on the case lies* against *him for the breach of such implied promise and undertaking*; and he will be made to *repair the owner in damages equivalent to what he has detained in such violation of his promise.* This is applicable to almost every case where the defendant has received money, which *ex æquo et bono*, he ought to refund. 2 *Burr.* 1012.

This species of assumpsit lies in numberless instances for money the defendant has received from a *third* person; which he claims title to, in opposition to the plaintiff's right, and which he had by law *authority to receive* from such third person. 2 *Burr.* 1008.

One great benefit which arises to suitors from the nature of this action, is, *that the plaintiff need not state the special circumstances*, from which he concludes, that *ex æquo et bono*, the money received by the defendant, ought to be deemed as belonging to him: he may declare generally that the money was received to his use, and make out his case at the trial. 2 *Burr.* 1010.

This is equally beneficial to the defendant. It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that may go into every equitable defence upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short he may defend himself by every thing, which shows that the plaintiff, *ex æquo et bono*, is *not entitled* to the *whole* of his demand, or to any part of it.

This action will lie to recover premiums of insurance paid by the insured to the lottery-office-keeper. *Cowp.* 790. But it will not lie to recover back winnings paid by the lottery-office keeper or insurer of lottery tickets. 4 *Burr.* 1984.

If two persons engage jointly in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker, with the privity and consent of the other, the whole sum, he may recover a moiety from the other, in an action for *money paid* to his use. 3 *Term Rep.* 418.

But in such a case of an illegal transaction, if one partner pay money for another, *without an express authority*, he cannot recover it back. *Id.*

And, generally, *assumpsit* for *money paid, laid out, and expended*, will not lie when the money has been paid *against the express consent* of the party for whose use it is supposed to have been paid. 1 *Term Rep.* 20.

See tit. *Consideration.*

IV. The plaintiff must set forth every thing essential to the gist of the action, with such certainty, that it may appear to the court that there were sufficient grounds for the action; for if any thing material be omitted, it cannot appear to the court whether the damages given by the jury were in proportion to the demand, or whether the party was at all entitled to a verdict. And therefore, in an action upon the case, the plaintiff cannot declare *quod cum* the defendant was indebted to the plaintiff in such a sum, and that the defendant, in consideration thereof, *super se assumpsit* to pay, &c. without showing the *cause* of the debt. 10 *Co.* 77.

If in an *assumpsit* the plaintiff declares, *quod cum* there were several reckonings and accounts between the plaintiff and defendant; and, at such a day, &c. *insimul computaverunt* for all debts, reckonings, and demands; and the defendant, upon the said account, was found to be in arrear the sum of 20*l.* in consideration whereof the defendant promised to pay, &c. this is a good declaration, without showing it was *pro mercimoniis*, or otherwise, wherefore he should have an account; for an account may be for divers causes, and several matters and things may be included and comprised therein, which *in fede computi* are reduced to a sum certain, and thereupon being indebted to the plaintiff, it is sufficient to ground an action. *Cro. Car.* 116.

If in an *assumpsit* the plaintiff declares, that the defendant did assume and promise to pay to the plaintiff so much money, and also to carry away certain wood before such a day; the defendant, as to the money, cannot plead that he paid it, and as to the carriage of wood, *non assumpsit*, for the promise being entire, cannot be apportioned. *March.* 100.

On an *assumpsit* in *law*, *payment*, or any other matter that excuses payment, may be given in evidence, on the general issue. In an *assumpsit* in *deed*, it must be pleaded. *Gilb. Evid.* 204, 205.

If the plaintiff declares upon an *indebitatus assumpsit*, and upon a *quantum meruit*, and the defendant pleads, that after the said several promises made, and before the action brought, the plaintiff and defendant came to an account concerning divers sums of money, and that the defendant was found in arrear to the plaintiff 30*l.* and thereupon, in consideration that the defendant promised to pay the said 30*l.* the plaintiff likewise promised to release and acquit the defend-

ant of all demands, this is a good plea; for, by the account, the first contract is merged. 2 *Mod.* 43, 44.

The defendant cannot plead that he revoked his promise; as if *A.* is in execution at the suit of *B.* and *J. S.* desires *B.* to let him go at large, and that he will satisfy him; to which *B.* agrees; though *J. S.* before any thing is done in pursuance of this promise and agreement, comes to *B.* and tells him, that he revokes his promise, and that he will not stand to it; yet such revocation cannot be pleaded in bar to the action. 1 *Roll. Abr.* 32.

In an action upon an *assumpsit*, if the consideration be *executory*; as if one promises to do something for me, in consideration of something to be done before by me, to or for him, if I will sue him for that he is to do for me, I must aver, that I have done that which was first to be done by me, for till that be done I may not maintain an action upon the promise. *Cro. Jac.* 583. 620. For further particulars see *Com. Dig.* tit. *Action on the Case on Assumpsit*; and see also 3 *Comm.* 158. and this *Dictionary*, tit. *Agreement*, *Consideration*.

ASSUMPTION, The day of the death of a saint so called, *Quia ejus anima in cœlum* assumitur. *Du Cange.*

ASSURANCE OF LANDS, Is where lands or tenements are conveyed by deed: and there is an *assurance* of ships, goods and merchandise, &c. See *Insurance.*

ASSYSERS, (jurors,) Those who in an inquest, serve a man, heir, or judge, the probation in criminal cases. *Scotch Dict.*

ASSYTHMENT, Is the reparation made for mutilation and slaughter. *Scotch Dict.*

ASSYTH THE KING, Is to cause malefactors pay what fyne is modified. *Scotch Dict.*

ASTER, and *Homo Aster*, A man that is resident. *Britton*, 151.

ASTRARIUS HÆRES, (from *Astre*, the hearth of a chimney,) Is where the ancestor by conveyance hath set his heir apparent and his family in a house in his life-time. *Co. Lit.* 8.

ASTRUM, A house or place of habitation, also from *astre*. *Placit. Hilar.* 18 *Edw.* I.

ATEGAR, A weapon among the *Saxons*, which seems to have been a hand-dart, from the Sax. *aeton*, to fling or throw, and *gar* a weapon. *Spelm.*

ATHE, *Adda.*] A privilege of administering an oath, in some cases of right and property; from the Sax. *ath*, *othe*, *juramentum*. It is mentioned among the privileges granted by King *Henry* II. to the monks of *Glastonbury*. *Cartular. Abatt. Glaston. MS.* fol. 14. 37.

ATIA. See *odio & atia*. A writ of inquiry whether a person be committed to prison on just cause of suspicion.

ATILIA, Utensils or country implements. *Blount.*

ATRIUM, A court before the house, and sometimes a churchyard.

To ATTACH, *Attachiare*, from the Fr. *attacher.*] To take or apprehend by commandment of a writ or precept. *Lamb. Eiren. lib.* 1. *cap.* 16. It differs from arrest, in that he who arresteth a man carrieth him to a person of higher power to be forthwith disposed of; but he that *attacheth* keepeth the party *attached*, and presents him in court at the day assigned; as appears by the words of the writ. Another difference there is, that arrest is only upon the body of a man; whereas an *attachment* is oftentimes upon his goods. *Kitch.* 279. A *capias* taketh hold of immoveable things, as lands or tenements, and

properly belongs to real actions, but attachment hath place rather in personal actions. *Bract. lib.* 4. *Fleta, lib.* 5. *cap.* 24.

ATTACHIAMENTA BONORUM, A distress taken upon goods or chattels, where a man is sued for personal estate or debt, by the legal attachiators or bailiffs, as security to answer an action. *Satit Process.* There is likewise *attachiamenta de spinis & bosco*, a privilege granted to the officers of a forest, to take to their own use thorns, brush, and wind-fall within their precincts. *Kennet's Paroch. Antiq. p.* 209.

ATTACHMENT, Is a process from a court of record, awarded by the justices at their discretion, on a bare suggestion, or on their own knowledge; and is properly grantable in cases of *contempts*, against which all courts of record, but more especially those of *Westminster-hall*, and above all the court of *B. R.* may proceed in a summary manner. *Leach's Hawk. P. C.* 2. *c.* 22. See 1 *Wils.* 300.

The most remarkable instances of contempts seem reducible to the following heads: 1. Contempts of the king's writs. 2. Contempts in the face of a court. 3. Contemptuous words or writings concerning the court. 4. Contempts of the rules or awards of the court. 5. Abuse of the process of the courts. 6. Forgeries of writs and other deceits tending to impose on the court. 2 *Hawk. P. C. c.* 22. § 33.

All courts of record have a kind of discretionary power over their own officers, and are to see that no abuses be committed by them, which may bring disgrace on the courts themselves; therefore if a sheriff or other officer shall be guilty of a corrupt practice in not serving a writ; as if he refuse to do it, unless paid an unreasonable gratuity from the plaintiff, or receive a bribe from the defendant, or give him notice to remove his person or effects, in order to prevent the service of any writ; the court which awarded it may punish such offences in such a manner as shall seem proper by attachment. *Dyer*, 218. 2 *Hawk. P. C. c.* 22. § 2.

But if there be no palpable corruption, nor extraordinary circumstance of wilful negligence or obstinacy, the judgment whereof is to be left to the discretion of the court, it seems not usual to proceed in this manner; but to leave the party to his ordinary remedy against the sheriff, either by action or by rule to return the writ, or by an *alias* and *pluries*, which if he have no excuse for not executing, an attachment goes of course. *Hob.* 62. 264. *Noy*, 101. *F. N. B.* 38. *Finch*, 237. 5 *Mod.* 314, 315.

Attachment lies against attorneys for injustice, and base dealing by their clients, in delaying suits, &c. as well as for contempts to the court. 2 *Hawk. c.* 22. § 11. If affidavits to ground an *attachment* are full as to the charge; yet if the party deny such charge by as plain and positive affidavits, he shall be discharged; but if he take a false oath, he may be indicted of perjury. *Mod. Cas. in L. and E.* 81.

Against sheriffs making false returns of writs, and against bailiffs for frauds in arrest, and exceeding their power, &c. *attachment* may be had. For contempts against the king's writs; using them in a vexatious manner; altering the teste, or filling them up after sealed, &c. *attachment* lies. And for contempts of an enormous kind, in not obeying writs, &c. *attachment* may issue against peers. 2 *Hawk. c.* 22. § 33. &c. For persuading jurors not to appear on a trial, *attachment* lies against the party, for obstructing the proceedings of the court. 1 *Lill.* 121. The court of *B. R.* may award attachment against any

inferior courts usurping a jurisdiction, or acting contrary to justice. *Salk.* 207. Though it is usual first to send out a prohibition.

Attachment lies for proceeding in an inferior court, after a *habeas corpus* issued, and a *supersedeas* to stay proceedings. 21 *Car. B. R.* And *attachment* may be granted against justices of peace, for proceeding on an indictment after a *certiorari* delivered to them to remove the indictment. 1 *Lill.* 121. But it does not lie against a corporation, the mode of compulsion being by sequestration. *Cowp.* 377. *Attachment* lies against a lord that refuses to hold his court, after a writ issued to him for that purpose, so that his tenant cannot have right done him. *New Nat. Br.* 6. 27.

An attachment is the proper remedy for disobedience of the rules of court; as of those made in ejectment, arbitrament, &c. So where a defendant in account, being adjudged to account before the auditors, refuses to do it, unless they will allow matter disallowed by the court before: or where one refuses to pay costs taxed by the master, whose taxation the law looks upon as a taxation by the court. 1 *Mod.* 21. 1 *Salk.* 71.

But an attachment is not granted for disobedience of a rule of *Nisi Prius*, unless it be first made a rule of court; nor for disobedience of a rule made by a judge at his chamber, unless it be entered; nor for disobedience of any rule without personal service. 1 *Salk.* 84.

Also an attachment is proper for abuses of the process of the court, as for suing out execution where there is no judgment; bringing an appeal for the death of one known to be alive; making use of the process of a superior court, to bring a defendant within the jurisdiction of an inferior court, and then dropping it; using such process in a vexatious, oppressive, or unjust manner, without colour of serving any other end by it. 2 *Hawk. P. C. c.* 22. § 33. &c. It seems also that *counsellors* are punishable by attachment for foul practices. 2 *Hawk. P. C. c.* 22. § 30. *Gaolers* are thus punishable for misbehaviour in their offices. *Id. ib. Witnesses* for non-attendance on a trial. *Leach's Hawk. P. C.* 2. *c.* 22. § 33. in note. *Peers* are liable to attachment for certain outrageous contempts, as a disobedience to a writ of *habeas corpus*, and generally of other writs. *Id. ib.*

Attachments are *usually granted on a rule to show cause*, unless the offence complained of be of a flagrant nature, and positively sworn to; in which last case the party is ordered to attend, which he must do in person, as must every one against whom an attachment is granted; and if he shall appear to be apparently guilty, the court in discretion, on consideration of the nature of the crime, and other circumstances, will either commit him immediately, in order to answer interrogatories to be exhibited against him concerning the contempt complained of, or will suffer him to enter into recognisance to answer such interrogatories; which if they be not exhibited within four days, the party may move to have the recognisance discharged; otherwise he must answer them, though exhibited after the four days; but in all cases, if he fully answer them, he shall be discharged as to the attachment, and the prosecutor shall be left to proceed against him for the perjury, if he think fit; but if he deny part of the contempts only, and confess other part, he shall not be discharged as to those denied, but the truth of them shall be examined, and such punishment inflicted as from the whole shall appear reasonable; and if his answer be evasive as to any material part, he shall be punished in the same manner as if he had confessed it. 2 *Hawk. P. C. c.* 22. § 1. 1 *Salk.* 84. 6 *Mod.* 73. 2 *Jones*, 178. See *Interrogatories*.

Upon all these examinations the master is to make his report, and the party is then and not before acquitted or adjudged in contempt. *Hardw.* 23. And in the latter case is either immediately sentenced or committed to the marshal; unless the court waive giving judgment, (as they sometimes do from motives of lenity,) and order the recognisance to be discharged. 3 *Burr.* 1256. Or the attorney-general consent that the party may continue on the recognisance to appear under a rule of court at some future time. 2 *Burr.* 797.

Attachments for non-payment of costs, and for non-performance of an award, are in the nature of civil executions. 1 *Term Rep.* 266.

Attachments out of *Chancery* may be had of course, upon affidavit made that the defendant was served with a *subpœna*, and appeared not; or upon non-performance of any order or decree; also after the return of this *attachment*, that the defendant *non est inventus*, &c. then *attachment* with proclamation issues against him, &c. *West. Symb.* And for contempts, when a party appears, he must upon his oath answer interrogatories exhibited against him; and if he be found guilty he shall be fined.

On attachment the party is not obliged to answer any interrogatories tending to convict him of any other offence. *Stra.* 444. Or which may subject him to a penalty. *Hardw.* 239.

ATTACHMENT OF PRIVILEGE is where a man by virtue of his privilege calls another to that court whereto he himself belongs, and in respect thereof is privileged, there to answer some action (as an attorney, &c.) or it is a power to apprehend a man in a place privileged. *Book Entr.* 431. Corporation courts have sometimes power by charter to issue *attachments*, and some courts baron grant *attachments* of debt. *Kitch.* 79.

ATTACHMENT FOREIGN is an *attachment* of the goods of foreigners, found in some liberty, to satisfy their creditors within such liberty. *Carth. Rep.* 66.

Foreign attachment under the custom of *London* is thus: if a plaint be entered in the court of the mayor, or the sheriff against *A.* and the process be returned *nichil*, and thereupon plaintiff suggests that another person within *London* is indebted to *A.* the debtor shall be *warned*, (whence he is called the *garnishee*,) and if he does not deny himself to be indebted to *A.* the debt shall be attached in his hands. *Com. Dig.* tit. *Attachment foreign*, cites 22 *Edw.* IV. 30.

The plaint may be exhibited in the *mayor's* or the *sheriff's* court; but the proceeding in the former is the most advantageous. *Id. ib.*

This custom of foreign attachment is said to prevail in *Exeter* and other places. *Sed qu.*

But a foreign *attachment* cannot be had when a suit is depending in any of the courts at *Westminster*. *Cro. Eliz.* 691. And nothing is *attachable* but for a certain and due debt; though by the custom of *London* money may be attached before due, as a debt; but not levied before due. *Sid.* 327. 1 *Nels. Abr.* 282, 283.

Foreign attachments in *London*, upon plaint of debt, are made after this manner: A. *oweth* B. 100*l.* *and* C. *is indebted to* A. 100*l.* B. *enters an action against* A. *of* 100*l.* *and by virtue of that action a serjeant* attacheth 100*l.* *in the hands of* C. *as the money of* A. *to the use of* B. *which is returned upon that action.* The *attachment* being made and returned by the serjeant, the plaintiff is immediately to fee an attorney before the next court, or the defendant may then put in bail to the attachment, and nonsuit the plaintiff: four court days must pass before the plaintiff can cause *C.* the *garnishee* in whose hands the

money was *attached*, to show cause why *B.* should not condemn the 100*l.* *attached* in the hands of *C.* as the money of *A.* the defendant in the action (though not in the *attachment*) to the use of *B.* the plaintiff; and the garnishee *C.* may appear in court by his attorney, wage his law, and plead that he hath no money in his hands of the defendant's, or other special matter; but the plaintiff may hinder his waging of law, by producing two sufficient citizens to swear that the garnishee had either money or goods, in his hands, of *A.* at the time of the *attachment*, of which affidavit is to be made before the lord mayor, and being filed, may be pleaded by way of estoppel: then the plaintiff must put in bail, that if the defendant come within a year and a day into court, and he can discharge himself of the money condemned in court, and that he owed nothing to the plaintiff at the time in the plaint mentioned, the said money shall be forthcoming, &c. If the garnishee fail to appear by his attorney, being warned by the officer to come into court to show cause as aforesaid, he is taken by default for want of appearing, and judgment given against him for the goods and money attached in his hands, and he is without remedy either at common law or in equity; for if taken in execution, he must pay the money condemned, though he hath not one penny, or go to prison; but the garnishee appearing to show cause why the money or goods *attached* in his hands ought not to be condemned to the use of the plaintiff, having feed an attorney, may plead as aforesaid, that he hath no money or goods in his hands of the party's against whom the attachment is made; and it will then be tried by a jury, and judgment awarded, &c. but after trial bail may be put in, whereby the *attachment* shall be dissolved, but the garnishee, &c. and his security will then be liable to what debt the plaintiff shall make out to be due, upon the action: and an *attachment* is never thoroughly perfected, till there is a bail, and satisfaction upon record. *Privileg. Lond.*

But the original defendant must be summoned and have notice; otherwise judgment against the garnishee will be erroneous; and the money paid or levied in execution, or it will not discharge the debt from the garnishee to the defendant: (though it was alleged that the custom of the city court is to give no notice.) 3 *Wils.* 297. 2 *Black. Rep.* 834. See 1 Ld. *Raym.* 727.

Where a *foreign attachment* is pleaded to an action, the custom is to set forth, that he who levied the plaint shall have execution of the debt owing by himself, and by which he was attached, if the plaintiff in the original action shall not disprove it within a year and a day; now if the plaintiff in the action below doth not set forth such conditional judgment given by the court, it is wrong because he doth not bring his case within the custom. *Vide* 2 *Lutw.* 985.

In assumpsit, &c. there was evidence given, that the debt was attached by the custom of *London* before the action brought, and that it was condemned there before the plea pleaded; and this evidence was given upon the general issue *non assumpsit*; and it being insisted for the defendant, that this should relate so as to defeat the plaintiff's action, it was adjudged, that where there is an attachment and condemnation before the action brought, it may be given *in evidence* upon the general issue, because there is an alteration of the property; but if the attachment be only before the action brought, and the condemnation afterwards, the *attachment* may be pleaded in *abatement*, and the *condemnation* may be pleaded in *bar*, but shall not be given in evidence on the general issue, because by the *condemnation* the property is altered, but not before. 1 *Salk.* 280. 291.

Action of debt, &c. the defendant pleaded in bar, that there was a *custom in London* to attach the debt before the day of payment came ; *et per curiam*, such a custom may be good, but to have judgment to recover the debt before the day of payment is come, cannot be a good custom, because the debtee himself could not recover in such case, and therefore he who made the attachment shall not. This custom was pleaded, that the debtee in person, or *by his attorney*, may swear that the debt is due ; but this cannot be good as to the attorney ; it was agreed, that goods might be attached by a foreign attachment, and that the value thereof ought to be found before judgment ; but that this plea was ill, because the defendant did not aver it, *viz. et hoc paratus est verificare. W. Jones*, 406.

A sum of money was to be paid at *Michaelmas*, and it was attached before that day ; adjudged that a *foreign attachment* cannot reach a debt *before it is due ;* therefore though the judgment on the attachment was after *Michaelmas*, yet the money being attached before it was due, it is for that reason void. *Cro. Eliz.* 184. For further matter, see *Com. Dig.* tit. *Attachment, Foreign Attachment.*

Money due to an executor or administrator, as such, cannot be attached. It would give a simple contract creditor priority over judgments, &c. *Fisher* v. *Lane and others.* 3 *Wils.* 297. Nor trust-money in the hands of the garnishee. See *Doug.* 380.

In an action on the case the plaintiff had judgment against the defendant, and he owing 60*l.* to one *C. D.* he entered a plaint against him in *London*, and attached the 60*l.* in the hands of the said defendant, against whom the plaintiff had recovered as aforesaid, and had execution according to the custom ; afterwards the plaintiff brought a *sci. fa.* against the defendant, to show cause why he should not have execution upon the judgment which he had recovered, to which the defendant pleaded the *execution upon the attachment ;* and upon demurrer to that plea it was adjudged against the defendant, because a duty which accrueth by matter *of record*, cannot be attached by the *custom of London ;* for judgments obtained in the king's courts shall not be defeated or avoided by such particular customs, they being of so high a nature that they cannot be reached by attachment. 1 *Leon.* 29.

Debtor and creditor being both citizens of *London*, the debtor delivered several goods to the *Exeter* carrier then in *London*, to carry and deliver them at *Exeter*, and the creditor attached them in the hands of the *carrier* for the debt due to him from his debtor; adjudged, that the action should be discharged, because the *carrier* is privileged in his person and goods, and not only in the goods which are his own, but in those of other men, of which he is in possession, for he is answerable for them. 1 *Leon.* 189.

An executor submitted to an award, and the arbitrators awarded, that the defendant should pay the executor 350*l.* This money is not attachable in his hands by any creditor of his testator, though it is assets in his hands when recovered; because it was not due to the testator *tempore mortis*, and the custom of foreign attachments extends only to such debts. 1 *Vent.* 111.

A garnishee against whom a recovery was had in the mayor's court on foreign attachment, after a summons to defendant, and *nihil* returned ; may protect himself by giving such proceedings in evidence upon *assumpsit* in an action to recover the same debt brought by the defendant below without proving the debt of the plaintiff below, who attached the money in his hands, although by the course of pro-

ceedings in the mayor's court, bail not having been put in, the plaintiff below was not obliged to prove the debt to entitle himself to recover against the garnishee. *M'Daniel* v. *Huges*, *H.* 43 *Geo.* III. 3 *East*, 367.

ATTACHMENT OF THE FOREST, Is one of the three courts held here. *Manwood*, 90. 99. The lower court is called the *attachment*; the middle one the *swainmote*; the highest, *the justice in eyre's seat*. The *court of attachment* seemeth to be so called, because the *verderors* of the forest have therein no other authority, but to receive the *attachments* of offenders against *vert* and *venison*, taken by the rest of the officers, and to inroll them, that they may be presented and punished at the next *justice's seat*. *Manwood*, 93. And this *attaching* is by three means: 1. By goods and chattels. 2. By the body, pledges, and mainprize. 3. By the body only. This court is kept every forty days. See *Crompton*, in his *Court of the Forest*.

ATTAINDER, *attincta* and *attinctura*.] The *stain* or *corruption* of the blood of a criminal capitally condemned; the immediate inseparable consequence, by the common law, on the pronouncing the sentence of death.

He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court: neither is he capable of performing the functions of another man: for by an anticipation of his punishment, he is already dead in law. 3 *Inst.* 213. This is after *judgment*: for there is great difference between a man *convicted* and *attainted*; though they are frequently through inaccuracy confounded together; when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of any thing to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences; or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted. 4 *Comm.* 380, 381.

A man is *attainted* by appearance or by process: *attainder* on appearance is by confession, or verdict, &c. Confession, when the prisoner upon his indictment being asked whether guilty or not guilty, answers guilty, without putting himself upon his country; (and formerly confession was allowed before the coroner in sanctuary; whereupon the offender was to abjure the realm, and this was called *attainder* by abjuration.) *Attainder* by verdict is when the prisoner at the bar pleaded not guilty, and is found guilty by the verdict of the jury of life and death. And *attainder* by process, (otherwise termed *attainder* by default or outlawry,) is when the party flieth, and is not found until he hath been five times publicly called or proclaimed in the country, on the last whereof he is outlawed upon his default. *Staundf. Pl. Co.* 44. 122. 182. Also persons may be attainted by act of parliament.

Acts of attainder of criminals have been passed in several reigns, on the discovery of plots and rebellions, from the reign of King *Charles* II. when an act was made for the *attainder* of several persons guilty of the murder of King *Charles* I. to this time; among which, that for *attainting* Sir *John Fenwick*, for conspiring against King *William*, is the most remarkable; it being made to *attaint* and convict him of high treason on the oath of one witness, just after a law had

been enacted, that no person should be tried or *attainted* of high treason where corruption of blood is incurred, but by the oath of two lawful witnesses, unless the party confess, stand mute, &c. Stat. 7 and 8 *Wm.* III. *cap.* 3. But in the case of Sir *John Fenwick*, there was something extraordinary; for he was indicted of treason, on the oaths of two witnesses; though but one only was produced against him on his trial. It was alleged Sir *John* had tampered with, and prevailed on one of the witnesses to withdraw.

The consequences of attainder are forfeiture and corruption of blood; which latter cannot regularly be taken off but by act of parliament. *Co. Lit.* 391. b.

As to forfeiture of lands, &c. by attainder, see this *Dict.* tit. *Forfeiture.* As to *Corruption of Blood*, this operates upwards and downwards, so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor. See tit. *Tenure*, *Descent*, *Forfeiture.*

This is one of those notions which our laws have adopted from the feodal constitutions, at the time of the *Norman* conquest, as appears from its being unknown in those tenures which are indisputably *Saxon*, or *Gavelkind*: wherein, though by treason, according to the ancient *Saxon* laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descent ensues; and, on judgment of mere felony, no escheat accrues to the lord. And therefore as every other oppressive mark of feodal tenures is now happily worn away in these kingdoms, it is to be hoped that the *corruption of blood*, with all its connected consequences not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, may in process of time be abolished by act of parliament: as it stands upon a very different footing from the forfeiture of lands for high treason, affecting the king's person or government. And indeed the legislature has, from time to time, appeared very inclinable to give way to so equitable a provision; by enacting that, in certain treasons respecting the papal supremacy, stat. 5 *Eliz. c.* 1. and the public coin, stats. 5 *Eliz. c.* 11. 18 *Eliz. c.* 1. 8 and 9 *Wm.* III. *c.* 26. 15 and 16 *Geo.* II. *c.* 28. and in many of the new made felonies, created since the reign of *Henry* VIII. by act of parliament, corruption of blood shall be saved. But as in some of the acts for creating felonies, (and those not of the most atrocious kind,) this saving was neglected, or forgotten to be made, it seems to be highly reasonable and expedient to antiquate the whole of this doctrine by one undistinguishing law: especially as by the stat. of 7 *Ann. c.* 21. (the operation of which is postponed by stat. 17 *Geo.* II. *c.* 39.) after the death of the sons of the late Pretender, no attainder for treason will extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself; which virtually abolishes all corruption of blood for treason, though (unless the legislature should interpose) it will still continue for many sorts of felony. 4 *Comm.* 388, 389. See 2 *Comm.* 253.

In treason for counterfeiting the coin, although by the statutes corruption of blood is saved, yet the lands of the offender are forfeited immediately to the king on *attainder*, it being a distinct penalty from

corruption of blood; for the corruption may be saved, and the forfeiture remain, &c. And accordingly so it is provided by some statutes. 1 *Salk.* 85.

Attainders may be reversed or falsified, by a writ of error, or by plea. If by a writ of error, it must be by the king's leave, &c. and when by plea, it may be by denying the treason, pleading a pardon by act of parliament, &c. 3 *Inst.* 232.

By a king's taking the crown upon him, all *attainders* of his person are *ipso facto* purged, without any reversal. 1 *Inst.* 26. *Finch. L.* 82. *Wood*, 17. This was the declaration of parliament, made in favour of *Henry* VII. See 1 *Comm.* 248.

The stat. 8 *Wm.* III. *c.* 5. requires Sir *George Barclay*, Major-General *Holmes*, and other persons to surrender themselves to the lord chief justice, or secretaries of state; or to be *attainted*. By the 13 *Wm.* III. *c.* 3. the pretended *Prince of Wales* is under *attainder* of treason, &c. And by 1 *Geo.* I. *c.* 16. the *Duke of Ormond* and others are *attainted*. And besides these acts of *attainder*, *bills for inflicting pains and penalties* are sometimes past; as that against the *Bishop of Rochester*; stat. 9 *Geo.* I. *c.* 17. See tit. *Corruption of Blood*.

ATTAINT, *attincta.*] A writ that lieth to inquire whether a jury of twelve men gave a false verdict; (*Finch*, 484.) that so the judgment following thereupon, may be reversed; and this must be brought in the life-time of him for whom the verdict was given, and of two at least of the jurors who gave it. This lay at common law, only upon writs of *assise*; and seems to have been coeval with that institution by King *Henry* II. at the instance of his chief justice *Glanvil*: being probably meant as a check upon the vast power then reposed in the recognitors of assise, of finding a verdict according to their own personal knowledge, without the examination of witnesses. And even here it extended no further than to such instances, where the issue was joined upon the very point of assise, (the heirship, disseisin, &c.) and not on any collateral matter; as villainage, bastardy, or any other disputed fact. See *Vin.* tit. *Attaint*, this *Dict.* tit. *Jury* IV.

In these cases the *assise* was said to be turned into an *inquest* or *jury*, (*assisa vertitur in juratum*,) or that the assise should be taken *in modum juratæ*, *et non in modum assisæ*; that is, that the issue should be tried by a common jury or inquest, and not by the recognitors of assise: (*Bract. l.* 4. *tr.* 1. *c.* 34. § 2, 3, 4. *tr.* 3. *c.* 17. *tr.* 5. *c.* 4. § 1, 2. *Flet. l.* 5. *c.* 22. § 8. *Co. Ent.* 61. b. *Booth*, 213.) and then it seems that no attaint lay against the inquest or jury that determined such collateral issue: *Br.* 4. 1. 34. 2. *Flet. l.* 5. *c.* 22. Neither is mention made by our ancient writers, of such a process obtaining after the trial by inquest or jury, in the old *Norman* or feodal actions prosecuted by writ of *entry*. Nor did any attaint lie in *trespass*, *debt*, or other action personal, by the old common law: because those were always determined by common inquests or juries. *Year Book*, 28 *Edw.* III. 15. 17. *Ass. pl.* 15. *Flet.* 5. 22. 16. At length the stat. of *Westm.* 1. (1 *Edw.* I.) *c.* 38. allowed an attaint to be sued upon *inquest*, as well as *assises*, which were taken upon any plea of *land* or of *freehold*. But this was at the king's discretion, and is so understood by the author of *Fleta*, (*l.* 5. *c.* 22. § 8. 16.) a writer contemporary with the statute; though Sir *Ed. Coke*, (2 *Inst.* 130. 237.) seems to hold a different opinion. Other subsequent statutes (1 *Edw.* III. *st.* 1. *c.* 6. 5 *Edw.* III. *c.* 7. 28 *Edw.* III. *c.* 8.) introduced the same remedy in all

pleas of *trespass*, and the stat. 34 *Edw.* III. *c.* 7. extended to *all* pleas whatsoever, personal as well as real; except only the writ of *right*, in such cases where the mise or issue is joined on the *mere right*, and not on any *collateral* question. For though the attaint seems to have been generally allowed in the reign of *Henry* II. at the first introduction of the grand assise, (which at that time might consist of only *twelve* recognitors, in case they were all unanimous,) yet subsequent authorities have holden, that no attaint lies on a false verdict given upon the mere right, either at common law or by statute; because that is determined by the grand assise, appealed to by the party himself, and now consisting of sixteen jurors. *Bract.* 290. *Flet.* 5. 227. *Britt.* 243. b. 12 *Hen.* VI. 6 *Bro. Abr.* tit. *Attaint*, 42. 1 *Roll. Abr.* 280.

The jury who are to try this false verdict, must be twenty-four, and are called the grand jury; for the law wills not that the oath of one jury of twelve men should be attainted or set aside by an equal number, nor by less indeed than double the former. *Bract. l.* 4. *tr.* 5. *c.* 4. § 1. *Flet. l.* 5. *c.* 22. § 7. If the matter in dispute be of 40*l.* value in personals, or of forty shillings a year in lands and tenements, then by stat. 15 *Hen.* VI. *c.* 5. each grand juror must have a freehold to the annual value of twenty pounds. And he that brings the attaint can give no other evidence to the grand jury, than what was originally given to the petit: for as their verdict is now trying, and the question is, whether or no they did right upon the evidence that appeared to them, the law adjudged it the highest absurdity to produce any subsequent proof upon such trial, and to condemn the prior jurisdiction for not believing evidence which they never knew. But those against whom it is brought are allowed, in affirmance of the first verdict, to produce new matter; (*Finch, L.* 486.) because the petit jury may have formed their verdict upon evidence of their own knowledge, which never appeared in court. If the grand jury found the verdict a false one, the judgment by the common law was, that the jurors should lose their *liberam legem*, and become for ever infamous; should forfeit their goods and the profits of their lands; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows ploughed; and that the plaintiff should be restored to all that he lost by reason of the unjust verdict. But as the severity of this punishment had its usual effect, in preventing the law from being executed, therefore by the stat. 11 *Hen.* VII. *c.* 24. (revived by 23 *Hen.* VIII. *c.* 3. and made perpetual by 13 *Eliz. c.* 25.) an attaint is allowed to be brought after the death of the party, and a more moderate punishment was inflicted upon attainted jurors, *viz.* perpetual infamy; and, if the cause of action were above 40*l.* value, a forfeiture of 20*l.* a-piece by the jurors; or if under 40*l.* then 5*l.* a-piece, to be divided between the king and the party injured. So that a man may now bring an attaint either upon the statute or at common law, at his election; (3 *Inst.* 164.) and in both of them may reverse the former judgment. But the practice of setting aside verdicts upon motion, and granting *new trials*, has so superseded the use of both sorts of attaints, that very few instances of an attaint appear in our books later than the sixteenth century. *Cro. Eliz.* 309. *Cro. Jac.* 90.

It may be matter of some curiosity, however, and perhaps of use, under this head, to state so much of the old law as tends further to explain,

I. *By and against whom attaint may be brought.*
II. *In what cases it will lie.*
III. *Of the proceedings in attaint.*

I. The party grieved may have writ of attaint against the other party, (whether plaintiff or defendant,) and against the jurors or such of them as shall be then living: it is said any one that is hurt by the false verdict may bring this writ: and if the verdict be for matter of land, the remedy commonly runs with the land, so that any party or privy, as an heir or executor may have it. *F. N. B.* 109. *Co. Lit.* 294. 1 *And.* 24, 25.

Where *trespass* is brought *against baron and feme*, and the plaintiff *recovers*, *the baron alone shall not have attaint*, for it shall be brought according to the record. *Br. Baron and Feme, pl.* 22. *Successors of a parson* shall have error or attaint of judgment against the predecessor. *Br. Attaint, pl.* 100. *None shall have attaint but he that may be restored* to the thing lost by the judgments; *per Bramstone*, Ch. J. *Mar.* 210. Reversioners may have an attaint upon a false verdict, &c. against a particular tenant who shall be restored to his possession, and the reversioner to his arrearages. Stat. 9 *Rich.* II. *c.* 3. This action must be brought against the jurors, and the parties to the first suit; or, if the parties be dead, their heirs, or executors, or any other for the most part that recovered by the first punishment. *Dyer*, 201. If all the jurors but one are dead, the action is gone, and no attaint can be brought; and where any one dies depending the suit, it is gone; but not by the death of the defendant that recovered in the first action. *Dyer*, 139. *Hob.* 227.

II. Attaint lies where a jury gives a verdict contrary to evidence: where a judge declares the law erroneously, judgment may be reversed; but in this case the jury shall be excused. *Vaugh.* 145. Attaint lies not for that which is not given in evidence; nor upon an inquest of office, &c. or when a thing found is impertinent to the issue. *Hob.* 53. *Co. Lit.* 355. And no attaint lieth where the king is sole party, and the jury find for him. 4 *Leon.* 46. *aliter*, where the suit is *tam pro domino rege quam pro seipso.* 4 *Leon.* 46. An attaint may be brought where any material falsehood is found, though some truth may be found with it; as where a jury shall find a man guilty of many trespasses, who is guilty but of one trespass. So if a jury find any thing against the common or statute law, that all men are to take notice of, this may make them chargeable in attaint. *Bro.* 44. *Hob.* 227.

The jury may be attainted two ways: 1st. Where they *find contrary to evidence*; 2dly. Where they find *out of the compass of the allegata.* But to attaint them for finding contrary to evidence is not easy, because they may have evidence of their own conusance of the matter by them, or they may find upon distrust of the witnesses, or their own proper knowledge; but if they find upon evidence that does not prove the *allegata*, there it is easy to subject them to an attaint, because it is manifest that what is so found is an evidence not corresponding to their issue; and this was the only curb they had over the jurors: for the judge being best master of the *allegata*, if they did not follow his direction touching the proof, they were then liable to the danger of an attaint: and therefore *since the judges*, from the difficulty of attainting the jury, *have granted new trials*, whereby *jurors* have been freed from the fear of attaint, they *have taken a great liberty*

in giving verdicts; but since *the attaint is only disused, and not taken away*, it is necessary that a certain matter should be brought before them; and therefore in *trespass*, the quantity and value of the thing demanded must be so conveniently described, that if the jury find *damages* beyond such quantities and value, it may be *apparently excessive*, and they subject to the attaint; and so *on special contracts*, they must be set forth so precisely, that *if evidence be given of another contract*, and not in the allegations, *and yet the jury find for the plaintiff, they may be subject to an attaint*; and were it otherwise, if the plaintiff had a jury to his turn, and the judge should direct that the plaintiff be nonsuit, yet if the plaintiff would stand the trial, the judge must give positive directions to find for the defendant; and there would be no means of compelling the jury to find according to the direction of the judge, if they were not under the terror of an attaint, if they did otherwise; so this is the only curb that the law has put in the hands of the judges to restrain jurors from giving corrupt verdicts. *Gilb. H. C. B.* 128.

III. The process to be issued is directed by stat. 23 *Hen.* VIII. *c.* 3. already mentioned: and by the said statute if any of the petit jury appear at the return of the writ of attaint, the plaintiff shall assign the false oath of the verdict untruly given. And if the defendant, or any of the petit jury appear not on distress, the grand inquest shall be taken by default.

The petit jury can plead no plea, but such as may excuse them of the false oath. 1 *Roll. Abr.* 285.

In the court of *King's Bench* and *Common Pleas*, and the court of *Hustings* of *London*, *Attaint* may be brought: and the plaintiff setting aside the verdict shall have restitution, &c. But if the first verdict be affirmed, the plaintiff shall be imprisoned and fined. 11 *Hen.* VII. *c.* 21.

In *attaint* the parties and the jury appeared and demanded *oyer* of the record upon which the *attaint* was founded, which record being in the Common Pleas, they had it, and thereupon the plaintiff assigned the false oath; the defendant pleaded, that they made a good and lawful oath; upon which they were at issue, and in the same term the record was removed by a writ of error into the King's Bench; adjudged, that notwithstanding it was thus removed, the court of Common Pleas might proceed if the process for the grand jury were returned. *Dyer*, 284.

Attaint was brought in the common pleas against a jury, for a verdict given in the King's Bench, whereupon the record was removed from that court to the *Common Pleas*, and there the verdict was affirmed; adjudged, that the plaintiff in the action shall have execution according to the verdict, for the record is in the King's Bench, and nothing but the *tenor* thereof in the Common Pleas; but if the verdict had been set aside, and execution had been had upon it before it was set aside, then the court of Common Pleas might have awarded restitution to the party grieved. *Cro. Eliz.* 371.

A nonsuit in *attaint* is peremptory: and no *supersedeas* is grantable upon *attaint*. *Co. Lit.* 227.

An *attaint* as well as a writ of error shall follow the nature of the action upon which it is founded; so that if summons and severance lies in the first action, it shall do so likewise in the *attaint*, but this is not a *supersedeas* as a writ of error is: adjudged likewise, if damages are recovered against several in an action of conspiracy, all of

them must join in an *attaint*, and the nonsuit of one of them shall not hurt the rest. 6 *Rep.* 25.

In an *attaint* the plaintiff shall recover against all the jurors, tenants and defendants, the costs and damages which he shall sustain by delay or otherwise in that suit: and if the defendant's plea in bar be found against him, the plaintiff will have judgment to be restored to what he lost, with damages. Stat. 11 *Hen.* VI. *c.* 4. and 15 *Hen.* VI. *c.* 5.

ATTAINTED. See *Attainder.*

ATTAL SARISIN, The term by which the inhabitants and miners of *Cornwall* call an old deserted mine that is given over, *i. e.* the leavings of the *Sarasins*, *Sassins*, or *Saxons*. *Cowel.*

ATTEGIA, from the Lat. *ad* and *tego.*] A little house. *Ethelwerd, lib.* 4. *Hist. Angl. cap.* 3. *Blount.*

ATTENDANT, *attendens.*] Signifies one that owes a duty or service to another, or in some sort depends on him. Where a wife is endowed of lands by a guardian, &c. she shall be attendant on the guardian, and on the heir at his full age. *Terms de Ley.*

ATTERMINING, from the Fr. *atterminer.*] The granting a time or term for payment of a debt. *Ordinatio de libertatibus perquirendis, anno* 27 *Edw.* I. And see stat. *Westm.* 2. *c.* 4.

ATTILE, *Attilium, attilamentum.*] The rigging or furniture of a ship. *Fleta, lib.* 1. *c.* 25.

ATTORNARE REM, To *atturn* or turn over money or goods, *viz.* to assign or appropriate them to some particular use and service. *Kennet's Paroch. Antiq. p.* 283.

ATTORNATO FACIENDO VEL RECIPIENDO, A writ to command a sheriff or steward of a county court or hundred court, to receive and admit an attorney, to appear for the person that owes suit of court. *F. N. B.* 156. Every person that owes suit to the county-court, court-baron, &c. may make an attorney to do his suit. Stat. 20 *Hen.* III. *c.* 10.

ATTORNEY, *attornatus.*] Is one that is appointed by another man to do any thing in his absence. *Westm. Symb. Compt. Jurisdic.* 105. An attorney is either public, in the courts of record, the *King's Bench* and *Common Pleas*, &c. and made by warrant from his client: or private, upon occasion for any particular business, who is commonly made by letter of attorney. In ancient times, those of authority in courts had it in their power whether they would suffer men to appear or sue by any other but themselves: and the king's writs were to be obtained for the admission of attorneys: but, since that, attorneys have been allowed by several statutes. Attorneys may be made in such pleas whereon appeal lieth not: in criminal cases there will be no attorneys admitted. See stat. *Glouc.* 6 *Edw.* I. *st.* 1. *c.* 8. An infant ought not to appear by attorney, but by guardian, for he cannot make an attorney, but the court may assign him a guardian; 1 *Lill. Abr.* 138. Infants, after they come to full age, may sue by attorney, though admitted before by guardian, &c. In action against *baron* and *feme*, the *feme* being within age, she must appear by guardian: but if they bring an action, the husband shall make attorney for both. 1 *Danv. Abr.* 602. Where *baron* and *feme* are sued, though the wife cannot make attorney, the husband may do it for both of them. 2 *Sand.* 213. One *non compos mentis*, being within age, is to appear by guardian; but after he is of age he must do it by attorney. *Co. Lit.* 135. An idiot is not to appear by attorney, but in proper person. A corporation cannot appear otherwise than by

attorney, who is made by deed under the seal of the corporation. *Plowd.* 91.

ATTORNEYS AT LAW, are such persons as take upon them the business of other men, by whom they are retained.

Before the statute of *Westm.* 2. *c.* 10. [13 *Edw.* I. *A. D.* 1285.] all attorneys were made by letters patent under the great seal, commanding the justices to admit the person to be his attorney. These patents, where they were obtained, seemed to have been inrolled by a proper officer, called the clerk of the warrants; and also the courts inrolled those patents on which any proceedings were. If such letters patent could not be obtained, the persons were obliged to appear each day in court in their proper persons. *Gilb. H. C. P.* 32, 33.

The said statute of *Westm.* 2. *c.* 10. gives to all persons a liberty of appearing, and of appointing an attorney, as if they had letters patent; and therefore the clerk of the warrants received each person's warrant, and upon the warrant it equally appeared to the court, that he had appointed such a one his attorney to the end of the cause, unless revoked; so that on each act there is no occasion of the plaintiff's and defendant's presence, as was used before that time. This authority continues till judgment, and for a year and a day, and afterwards to sue out execution, and for a longer time, if they continue execution; but if not, the judgment is supposed to be satisfied; and to make it appear otherwise, the plaintiff must again come into court, which he either does by a *scire facias* or an action of debt on the judgment. *Gilb. H. C. P.* 33.

The attorneys of *B. R.* are of record as well as the attorneys of *C. B.* 1 *Roll.* 3. And it is now the common course for the plaintiff and defendant to appear by attorney. *F. N. B.* 26. *D.* But where the party stands in contempt, the court will not admit him by attorney, but oblige him to appear in person. *Ib.* 262. Outlawry is excepted by stat. 4 and 5 *Wm. & M. c.* 18. unless where the court orders special bail. By stat. 13 *Wm.* III. *c.* 6. attorneys are to take the oaths to government under penalties, and disability to practise. By stat. 1 *Hen.* V. *c.* 4. "no sheriff, sheriff's clerk, receiver, nor sheriff's bailiff shall be attorney in the king's courts, during the time he is in office with any such sheriff."

In *Trinity* term, 31 *Geo.* III. a rule of court was made to prevent the admission of persons under irregular articles of clerkship, &c. chiefly to prevent the clerks of attorneys from acting as principals. See 4 *Term Rep.* 379.

Parties to fines, as well demandant or plaintiff as tenants or defendants, that will acknowledge their right of lands unto others in pleas of *warrantia chartæ*, *covenant*, &c. before the fines pass, shall appear personally, so that their age, idiocy or other default (if any be) may be discerned; provided that if any, by age, impotency, or casualty, is not able to come into court, one of the justices shall go to the party and receive his cognisance, and shall take with him a knight or man of good fame. Barons of the exchequer and justices shall not admit attorneys, but in pleas that pass before them, and where they be assigned. Reserving to the chancellor his authority in admitting attorneys, and to the chief justices. Stat. 15 *Edw.* II. stat. 1.

In respect to the several courts, there are attorneys at large, and attorneys special, belonging to this or that court only. An attorney may be a solicitor in other courts, by a special retainer: one may be attorney on record, and another do the business; and there are attorneys who manage business out of the courts, &c. Stat. 4 *Hen.* IV.

c. 18. was enacted, that the justices should examine attorneys, and remove the unskilful; and attorneys shall swear to execute their offices truly, &c. and by stat. 33 *Hen.* VI. c. 7. the number of attorneys in *Norfolk* and *Suffolk* were limited.

By 3 *Jac.* I. c. 7. attorneys, &c. shall not be allowed any fees laid out for counsel, or otherwise, unless they have tickets thereof signed by them that receive such fees; and they shall give in true bills to their clients of all the charges of suits, under their hands, before the clients shall be charged with the payment thereof. If they delay their client's suit for gain, or demand more than their due fees and disbursements, the clients shall recover costs and treble damages; and they shall be for ever after disabled to be attorneys. None shall be admitted attorneys in courts of record, but such as have been brought up in the said courts, or are well practised and skilled, and of an honest disposition; and no attorney shall suffer any other to follow a suit in his name, on pain of forfeiting 20*l.* to be divided between the king and the party grieved. This statute, as to fees to counsel, doth not extend to matters transacted in inferior courts, but only to suits in the courts of *Westminster Hall.* *Carth.* 147.

By the stat. 12 *Geo.* I. *cap.* 29. if any, who hath been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney or solicitor in any suit or action in any court, the judge, where such action shall be brought, hath power to transport the offender for seven years, by such ways, and under such penalties, as felons.

The act 2 *Geo.* II. c. 23. ordains, that all attorneys shall be sworn, admitted and inrolled, before allowed to sue out writs in the courts at *Westminster*; and after the first of *December*, 1730, none shall be permitted to practise but such as have served a clerkship of five years to an attorney, and they shall be examined, sworn, and admitted in open court; and attorneys shall not have more than two clerks at one time, &c. Every writ, and copy of any process, served on a defendant, and also every warrant made out thereon, shall be indorsed with the name of the attorney by whom sued forth; and no attorneys or solicitors shall commence any action for fees till a month after the delivery of their bills, subscribed with their hands: also the parties chargeable may, in the mean time, get such bills taxed, and upon the taxation, the sum remaining due is to be paid in full of the said bills, or in default, the parties shall be liable to attachment, &c. And the attorney is to pay the costs of taxation, if the bill be reduced a sixth part. A penalty of 50*l.* inflicted, and disability to practise, for acting contrary to this statute.

By stat. 6 *Geo.* II. *cap.* 27. attorneys of the courts of *Westminster* may practise in inferior courts.

By 12 *Geo.* II. c. 13. attorneys, &c. that act in any county court, without being admitted according to the statute 2 *Geo.* II. c. 23. shall forfeit 20*l.* recoverable in the courts of record; and no attorney who is a prisoner in any prison, shall sue out any writ, or prosecute suits; if he doth, the proceedings shall be void, and such attorney, &c. is to be struck off the roll. But suits commenced before by them may be carried on. A *quaker*, serving a clerkship, and taking his solemn affirmation instead of an oath, shall be admitted an attorney.

By the stat. 22 *Geo.* II. c. 46. persons bound clerks to attorneys or solicitors are to cause affidavits to be made and filed of the execution of the articles, names and places of abode of attorney or solicitor, and clerk, and none to be admitted till the affidavits be produced and

read in court; no attorney having discontinued business to take any clerk. Clerks are to serve actually during the whole time, and make affidavits thereof. Persons admitted sworn clerks in *Chancery*, or serving a clerkship to such, may be admitted solicitors. By the stat. 23 *Geo.* II. *c.* 26. any person duly admitted a solicitor, may be admitted an attorney, without any fee for the oath, or any stamp to be impressed on the parchment whereon his admission shall be written, in the same manner as by stat. 2 *Geo.* II. *c.* 23. § 20. attorneys may be admitted solicitors.

By several stamp acts, 25 *Geo.* III. *c.* 80. and 44 *Geo.* III. *c.* 98. every admitted attorney, solicitor, notary, proctor, agent, or procurator, shall annually take out a certificate from the courts in which they practise, on penalty of 50*l.*

Stamp duties are imposed by several acts on articles of clerkship to attorneys and solicitors. See now 44 *Geo.* III. *c.* 98. for *Great Britain*, and 46 *Geo.* III. *c.* 64. for *Ireland*. Acts of indemnity are from time to time passed, allowing further time for stamping articles, and taking out certificates.

Attorneys of courts, &c. shall not receive or procure any blank warrant for arrests from any sheriff, without writ first delivered, on pain of severe punishment, expulsion, &c. And no attorney shall make out a writ with a clause *ac etiam billæ*, &c. where special bail is not required by law. *Pasch.* 15 *Car.* II. See tit. *Appearance*. Action upon the case lies for a client against his attorney, if he appear for him without a warrant; or if he plead a plea for him, for which he hath not his warrant. 1 *Lill. Abr.* 140. But if an attorney appear without warrant, and judgment is had against his client, the judgment shall stand, if the attorney be responsible: *contra*, if the attorney be not responsible. 1 *Salk.* 88.

Action lies against an attorney for suffering judgment against his client by *nil dicit*, when he had given him a warrant to plead the general issue: this is understood where it is done by covin. 1 *Danv. Abr.* 185. If an attorney makes default in a plea of land, by which the party loses his land, he may have a writ of deceit against the attorney, and recover all in damages. *Ibid.* An attorney owes to his client secrecy and diligence, as well as fidelity; and if he take reward on the other side, or cause an attorney to appear and confess the action, &c. he may be punished. *Hob.* 9.

But action lies not against an attorney retained in a suit, though he knows the plaintiff hath no cause of action; he only acting as a servant in the way of his profession. 4 *Inst.* 117. 1 *Mod.* 209. Though, where an attorney or solicitor is found guilty of a gross neglect, the court of *Chancery* has in some cases ordered him to pay the costs. 1 *P. Wms.* 593. He who is attorney at one time, is attorney at all times pending the plea. 1 *Danv.* 609. And the plaintiff or defendant may not change his attorney, while the suit is depending, without leave of the court, which would reflect on the credit of attorneys; nor until his fees are paid. *Mich.* 14 *Car.* A cause is to proceed notwithstanding the death of an attorney therein; and not be delayed on that account. For if an attorney dieth, the plaintiff or defendant may be required to make a new attorney. 2 *Keb.* 275.

Attorneys are liable to be punished in a summary way, either by attachment, or having their names struck out of the roll for ill practice, attended with fraud and corruption, and committed against the obvious rules of justice and common honesty; but the court will not easily be prevailed on to proceed in this manner, if it appears that the

matter complained of was rather owing to neglect or accident than design; or if the party injured has other remedy by act of parliament, or action at law. 12 *Mod.* 251. 318. 440. 583. 657. 4 *Mod.* 367.

If an attorney, defendant in an action, does not appear in due time, plaintiff may sign a *forejudger*, which enables him to strike the defendant off the roll, and then he may be sued as a common person (stat. 2 *Hen.* IV. *c.* 8.) and cannot be proceeded against by bill. On making satisfaction to the plaintiff, an attorney so forejudged may be restored. See *Impey's Instructor Clericalis*, *C. P.* 521.

Sometimes attorneys are struck off the roll on their own application, for the purpose of being called to the bar, &c. and in this case, they must be disbarred by their inn, before they are readmitted attorneys. *Doug.* 144.

An attorney convicted of felony struck off the roll. *Cowp.* 829.

They are also liable to be punished for base and unfair dealings towards their clients, in the way of business, as for protracting suits by little shifts and devices, and putting the parties to unnecessary expense, in order to raise their bills; or demanding fees for business that was never done; or for refusing to deliver up their client's writings with which they had been intrusted in the way of business; or money which has been recovered and received by them to their client's use, and for other such like gross and palpable abuse. 2 *Hawk. P. C.* 144. 8 *Mod.* 306. 12 *Mod.* 516.

In a *criminal* case the attorney for defendant may be his bail. *Doug.* 467. See tit. *Bail.*

Payment to the attorney is payment to the principal. *Doug.* 623. 1 *Black. R.* 8.

An action lies against an attorney for neglecting to charge a person in execution of his client's suit, according to a rule of court; although it seems it was rather want of judgment than negligence. 3 *Wils.* 325. But the court will not proceed against him for it in a summary way. 4 *Burr.* 2060.

An attorney has a lien on the money recovered by his client, for his bill of costs; if the money come to his hands, he may retain to the amount of his bill. He may stop it *in transitu* if he can lay hold of it; if he apply to the court, they will prevent its being paid over until his demand is satisfied. If the attorney give notice to the defendant not to pay till his bill be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice. *Doug.* 238.

An attorney has a lien upon a sum awarded in favour of his client as well as if recovered by judgment, and if after notice to defendant, the latter pay it over to his plaintiff, the plaintiff's attorney may compel a repayment of it to himself; and he shall not be prejudiced by a collusive release from the plaintiff to the defendant. *Ormerod* v. *Tate*, 1 *East*, 464.

The court, under circumstances, will entertain a summary jurisdiction over an attorney in obliging him to deliver up deeds, &c. on satisfaction of his lien, though they came into his hands as steward of a court and receiver of rents. 3 *Term Rep.* 275. See 1 *Salk.* 87. 1 *Lill.* 148. *Mod. Cas. Law and Eq.* 306. The latter that an attorney cannot detain papers delivered to him on a special trust for money due to him in that very business.

Attorneys have the privilege to sue and be sued only in the courts at *Westminster*, where they practise: they are not obliged to put in

special bail, when defendants ; but when they are plaintiffs, they may insist upon special bail in all bailable cases. 1 *Vent.* 299. *Wood's Inst.* 450. But an attorney of one court, may in that court, hold an attorney of another court to bail. Attorneys shall not be chosen into offices, against their wills. See tit. *Abatement*, *Privilege*.

ATTORNEY OF THE DUTCHY COURT OF LANCASTER, *Attornatus curiæ ducatûs Lancastriæ.*] Is the second officer in that court ; and seems for his skill in law to be there placed as *assessor* to the chancellor, and chosen for some special trust reposed in him, to deal between the king and his tenants. *Cowel.*

ATTORNEY-GENERAL, Is a great officer under the king, made by letters patent. It is his place to exhibit informations, and prosecute for the crown, in matters criminal ; and to file bills in the *Exchequer*, for any thing concerning the king in inheritance or profits ; and others may bring bills against the king's attorney. His proper place in court, upon any special matters of a criminal nature, wherein his attendance is required, is under the judges, on the left hand of the clerk of the crown : but this is only upon solemn and extraordinary occasions ; for usually he does not sit there, but within the bar in the face of the court.

ATTORNMENT, *Attornamentum*, from the Fr. *tourner*, to turn.] Sir *Martin Wright* and many other writers have laid it down as a general rule, that by the old feudal law the feudatory could not alien the feud without the consent of the lord ; nor the lord alien or transfer his seignory without the consent of his feudatory. *Wright's Tenures*, 30, 31. It is certain that this doctrine formerly prevailed in *England* ; if not at least to equal extent in other countries.

This necessity of the consent of the tenant to the alienation of the lord gave rise in our old law to the doctrine of *attornment* ; which at common law, signified only *the consent of the tenant to the grant of the seignory*, whereby he agreed to become the tenant of the new lord. But after the statute *quia emptores terrarum*, (18 *Edw.* I. *st.* 1.) was passed, by which subinfeudation was prohibited, it became necessary that when the reversioner or remainder-man after an estate for years, for life or in tail, granted his reversion or remainder, the particular tenant should attorn to the grantee. The necessity of attornment was, in some measure, avoided by the statute of uses, (27 *Hen.* VIII. *c.* 10.) as by that statute the possession was immediately executed to the use ; and, by the statute of *Wills*, (34 and 35 *Hen.* VIII. c. 5.) by which the legal estate is immediately vested in the devisee.

Attornments, however, still continue to be necessary in many cases ; but both their necessity and efficacy are now almost totally taken away ; for by stat. 4 *Ann. c.* 16. § 9. it is enacted, that all grants and conveyances of manors, lands, rents, reversions, &c. by fine or otherwise, shall be good without the attornment of the tenants ; but notice must be given of the grant, to the tenant, before which he shall not be prejudiced by payment of any rent to the grantor or for breach of the condition for non-payment. And by stat. 11 *Geo.* II. *c.* 19. attornments of lands, &c. made by tenants to strangers claiming title to the estate of their landlords shall be null and void, and their landlord's possession not affected thereby ; though this shall not extend to vacate any attornment made pursuant to a judgment at law, or with consent of the landlord ; or to a mortgagee on a forfeited mortgage.

Till the passing of these statutes, the doctrine of attornment was one of the most copious and abstruse points of the law. But these acts having made attornment both unnecessary and inoperative, the

learning upon it may be said to have become almost entirely useless. See 1 *Inst.* 309.

AVAGE, or *Avisage*. A rent or payment by tenants of the manor of *Writtle* in *Essex*, upon *St. Leonard's* day, 6 *November*, for the privilege of pannage in the lord's woods, *viz.* for every pig under a year old, a halfpenny; for every yearly pig, one penny; and every hog above a year old, two-pence. *Blount.*

AUCTIONARII, *Auxionarii*, Sellers, regraters, or retailers. *Placit. Parl.* 18 *Edw.* I. But more properly brokers.

AUCTIONS and AUCTIONEERS, Under statutes 17 *Geo.* III. *c.* 50. 19 *Geo.* III. *c.* 25. 56. 21 *Geo.* III. *c.* 17. 22 *Geo.* III. *c.* 66. 32 *Geo.* III. *c.* 11. every auctioneer must take out an annual license; paying, within the bills of mortality, *l.* 3*s.* and without 5*s.* 9*d.* and under these statutes, and stat. 27 *Geo.* III. *c.* 13. (explained by statutes 29 *Geo.* III. *c.* 63. 30 *Geo.* III. *c.* 26. 32 *Geo.* III. *c.* 41. containing certain exemptions) duties are imposed on goods sold by auction; which duties are a charge on the auctioneer, not on the purchaser.

Stats. 37 *Geo.* III. *c.* 14. § 1. 45 *Geo.* III. *c.* 30. impose additional duties upon auctions, according to the amount sold.

38 *Geo.* III. *c.* 54. § 2. Penalty on auctioneers not paying duties on sales in the legal time, &c.

41 *Geo.* III. *c.* 10. § 15. exempts *American* wheaten flour, &c. from the auction duty.

41 *Geo.* III. *c.* 28. § 3. exempts the sale of lands, &c. sold for the redemption of the land-tax, under the 38 *Geo.* III. *c.* 60. § 112. from the said duty.

46 *Geo.* III. *c.* 43. imposes a duty on appraisement where no auction takes place.

The practice of *puffing*, as it is called, at auctions, was in *Bexwell* v. *Christie*, (*Cowp.* 395.) considered as illegal; but the legislature having enacted, that property put up to sale at auction shall, upon the knocking down the hammer, subject the auctioneer to the payment of certain duties, unless such property can, by the mode prescribed by the act, be shown to have been bought in by the owner himself, or by some person by him authorised, seems indirectly to have given a sanction to this practice, which may materially affect the authority of the decision in *Walker* v. *Gascoigne*, and the opinion in *Bexwell* v. *Christie*: see 2 *Bro. C. R.* 326. and the stat. 28 *Geo.* III. *c.* 37. § 20. *Fonblanque's Treatise of Equity*, i. 215. See 3 *T. R.* 148.

AUDIENCE COURT, *Curia audientiæ Cantuariensis.*] A court belonging to the archbishop of *Canterbury*, having the same authority with the court of arches, though inferior to it in dignity and antiquity. It was held in the archbishop's palace; and in former times the archbishops were wont to try and determine a great many ecclesiastical causes in their own palaces; but before they pronounced their definitive sentence, they committed the matter to be argued by men learned in the law, whom they named their auditors; and so in time it grew to one special man, who, at this day, is called *causarum negotiorumque* audientiæ *Cantuariensis auditor officialis*. And to the office of auditor was formerly joined the chancery of the archbishop, which meddleth not with any point of contentious jurisdiction, that is, deciding of causes between party and party, but only such as are of office, and especially as are *voluntariæ jurisdictionis*; as the granting the custody of spiritualties, during the vacancy of bishopricks, institutions to benefices, dispensations, &c. but this is now distinguished from the audience. The auditor of this court anciently, by special commission, was *vicar*

general to the archbishop, in which capacity he exercised ecclesiastical jurisdiction of every diocese becoming vacant within the province of *Canterbury*. 4 *Inst.* 337. But now these three great offices of official principal of the archbishop, dean or judge of the peculiars, and official of the audience, are, and have been, for a long time past, united in one person, under the general name of *Dean of the Arches*. *Johns.* 254.

The archbishop of *York* hath, in like manner, his court of audience. *Johns.* 255. See *Arches' Court*.

AUDIENDO ET TERMINANDO. See title *Oyer* and *Terminer*, *Assise*. *Justices*.

AUDITA QUERELA, A writ whereby a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, [or on a statute-merchant, statute-staple, or recognisance,] may be relieved upon good matter of discharge, which has happened since the judgment: as if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff, without procuring satisfaction to be entered on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it, (either at the beginning of the suit, or *puis darrein continuance*, which must always be before judgment,) an *audita querela* lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court, stating that the complaint of the defendant had been heard, (*auditâ querelâ defendentis*,) and then, setting out the matter of the complaint, it at length injoins the court to call the party before them, and, having heard their allegations and proofs, to cause justice to be done between them. *Finch*, *L.* 488. *F. N. B.* 102. It also lies for *bail*, when judgment is obtained against them by *scire facias*, to answer the debt of their principal, and it happens afterwards, that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to *plead* this special matter, and therefore they shall have redress by *audita querela*; (1 *Roll. Abr.* 308.) which is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party, who hath good defence, is too late to make it in the ordinary forms of law. But the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression, (Lord *Raym.* 439. 1 *Salk.* 93.) has almost rendered useless the writ of *audita querela*, and driven it quite out of practice. 3 *Comm.* 406.

Some part of the old law on this subject is here stated; to give the student a general idea of this circuitous proceeding. If necessary to enter more at large into this learning, let him look into *Viner's Abridgment* and *Comyn's Digest*.

On a statute, the conusor or his heir may bring *audita querela*, before execution is sued out; but this may not be done by a stranger to the statute, or a purchaser of the land. 1 *Danv. Abr.* 630. 3 *Rep.* 13. If a lessee covenants for him and his assigns to repair, and the lessee assign over, and the covenant is broken; if the lessor sues one of them, and recovers damages, and then sues the other, he may bring *audita querela* for his relief. *Bro.* 74. And where a man hath goods from me by my delivery, and another takes them from him, so that he is liable to both our suits: and one of us sue and recover against him, and then the other sues him, his remedy is by this writ. *Dyer*, 232. One binds himself and his heirs in an obligation, if the obligee recover of the heir, and after sue the executors for the same cause, &c. they may have the

writ *audita querela*. *Plowd.* 439. If two joint and several obligors are sued jointly, and both taken in execution, the death or escape of one will not discharge the other, so as to give him this action; but if such obligors be prosecuted severally, and a satisfaction is once had against one of them, or against the sheriff upon the escape of one, the other may have it. *Hob.* 58. 5 *Rep.* 87. Judgment is had against a sheriff on an escape of a person in execution, and after the first judgment is reversed for error, the sheriff shall have relief by *audita querela*. 8 *Rep.* 142.

If a plaintiff, that sues as administrator, and recovers judgment and sues out execution, has his letters of administration revoked; the defendant *must* be relieved by *audita querela*. *Sty.* 417.

If *A.* being within age, becomes bail for *B.* and after two *scire fa.* and *nihil* returned, judgment is given against *A.* &c. he may have an *audita querela*, and avoid the recognisance, and so the judgment thereupon, of consequence, shall be avoided. *Yelv.* 155.

But if *A.* being within age, enters into a bond to *B.* who procures *C.* without any warrant, to appear for *A.* and confesses a judgment thereupon, yet *A.* shall not have an *audita querela*, but he must take his remedy by action of *deceit* against the attorney. *Cro. Jac.* 694.

The writ of *audita querela* may be had, where a recognisance or statute entered into is defective, and not good; or being upon a usurious contract, by duress of imprisonment, or where there is a defeasance upon it, &c. *Moor's Ca.* 1097. 1 *Brownl.* 39. 2 *Bulst.* 320. So, upon showing an acquittance of the cognisee, on a suggestion that he had agreed to deliver up the statute. 1 *Roll.* 309. Where one enters into a statute, and after sells his land to divers purchasers; or judgment is had against a man, who leaves land to several heirs, &c. and one of the purchasers, or one heir alone, is charged, he may have this writ against the rest to contribute to him. 3 *Rep.* 44. 2 *Bulst.* 15.

Where a statute or recognisance is acknowledged before one who hath not power to take it, and afterwards the cognisor makes a feoffment of the land to another, and the cognisee, taketh out execution, in such case the feoffee may have an *audita querela*, and avoid the execution. *Dyer*, 27. 35.

If *A.* enters into a statute to *B.* and pays the money at the day assigned, upon which the statute is cancelled, and after *B.* forges a new statute in the name of *A.* in this case *A.* may relieve himself by *audita querela*; for the forged statute having all the essentials of a true one, the court was obliged to look on it as such till the contrary appeared; which the cognisor could not set forth before execution, having no day to appear judicially in court, and therefore is put to this writ to avoid the execution founded on the injustice of the pretended conusee. *F. N. B.* 104.

If upon an *elegit* the sheriff takes an inquisition, and there are several lands found subject to the extent, and several values found, and the sheriff returns, that he has delivered some of the lands in particular for the moiety, where it appears, according to the values found, that an equal moiety is not delivered to the party who recovered, but more than a moiety; yet this is not void, nor is it a disseisin by the entry, but only voidable by *audita querela*. 1 *Roll. Abr.* 305.

If two executors sue execution for damages recovered by the testator, where one hath released, an *audita querela* lies against both. 1 *Roll. Abr.* 312.

If *A.* cognisee of a statute, releases to the tenant all right, interest, and demand, together with all suits and executions, and afterwards sues execution, the tertenant shall have an *audita querela* to set aside this execution. *Cro. Eliz.* 40. 1 *And.* 133.

So in trespass or other action, if it be found for the plaintiff by *nisi prius*, and after, before the day in bank, the plaintiff releases to the defendant, and after judgment is given for the plaintiff, the defendant shall have an *audita querela* upon this matter; because he could not plead the release at the day in bank. 1 *Roll. Abr.* 307.

In an *audita querela*, the process is a *venire facias*, *distringas*, *alias*, *pluries*; and if *non est inventus* be returned, or *that he hath nothing*, the plaintiff shall have a *capias* against the defendant. *F. N. B.* 104. *Dyer*, 297. *b.*

If an *audita querela* is founded on a record, or the person bringing it is in custody, the process upon it is a *scire facias*; but if founded on matter of fact, or the party is at large, then the process is a *venire*. 1 *Salk.* 92.

And if there be a default by the defendant upon a *scire feci*, or two *nihils* returned, the plaintiff shall have judgment. 1 *Salk.* 93. But, where an *audita querela* is sued *quia timet*, and the party is at large, there shall never be a *scire facias*. 1 *Salk.* 92. 1 *Inst.* 100. a.

An *audita querela* shall be granted out of the court, where the record, upon which it is founded, remains, or it may be returnable in the same court. *F. N. B.* 105. *b.* And therefore if a man recover in *B. R.* or *C. B.* the defendant, having a release after judgment, and before execution, shall sue the *audita querela* out of *B. R.* or *C. B.* where the record is. *F. N. B.* 105. So if a recognisance be acknowledged in *C. B.* and execution be sued upon it after release, the defendant shall sue the *audita querela* out of *C. B. F. N. B.* 105. But an *audita querela* may be by original; and, upon a judgment in *C. B.* it goes out of chancery returnable in *C. B. F. N. B.* 105.

The writ of *audita querela* shall be allowed only in open court. 1 *Bulst.* 140. 2 *Bulst.* 97. 2 *Show.* 240.

Upon *audita querela* brought, a *supersedeas* shall go to stay execution: and the judgment in this action is to be discharged of execution. *Hob.* 2. If an *audita querela* be unduly gotten, upon a false surmise, it may be quashed. 1 *Bulst.* 140. *This writ lies* not *after judgment upon a matter which the party might have pleaded before. Cro. Eliz.* 35. A bare surmise is not sufficient to avoid a judgment; but, generally, some specialty must be shown. *Cro. Jac.* 579. Upon a release or other deed pleaded, no *supersedeas* will be granted till the plaintiff, in the *audita querela*, hath brought his witnesses into court to prove the deed: and if execution be executed before, bail is to be put in by allowance of the court. 1 *Lill. Abr.* 151.

Upon a motion for an allowance of an *audita querela*, it was held, that *bail must be given in court*, and not elsewhere; unless in cases of necessity, to be allowed by the court, and then it may be put in before two judges. *Palm.* 422.

A man, nonsuited in an *audita querela*, may have a new writ. *F. N. B.* 104. When lands are extended on any statute, &c. before the time, *audita querela* lieth. 22, 46 *Edw.* III. A writ, in the nature of an *audita querela*, has been made out returnable in *B. R.* on a special pardon, setting forth the whole matter. *Jenk. Cent.* 109.

AUDITOR, *Lat.*] An officer of the king, or other person or corporation, who examines yearly the accounts of all under-officers, and makes up a general book, which shows the difference between their

receipts and charge, and their several allowances commonly called *allocations:* as the *auditors* of the *exchequer* take the accounts of those receivers who collect the revenues. 4 *Inst.* 106. Receivers-general of fee-farm rents, &c. are also termed *auditors*, and hold their *audits*, for adjusting the accounts of the said rents, at certain times and places appointed. And there are *auditors* assigned by the court, to *audit* and settle accounts in actions of account, and other cases, who are proper judges of the cause, and pleas are made before them, &c. 1 *Brownl.* 24. See tit. *Account.*

AUDITOR OF THE RECEIPTS, An officer of the *exchequer*, that files the tellers' bills, and having made an entry of them, gives the lord treasurer, &c. weekly, a certificate of the money received; he makes debentures to the tellers before they pay any money; and takes their accounts: he also keeps the *black book* of receipts, and the treasurer's key of the treasury, and seeth every teller's money locked up in the treasury. 4 *Inst.* 107.

AUDITORES, the same with *audientes*, *i. e.* the catechumens, or those who are newly instructed in the mysteries of the christian religion before they were admitted to baptism; and *auditorium* was that place in the church where they stood to hear, and be instructed, now called the *nave* of the church: and in the primitive times, the church was so strict in keeping the people together in that place, that the person who went from thence in sermon time was excommunicated. *Blount.*

AUDITORS OF THE IMPREST, Officers in the *exchequer*, who formerly had the charge of *auditing* the great accounts of the king's customs, naval and military expenses, &c. But who are now superseded by the commissioners for auditing the public accounts. See tit. *Accounts Public.*

AVENAGE, from the Lat. *avena.*] A certain quantity of oats paid by a tenant to his landlord as a rent, or in lieu of some other duties. *Blount.*

AVENOR, *avenarius*, from the Fr. *avoine*, oats.] An officer belonging to the king's stables, that provided oats for his horses; mentioned stat. 13 *Car.* II. *cap.* 8.

AVENTURÆ, *Adventures* or trials of skill at arms; military exercises on horseback. *Assisa de armis. Brady's Append. Hist. Eng.* 250. *Addit. Mat. Paris, p.* 149.

AVENTURE, (properly *adventure.*) A *mischance* causing the death of a man: as where a person is suddenly drowned, or killed by any accident, without felony. *Co. Lit.* 391.

AVERA, *quasi overa*, from the Fr. *ouvre* and *ouvrage*, *velut*, operagium.] Signifies a day's work of a ploughman, formerly valued at 8*d.* It is found in *Domesday.* 4 *Inst.* 269.

AVERAGE, *averagium.*] Is said to signify service which the tenant owes to his lord by horse or carriage: but it is more commonly used for a contribution that merchants and others make towards their losses, who have their goods cast into the sea, for the safeguard of the ship, or of the other goods and lives of those persons that are in the ship, during a tempest. It is in this sense called *average*, because it is proportioned and allotted after the rate of every man's goods carried. See tit. *Insurance.*

Average is likewise a small duty, paid to masters of ships when goods are sent in another man's ship, for their care of the goods, over and above the freight.

AVERAGE OF CORN FIELDS, The stubble or remainder of straw and grass left in corn fields after the harvest is carried away. In *Kent* it is called the *gratten*, and in other parts the *roughings*, &c.

AVER CORN, Is a reserved rent in *corn*, paid by farmers and tenants to religious houses: and signifies, by *Somner*, corn drawn to the lord's granary, by the working cattle of the tenant. 'Tis supposed that this custom was owing to the *Saxon cyriac sceat*, a measure of *corn* brought to the priest annually on *St. Martin's* day, as an oblation for the first fruits of the earth: under which title the religious had corn-rent paid yearly; as appears by an inquisition of the estate of the abbey of *Glastonbury*. *A. D.* 1201.

AVER LAND, Seems to have been such lands as the tenant did plough and manure, *cum* averiis *suis*, for the proper use of a monastery, or the lords of the soil. *Mon. Angl.*

AVER PENNY, (or *average penny.*) Money paid towards the king's *averages* or carriages, or to be freed thereof. *Rastal.*

AVER SILVER, A custom or rent formerly so called. *Cowel.*

AVERIA, Cattle. *Spelman* deduces the word from the Fr. *ouvrer*, to work, as if chiefly working-cattle: though it seems to be more probable from *avoir*, to have or possess: the word sometimes including all personal estate, as *catalla* did all goods and chattels. This word is used for oxen or horses of the plough; and in a general sense any cattle. Averia *elongata*; see *Elongata*.

AVERIIS CAPTIS IN WITHERNAM, A writ for the taking of cattle to his use who hath cattle unlawfully distrained by another, and driven out of the county where they were taken, so that they cannot be replevied by the sheriff. *Reg. Orig.* 82. See tit. *Distress.*

AVERMENT, *verificatio*, from the Fr. *averer*, *i. e. verificare*, *testari.*] Is an offer of the defendant to make good or justify an exception pleaded by him in abatement or bar of the plaintiff's action: and it signifies the act, as well as the offer, of justifying the exception; and not only the form, but the matter thereof. *Co. Lit.* 362. *Averment* is either general or particular; general, which includes every plea, &c. containing matter affirmative, and ought to be with these words, *and this he is ready to verify*, &c. Particular *averment* is when the life of tenant for life, or of tenant in tail, &c. is *averred*. *Ibid.* As to general *averments*, see tit. *Pleading*. With respect to particular averments, the following quotations may serve as examples. See further *Vin. Abr.* tit. *Averment*.

He that *claims estate from tenant for life, or in tail, or from parson of a church*, ought to aver his life. *Br. Estate, pl.* 18.

Where one thing is to be done in consideration of another, on contracts, &c. there must be an *averment* of performance, but where there is promise against promise, there needs no *averment*; for each party hath his action. 1 *Lev.* 87. The use of *averment* being to ascertain what is alleged doubtfully, deeds may sometimes be made good by *averment*, where a person is not certainly named; but when the deed itself is void for uncertainty, it cannot be made good by *averment*. 5 *Rep.* 155. *Averment* cannot be made against a record, which imports in itself an uncontrollable verity. *Co. Lit.* 26. *Jenk.* 232.

Where a *statute* is recited, there one may not aver that there is no such record; for generally an averment, as this is, doth not lie against a record; for a record is a thing of solemn and high nature, but an averment is but the allegation of a party, and not so much credit in law to be given to it. *Lill. P. R.* 155.

Averment lies not against the *proceedings of a court of record*. 2 *Hawk. P. C. c.* 1. § 14. Nor shall it be admitted against a will concerning lands. 5 *Rep.* 68. And an *averment* shall not be allowed where the intent of the testator cannot be collected out of the words of the will. 4 *Rep.* 44. One may not aver a thing contrary to the condition of an obligation, which is supposed to be made upon good deliberation, and before witnesses, and therefore not to be contradicted by a bare *averment*. 1 *Lill. Abr.* 156.

An *averment* of a wicked and unlawful consideration of giving a bond, may well be pleaded, though it doth not appear on the face of the deed: and any thing which shows an obligation to be void may well be averred, although it doth not appear on the face of the bond. Adjudged on demurrer, after two arguments in the case of *Collins* and *Blantern*, *C. B. Easter*, 7 *Geo.* III. 2 *Wils.* 747.

If an heir is sued on the bond of his ancestor, it must be *averred* that the heirs of the obligor were expressly bound. 2 *Saund.* 136. In declaring you show that the obligor bound his heirs. Another consideration than that mentioned in a deed may be *averred* where it is not repugnant or contrary to the deed. *Dyer*, 146. But a consideration may not be *averred*, that is against a particular express consideration; nor may *averment* be against a consideration mentioned in the deed, that there was no consideration given. 1 *Rep.* 176. 8 *Rep.* 155. If an estate is made to a woman that hath a husband, by fine or deed, for her life: in this case it may be *averred* to be made to her for her jointure, although there be another use or consideration expressed. 4 *Rep.* 4. *Averment* may be of a use upon any fine or common recovery; though not of any other use than what is expressed in it: it may be received to reconcile a fine, and the indenture to lead the uses. *Dyer*, 311. 2 *Bulst.* 235. 1 *And.* 312.

If one has *two manors known by the name of W.* and *levies a fine*, or grants an annuity out of his manor of *W.* he shall by averment *ascertain* which of them it was: *per cur.* 6 *Mod.* 235. *Cha. Rep.* 138.

If a piece of ground was anciently called by one name, and of late is called by another, and it is granted to me by this new name, an *averment* may be taken that it is all one thing, and it will make it good. *Dyer*, 37. 44. No *averment* lies against any returns of writs, that are definitive to the trial of the thing returned; as the return of a sheriff upon his writs, &c. But it may be where such are not definitive: and against certificates upon commissions out of any court: also against the returns of bailiffs of franchises, so that the lords be not prejudiced by it. *Dyer*, 348. 8 *Rep.* 121. 2 *Cro.* 13.

As to *averments* in actions on the case for words, see tit. *Action* II. 1.

A special *averment* must be made upon the pleading of a general pardon, for the party to bring himself within the pardon. *Hob.* 67. A person may *aver* he is not the same person on appeal of death in favour of life. 1 *Nels. Abr.* 305.

Where a man is to take a benefit by an *act of parliament*, there, in pleading, he must *aver*, *that he is not a person excepted*; but where he claims no benefit by it, but only to keep that which he had before, in such case it is not necessary to make such averment. *Plowd. Com.* 87. 488.

Pleas merely in the negative shall not be *averred*, because they cannot be proved: nor shall what is against presumption of law, or any thing apparent to the court. *Co. Lit.* 362. 373. By stat. 4 and 5 *Ann. c.* 16. no exception or advantage shall be taken upon a demurrer, for

want of *averment* of *hoc paratus est*, &c. except the same be specially set down for cause of demurrer. See tit. *Amendment*.

AVERRARE, To carry goods in a waggon, or upon loaded horses, a duty required of some customary tenants. *Cartular. Glaston. MS. f.* 4.

AVETTING, (Abetting,) signifies helping or assisting. *Scotch Dict.*

AUGEA, A cistern for water. *Reg. Eccl. Well. MS.*

AUGMENTATION, *augmentatio.*] The name of a court erected 27 *Hen.* VIII. for determining suits and controversies relating to monasteries and abbey lands. The intent of this court was, that the king might be justly dealt with touching the profits of such religious houses, as were given to him by act of parliament. It took its name from the *augmentation* of the revenues of the crown, by the suppression of religious houses: and the office of *augmentation*, which hath many curious records, remains to this day, though the court hath been long since dissolved. *Terms de Ley*, 68.

AVISAMENTUM, Advice or counsel. *De* avisamento *et consensu concilii nostri concessimus*, &c. was the common form of our ancient kings' grants.

AULA, *i. e.* A court-baron, *aula ibidem tent' die*, &c. Aula *ecclesiæ* is that which is now termed *navis ecclesiæ*. *Eadm. lib.* 6. *fi.* 141.

AULNAGE. See *Alnage*.

AUMONE, Fr. *aumosne*, alms.] Tenure in *aumone* is where lands are given in alms to such church, or religious house, upon condition that a service or prayers shall be offered at certain times for the repose of the donor's soul. *Brit.* 164. *Vide Frankalmoign.*

AUNCEL, or ANSEL-WEIGHT, *quasi hand-sale-weight*, or from *ansa*, the handle of the balance.] An ancient manner of *weighing*, (mentioned in stat. 14 *Edw.* III. *st.* 1. *c.* 12.) by the hanging of scales or hooks at each end of a beam or staff, which, by lifting up in the middle with one's finger or hand, discovered the equality or difference between the *weight* at one end, and the thing *weighed* at the other. This *weighing* being subject to great deceit, was prohibited by several statutes, and the even balance commanded in its stead. But, notwithstanding, it is still used in some parts of *England*: and what we now call the *steelyards*, a sort of hand-weighing among butchers, being a small beam with a *weight* at one end, (which shows the pounds by certain notches,) seems to be near the same with the *auncel-weight*. See tit. *Weights and Measures.*

AUNCIATUS.] Antiquated. *Brompton, lib.* 2. *cap.* 24. *par.* 6.

AVOIDANCE, In the general signification, is when a benefice is void of an incumbent; in which sense it is opposed to plenarty. Avoidances are either in *fact*, as by death of the incumbent, or in *law*: and may be by cession, deprivation, resignation, &c. See tit. *Advowson.*

AVOIRDUPOIS, or *averdupois*, Fr. *avoir du poids*, *i. e. habere pondus, aut justi esse ponderis.*] A weight different from that of Troy weight, which contains but twelve ounces in the pound, whereas this hath sixteen ounces: and in this respect it is probably so called, because it is of greater weight than the other. It also signifieth such merchandises as are weighed by this weight; and is mentioned in divers statutes. See tit. *Weights.*

AVOW. See *Advow.*

AVOWEE, Of a church benefice. *Britt. c.* 29. See *Advocate.*

AVOWRY, Is where a man takes a distress for rent or other thing, and the party on whom taken sues for a *replevin*, then the taker shall justify his plea for what cause he took it; and if in his own right, he must show the same, and *avow* the taking; but if he took it in right of another, he must make *cognisance* of the taking, as bailiff or servant to the person in whose right he took the same. *Terms de Ley*, 70. 2 *Lill.* 454. The *avowry* must contain sufficient matter for judgment to have return: but so much certainty is not required in an *avowry* as in a declaration; and the *avowant* is not obliged to allege seisin within the statute of limitations. Nor shall a lord be required to *avow* on any person in certain; but he must allege seisin by the hands of some tenant within forty years. Stat. 21 *Hen.* VIII. *c.* 19. 1 *Inst.* 268. In *avowry*, seisin in law is sufficient; so that where a tenant hath done homage or fealty, it is a good seisin of all other services to make an *avowry*, though the lord, &c. had not seisin of them within sixty years. See stat. 32 *Hen.* VIII. *cap.* 2. 4 *Rep.* 9. A man may distrain and *avow* for rent due from a copyholder to a lord of the manor; and also for heriots, homage, fealty, amercements, &c. 1 *Nels. Abr.* 315.

If a person makes an *avowry* for two causes, and can maintain his *avowry* but for one of them, it is a good *avowry*: and if an *avowry* be made for rent, and it appears that part of it is not due, yet the *avowry* is good for the rest: supposing sufficient rent due to justify a distress. An *avowry* may be made upon two several titles of land, though it be but for one rent; for one rent may depend upon several titles. 1 *Lill. Abr.* 157. *Saund.* 285. If a man takes a distress for rent, reserved upon a lease for years, and afterwards accepts a surrender of the lands, he may nevertheless *avow*, because he is to have the rent due, notwithstanding the surrender. 1 *Danv. Abr.* 652. Where tenant in tail aliens in fee, the donor may *avow* upon him, the reversion being in the donor, whereunto the rent is incident. *Ibid.* 650. If there be tenant for life, remainder in fee, the tenant for life may compel the lord to *avow* upon him: but where there is tenant in tail, with such remainder, and the tenant in tail makes a feoffment, the feoffee may not compel the lord to *avow* upon him. 1 *Danv. Abr.* 648. *Co. Lit.* 268. If the tenant enfeoffs another, the lord ought to *avow* upon the feoffor for the arrearages before the feoffment, and not upon the feoffee. 1 *Danv.* 650. The lord may *avow* upon a disseisor. 20 *Hen.* VI. And if a man's tenant is disseised, he may be compelled to *avow* by such tenant, or his heir. A defendant in replevin may *avow* or justify; but if he justifies he cannot have a return. 3 *Lev.* 204. The defendant need not *aver* his *avowry* with a *hoc paratus est, &c.* By stat. 21 *Hen.* VIII. *c.* 19. it is enacted, that if in any *replegiare* for rents, &c. the *avowry*, cognisance, or justification be found for the defendant, or the plaintiff be nonsuit, &c. the defendant shall recover such damages and costs as the plaintiff should have had if he had recovered. See *Bull. N. P.* 57. that this statute does not extend to an avowry for a *nomine pœnæ* or estray. And by stat. 17 *Car.* II. *c.* 7. when a plaintiff shall be nonsuit before issue in any suit of replevin, &c. removed or depending in any of the courts at *Westminster*, the defendant making suggestion in the nature of an *avowry* for rent, the court, on prayer, shall award a writ to inquire of the sum in arrear, and the value of the distress, &c. upon return whereof the defendant shall recover the arrears, if the distress amounts to that value, or else the value of the distress with costs; and where the distress is not found to the value of the arrears, the party may distrain for the residue. See titles *Distress; Replevin* IV. 2. *Rent.*

AURUM REGINÆ, The queen's gold. This is a royal revenue belonging to every queen-consort during her marriage, from every person who hath made a voluntary offering or fine to the king, of ten marks or upwards, in consideration of any grants, &c. by the king to him; and it is due in the proportion of one-tenth part more, over and above the entire fine to the king. 1 *Comm.* 221.

AUSCULTARE. Formerly persons were appointed in monasteries to hear the monks read, and direct them how, and in what manner they should do it with a graceful tone or accent, to make an impression on their hearers, which was required before they were admitted to read publicly in the church; and this was called *auscultare*. See *Lanfrancus in Decretis pro ordine Benedict. c. 5.*

AUSTURCUS, and *Osturcus*. A goshawk; from whence we usually call a faulconer, who keeps that kind of hawks, an *ostringer*. In ancient deeds there has been reserved, as a rent to the lord, *unum austurcum*.

AUTER DROIT, An expression used where persons sue or are sued *in another's right*; as executors, administrators, &c.

AUTERFOITS ACQUIT, Is a plea by a criminal, that he was heretofore *acquitted* of the same treason or felony: for one shall not be brought into danger of his life for the same offence more than once. 3 *Inst.* 213. Except by appeal of death, which is a private suit. See tit. *Appeal.* There is also a plea of *auterfoits convicts*, and *auterfoits attaint*; that he was heretofore convicted, or attainted, of the same felony. In appeal of death, *auterfoits acquit*, or *auterfoits attaint*, upon indictment of the same death, is no plea. *H. P. C.* 244. But in other cases where a person is attainted, it is to no purpose that he should be attainted a second time. And conviction of manslaughter, where clergy is admitted thereon, will bar any subsequent prosecution for the same death. 2 *Hawk. P. C. c.* 35, 36.

AUTHORITY, Is nothing but a power to do something: it is sometimes given by *words*, and sometimes by *writing*: also it is by writ, warrant, commission, letter of attorney, &c. and sometimes by *law*. The *authority* that is given must be to do a thing lawful; for if it be for the doing any thing against law, as to beat a man, take away his goods, or disseise him of his lands, this will not be a good *authority* to justify him that doth it. *Dyer*, 102. *Keilw.* 89. An authority given to another person, to do that which a man himself cannot do, is void: and where an authority is lawful, the party to whom given must do the act in the name of him who gave the authority. 11 *Rep.* 87. Where an authority is given by law, it must be strictly pursued; and if a person acting under such authority, exceeds it, he is liable to an action for the excess.

An authority in some cases cannot be transferred. Thus a person, who has an authority to do any act for another, must execute it himself, and cannot transfer it to another: for this being a trust and confidence reposed in the party, cannot be assigned to a stranger, whose ability and integrity were not so well thought of by him for whom the act was to be done. 9 *Co.* 77. b. 1 *Roll. Abr.* 330.

Some authorities likewise determine with the life of the person who gave them.

The authority given by letter of attorney must be executed during the life of the person that gives it; because the letter of attorney is to constitute the attorney my representative for such a purpose, and therefore can continue in force only during the life of me that am to be represented. 2 *Roll. Abr.* 9. *Co. Lit.* 52.

But if any corporation aggregate, as a mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of the mayor or dean, but the attorney may well execute the power after their death: because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean, and therefore may be represented by their attorney; but if the dean or mayor be named by their own private name, and die before livery, or be removed, livery after seems not good. *Co. Lit.* 52. 2 *Roll. Abr.* 12.

It is a rule that every authority shall be countermandable, and determine by the death of him that gives it, &c. But where an interest is coupled with an authority, there it cannot be countermanded or determined. *And.* 1. *Dyer*, 190. and see *Vin. Abr.* tit. *Authority*.

A devise to another, *to have the disposing, selling, and letting his land*; so a devise to his son, *but that his wife shall take the profits*; so a devise that his executor shall have the *oversight and dealing of his lands*; so a devise to an infant in tail, but that *G. D.* shall have the *oversight* of his will, and the education of his son till of age, and to *receive, set, and let for him*; these and such like words give the devisee an *authority*, but *no interest*. *Dyer*, 26. b. 331. 2 *Leon.* 221. 3 *Leon.* 78. 216. *Moor*, 635. S. P. *Cro. Eliz.* 674. 678. 734.

The law makes a difference where *lands are devised to executors to sell*, and where the devise is, that *his lands shall be sold by his executors*; for in the first case an *interest* passes to the executors, because the lands are expressly devised to them, but in the other case, they have only an authority to sell. *Golds.* 2. *Dyer*, 219. *Moor*, 61. *Keilw.* 107. *b.* 1 *And.* 145.

The testator devised that his executors should receive the *issues and profits* of his lands till his son came of age, *to pay his debts and legacies, and to breed up his younger children*; the testator died, so did the executor, during the minority of the son, having first made *J. S.* his executor; adjudged, that this executor of an executor may dispose of the *issues and profits*, for the purposes mentioned in the will, during the infancy of the son; because the first executor had not only a bare *authority*, but an *interest* vested in him. *Dyer*, 210.

Where the testator gives another authority *to sell his lands*, he may sell the inheritance, because he gave him the same power he had himself, and in such case the purchaser shall be in by the devise. 2 *Rep.* 53.

An authority may be *apportioned* or *divided*, but an *interest is inseparable* from the person, and where an act, which is in its nature indifferent, will work *two ways*, the one by an *authority*, and the other by an *interest*, the law will attribute it to the *interest*. But where an *interest and authority* meet, if the party declare that the thing shall take effect by virtue of his *authority*, there it shall prevail against the *interest*. 6 *Rep.* 17.

In many cases authorities must be strictly executed according to the power given.

If a man devise *that his executors shall sell his lands*, this gives but a naked authority; and the lands, till the sale is made, descend to the heir at law; and in this case all must join in the sale; and if one die, it being a bare authority, cannot survive to the rest. *Co. Lit.* 112. b. 113. a. 181. b.

But if a man by will *give land to executors to be sold*, and one of them die, the survivors may sell; for the trust being coupled with an interest, shall survive together with it. *Co. Lit.* 113. b. 181. b.

If a letter of attorney be to make livery upon condition, so as to make a conditional feoffment, and the attorney delivers seisin absolutely, the livery is not good; because the attorney had no authority to create an absolute fee-simple; and therefore such absolute feoffment shall not bind the feoffor, because he gave no such authority. 2 *Roll. Abr.* 9.

If a warrant of attorney be given to make livery to one, and the attorney makes livery to two; or if the attorney had authority to make livery of *Black Acre*, and he made livery of *Black Acre* and *White Acre*, though the attorney has in these cases done more, yet there is no reason that shall vitiate what he has done pursuant to his power, since what he did beyond it is a perfect nullity, and void. *Perk. Sect.* 189.

If a letter of attorney be given to *two jointly* to take livery, and feoffor makes livery to one in the absence of the other, in the name of both, this is void; because they being appointed *jointly* to receive livery, are to be considered but as one. *Co. Lit.* 49. b. 2 *Roll. Abr.* 8.

But if a letter of attorney be made to three, *conjunctim et divisim*, and two only make livery, this is not good, because not pursuant to their authority: for the delegation was to them all three, or to each of them separately; yet if the third was present at the time of the livery made by two, though he did not actually join with them in the act of livery, yet the livery is good; because, when they all three are upon the land for that purpose, and two make livery in the presence of the third, there is his concurrence to the act, though he did not join in it actually, since he did not dissent to it. *Dyer*, 62. 1 *Roll. Abr.* 329. *Co. Lit.* 181. b. 1 *Roll. Rep.* 299. *Yelv.* 26.

If a letter of attorney be given to *A.* to make livery of lands already in lease, the attorney may enter upon the lessee in order to make livery; because, whilst the lessee continues in possession, the attorney cannot deliver seisin of it; and therefore, to execute the power given him by the letter of attorney, it is necessary he should have a power to enter upon the lessee. *Co. Lit.* 52. *Poph.* 103. *Dyer*, 131. a. 340. a.

If a sheriff makes a warrant to four or three, or a *capias* jointly or severally to arrest one, two of them may arrest the party, for the greater expedition of justice. *Co. Lit.* 181. *Palm.* 52. 2 *Roll. Rep.* 137.

So if the lord gives license to a copyholder for life, to lease the copyhold for five years, if the copyholder *tamdiu vixerit*, and he leases it for five years, generally, without limitation, this is a good execution, and pursuant to the license; for the lease is determinable by his death, by a limitation in law; and therefore as much is implied by law, as if he had made an actual limitation. 1 *Roll. Abr.* 330, 331. *Cro. Jac.* 436. S. C. See further tit. *Power*, and *Vin. Abr.* tit. *Authority*.

AUTUMN, The decline of the summer. Some computed the years by *autumns*; but the *English Saxons* by winters; *Tacitus* says, that the ancient *Germans* knew the other divisions of the year, but did not know what was meant by *autumn*.

AUTUMNALIA, Those fruits of the earth which are ripe in *autumn* or harvest.

AUXILIUM AD FILIUM MILITEM FACIENDUM ET FILIAM MARITANDAM. A writ formerly directed to the sheriff of every county where the king or other lord had any tenants, to levy of them

an did towards the knighting of a son, and the marrying of a daughter. *F. N. B.* 82. See tit. *Aid*, *Tenure*.

AUXILIUM CURIÆ, A precept or order of court for the citing or convening of one party, at the suit and request of another, to warrant some thing. *Kennet's Paroch. Antiq.* 477.

AUXILIUM FACERE ALICUI IN CURIA REGIS, To be another's friend and solicitor in the king's courts; an office undertaken for, and granted by, some courtiers to their dependants in the country. *Paroch. Antiq.* 126.

AUXILIUM REGIS, The king's aid, or money levied for the king's use, and the public service; as where taxes are granted by parliament. See tit. *Aid*, *Taxes*.

AUXILIUM VICECOMITI, A customary aid or duty anciently payable to sheriffs out of certain manors, for the better support of their offices. See *Mon. Angl. tom.* 2. *p.* 245. An exemption from this duty was sometimes granted by the king: and the manor of *Stretton*, in *Warwickshire*, was freed from it by charter. 14 *Hen.* III. *M.* 4.

AWAIT, Seems to signify what we now call *waylaying*, or lying in *wait*, to execute some mischief. By stat. 13 *Rich.* II. *st.* 2. *c.* 1. it is ordained, that no charter of pardon shall be allowed before any justice for the death of a man slain by *await*, or malice prepensed, &c.

AWARD, from the Fr. *Agard.*] Perhaps, because it is imposed on both parties, to be *observed* by them. *Dictum quod ad custodiendum seu observandum partibus imponitur. Spelm.*

That act by which parties refer any matter in dispute between them to the private decision of another party, (whether one person or more,) is called *a Submission*; the party to whom the reference is made, *an Arbitrator* or *Arbitrators*: when the reference is made to more than one, and provision made, that in case they shall disagree, another shall decide, that other is called *an Umpire*. The judgment given or determination made by an arbitrator or arbitrators, is termed *an Award*; that by an umpire *an Umpirage*, or less correctly an award.

The following system of the law on this subject is chiefly collected from, and follows the plan of *Kyd's Treatise on the Law of Awards*.

The subject may be conveniently distributed under the following heads:

I. *The Submission.*
II. *The Parties thereto.*
III. *The subject of the reference.*
IV. *The Arbitrators and Umpire.*
V. *The Award of Umpirage.*
VI. *The remedy to compel performance, on an Award or Umpirage properly made.*
VII. *Of the means of procuring relief against it, when improperly made. And,*
VIII. *The effect, in precluding the parties from suing on the original cause of action, or subject of reference.*

I. The Submission may be purely by the act of the parties themselves; or it may be by their act, with the interposition of a court of justice; in either case it may be either verbal or in writing; the general practice, as well as the most safe, is to prefer the latter.

When the submission is in writing, it is most commonly by mutual bonds, given by the parties each to the other, in a certain sum penal,

on condition, to be void on performance of the award; but such bonds may be given to a third person, or even to the arbitrator himself; (*Comb.* 100.) and they may be given *by* other persons than the parties themselves, who will incur the forfeiture if the parties do not perform the award. The submission may also be by indenture, with mutual covenants to stand to the award. 2 *Mod.* 73.

It is usual in articles of copartnership, to insert a provision, that all disputes between the partners shall be referred to arbitration. This has so far the effect of a submission, that one of the parties cannot sue another either at law or in equity, for any matter within the terms or meaning of the proviso, without having first had an actual reference, which has proved ineffectual, or a proposal by the plaintiff to refer, and a refusal by the defendant. See 2 *Atk.* 585. (569.) 2 *Brownl.* c. 336.

All the cases of awards reported in the books for a long series of years, appear to have been made on submissions, by the act of the parties only; but when mercantile transactions came to be frequently the subject of discussion in the courts, it was soon found, that a judge and jury were very unfit to unravel a long and intricate account; and it therefore became a practice, in cases of that kind, and others, which seemed to be proper for the same tribunal, to refer the matters, by consent of parties, under a rule of *nisi prius*; which was afterwards made a rule of that court, out of which the record proceeded, and performance of the award was enforced by process of contempt. This practice does not appear to have begun before the reign of *Charles* II. for the reports of that period show, that it was not before the latter end of that reign, that the courts granted their interference without reluctance. Their utility, however, was at length so well understood, that by stat. 9 and 10 *Wm.* III. *c.* 15. it was enacted, "That it shall and may be lawful to and for all traders and merchants, and others, desiring to end by arbitration, any controversy, suit or quarrel, for which there is no other remedy, but by personal action, or suit in equity, to agree that *their submission of their suit to the award or umpirage of any person or persons, should be made a rule of any of his Majesty's courts of record*; and to insert such their agreement in their submission, or the condition of *the bond or promise* whereby they oblige themselves respectively; which agreement being so made and inserted, may, on producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and on reading and filing the said affidavit in court, be entered of record in such court; and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage, which shall be made concerning them, by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitrator or umpirage, the party neglecting or refusing shall be subject to all the penalties of contemning a rule of court." On this statute, and awards made in consequence, see 1 *Stra.* 1, 2. 2 *Stra.* 1178. 10 *Mod.* 332, 333. *Barnes*, 55. 58. 1 *Salk.* 72. *Comyns*, 114. 1 Ld. *Raym.* 664. 3 *East*, 603.

The extent of the submission may be various, according to the pleasure of the parties; it may be of one particular matter only, or of many, or of every subject of litigation between them.

It is proper to fix a time, within which the arbitrators shall pronounce their award: but where the submission limits no time for the making of the award, that shall be understood to be within convenient

time; and if in such a case the party request the arbitrators to make an award, and they do not, a revocation of the authority afterwards will be no breach of the submission. 2 *Keb.* 10. 20.

The submission, being the voluntary agreement of the parties, the words of it must be so understood, as to give a reasonable construction to their meaning, and to make their *intention* prevail; and where there is a repugnancy in the words of the submission, the latter part shall be rejected, and the former stand. *Poph.* 15, 16.

It has been said, that as all authority is in its nature revocable, even though made irrevocable, therefore a *submission* to an award may be *revoked* by either of the parties; such at least was the determination under the old law as reported in the year-books, and ancient reporters; but now it may reasonably be supposed, that the courts would sustain an action on the case, for countermanding the authority of the arbitrator. A case is reported in two books, one being evidently nothing more than a loose note; 1 *Sid.* 281. the other report is at length, and the manner of the pleadings distinctly given; the breach being assigned in a discharge by the defendant of the arbitrators from making any award; and the judgment of the court without much hesitation in favour of the plaintiff. 2 *Keb.* 10. 20. 24.

This applies only, however, to the case of an *express* revocation; not to that which must necessarily be implied by construction of law from another act of the party. Thus, if a woman while sole, submit to arbitration, and marry before the making of the award, or before the expiration of the time for making it, the marriage operates as a revocation. *W. Jones*, 388. 3 *Keb.* 9. 745.

The court have no authority by 9 and 10 *Wm.* III. *c.* 15. to make a parol submission to an award a rule of court. *Ansell* v. *Evans.* 7 *T. R.* 1.

The court will not presume that the matters in difference submitted to arbitration, arose subsequent to the indenture of assignment and power of attorney from the principals to the plaintiff; but such matter may be pleaded by way of defence to the action. *Ib.* 517.

It is not necessary for the plaintiff, in setting the assignment to him from his principals, (by virtue of which he was authorised to submit their demands to arbitration,) to make a profert of the same in his declaration. 7 *T. R.* 517.

The court will not make a submission to an award a rule of court, where part of the matter agreed to be referred has been made the subject of an indictment; the statute 9 and 10 *Wm.* III. *c.* 15. for regulating "controversies, suits, or quarrels," by arbitration, being confined to civil disputes. *Watson* v. *M'Cullum.* *Ib.* 520.

Where parties, by an indorsement in general terms on the bonds of submission to arbitration, agree that the time for making an award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference; amongst others, that the submission for such enlarged time shall be made a *rule of court*, and consequently the party is liable to an attachment for non-performance of an award made within such enlarged time after the stat. 9 and 10 *Wm.* III. *c.* 15. *Evans* v. *Thomson.* 5 *East*, 189.

II. EVERY ONE who is capable of making a disposition of his property, or a release of his right, may make a submission to an award; but no one can, who is either under a natural or civil capacity of contracting. Therefore a *married woman* cannot be *party* to a submission, whatever may be the subject of dispute, whether arising before

or after her marriage; but the husband may submit for himself and his wife. *Stra.* 351.

On the principle that an *infant* cannot bind himself for any thing but necessaries, it is clear he cannot be party to a submission; whether the matter in dispute be an injury done to him, or an injury done by him to another; but a guardian may submit for an infant, and bind himself that he shall perform the award. See *Comb.* 318. *Roberts* v. *Newbold*; which established this principle, in contradiction to former determinations.

An *executor* or administrator may submit a matter in dispute between another and himself, in right of his testator and intestate; but it is at his own peril; for if the arbitrator do not give him the same measure of justice as he would be entitled to at law, he must account for the deficiency to those interested in the effects. See *Dyer*, 216. b. 217. a. *Com. Dig. Admin.* (l. i.) 3 *Leon.* 53. and *Barry* v. *Rush*, 1 *Term Rep.* 691.

So the *assignees of a bankrupt* may submit to arbitration any disputes, between their bankrupt and others, provided they pursue the directions of the stat. 5 *Geo.* II. *c.* 30. § 34. on the construction of which, see 1 *Atk.* 91.

Those only who are actually parties to the submission shall be *bound* by the award. For the case of partners see 2 *Mod.* 228. Of coparishioners, *Mudy* v. *Osam*, *Litt.* 30.

So, in general, a man is bound by an award, to which he submits for another, *Alsop* v. *Senior*, 2 *Keb.* 707. 718. And see *Bacon* v. *Dubarry*; the case of an attorney submitting for his principal without authority from him. 1 Ld. *Raym.* 246. See *Kyd on Awards*, *p.* 27. and *Colwell* v. *Child*, 1 *Rep. Ch.* 104. 1 *Ca. Ch.* 86.

But if a man *authorise* another on his behalf, to refer a dispute, the award is binding on the principal alone. *Dyer*, 216. b. 217. unless the agent *binds* himself for the performance of the principal. 1 *Wils.* 28. 58.

When there are several claimants on one side, and they *all agree* to submit to arbitration, and *some only enter into a bond* to perform the award, the award shall bind the rest. *Wood et al.* v. *Thompson et al.* *M.* 24 *Car. B. R. Roll. Abr.* tit. *Arbitr.* F. 11.

Where there are two on one side, though they will not be bound the one for the other, yet if the award be general, that they shall do one entire thing, both shall be bound to performance of the whole. *Cro. Car.* 434.

If the husband and wife submit to arbitration any thing in right of the wife, the wife shall, after the death of the husband, be bound by the award. *Lumley* v. *Hutton*, 1 *Roll. Rep.* 268, 269.

An award creates a duty which survives to executors or administrators; they shall therefore on the one hand be compelled to the performance, if made against their testator or intestate; and on the other, may take advantage of it if made in his favour. 2 *Vent.* 249. 1 Ld. *Raym.* 248.

And it is a general rule, that all those who would be *bound* by an award may take advantage of it.

Generally speaking, a submission of *all* matters *between the parties*, when there are more persons than one, either on one or both sides, is the same as a submission of all matters between the parties, *any or either of them*. *Comyns*, 328. And therefore on submission by *A.* and *B.* on the one side, and *C.* and *D.* on the other, the award may be of matters between *A.* and *C.* alone, or between *A.* and *B.* together with

C. alone, or *vice versâ*; and money may be awarded to be paid accordingly. This rule however may be controlled by the words of the submission, in which it is in this case more particularly requisite to be very exact. See *Kyd on Awards*, 121. 8 *Co.* 98. a. *Hardr.* 399. 1 *Vern.* 259. *Comm.* 547. *Roll. Abr.* tit. *Arbitr. D.* 5. and *O.* 8.

III. Though the courts have at all times manifested a general disposition to give efficacy to awards, yet there are some cases in which they have refused them their protection because the subjects on which they were made were not the proper *objects of such reference*.

The only motive which can influence a man to refer any subject of dispute to the decision of an arbitrary judge, is, to have an amicable and easy settlement of something which in its nature is *uncertain*. An award therefore is of no avail when made of debt on a bond for the payment of a sum *certain*, whether it be single, or with the condition to be void on the payment of a less sum; nor if made of debt for arrears of rent ascertained by a lease; nor of covenant to pay a certain sum of money; *Blake's* case, 6 *Co.* 43, 44. nor of debt on the arrears of an account, as formerly taken before auditors in an action of account; 1 *Lev.* 292. nor of damages recovered by a judgment; *Goldsb.* 91, 92. for in all these cases the demand is ascertained. But See *Lumley* v. *Hutton*, *Roll. Abr.* tit. *Arbitr. B.* 8. and *Coxal* v. *Sharp*, 1 *Keb.* 937. as it seems that when joined with other demands of an uncertain nature, those which are certain may also be submitted; even in the case of a verdict and judgment.

But in general, where the party complaining could recover by action only *uncertain* damages, the subject of complaint may be the object of a reference to arbitration; as any demand *not ascertained* by the agreement or contract of the parties, though the claimant *demand* a sum certain; as a claim of 5*l.* for different expenses in the service of the other party. *Sower* v. *Bradfield*, *Cro. Eliz.* 422. So an action of account may be submitted; for, till the account be taken, the sum remains uncertain. *Roll. Abr.* tit. *Arbitr. R.* 4.

It is said, and it appears justly, that all kinds of personal wrong, the compensation for which is always uncertain, depending on the verdict of a jury, may be submitted to arbitration; where the injury done to the individual is not considered, by the policy of the state, as merged in the public crime, which latter can never be the subject of arbitration.

In the case of deeds, when no certain duty accrues by the deed alone, but the demand arises from a wrong or default subsequent, together with the deed, as in the case of a bond to perform covenants, or covenant to repair a house, there the demand being for *damages* for a breach, may be submitted to award. *Blake's* case, 6 *Co.* 43, 44. *Cro. Jac.* 99. However, in all cases where the demand arises on a deed, the submission ought also to be by deed; because a specialty cannot be answered but by a specialty. *Lumley* v. *Hutton*, before quoted.

Much doubt and uncertainty seems anciently to have prevailed on a question, "How far a dispute concerning *land* could be referred to an arbitrator; and how far, on an actual reference, the parties were bound by his award." But it appears that the real difficulty was how to enforce an award made on a reference of a dispute concerning land; for whenever the submission was by bond, it was almost universally held, that the party who did not perform the award forfeited the bond. *Kitch.* 43. 45.

The present rule of law therefore is, that "Where the parties might *by their own act* have transferred real property, or exercised any act of ownership with respect to it, they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done which the parties themselves might do by their own agreement." *Knight* v. *Burton*, 6 *Mod.* 231. *Trusloe* v. *Ascware*, *Cro. Eliz.* 223. *Dyer*, 183. *in marg.*

As real property cannot be transferred by the parties themselves without deed, wherever that makes a part of the dispute, the submission as well as the award, [and whatever act is, by the award, directed to be performed by the parties, as to real property,] must also be by deed.

IV. EVERY ONE whom the law supposes free, and capable of judging, whatever may be his character for integrity or wisdom, may be *an arbitrator* or umpire; because he is appointed by the choice of the parties themselves, and it is their folly if they choose an improper person.

An infant cannot be an arbitrator; nor a married woman; nor a man attainted of treason or felony. But an unmarried woman may be an arbitratrix. *Duchess of Suffolk's* case, 8 *Edw.* IV. 1. *Br.* 37.

It is a general rule of law, founded on the first principles of natural justice, that a man cannot take on himself to be judge in his own cause; but should he be nominated an arbitrator, by or with the consent of the opposite party, the objection is waived; and the award shall be valid. *Matthew* v. *Allerton*, *Comb.* 218. 4 *Mod.* 226. *Hunter* v. *Bennison*, *Hardr.* 43.

The nomination of *the umpire* is either made by the parties themselves, at the time of their submission, or left to the discretion of the arbitrators. Where two arbitrators (as is most frequently the case) have this power, the law provides that the choice shall be fair and impartial, and that it shall not even be left to *chance*, an *election* being an act of the will and understanding. 2 *Vern.* 485.

There is no part of the law relative to awards in which so much uncertainty and confusion appear in the reported cases, as on this respecting the umpire. The time when the power of the arbitrators ceases, and that of the umpire begins; the time when the umpire may be nominated; and the effect of his nomination have, each in its turn, proved questions of sufficient magnitude to exercise and distract the genius of the lawyers. The time limited for the umpire to make his umpirage, has sometimes been the same with that limited for the arbitrators to make their award. It is now however most usual, and certainly more correct, to *prolong* the time beyond that period.

In this case of a prolongation of time, the authority of the arbitrators is determined, and that of the umpire immediately begins *on the expiration of the* time specified to be allowed to the arbitrators. *Lumley* v. *Hutton*.

The point on which, on all the forms of submission, the greatest difficulty has been felt, has been to decide whether any conduct of the arbitrators, can authorise the umpire to make his umpirage *before* the expiration of the time limited for making their award.

On this head the following seems to be undeniably the clearest and most accurate opinion. If the arbitrators do in fact make an award within the time allowed to them, that shall be considered as the real award; if they make none, then the umpirage shall take place; and

there is here no confusion as to the concurrence of authority with respect to the time. The umpire has no concurrence absolutely, but only conditionally, if the arbitrators make no award within their time. This applies equally to the case where the umpire is confined to the same time with the arbitrators, and to that where a further time is given to him. *Chase* v. *Dare*, Sir *T. Jones*, 168. See also *Godb.* 241. 1 *Lev.* 174. 285. 1 Ld. *Raym.* 671. 12 *Mod.* 512. *Lutw.* 541. 544. *Cro. Car.* 263. 1 *Mod.* 274. Sir *T. Raym.* 205. 1 *Salk.* 71.

It is now finally determined that the arbitrators may nominate an umpire *before* they proceed to consider the subject referred to them; and that this is so far from putting an end to their authority, that it is the *fairest* way of choosing an umpire. 2 *Term Rep.* 645. And it is in fact not unusual for the parties to make it a condition in the submission that the umpire *shall* be chosen by the arbitrators, before they do any other act. They may also, when a further day is given to the Umpire, and the choice left to them in general terms, choose him at any time *after* the expiration of their own time, provided it be before the time limited for *him*. 3 *Keb.* 387. *Freem.* 378. 2 *Mod.* 169.

From the opinion that the arbitrators having *once elected* an umpire had executed their authority, it has been thought to follow as a necessary consequence, that if they elected one who refused to undertake the business they could not elect another. This opinion has been supported by two chief justices, but overruled (surely with propriety) by determinations of the court. 3 *Lev.* 263. 2 *Vent.* 113. *Palm.* 289. 2 *Saund.* 129. 1 *Salk.* 70. 1 Ld. *Raym.* 222. 12 *Mod.* 120.

When the person to whom the parties have agreed to refer the matters in dispute between them has consented to undertake the office, he ought to appoint a time and place for examining the matter, and to give notice of such appointment to the parties or to their attorneys; if the submission be by rule of reference at *nisi prius*, the witnesses should be sworn at the bar of the court, or afterwards (if neglected) before a judge.

The parties must attend the arbitrators, according to the appointment, either in person or by attorney, with their witnesses and documents. The arbitrators may also, if they think proper, examine the parties themselves, and call for any other information.

Where a time is limited for making the award, it cannot be made after that time, unless it be prolonged. When the submission is by the mere act of the parties, that prolongation may be made by their mutual consent; otherwise a rule of court is necessary for the purpose.

The law has secured each of the parties against the voluntary *procrastination* of the other, by permitting the arbitrator on due notice given to proceed without his attendance. *Waller* v. *King*, 9 *Mod.* 63. 2 *Eq. Abr.* 92. *c.* 3. or the willing party must press his opponent by rule of court to attend the arbitrator, who on failure may make his award without such attendance. *Hetley* v. *Hetley*, in *Scac. Mich.* 1789.

It has been formerly held that an *umpire* cannot proceed on the report of the arbitrators, but must hear the whole matter anew; but there seems to be no good reason why the umpire, if he think proper, may not take those points *on which the arbitrators agree* to be as they report them. The nature of his duty is only to make a final determination on the *whole subject* of dispute, where the arbitrators cannot do it, and by adopting their opinions as far as they agree, and incorporating it with his own on the other points, he effectually makes

that final determination. And in this manner umpires do usually act. And they are justified in so doing unless *requested* to re-examine the witnesses. 4 *Term Rep.* 589.

Though the words in the submission which regulate the appointment of an umpire, be not perfectly correct; but might from the grammatical order seem to imply that the *arbitrators* and the *umpire* should *all join* together in making an award, yet an award made by the arbitrators without the participation of the umpire, will be considered as satisfying the terms of the submission. *Roll. Abr.* tit. *Arbitr. p.* 6. And on the other hand, an umpirage made by the umpire jointly with the arbitrators is good; their approbation, shown by joining with him, being mere surplusage, does not render the instrument purporting to be *his* umpirage in any degree less the act of *his* judgment. *Soulsby* v. *Hodgson*, 2 *Black.* 463.

Unless it be expressly provided in the submission, that a *less number than all* the arbitrators named may make the award, the concurrence of all is necessary; and where such a proviso *is* made, all must be present, unless those who do not attend had proper and sufficient notice, and are wilfully absent. *Barnes*, 57.

As to the necessity imposed on the arbitrators or umpire of *giving notice of* their award, the following are the clearest determinations. If the award be made before the day limited in the submission, the parties shall not be bound by any thing awarded to be done before that day, unless they have notice; but they must take notice at their peril of any thing ordered *at* the day. 8 *Edw.* IV. 1. *Br.* 37. *Kielw.* 175. See *Cro. Eliz.* 97. *Cro. Car.* 132, 133.

It has long been the practice to guard against the consequences of the want of notice, by inserting a proviso in the condition of the arbitration-bond not only that the award shall be *made*, but that it shall be *delivered* to the parties by a certain day; and then the bond will not be forfeited by non-performance, unless the party not performing had notice; and the award ought to be delivered to *all* the persons who are parties on either side. *Hungate's* case, 5 *Co.* 103. *Cro. Eliz.* 885. *Mo.* 642.

The object of every reference is a *final* and certain *determination* of the controversies referred. A *reservation* of any point for the *future decision* of the arbitrator, or of a power to *alter* the award, is inconsistent with that object; and therefore it is established as a general rule that such a reservation is void: but the reservation of a *mere ministerial act*, as the measuring of land, the calculation of interest at a rate settled, &c. does not vitiate the award. 12 *Mod.* 139. 2 *Roll. Rep.* 189. 214, 215. *Palm.* 110. 146. *Cro. Jac.* 315. *Hob.* 218. *Lutw.* 550. *Hardr.* 43.

The submission to the decision of an individual, arises from the confidence which the parties repose in his integrity and skill; and is merely personal to him; it is therefore inconsistent that the arbitrators or umpire should *delegate* any part of their authority to another: and such delegation is absolutely void. But it was settled in the case of *Lingood* v. *Eade*, 2 *Atk.* 501. (515.) that arbitrators where they award the *substance* of things to be done, may refer it to another to settle the *manner* in which it shall be put in execution.

Since the introduction of references at *nisi prius*, there can be no question, but the arbitrator has a jurisdiction over the *costs* of the action, as well as over the subject of the action itself; unless some particular provision is made to the contrary by the form of the submission. Instead of ascertaining the costs, the arbitrator may refer them

to be taxed by the proper officer of the court, but to no one else. 2 *Atk.* 504. (519). 1 *Salk.* 76. 6 *Mod.* 195. *Hardw.* 181. *Barnes*, 56. 58. 1 *Sid.* 358. *Stra.* 737. 1035. *Com.* 330. When it is agreed that costs shall abide the event, it means the *legal* event. See 3 *Term Rep.* 139. And also as to awarding the costs *of the arbitration*, 2 *Term Rep.* 645. And the arbitrators may award damages to either party, though in point of law there was no cause of action. 2 *Vent.* 243. If the arbitrator takes no notice of the costs, but awards mutual releases, it shall be presumed to be meant that each party shall pay his own costs. See *Kyd*, 143.

V. EVERY AWARD should be consistent with the terms of the submission; the whole authority of the arbitrators being derived from thence. Therefore,

1. The award must not extend to *any matter not comprehended* in the submission: thus if the submission be confined to a *particular* subject of dispute, while there are other things in controversy between the parties, an award which extends to any of these other things is void as far as it respects them. 2 *Mod.* 309.

If two submit to the award of a third person all *demands* between them, without more; the word *demands*, implies all matters between them concerning the lands of both parties which are the subjects of variance. 1 Ld. *Raym.* 115. *Keilw.* 99.

If the submission be, "of all causes of action, suits, debts reckonings, accounts, sums of money, claims and demands," an award, "to release all bonds, specialties, judgments, executions and extents," is within the submission; for, as all *debts* are submitted, of course a release may be awarded of the *securities* for them. 2 *Saund.* 190.

Where the submission is, "of all debts, trespasses and injuries," an award "to release all actions, debts, duties and demands," does not exceed the submission; the word *injuries* comprehending demands. 3 *Bulst.* 312.

The rule however is not so strictly interpreted as to extend to every thing *literally* beyond the submission; if the award be of any thing depending on the principal, it is good. *Roll. Abr.* B. 2. C. 4, 5, 6.

Thus if the submission be of all trespasses, and the award be, "that one shall pay to the other 10*l.* and that he shall *enter into a bond* for the sum;" this is good, because it only renders the award more effectual. *Kyd*, 96.

In like manner if it can reasonably be presumed that nothing is in reality awarded beyond the submission, it has in general been supported. 10 *Co.* 131, 132. *Jenk.* 264. *Roll. Abr.* 21. See 6 *Mod.* 232.

On the submission of a *particular* difference when there are other matters in controversy, though an award of a *general release* is void; yet the proof of such other disputes existing is thrown on the party objecting. 2 *Mod.* 309. 1 *Sid.* 154. *Vide Hob.* 190. (See *post*, division 3. of this head.)

If in a similar case the arbitrators award "that all suits shall cease," this shall be confined to suits relating to the subject of the submission, and void only for the residue. 1 *Roll. Rep.* 362. 2 *Roll. Rep.* 192. *Cro. Jac.* 663.

On a dispute between a parson and one of his parishioners, whether the tithes should be paid in kind or not; the arbitrator awarded that

the parson should have 7*l.* for the tithes due before the submission, and that the parishioner should pay 4*l.* annually for the *future* tithes. This was held to be a good award, because the submission comprehended a question concerning the future rights. *Roll. Arbitr.* D. 8. But an award made on the 23d of *June*, ordering so much rent to be paid, which by the award itself appeared not to be due till the 24th, was held bad. 10 *Mod.* 204.

If partners refer all matters in difference between them, the arbitrators may dissolve the partnership. 1 *Black. Rep.* 475.

Where the submission is by reference at *nisi prius*, the order in which the words are placed in the rule of reference, gives no material distinction with respect to the power of the arbitrator. If the reference be "of all matters in dispute in the cause between the parties," the power of the arbitrator is confined solely to the matters in dispute in that suit. If it be "of all matters in difference between the parties in the suit," his power is not confined to the subject of that particular cause, but extends *to every matter* in dispute between them. 2 *Black.* 1118. 2 *Term Rep.* 644, 645. 3 *Term Rep.* 626.

As an award of a thing out of the submission cannot be enforced by an action at law, so neither shall a man by such an award be precluded from claiming his right in equity. *Finch. Rep.* 141.

2. The award should *not extend to* any who is *a stranger* (that is, not a party) to the submission. Thus if two submit to arbitration concerning the title to certain lands, and the arbitrators award that all controversies touching the land shall cease: and that one of the parties, *his wife and son, his heir apparent*, by his procurement shall make to the other such assurance of the land as the other shall require, this is void; because the wife and son are strangers to the submission. *Roll. Arbitr.* N. 9. and see *Samon's* case, 5 *Rep.* 77. b.

Lord *Coke* (10 *Rep.* 131. b.) says, that an award is void, which directs money to be paid by one of the parties to a third person not included in the submission; but this must be understood to hold good only when such payment *can be of no benefit* to the other party; for an award that one of the parties shall pay so much to the *creditor* of the other, in discharge of a debt, is unquestionably good. 1 Ld. *Raym.* 123. *Roll. Arbitr.* E. 6. F. 8.

And in general a distinction is taken between the case of an act awarded to be done *by* a stranger, and that of an act awarded to be done *to* him, by a party to the submission: in the latter case the award is said to be good; and if the stranger will not accept the money awarded to be paid to him, the party's obligation is saved. 3 *Leon.* 62.

So where a stranger is only an *instrument* to the performance of the award, no objection shall be allowed on that account: as if it be, that one of the parties shall surrender his copyhold into the hands of two tenants of the mansion who shall present the surrender; this award is good. *Roll. Arbitr.* E. 7, 8. 1 *Keb.* 569. and see division 4. of this head.

If the persons comprehended in the award were *in contemplation* of the submission, though they were not directly parties to it, yet the award is good. *Lutw.* 530. 571. 1 *Mar.* 78. *Comyns*, 183. *Roll. Arbitr.* B. 18.

An award shall not affect the *rights* of persons not parties to the submission. *Finch.* 180. 184. and see *Id.* 141.

3. The award ought not to be of *part only* of the things submitted. This however must be understood with a considerable degree of limitation; for though the words of the submission be more comprehensive

than those of the award, yet if it do not appear that any thing else was in dispute between the parties, beside what *is* comprehended in the award, it will be good. 8 *Co.* 98. *Roll. Abr.* L. 5.

If a submission be " of all the premises *or of any part of them*," in this case the arbitrator may undoubtedly make an award of part only. *Roll. Arbitr.* L. 6.

If an award be made of all matters except a bond, and of this it be awarded that it shall stand, the award is good; for it shall be presumed there was no cause to discharge the bond. *Cro. Jac.* 277. 400. *Bridg.* 91.

If arbitrators award for one thing, and say that *they will not meddle with the rest*, all is void; because they have not pursued their authority. *Cro. Eliz.* 858. See *Dyer*, 216, 217.

Where a submission is of certain matters specifically named, with a provisional clause " so that the award be made *of and upon the premises*," the arbitrator ought to make his award of all, otherwise it will be void. 8 *Co.* 98. *Goldsb.* 125. *Roll. Arbitr.* L. 9.

But where the submission is general of *all matters in difference* between the parties; though there should happen to be many subjects of controversy between them, if only one be *signified* to the arbitrator, he may make his award of that: he is, in the language of Ld. *Coke*, in the place of a judge, and his office is to determine according to what is alleged and proved. It is the business of the parties grieved, who know their own particular grievances, to signify their causes of controversy to the arbitrator; for he is a stranger, and cannot know any thing of their disputes but what is laid before him. 8 *Co.* 98. b. 1 *Brownl.* 63. 2 *Brownl.* 309.

In the case of such a general submission, if an award concerning one thing only be made, it shall be presumed (till the contrary be shown by the party objecting) that nothing else was referred. *Cro. Jac.* 200. 355. 1 *Burr.* 274. *et seq.* But the arbitrators ought to decide on all matters *laid before them*, or they cannot do complete justice. And it is said, that on a reference by rule of a court of equity, the award ought to comprehend all the matters referred. 1 *C. C.* 87. 186.

It is however no valid objection to an award that the arbitrator had notice of a certain demand, and that he made no award of that, if in other respects the award be good; as, though the sum in question may not be mentioned in the award, the arbitrator may have shown his opinion that the demand was unfounded; as, by ordering general releases, &c. See 1 *Saund.* 32.

An award of one particular thing for the ending of a hundred matters in difference is sufficient, provided it concludes to them all. 1 *Keb.* 738. 1 *Lev.* 132, 133.

4. If an award be to do any thing which is *against law*, it is *void*, and the parties are not bound to perform it. *Roll. Arbitr.* G. 1 *Sid.* 12. 2 *Vent.* 343. So also is an award of a thing which is *not* physically or morally *possible*, or in the power of the party to perform; as that he shall deliver up a deed which is in the custody or power of a person over whom he has no control. 12 *Mod.* 585. and see *Roll.* tit. *Arbitr.* And an award that the defendant shall be bound with sureties such as the plaintiff shall approve, is void; for it may be impossible to force the approbation of the plaintiff. 3 *Mod.* 272, 273. But in this case the party should enter into a bond himself and tender it to the plaintiff.

Where an award is that one of the parties shall procure a stranger to do a thing, there is a distinction taken between the case where he has

no power over the stranger, to compel him, and where he *has* power either by the common law or by bill in equity. In the former case, the award is void for so much as concerns the stranger. In the latter it is good. *Roll. Arbitr.* F. 1. 248. n. 11. *March.* 18. 1 *Mod.* 9. (See *ante*, division 2.)

Neither must an award be to do a thing *unreasonable*; nor by the performance of which the party awarded to do the acts may subject himself to an action from another. *Roll. Arbitr.* E. 2, 3. F. 10. 2 *Bulst.* 39. 1 *Keb.* 92. 1 *Roll. Rep.* 6. *Cro. Car.* 226. 3 *Lev.* 153.

What shall or shall not be unreasonable, is however matter of construction in which the cases differ considerably. See *Roll. Arbitr.* B. 12. J. 4. 5. 2 *Mod.* 304.

An award must not be of a thing which is merely *nugatory*, without any advantage to the parties. *Roll. Arbitr.* J. 10. 15. And if a man and a woman submit to arbitration, and it be awarded that they shall intermarry, this is said not to be binding (*Id. ib.*) for one reason among others, that it cannot be presumed to be advantageous to them. Mutual releases are advantageous, and therefore an award of them is good. *Freem.* 51.

5. The award must be *certain* and *final*. As the intention of the parties in submitting their disputes to arbitration, is to have something ascertained, which was uncertain before, it is a positive rule that the award ought to be so plainly exprest, that the parties may certainly know what it is they are ordered to do. 5 *Co.* 77. b. 78. a.

On the construction of certainty and uncertainty, the cases are multifarious; and it may be observed, that they principally depend on such circumstances as are peculiar to each case, and very seldom form any general precedent. The *rule* therefore serves better to regulate the conduct of arbitrators, than the numerous *exceptions*: as it is the interest of the party against whom the award is made to be ingenious in finding out objections, an award cannot be too particular or precise in laying down what is to be done by the parties, and the *manner*, *time* and *place* of their doing it. Though the two latter have been deemed immaterial, (*Stra.* 905.) yet it is safest to specify them.

Awards are now so liberally construed, that trifling objections are not suffered to prevail against the manifest intent of the parties. See 1 *Burr.* 277. and *post*, division 6. In favour of the equitable jurisdiction of the arbitrators, if that, to which the objection of uncertainty is made, can be *ascertained* either by the context of the award, or from the nature of, and circumstances attendant on, the thing awarded, or by a manifest reference to something connected with it, the objection shall not prevail. See 2 Ld. *Raym.* 1076. 12 *Mod.* 585. *Lutw.* 545. *Stra.* 903. Where there is no *date* to the award, it shall be taken as dated from the day of the delivery, which may be ascertained by averment; and all other uncertainties may be helped by proper averments in pleading. 1 Ld. *Raym.* 246. 612. *Cro. Eliz.* 676. *Sty.* 28. 2 *Saund.* 292.

As an award must be certain, so also must it be *final* at the time of making it; (see 1 *Sid.* 59. *Lutw.* 51. *Comb.* 456.) in order to prevent any future litigation on the subject of the submission.

On this principle, an award that each party shall be *nonsuited* in the action which he has brought against the other, is not good; because (among other reasons) a nonsuit does not bar them from bringing a new action: but an award that a party shall *discontinue* his action, or enter a *retraxit*, is good. 2 *Godb.* 276. *Roll. Arbitr.* F. 7.

An award, that all suits shall cease—or, that a bill in chancery shall be dismissed—or, that a party shall not commence or prosecute a suit—is final; for it shall be taken to mean, that the *debt* and *action* shall *cease for ever*; that alone being a substantial performance of the award. 6 *Mod.* 33. 232. 2 Ld. *Raym.* 961. 964. 1 *Salk.* 74, 75. *Roll. Arbitr.* O. 7. But see 2 *Stra.* 1024.

Lastly, The award must be *mutual*; not giving an advantage to one party without an equivalent to the other.

The principal requisite, however, to form that mutuality, about which so much is said in all the cases usually classed under this rule, is nothing more than that the thing awarded to be done should be a final *discharge* and *satisfaction* of all debts and claims by the party in whose favour the award is made, against the other, for the matters submitted; and therefore the present rule amounts to nothing more than a different form of expression of that which requires that an award should be final. See *Comb.* 439. 1 Ld. *Raym.* 246. *Cro. Eliz.* 904. *Comyns*, 328.

6. The rules which at present govern *the construction of awards* are, that they shall be interpreted, as deeds, according to the intention of the arbitrators. That they shall not be taken strictly, but liberally, according to the intent of the parties submitting, and according to the power given to the arbitrators. 1 *Burr.* 277. 2 *Atk.* 504. (519.) That all *actions* mentioned in the award shall be construed to mean, all actions over which the arbitrators have power by the submission. That if there be any contradiction in the words of an award, so that the one part cannot stand consistently with the other, the first part shall stand and the latter be rejected; but that if the latter be only an explanation of the former, both parts shall stand. *Palm.* 108. 3 *Bulst.* 66, 67. And that where the words of an award have any ambiguity in them, they are always to be construed in such a manner as to give effect to the award. 6 *Mod.* 35.

Much unnecessary difficulty occurs in all the old reports on the construction that ought to be put on the award of a *release*; but it is clearly settled, that an award of releases *up to the time of making the award*, is not altogether void; but that it shall be construed so as to support the award; and that for two reasons; 1st. That it shall be presumed that no difference has arisen since the time of the submission, unless it be specially shown that there has: 2d. That a release to the time of the *submission* is a good performance of an award, ordering a release to the time of the *award*; not because the meaning of the arbitrators is so, but because their meaning must be controlled so far as it is void, by construction of law. 10 *Mod.* 201. 6 *Mod.* 33. 35. 2 Ld. *Raym.* 964, 965. 1 Ld. *Raym.* 116. See 12 *Mod.* 8. 116. 589. *Godb.* 164, 165. 2 *Keb.* 431. 1 *Sid.* 365.

Formerly, if one part of an award was void, the whole was considered so: now, however, it is the rule of the courts, in many cases, to enforce the performance of that, which had it stood by itself, would have been good, notwithstanding another part may be bad. 12 *Mod.* 534. but if that part of the award, which is void, be so connected with the rest, as to affect the justice of the case between the parties, the award is void for the whole. *Cro. Jac.* 584.

When, from the tenor of the award, it appears that the arbitrator has intended that his award should be mutual, awarding something in favour of one of the parties as an equivalent for what he has awarded in favour of the other; if then that which is awarded on the one side, be *void*, so that performance of it cannot be enforced, the award is void *for the*

whole, because that mutuality, which the arbitrator intended, cannot be preserved. *Yelv.* 98. *Brown.* 92. *Roll. Abr. K.* 15. *Cro. Jac.* 577, 578.

If one entire act awarded to be done on one side, comprehend several things, for some of which it would be good, and for others not, the award is bad for the whole, because the act cannot be divided. *Cro. Jac.* 639.

When it appears clearly that both parties have the full effect of what was intended them by the arbitrator, though something be awarded which is void; yet the award shall stand for the rest. 1 Ld. *Raym.* 114. *Lutw.* 545. and see 12 *Mod.* 588.

An award ought regularly to be made *in writing*, signed and sealed by the arbitrators, and the execution properly witnessed: it may however be made by parol, if it is so expressly provided in the submission.

7. It is not in all cases absolutely necessary that *performance* should be exactly according to the words of the award; if it be substantially and effectually the same, it is sufficient. 3 *Bulst.* 67. And if the party in whose favour the award is made, accept of a performance differing in circumstances from the exact letter of the award, that is sufficient; for *consensus tollet errorum.* 3 *Bulst.* 67.

Where the concurrence and presence of both parties is not absolutely necessary to the performance, each ought to perform his part *without request* from the other. 1 Ld. *Raym.* 233, 234. and see *Roll. Arbitr.* Z. 6. If an award order that the defendant shall reassign to the plaintiff, certain mortgaged premises, it will be a breach if he do not reassign *without request.* 1 Ld. *Raym.* 234.

If the award be to pay *at*, *on* or *before* a particular day, payment before the day is equivalent to payment on the day. 3 *Keb.* 675, 676.

A considerable number of years having elapsed since the making of the award, is no objection to the parties being called upon to perform it. *Finch. Rep.* 384. Nor can the statute of limitations (28 *Jac.* I. *c.* 16. § 3.) be pleaded in bar. 2 *Saund.* 64.

On an award, that one party shall enter into a security for money, (note, bond, &c.) the giving the security is a performance of the award; and on non-payment, the person to whom it is given can only proceed against the other on that security, and not on the submission or arbitration-bond. *Bendl.* 15. *Stra.* 903. 1082.

An award that the defendant shall pay to the plaintiff such a sum of money, unless within twenty-one days, (which was the time limited for making the award,) the defendant shall exonerate himself by affidavit from certain payments and receipts, in which case he was only to pay a less sum, is illegal and void, because uncertain and inconclusive. 7 *Term Rep.* 73.

If an award be made on an improper stamp, and no application be made to enforce it, the court will not set it aside. *Preston* v. *Eastwood*, 7 *Term Rep.* 95.

Two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award; the arbitrator awarded each of the two to pay a certain sum to the third; held that they were jointly responsible for the sum awarded to be paid by each. *Mansell* v. *Burredge*, 7 *Term Rep.* 352.

VI. THE REMEDY *to compel performance of an award* is various, according to the various forms of the submission.

Though the submission be verbal, an action may be maintained on the award, whether it be for the payment of money, or for the performance of a collateral act. 1 Ld. *Raym.* 122. and see *ante*, division I.

Where the award is either verbal, or in writing, *for the payment of money*, and made on a submission, either by parol or by deed, the action on the award may be an action of *debt:* it may also be an action of *assumpsit:* and in all other cases on a parol submission, an *assumpsit* is the *only* species of action that can be maintained. 1 *Leon.* 72. *Cro. Jac.* 354.

In all actions on the award, it must necessarily be shown, in direct unequivocal terms, that the parties *submitted*, before the award can be properly introduced. 2 *Stra.* 923. The submission too must be so stated as to correspond with the award, and to support it. 2 *Lev.* 235. 2 *Show.* 61.

When the action is on a mutual *assumpsit*, to pay a certain sum *on request*, if the defendant should not stand to the award, an *actual* request to pay that sum, before the action brought, must be positively stated. 1 *Saund.* 33. 2 *Keb.* 126.

When the submission is by bond, if the award be for payment of money, an action of *debt* on the award lies, as well as an action on the *bond;* but the latter is the action most usually brought; in this the order of pleading commonly observed is, that the plaintiff declares on the bond, as in ordinary cases of action on a bond; the defendant then prays *oyer* of the condition, which being set forth, he pleads that the arbitrators, or the umpire, made *no award;* then the plaintiff replies, not barely alleging that they did, but setting forth the award at large, and assigning the breach by the defendant: (as to which see *post*, and *Winch.* 121. *Yelv.* 24. 78. 153. 1 Ld. *Raym.* 114. 123. 2 *Vent.* 221. 3 *Lev.* 293.) and on that the whole question arises as on an original declaration. The defendant than either rejoins, that they made "no *such* award," (*Jenk.* 116. *Cro. Jac.* 200. *Palm.* 511.) on which the plaintiff takes issue; or, he demurs, and the plaintiff joins in demurrer. *Vide Stra.* 923. *Freem.* 410. 415. 1 *Sid.* 370. 3 *Burr.* 1729, 1730. 5 *Edw.* IV. 108. *Brooke, pl.* 33. *Cro. Eliz.* 838.

Every thing necessary to show that the award was made according to the terms of the submission, must be stated by the plaintiff. *Lutw.* 536. 2 Ld. *Raym.* 989. 1076. Where also, by the terms of the award, performance on the part of the plaintiff is a *condition precedent* to that on the part of the defendant; there the plaintiff must show that he has done every thing necessary to entitle him to call on the opposite party. But tender by the plaintiff, and refusal by the defendant, will be sufficient, unless the thing to be done by the plaintiff can be done without the concurrence of the other. *Hardr.* 43, 44.

A *material* variance between the real award, and that set forth in the pleadings, will be fatal to the plaintiff; and if on the trial the jury doubt whether the variance is material or not, a special verdict may be taken for the opinion of the court. 1 *Salk.* 72. 1 Ld. *Raym.* 715. S. C. 1 *Burr.* 278.

In an action on the *award*, the defendant may plead "that he did not submit;" but in an action on the bond such a plea is not good. 1 *Sid.* 290. 2 *Stra.* 923.

More exactness is required in setting forth a written than a verbal award; in the former nothing must be alleged by inducement. 2 *Vent.* 242. The breach must also be assigned with such precision, as to show that the award was made of the thing in which the breach was

alleged. 1 *Roll. Rep.* 8. *Cro. Jac.* 339. 2 *Bulst.* 93. And in an action on the *assumpsit*, to perform the award, the plaintiff may assign several breaches. *Jenk.* 264. and see *Yelv.* 35. But in an action on the arbitration bond, where several things are ordered to be done by the defendants, it is not necessary to assign breaches of every matter, because the breach of any one is a forfeiture of the penalty of the bond; and when the plaintiff has once recovered, then he can never maintain another action on the same bond, to recover the penalty again on a second breach. 2 *Wils.* 276. 279. and *vide Id.* 293. *S. P.*

If the *defendant* set forth the award, and allege the performance generally, and then on a breach being assigned in the replication, he rejoin, and show a *special* performance, this will be a departure. 1 Ld. *Raym.* 234.

It has several times happened that the defendant, by setting forth an award partially, has imposed considerable difficulty on the plaintiff how to answer him. (See 1 *Keb.* 568. 1 *Saund.* 326. 3 *Lev.* 165. *Lutw.* 525.) In this case, if the plaintiff demand *oyer* of the award, and have it set forth at full length, assigning a breach in the same manner as if the defendant had pleaded *no award*, he will be secure against any objection from the manner of pleading. *Lutw.* 451. and see *Godb.* 255. 1 *Roll. Rep.* 6.

If, from the default of the defendant, no award has been made within the time limited, the plaintiff may, to the plea of *no award*, reply that default of the defendant. See 8 *Co.* 81. On a submission by bond, providing that the award shall be made within a limited time, though that time is enlarged *by mutual consent*, and the award made within the enlarged time, an action cannot be maintained on the bond to recover the penalty of non-performance. 3 *Term Rep.* 529. n. And as to such enlargement of time, see 2 *Term Rep.* 643, 644. 3 *Term Rep.* 601.

On the practice obtaining, of references at *Nisi Prius*, performance of the award was consequently enforced by means of an *attachment*, and the following is the present course of proceeding to obtain that remedy. The award must be tendered to the party bound to perform it, and on his refusal to accept it, affidavit must be made of the due execution of the award, and of such tender and refusal; and on that, application made to the court to make the order of *Nisi Prius* a rule of court, a copy of this rule must be personally served on the party; and if he still refuse to accept the award, an affidavit must be made of such service and refusal; on which the court will grant an attachment of course. 1 *Crompt. Pract.* 264. When the award is accepted, but the money being demanded is not paid, an affidavit must be made of such refusal, and of the due execution of the award. 2 *Black. Rep.* 990, 991. Where there is any dispute as to the proper performance of an award, it is discretionary in the court to grant or refuse an attachment. 1 *Stra.* 695. 1 *Burr.* 278.

When an award is not for the payment of money, but for the performance of any collateral act, it may sometimes be enforced by a *bill in equity*, on which the court will decree a specific performance. See 1 *Atk.* 74. (62.) 1 *Eq. Abr.* 51. 1 *C. R.* 46. 3 *C. R.* 20. 2 *Vern.* 24. 3 *P. Wms.* 187. 189, 190. But though a court of equity may assist a plaintiff to procure the execution of an award, it will not compel a defendant to discover a breach by which he may charge himself with the penalty of a submission-bond. *Bishop* v. *Bishop*, 1 *C. R.*

Upon an application for an attachment for non-performance of an award, for any illegality apparent on the award, though the time for

applying to set aside the award is expired. *Pedley* v. *Goddard*, 7 *Term Rep.* 73. But the court will not set aside an award for any defect after the time limited by the stat. 9 and 10 *Wm.* III. c. 15. *Ib.*

If an arbitrator, under a reference between *A.* and *B.* administrators, award that *B.* shall pay a certain sum, as the amount of *A.'s* demand, *B.* cannot afterwards object that he had no assets, but may be attached for non-payment. *Worthington* v. *Barlow*, administratrix, 7 *Term Rep.* 453.

An agreement to enlarge the time for making an award must contain a consent that it shall be made a rule of court, otherwise no attachment will be granted for not performing an award made under it. *Jenkins* v. *Law*, 8 *Term Rep.* 87.

To covenant in a deed, (made for the performance of several matters,) the defendant cannot plead that, in the deed, there is a covenant that in case any difference should arise between the parties respecting any part of the agreement, it should be settled by three arbitrators, to be chosen, &c. and that he offered to refer the matter in dispute, &c. but the plaintiff refused, &c. *Thompson* v. *Charnock*, 8 *Term Rep.* 139.

A. and *B.* in 1797, assigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound for the same; under which the plaintiff, in 1799, submitted to arbitration the matters in difference *then* subsisting between his principals and the defendants; and the plaintiff and defendants promised to each other to perform the award. The arbitrators having awarded a sum to be paid to the plaintiff as such attorney, he may maintain an action for it in his own name. *Banfill* v. *Leigh*, 8 *Term Rep.* 571.

Applications to set aside awards, though for objections appearing on the face of them, must be made within the time limited by the 9 and 10 *Wm.* III. c. 15. *Lowndes* v. *Lowndes*, 1 *East*, 276.

Where a verdict is taken, *pro formâ*, at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount, without first applying to the court for leave so to do. *Lee* v. *Lingard*, 1 *East*, 401.

If an arbitrator profess to decide upon the law, and he mistakes it, the court will set aside the award, although the arbitrator's reasons do not appear upon the face of the award, but only upon another paper delivered therewith. So it seems it would be if such reasons appeared in any other authentic manner to the court. *Kent* v. *Elstob et al.* 3 *East*, 18.

A. declared in covenant against *B.* and her husband, for that *B.* before her intermarriage, covenanted with *A.* by deed, to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives; and *A.* protested that *B.* had not, before her intermarriage, performed her part of the covenant, averred that, *after* the making the indenture, *and the intermarriage of the defendants*, the arbitrator awarded *B.* to pay a certain sum, and then alleged a breach for non-payment of such sum. After verdict on *non est factum* pleaded; held that, upon this declaration, it must be taken that *B. intermarried after* the submission, and *before* the *award* made; in which case, although the plaintiff could not recover upon the breach assigned *for non-payment of the sum awarded*, because the marriage was a *countermand* to the *authority of the arbitrator*; yet, as by the marriage itself *B.* had by her

own act put it out of her power to perform the award, the covenant to *abide* the award was broken, and therefore the judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach of non-performance of the award.* *Charnley* v. *Winstanley et Ux.* 5 *East*, 266.

Where a verdict is taken for a certain sum, subject to the award of an arbitrator, to whom all matters in difference are referred by a rule of *Nisi Prius*, he cannot award a *greater* sum than that for which the verdict was taken; and if he do, no *assumpsit* by implication will arise to pay even to the extent of the verdict so taken. *Bonner* v. *Charlton*, 5 *East*, 139.

VII. RELIEF may be obtained *against an award*, made contrary to the prescribed rules of law, when the award is put in suit. But when the submission is by the mere act of the parties, the defendant is not permitted to impeach the conduct of the arbitrators at law; so as to make it a defence to an action on the award or submission-bond. See 1 *Saund.* 327. 2 *Wils.* 149. In such case the only relief is in equity. 2 *Vezey*, 315. But a court of equity will not interfere to set aside an award, where the submission is voluntary, (or by order of *Nisi Prius*, 1 *C. C.* 140. 1 *Vern.* 157.) except for corruption or improper conduct in the arbitrators: or where the award appears on the face of it to be contrary to the rules of equity; as, to the prejudice of an infant, &c. 1 *C. C.* 276. 279, 280. 3 *Atk.* 529. (496.) 2 *Eq. Abr.* 63, 64. 3 *C. R.* 49. *Amb.* 245.

In bills to have an award set aside for corruption or partiality, it is usual to make the arbitrators defendants; together with the party in whose favour the award is made. *Finch. Rep.* 141. 3 *Atk.* 644. 397. The arbitrators may plead the award in bar; but they must show themselves impartial, or the court will make them pay costs. 2 *Atk.* 396. (412.)

Where the submission is by order of *Nisi Prius*, or under the stat. 9 and 10 *Wm.* III. a court of equity will not entertain a bill to relieve against an award for corruption or partiality, unless the court of law has not afforded that relief on application; or the time for complaining at law, under the statute, is elapsed. 2 *Atk.* 155. (162.) 396. (412.) 2 *Vez.* 316, 317. See *Bunb.* 265.

By the stat. 9 and 10 *Wm.* III. *c.* 15. It is enacted, That "any arbitration or umpirage, procured by corruption or undue means, shall be void; and be accordingly set aside by any court of law or equity, so as complaint be made to the court, where the rule for submission is made, before the last day of the next term after such arbitration made and published to the parties." See 1 *Stra.* 301. 2 *Burr.* 701. *Barnes*, 55. 57. But it seems that a court of equity may relieve, on manifest grounds, after the time required by the act for complaint at law, though no such complaint is made at all in the common law courts. *Bunb.* 265. 1 *Barn. K. B.* 75. 152.

Where the submission is by reference at *Nisi Prius*, there is no time limited for making an application to set aside an award for any cause. 2 *Atk.* 155. (162.) *Stra.* 301. 2 *Burr.* 701. When the submission is according to the statute, no application can be made to have the award set aside till the *submission* be actually made a rule of court, which may be either before or after making the award. 1 *Stra.* 301. 2 *Vez.* 317. 2 *Stra.* 1178. 3 *P. Wms.* 362.

The most frequent subject of complaint against an award, arises from some imputed *misconduct* of the arbitrators, and when the com-

plaint is made out, it is generally successful: as if one of the arbitrators unjustly exclude the rest from the award; or hold private meetings with one of the parties. 2 *Vern.* 515. or appoint an umpire by lot. *Id.* 485. or manifest any other undue partiality. *Id.* 101. 251. 3 *P. Wms.* 262. 2 *Vez.* 216. 218. 1 *Vez.* 317.

If it appear that the arbitrators went on a plain *mistake*, either as to the law, or in a point of fact, that is an error appearing on the face of the award, and sufficient to set it aside. 2 *Vern.* 705. So if the arbitrators appear to have an *interest* in the subject of reference. 2 *Vern.* 251. So also where any circumstance is *suppressed* or concealed from either of the arbitrators, and the arbitrator declares that had he known the circumstance, he would have made a different award. 1 *Atk.* 77. (64.)

Where the submission is under the statute, or by reference at *Nisi Prius*, the court will, on some occasions, send back the award to be reconsidered, on suggestion that the arbitrator had not sufficient materials before him, and perhaps too to rectify any trifling or apparent mistake; but such application must be made in the former case within the time prescribed by the statute. 2 *Term Rep.* 781.

VIII. An Award *may be pleaded in bar* to every action brought, for a cause or complaint which had been previously referred to the arbitrators, on which the award was made. See 4 *T. R.* 146.

The award thus pleaded, must have all the qualities necessary to constitute a good award; and must be such, if it be be pleaded without performance, that the plaintiff may have a remedy to compel performance: but if performance be alleged, as it may be, (see 1 *Roll. Rep.* 7, 8. *Cro. Jac.* 339. 2 *Bulst.* 93. *Roll. Arbitr.* F. 2. *Al.* 86. 3 *Leon.* 62.) even a void award may frequently be a good bar. An award, however, which is in itself uncertain, and cannot be ascertained by averment, cannot be pleaded in bar. 2 *Saund.* 292. 2 *Keb.* 736.

The cases which have determined an award not to be pleadable in bar, where it does not create a new duty, seem irreconcilable to the present state of the law on the subject—particularly as they allow that an action may be maintained on the submission, whether that is by bond or otherwise. 1 Ld. *Raym.* 248. 12 *Mod.* 130. *Comb.* 440. 1 *Salk.* 69. *Lutw.* 56, 57.

An award however, which does not extend to *the whole* of the thing demanded, is reasonably not a good plea to an action on the demand. *Al.* 5. 1 Ld. *Raym.* 612. See *Lutw.* 51. And in order to make an award a good plea, it must appear that both parties were equally bound by it.

Where the plaintiff lays several counts in his declaration, and the award, from the terms of it, can only be a bar to one of them; if in reality they are all for the same cause, the best way of pleading seems to be, to plead the award to that count to which it is answerable in terms; and the general issue to the rest. *Kyd*, 245.

There were anciently some distinctions in the manner of pleading an award, with respect to the necessity of alleging performance of the thing awarded, which are not now essential; for since it has been held that an action will lie on the mere submission, it is in no case necessary for the defendant, in pleading an award in bar of an action, to allege performance of the thing awarded, unless where the award is void, and consequently the plaintiff could not enforce it. 1 Ld. *Raym.* 122.

Where the lessor of the plaintiff, and the defendant in ejectment, had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, the award concludes the defendant

from disputing the lessor's title in an action of ejectment. *Doe*, d. *Morris et al.* v. *Prosser*, 3 *East*, 15.

FORM of an AWARD, on a SUBMISSION.

TO all people *to whom this present writing indented of* Award *shall come, greeting.* Whereas *there are several accounts depending, and divers controversies and disputes have lately arisen between* A. B. *of*, &c. *gent. and* C. D. *of*, &c. *all which controversies and disputes are chiefly touching and concerning*, &c. And whereas, *for the putting an end to the said differences and disputes, they the said* A. B. *and* C. D. *by their several bonds or obligations bearing date*, &c. *are become bound each to the other of them in the penal sum of*, &c. *to stand to and abide the* award *and final determination of us*, E. F. G. H. &c. *so as the said* award *be made in writing, and ready to be delivered to the parties in difference on or before*, &c. *next, as by the said obligations, and the condition thereof may appear.* Now know ye, *That we the said Arbitrators, whose names are hereunto subscribed, and seals affixed, taking upon us the burthen of the said* award, *and having fully examined and duly considered the proofs and allegations of both the said parties, do, for the settling amity and friendship between them, make and publish this our* award, *by and between the said parties, in manner following, that is to say*, First, *We do award and order, that all actions, suits, quarrels and controversies whatsoever had, moved, arisen or depending between the said parties in law or equity, for any manner of cause whatsoever, touching the said*, &c. *to the day of the date hereof, shall cease and be no further prosecuted, and that each of the said parties shall pay and bear his own costs and charges, in anywise relating to or concerning the said premises.* And *we do also* award *and order that the said* A. B. *shall pay, or cause to be paid to the said* C. D. *the sum of*, &c. *within the space of*, &c. *And also at his own costs and charges do*, &c. And *we do* award *and order that*, &c. And lastly, *we do* award *and order that the said* A. B. *and* C. D. *on payment of the money above mentioned, shall in due form of law, execute each to the other of them general releases, sufficient for the releasing by each to the other of them, his executors and administrators, of all actions, suits, arrests, quarrels, controversies and demands whatsoever touching or concerning the premises aforesaid, or any matter or thing thereunto relating, from the beginning of the world until the day of*, &c. *last.* In witness, &c.

THE READER is thus presented with a complete abridgment of the law on this subject. Were it accurately attended to, and were the arbitrators uninfluenced by motives of partiality, *arbitration* would be a very desirable way to put an end to many suits, instead of affording grounds of new proceedings, as they now too frequently do. As it is, the subjects most proper for arbitration seem to be (in the words of the author, to whom we have confessed ourselves so much indebted on this subject) "Long and intricate accounts—Disputes of so trifling a nature, that it is of little importance to the parties in whose favour the decision may be given, provided at all events there be a decision—and—questions on which the evidence is so uncertain, that it is much better to have a decision, whether right or wrong, than that the parties should be involved in continual litigation."

AWM, or *aume*, (Teut. *ohm. i. e. cadus vel mensura.*) A measure of *Rhenish* wine, containing forty gallons; mentioned in some statutes. This word is otherwise written *awame*. The rood of *Rhenish* wine of

Dordreight is ten *awmes*, and every *awme* 50 gallons: The rood of *Antwerp* is fourteen *awmes*, and every *awme* 35 gallons.

AWNHINDE. See *Third-night-awn-hinde.*

AYLE. See *Aile.*

AZALDUS, A poor horse or jade. *Claus.* 4 *Edw.* III.

B.

BACA, A hook, or link of iron, or staple. *Consuetudin. domûs de Farendon, MS. f.* 20.

BACINNIUM, or *Bacina*, A basin or vessel to hold water to wash the hands. *Simeon Dunelme, anno* 1126. *Mon. Angl. tom.* 3. *p.* 191. *Petrus filius Petri Picot tenet medietatem Heydenæ per serjantiam serviendi de bacinis.* This was a service of holding the *basin*, or waiting at the *basin*, on the day of the king's coronation. *Lib. Rub. Scaccar. f.* 137.

BACHELERIA, The commonalty or yeomanry, as distinguished from the baronage. *Annal. Burton, p.* 426. *sub an.* 1259.

BACHELOR, *Baccalaureus*, from the Fr. *bachelier*, viz. *tyro*, a learner.] In the universities there are *bachelors of arts*, &c. which is the first degree taken by students, before they come to greater dignity. And those that are called *bachelors* of the companies of *London*, are such of each company as are springing towards the estate of those that are employed in council, but as yet are inferiors; for every of the twelve companies consists of a *master*, two *wardens*, the *livery*, (which are assistants in matters of council, or such as the assistants are chosen out of,) and the *bachelors*, in other companies, called the *yeomanry*. The word *bachelor* is also used, and signifies the same with *knight-bachelor*, a simple knight, and not knight banneret, or *knight of the Bath*. The name of bachelor was also applied to that species of esquire, ten of whom were retained by each knight banneret on his creation. *Anno* 28 *Edw.* III. a petition was recorded in the *Tower*, beginning thus: *A nostre Seigneur le Roy monstrent votre* simple bachelor, *Johan de Bures, &c. Bachelor* was anciently attributed to the admiral of *England*, if he were under the degree of a baron. In *Pat.* 8 *Rich.* II. we read of a *baccalaureus regis*. Touching the further etymology of this word, see *Spelman.*

The term bachelor also denotes in law a man who has never been married; and as such, taxes have at times been levied, or the taxes laid on others increased, if paid by bachelors: as in the case of the duty on servants, under stat. 25 *Geo.* III. *c.* 43.

BACKBERINDE, *Sax.*] Bearing upon the back, or about a man. *Bracton* useth it for a sign or circumstance of theft apparent, which the civilians call *furtum manifestum. Bract. lib.* 3. *tract.* 2. *cap.* 32. *Manwood* remarks it as one of the four circumstances or cases, wherein a forester may arrest the body of an offender against vert or venison, in the forest: by the assise of the forest of *Lancaster*, (says he,) *taken with the manner*, is when one is found in the king's forest in any of these four degrees, *stable-stand*, *dog-draw*, *backbear*, and *bloody-hand. Manw.* 2 part, *Forest Laws.*

BACO, A bacon hog, used in old charters. *Blount.*

BACTILE, A candlestick properly so called, when formerly made *ex baculo* of wood, or a stick. *Clodingham Hist. Dunelm. apud Wartoni. Ang. Sac. p.* 1723.

Dordreight is ten *awmes*, and every *awme* 50 gallons: The rood of *Antwerp* is fourteen *awmes*, and every *awme* 35 gallons.

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BADGER, From the Fr. *baggage*, a bundle, and thence is derived *bagagier*, a carrier of goods.] One that buys corn or victuals in one place, and carries them to another to sell and make profit by them: and such a one was exempted in the stat. 5 and 6 *Edw.* VI. *c.* 14. from the punishment of an ingrosser within that statute. But by 5 *Eliz. c.* 12. *Badgers* are to be licensed by the justices of peace in the sessions; whose licenses will be in force for one year, and no longer; and the persons to whom granted must enter into a recognisance that they will not by colour of their licenses forestal, or do any thing contrary to the statutes made against forestallers, ingrossers, and regrators. If any person shall act as a *Badger* without license, he is to forfeit 5*l.* one moiety to the king, and the other to the prosecutor, leviable by warrant from justices of peace, &c. *Vide* 13 *Eliz. c.* 25. § 20.

BAG, An uncertain quantity of goods and merchandise, from three to four hundred. *Lex Mercat.*

BAGA, A bag or purse. *Mon. Angl. tom.* 3. *p.* 237.

BAGAVEL. The citizens of *Exeter* had granted to them by charter from king *Edw.* I. the collection of a certain tribute or toll upon all manner of wares brought to that city to be sold, towards the paving of the streets, repairing of the walls, and maintenance of the city, which was commonly called in old *English*, *begavel*, *bethugavel*, and *chippinggavel*. *Antiq.* of *Exeter*.

BAHADUM, A chest or coffer. *Fleta*, *lib.* 2. *c.* 21.

BAJARDOUR, Lat. *bajulator.*] A bearer of any weight or burthen. *Petr. Bles. Contin. Hist. Croyland*, *p.* 120.

BAIL, *ballium*, from the Fr. *bailler*, which comes of the *Greek* Βαλλω, and signifies to deliver into hands.] Is used in our common law for the freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, on surety taken for his appearance at a day and place certain. *Bract. lib.* 3. *tract.* 2. *cap.* 8. The reason why it is called *bail*, is because, by this means, the party restrained is delivered into the hands of those that bind themselves for his forthcoming, in order to a safe keeping or protection from prison: and the end of *bail* is to satisfy the condemnation and costs, or render the defendant to prison.

With respect to bail in *civil cases* it is to be observed, that there is both *common* and *special bail*: common *bail* is in actions of small concernment, being called common, because any sureties in that case are taken; whereas, in causes of greater weight and value, special *bail* or surety must be taken, and they according to the value. 4 *Inst.* 179. See tit. *Appearance*.

By stat. 23 *Henry* VI. *c.* 9. sheriffs, &c. are to let to bail persons by them arrested by force of any writ, in any personal action, &c. upon reasonable sureties, having sufficient within the county to keep their days in such place, &c. as the writs require.

Bail and *mainprize* are often used promiscuously in our law books, as signifying one and the same thing, and agree in this notion, *that they save a man from imprisonment in the common gaol*; his friends undertaking for him, before certain persons for that purpose authorised, that he shall appear at a certain day, and answer whatever shall be objected to him in a legal way. 2 *Hawk. P. C. c.* 15. § 29. 4 *Inst.* 180.

The chief difference is, that a man's *mainpernors* are barely his *sureties*, and cannot imprison him themselves to secure his appearance, *as his bail may*, who are looked upon as his gaolers, to whose custody he is committed, and therefore may take him upon a *Sunday*, *and confine until the next day*, *and then render him.* 6 *Mod.* 231. Ld. *Raym.* 706. 12 *Mod.* 275.

Special bail, are two or more persons who undertake *generally*, or in a *sum certain*, that if the defendant be convicted, he shall satisfy the plaintiff, or render himself to the custody of the marshal; generally there are but *two persons* who become bail for a defendant.

Where the defendant has been arrested or discharged out of custody, upon giving a bail-bond to the sheriff, he must, at the return of the writ, to discharge such bond, appear thereto, namely, by putting in *special bail*, or, as it is termed, bail *above*, so called, in contradistinction to the sheriff's bail, or bail *below*; nor can he render himself, in discharge of such bond, without *first putting in bail above*. 5 *Burr.* 2683.

By rule *M.* 1654, no attorney shall be bail for a defendant in any action, nor his clerk. *Cowp.* 228. n. *Vide Doug. Rep.* 466. that an attorney may be admitted as bail in a criminal case.

No sheriff's officer, bailiff, or other persons concerned in the execution of process, shall be permitted to be bail in any action or suit depending in *K. B.* nor persons outlawed after judgment. *R. M.* 14 *Geo.* II. The keeper of the *Poultry Compter* was rejected. *Doug.* 466.

I. Of Bail in Civil Cases. As to the form and requisites of affidavits to hold to bail, see title *Affidavit*.] In actions of battery, trespass, slander, &c. though the plaintiff is likely to recover large damages, special bail is not to be had, unless by order of court, and the process is marked for special bail; nor is it required in actions of account, or of covenant, except it be to pay money; nor against heirs or executors, &c. for the debt of the testator, unless they have wasted the testator's goods. 1 *Danv. Abr.* 681.

If *baron* and *feme* are sued, the husband must put in bail for both; but if the husband does not appear upon the arrest, the wife must file common bail before she can be discharged; for otherwise the plaintiff could not proceed to obtain judgment. *Golds.* 127. *Cro. Eliz.* 370. *Cro. Jac.* 445. *Sty.* 475. 1 *Mod.* 8. 6 *Mod.* 17. 105. *Tidd's Pract.*

A *feme covert* was discharged out of custody, because she was arrested without her husband; though the writ was sued against both, and *non est inventus* returned as to the husband. 1 *Term Rep.* 486. See tit. *Arrest*.

In all actions brought in *B. R.* upon any penal law, the defendant is to put in but common bail. *Yelv.* 53. In actions where damages are uncertain, bail is to be at the discretion of the court: on a dangerous assault and battery, upon affidavit of special damages, a judge's hand may be procured for allowance of an *ac etiam* in the writ: and in action of *scandalum magnatum*, the court, on motion, ordered special bail. *Raym.* 74. When bail is taken by the chief justice, or other judge, on a *habeas corpus*, the bail taken in the inferior court is dismissed, though the last bail be not filed presently, nor till the next term. *Yelv.* 120, 121. Yet it has been held, where a cause is removed out of an inferior court by *habeas corpus*, if the bail below offer themselves to be bail above, they shall be taken, not being excepted against below, unless the cause comes out of *London*. For the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff: so that the plaintiff had not the liberty of excepting against them, and the clerk is not responsible for their deficiency in the court above, though he was in *London*. 1 *Salk.* 97.

In *London* it is said, special bail is to be given in action of account, &c. But on removal by *habeas corpus* into *B. R.* that court will accept common bail. 2 *Keb.* 404.

There is not only bail to appear, &c. on writs of error; but also in *audita querela*, a recognisance of bail must be acknowledged; and upon a writ of *attaint*, to prosecute, &c. *Jenk. Cent.* 129.

By the stat 3 *Jac.* I. *c.* 8. No execution shall be delayed by any writ of *error* or *supersedeas* thereupon, unless bail shall be given in double the sum adjudged, to prosecute the writ of error with effect; and also to satisfy the debt, damages, and costs adjudged, &c.

If a cause, removed from an inferior court, be remanded back by *procedendo* the same term, the original bail in the inferior court are chargeable, but not if remanded in another, term. *Cro. Jac.* 363. One taken on a writ of execution is not bailable by law; except an *audita querela* be brought; but where a writ of error is brought and allowed, if the defendant be not in execution, there shall not be an execution awarded against him at the request of the bail, though he be present in court. 1 *Nels. Abr.* 331. The bail ought not to join with the principal, nor the principal with the bail, in a writ of error to reverse the judgment against either. *Cro. Jac.* 384.

On *capias ad satisfaciendum* against the defendant returned *non est inventus*, *scire facias* is to issue against the bail, or an action may be brought. Where a defendant renders his body in discharge of the bail, the plaintiff is, by the rules of the court, to make his choice of proceeding in execution, whether he will charge body, goods, or lands. 1 *Lill.* 183. And if the principal, after judgment, renders not himself in discharge of his bail, it is at the election of the plaintiff to take out execution either against him, or proceed against his bail: but if he takes the bail in execution, though he hath not full satisfaction, he shall never after take the principal: and if the principal be taken, he may not after meddle with the bail.

Where two are bail, although one be in execution, the plaintiff may take the other. *Cro. Jac.* 320. 2 *Bulst.* 68. If a principal render himself, and there is none to require his commitment, the court is *ex officio* to commit him; and if the plaintiff refuse him, he shall be discharged, and an entry made of it upon the record. *Moor, Cas.* 1249. 1 *Leon.* 59. See *Hob.* 210.

There must be an *exoneretur* entered, to discharge the bail. If the defendant dies before a *capias ad satisfac.* against him returned and filed, the bill will be discharged. 1 *Lill.* 177.

The bail upon a writ of error cannot render the party in their discharge; because they are bound in a recognisance that the party shall prosecute the writ of error with effect, or pay the money if judgment be affirmed. 1 *Lill. Abr.* 173. 2 *Cro.* 402. 3 *Mod.* 87. Nor can the bail in such case surrender the principal, though he become a bankrupt pending the writ of error. 1 *Term Rep.* 624. See *Scire Facias.*

Before a *scire facias* taken out against bail, the principal may render his body in discharge of the bail: and if the bail bring in the principal before the return of the second *sci. fa.* against them, they shall be discharged. 1 *Roll. Abr.* 250. 1 *Lill.* 471. Anciently the bail were to bring in the principal upon the first *sci. fa.* or it would not be allowed. 3 *Bulst.* 182.

If the bail mean to acquit themselves of their recognisance entirely, and run *no hazard* of the death of the defendant, then they must render him in their discharge, *before* the return of the *ca. sa.* as the death of the principal afterwards will not discharge them. 2 *Wils.* 67. 2

Cro. 165. *Jon.* 139. *Stra.* 511. But if they do not, then they have until the return day, (if the proceedings be by bill,) *sedente curiâ* of the first *scire facias*, if it be returned *scire feci*, but if a *nihil* is returned thereon, then until the return day, *sedente curiâ* of the second *sci. fa. N. on R. E.* 5 *Geo.* II. And if the proceedings be by original, they have till the *quarto die post* of the return of the first *sci. fa.* if returned *scire feci*; if not, then till the *quarto die post* of the return day of the second. 4 *Burr.* 2134. 1 *Wils.* 270. If an action be brought, then eight days in full term after the return. *R. Trin.* 1 *Ann.* See further *Impey's* and the other books of practice.

If bail surrender the principal at or before the return of the second *scire facias*, it is good, although there be not immediate notice of it to the plaintiff; and if, through want of notice, he is at further charge against the bail, that shall not vitiate the surrender, but the bail shall not be delivered till they pay such charges; if at any time, after the return of the *capias*, the bail surrender the principal at a judge's chamber, and he thereupon is committed to the tipstaff, from whom he escapes, &c. this will not be a good surrender; but if it be before or on a *capias* returned, it is otherwise, the one being an indulgence, and the other matter of right. *Mod. Cas.* 238. When a person makes his escape out of prison, and is retaken and bailed; the bail shall be discharged on writ to the sheriff commanding him to keep the prisoner in discharge of the bail. Stat. 1 *Ann. st.* 2. *c.* 6. § 3.

The judges of the courts at *Westminster* have power by statute to appoint commissioners in every county to take recognisances of bail, in causes depending in their courts; and to make such rules for justifying the bail as they shall think fit, &c. Stat. 4 and 5 *Wm. & M. c.* 4.

The *commissioners* are to take bail, but are obliged by rule of court to *keep a book* wherein are the names of the plaintiff, defendant, and bail, and the person who transmits the same, and who makes affidavit that the recognisance was duly acknowledged in his presence: on such affidavit the judges make a conditional *allocatur*, and the bail are to stand absolute, unless the plaintiff excepts against them within twenty days, and if he excepts, the bail may *justify by affidavit before commissioners* in the country. *Gilb. H. C. B.* 32.

If a defendant puts in bail by a wrong name, the proceedings shall nevertheless be good; for otherwise every man impleaded may give a false name to his attorney by which he will be bailed, and then plead it in arrest of judgment. *Goldsb.* 138. But it hath been held, that if the bail be entered in one name, and the declaration and all the proceedings are by a contrary name, it will be erroneous. *Cro. Eliz.* 223. So if there is bail, and the bail be taken off the file, the plaintiff is without remedy; though where a *habeas corpus* and *bail-piece* were lost in *B. R.* new ones were ordered to be made out. *Sty.* 261.

Stat. 21 *Jac.* 1. *cap.* 26. enacts, That it is felony without benefit of clergy to acknowledge, or procure to be acknowledged, any bail in the name of another person not privy or consenting thereto; provided that it shall *not corrupt* the blood, or take away dower.

Stat. 4 and 5 *Wm. & M. cap.* 4. § 4. enacts, That any person representing or personating another *before commissioners* appointed to take bail, shall be adjudged guilty of *felony*.

Special bail, which is taken before a judge, or by commissioners in the country, when accepted, is to be filed; after *twenty* days notice given of putting in special bail before a judge, on a *cepi corpus*, if there be no exception, the bail shall be filed in four days. 1 *Lill. Abr.*

174. Upon a *capi corpus* twenty days are allowed to except against the bail: so on a writ of error; and you need not give notice; but you cannot take out execution without giving a four days rule to put in better bail: in all other cases, notice must be given. Upon a *habeas corpus* eight and twenty days are appointed to except against the bail, and after that, if it be not excepted against, it shall be filed in four days. 1 *Salk.* 98. *R. M.* 8 *Ann.*

The exception to bail put in before a judge, must be entered in the bail-book, at the judge's chambers at the side of the bail there put in, after this manner: *I do except against this bail*, A. B. *attorn. for the plaintiff.* And if there be no such exception, the defendant's attorney may take the *bail-piece* from the judge's chamber, and file it. Bail is not properly such until it is filed, when it is of record: but it shall be accounted good, till the same is questioned and disallowed.

Bail cannot be justified *before a judge in his chamber*, except it be by consent, or for necessity in vacation; but in the latter case they ought to be justified *again in term*, and upon that the defendant is compelled to accept a declaration to go to trial at the assises, if it be an issuable term; and upon putting in bail, it is not enough to give *notice* of their being put in, but it *ought to be of their names, places of abode, and trade or vocation*, that the plaintiff may know how to inquire after them. 6 *Mod.* 24, 25.

It being doubtful whether *Sunday* should be reckoned as one day in notice to justify bail, it was determined *per cur.* that for the future, *Sunday* shall not be counted one; (it not being a proper day to inquire after bail;) but *two days notice must be given, of which* Sunday *shall not be one;* upon motion for defendant to justify bail, notice was served *Saturday, June* 23, to justify bail *Monday*, 25; the notice being insufficient, the bail was not suffered to justify. *Notes in C. B.* 220.

After the plaintiff has entered his exception, and given notice thereof to the defendant, the bail (to discharge the bond) must personally appear in court within the time limited by the rules thereof, and justify themselves, [or by affidavit if taken before commissioners in the country,] and the plaintiff may oppose them by his counsel: if it appear they are insufficient the court will reject them, and leave the plaintiff at liberty to proceed upon the bail-bond, or against the sheriff.

Bail coming to justify and not being present at the sitting of the court, must wait until the rising.

Generally, bail are opposed *on five* grounds with effect. 1st. That there is some mistake in the notice to justify; namely, that it should have been given *two days* previous, instead of one. 2dly. That the bail have assumed *names* that are either *feigned, or belong to other persons*, contrary to the stats. 21 *Jac.* I. and 4 and 5 *Wm. & M.* But the court will not vacate the proceedings against the party personated, until the offender be convicted. 1 *Vent.* 301. Nor can a conviction take place, until the bail-piece be filed. 2 *Sid.* 90. 3dly. A *third* ground of opposing bail is, that they are not housekeepers; if they be, the rent paid is immaterial, though under 10*l.* *Loft*, 148. Nor is it necessary they should have been assessed to the poor's rate. *Ibid.* 328. 4thly. They may be opposed on the ground of their not being worth *double the sum sworn to*, after payment of all their *debts.* Under this head may be ranked *bankrupts*, who have not obtained their certificates; or such as have been *twice bankrupts*, and not paid 15*s.*

in the pound. *M.* 24 *Geo.* III. *Lastly*, after the *expiration* of the rule to bring in the body. *Loft.* 438. *M.* 20 *Geo.* III.

If the bail do not justify at the day given, (being the last day they have,) they are out of court. Nor can they justify after the rule upon the sheriff to bring in the body is expired, without leave of the court. *Loft*, 88.

In case the defendant by neglect has suffered the plaintiff to take an assignment of the bond, and he *has lost a trial*; if he would wish to try the cause, he must move the court for that purpose on a special affidavit containing merits, if it be in term time; if *in vacation*, he may apply and obtain a judge's order, which will be granted upon *putting in and perfecting bail, paying the costs incurred, receiving a declaration in the original action, pleading issuably, and taking short notice of trial, so as not to delay the plaintiff, and consenting that the bond stand as a security.* But the court of *K. B.* has not yet said, that the plaintiff shall take judgment on the actions upon the bond, although the practice in the *Common Pleas* is so.

If the bond be irregularly assigned, defendant may move the court to set the proceedings aside for irregularity, upon an affidavit, stating the particular facts.

If the court stay the proceedings on the bond, the defendant is not at liberty to plead in *abatement*, but in *chief*. *Salk.* 519. Nor will the court order the bond to be delivered up to be cancelled, on the ground of a *misnomer*. 3 *Term Rep.* 572.

Pending a rule to set aside proceedings for irregularity, and to stay the proceedings, plaintiff took an assignment of the bond in the mean time; the court agreed that the proceedings were totally *suspended by* an act of the court, and made the rule absolute to set aside the assignment of the bond, as having been made *too soon*. 4 *Term Rep.* 176.

The court may adjudge bail sufficient, when the plaintiff will not accept of it. Also the court on motion, or a judge at his chamber, will order a common appearance to be taken, when special bail is not required, on affidavit made by the defendant of the smallness of the debt due, &c. The putting in of a declaration, and the acceptance of it by the defendant's attorney, with the privity of the plaintiff's attorney, is an acceptance of the bail.

When the sheriff hath taken good bail of the defendant, he will on a rule return a *cepi*, and assign the bail-bond to plaintiff, which may be done by indorsement without stamp; so as it be stampt before action brought thereupon; and then the defendant and bail may be sued on the bond, by the plaintiff in his own name, *i. e.* as assignee of the sheriff. Stat. 4 and 5 *Ann. c.* 16. The action must be brought in the same *court* where the original writ was sued out. 3 *Burr.* 1923. 1 *Burr.* 642. The *venue* may be laid in any county. *Stra.* 727. 2 Ld. *Raym.* 1455. But if the plaintiff takes an assignment of the bail-bond, though the bail is insufficient, the court will not amerce the sheriff. 1 *Salk.* 99.

In case the defendant doth not put in bail, the attorney for the plaintiff is to call on the sheriff for his return of the writ; and so proceed to an attachment against the sheriff. If on a *cepi corpus* no bail is returned, a rule will be made out to bring in the defendant's body. Though a defendant, with leave of the court, may deposit money in court instead of bail; and in such case the plaintiff shall be ordered to waive other bail. *Lill. Abr. Trin.* 23 *Car. B. R.*

If more damages, &c. are recovered than mentioned in the plaint, or than the sum wherein the bail is bound, the bail will not be liable for the surplus. 1 *Salk.* 102.

A bail cannot be witness for the defendant at the trial; but the court, on motion, will discharge the bail, upon giving other sufficient bail. *Wood's Inst.* 582. Bail-pieces are written on a small square piece of parchment, with the corners cut off at the bottom.

Bail are not regularly put in, unless the name of the proper county be inserted in the bail-piece. *Smith* v. *Miller*, 7 *Term Rep.* 96.

If a sheriff's officer on an arrest take an undertaking for the appearance of the party instead of a bail-bond without the plaintiff's assent, and bail above is not duly put in, the sheriff is liable to an action for an escape, and the court will not relieve him by permitting him to put in and justify bail afterwards. *Fuller* v. *Prest*, *Ibid.* 109.

But if the sheriff permit the defendant to go at large without taking a bail-bond, he may retake him before the return of the writ. *Ibid.*

Where a bail-bond has been taken, it may be cancelled if the defendant return into the sheriff's custody before the return of the writ. *Stamper* v. *Milbourne*, *Ib.* 122.

The court on the application of the defendant's bail, granted a *habeas corpus* to the sheriff of *H.* in whose custody the defendant was under a charge of felony to bring him up in order that he might be surrendered by his bail. *Sharp* v. *Sheriff*, *Ib.* 226.

If an action be brought here against bail on a recognisance of bail taken in *C. B.* they have the same indulgence (of eight days in full term after the return of the writ against them) to render the principal, as if the recognisance had been taken in this court. *Fisher* v. *Branscombe*, 7 *Term Rep.* 355.

It is not necessary to give bail in error on a judgment in debt, for goods sold and delivered, and on an account stated. *Alexander* v. *Biss*, *Ib.* 449.

If a defendant be sent out of the kingdom under the alien bill after he has given a bail-bond and before the return of the writ, the court will order the bail-bond to be cancelled. *Postel* v. *Williams*, *Ib.* 517.

Bail to the sheriff are liable to the plaintiff's whole debt (without regard to the sum sworn to) and costs, provided they no not exceed the penalty of the bail-bond. *Stevenson* v. *Cameron*, 8 *Term Rep.* 28.

But bail in the *action* are not liable beyond the sum sworn to and the costs. *Ib.*

Bail in the original action after judgment recovered against them on the bail-bond, may be holden to bail in an action on such judgment. *Prendergast* v. *Davis*, *Ib.* 85.

But bail to the sheriffs, cannot themselves be holden to bail in an action on the bail-bond. *Ib.*

An action on the bail-bond must be brought in the court where the original action was brought. *Donatty* v. *Barclay*, *Ib.* 152.

Bail have eight days to render the principal from the return of that writ on which there is an effectual proceeding against them. *Wilkinson* v. *Vass*, *Ib.* 422.

Therefore where the plaintiff sued the bail on their recognisance, who did not render the principal within eight days, and then the plaintiff died, and his executors brought another action against the bail, it was ruled that the bail had eight days from the return of the process in the second action in which to render the principal. *Ib.*

A defendant who has given a bail-bond cannot be holden to bail in an action brought by the sheriff on that bond. *Mellish* v. *Patherich*, *Ib.* 450.

Bail above may be put in *before* the return of the writ; and consequently the plaintiff cannot afterwards proceed on the bail-bond. *Hyde* v. *Wishard*, *Ib.* 456.

When the rule to bring in the body expires the last day of a term, the bail have the whole of the first day of the next term to justify; and if the defendant surrender in discharge of the bail on any part of that day, the sheriff cannot be attached for not bringing in the body. *R.* v. *The Sheriff of Middlesex*, *Ib.* 464.

The plaintiff may sue out a writ against the bail on their recognisance, on the return day of the *ca. sa.* against the principals. *Shivers* v. *Brooks*, *Ib.* 628.

The same persons who were bail in *B. R.* may justify again, or bail upon a writ of error returnable in parliament. *Martin* v. *Justice*, *Ib.* 639.

If a defendant be arrested by process of *K. B.* and removed by *habeas corpus* to *C. B.* he may put in and justify bail in either court. *Knowlys et al.* v. *Reading*, *C. B.* 1 *B. & P.* 311.

Bail were allowed to justify after the rule to bring in the body had expired, on payment of the costs of the opposition. *Weddall* v. *Berger*, *Ib.* 325.

If a man carry on business at a lodging in one place, and keep a house at another, notice of bail describing him as of the former place is sufficient. *Ib.*

The court allowed the defendant to justify bail after an attachment had issued against the sheriff, but gave leave to the plaintiff to oppose them without prejudice. *Williams* v. *Waterfield*, *Ib.* 334.

Where bail are regularly put in and excepted to, the defendant need not describe them in his notice of justification. *England* v. *Kerwan*, 8 *Term Rep.* 335.

The court will not discharge a defendant on a common appearance on the ground of infancy. *Madox* v. *Eden*, *Ib.* 480.

A defendant cannot enter into the recognisance of bail. *Reg. Gen. Ib.* 530.

But each bail shall bind himself in double the sum sworn to. *Ib.*

In *C. B.* two days notice of justification must be given whether the bail originally put in, or added bail be brought up. *Nation* v. *Barret*, *C. B.* 2 *B. & P.* 30. *Secus* in *B. R. Wright* v. *Ley*, *Ib.* 31.

It is not a sufficient ground for rejecting a person as bail, that he is described to be "of *A.* in the county of *B.* gaol-keeper." *Faulkner* v. *Wise*, *Ib.* 150.

The court will not discharge a defendant on common appearance on the ground of his having obtained his certificate as a bankrupt and of the debt being thereby barred, if the validity of the certificate is meant to be disputed. *Stacy* v. *Federici*, *Ib.* 390.

If a defendant in error, (the plaintiff in an action,) upon judgment being affirmed, take in execution the body of the plaintiff in error, for the debt, damages and costs in error, he does not thereby discharge the bail in error, but may sue them upon their recognisance. *Perkins* v. *Petit* and *Gale*, *Ib.* 440.

A recognisance entered into by the bail in error without the principal is good. *Dixon* v. *Dixon*, *Ib.* 443.

If on a bond debt, double the sum secured by the bond be the sum for which the bail bind themselves in the recognisance in error, it is

sufficient, though a further sum be due for interest and costs, and nominal damages have been recovered. *Ib.*

If bail be put in with the *filazer* of the county in which the defendant is arrested on a *testatum capias*, the bail may be treated as a nullity and an attachment issue. *Clompson* v. *Knox*, *Ib.* 516.

But if the plaintiff appear to have been aware that the bail were actually put in, though with the wrong *filazer*, the court will relieve against the attachment. *Id. Ib.*

An indorsor of a bill of exchange may be bail for the drawer, in an action against him on the same bill. *Harris* v. *Manley*, *Ib.* 526.

An attorney's clerk, though not clerk to the defendant's attorney, cannot become bail above. *Redit* v. *Broomhead*, *Ib.* 564.

Court will stay proceedings against both the bail on payment of the sum sworn to, and costs, although less than the damages recovered, or than the sum named in the process. *Clark* v. *Bradshaw*, 1 *East*, 86.

Sci. fa. against bail must lie four days in the office as well where *scire feci* is returned as *nihil*. *Williams* v. *Mason*, cited in the above case.

Where defendant was sued by original in *London* the *sci. fa.* against the bail must be sued there also ; and it does not help the plaintiff who sued out the *sci. fa.* in *Middlesex*, that bail had by mistake has been put in there. *Harris and another* v. *Calvart and another*, 1 *East*, 603.

A writ of error though not returned is of itself a *supersedeas*, and may be pleaded by bail to have been issued and allowed after issuing, and before the return of the *ca. sa.* against the principal, so as to avoid proceedings against them in *sci. fa.* upon the recognisance of bail prosecuted after a return by the sheriff of *non est inventus* made pending such writ of error. *Sampson* v. *Brown*, 2 *East*, 439.

Bail in error are not required by stat 3 *Jac.* I. *c.* 8. on error brought on a judgment by default in debt on a count for a promissory note any more than on counts for goods sold and delivered, and on an account stated ; though if there were one count, on which judgment was entered up, for which bail in error were not required, it seems sufficient to excuse the plaintiff in error. *Trier* v. *Bridgman*, 2 *East*, 359.

An omission in the *ac etiam* part of the writ of the sum for which the defendant is arrested, on bailable process is irregular, and he cannot be holden to special bail thereon. *Davison* v. *Frost*, *Ibid.* 305.

Time enlarged for bail to surrender a bankrupt under examination. *Maude* v. *Jouett*, 3 *East*, 145.

B. R. have power to bail in discretion in all cases of felony, as well as other offences. *Rex* v. *Marks*, *Ib.* 163.

One who was committed to *Newgate* by commissioners of bankrupt for not answering satisfactorily to certain questions, must for the purpose of being surrendered by his bail in a civil suit, be brought up by *habeas corpus* issued on the crown side of the court, on which side also must be taken the subsequent rule of his surrender in the action, his commitment *pro forma* to the marshal, and his recommitment to *Newgate* charged with the several matters. *Taylor's* case, *Ib.* 232.

After notice of render, all proceedings against bail shall cease. (*T.* 1 *Ann.*) *Byrne* v. *Aguilar*, *Ib.* 306.

Upon a writ of error sued out by the principal after the bail are fixed and proceedings against them in *sci. fa.* the court will only stay proceedings against the bail pending the writ of error, on the terms of

the bail's undertaking to pay the condemnation money and the costs of the *sci. fa.* and (if it be a case in which there is no bail in error) to pay the costs also of a writ of error if judgment should be affirmed. *Buchanan* v. *Alders and another*, *Ib.* 546.

If the second writ of *sci. fa.* be in proper time on the file in the sheriff's office, that is sufficient to warrant proceedings against the bail, though it were not entered in the *sci. fa.* book in the sheriff's office, which is merely a private book for his own convenience. *Heywood* v. *Rennard et al. Ib.* 570.

If bail apply to stay proceedings upon the bail-bond, or against the sheriff, they need not swear to merits, though a trial has been lost. 1 *B.* & *P.*

II. As to Bail for Crimes. At common law, bail was allowed for all offences except murder. 2 *Inst.* 109. And if the party accused could find sureties, he was not to be committed to prison; for all persons might be bailed till convicted of the offence. 2 *Inst.* 186. But by statute it was after enacted, that in case of homicide the offender should not be bailed: and by our statutes, murderers, outlaws, house-burners, thieves openly defamed, &c. are not bailable; but where persons are accused of larceny, as accessaries to felony, or under light suspicion, they may be admitted to bail. Stat. 3 *Edw.* I. *c.* 15.

One indicted and found guilty of the *death of a man by misadventure*, as by casting a stone over a house, and by chance killing a man, woman or child, is not bailable. 3 *Edw.* III. *Corone*, 354.

One indicted of *conspiracy*, *viz.* that he with others conspired falsely to *indict another of murder or felony*, by means whereof he was indicted, and afterwards convicted, shall not be bailed. The resolution of all the judges, upon the question demanded by King *Edw.* III. himself, as appears, 27 *Ass.* 1.

One indicted for *burglary* may be bailed. 29 *Ass.* 44.

One indicted on *suspicion of robbery* was outlawed, and *taken on the outlawry*, and *brought writ of error*, and being brought to *B. R.* by *habeas corpus*, prayed to be bailed and took two exceptions to the indictment; 1st. That he was in prison, and knew nothing of the outlawry; 2dly. That the charge is too general, and nobody prosecutes; but *per Rolle*, Ch. J. He cannot be bailed. *Sty.* 418. But see stat. 4 and 5 *Wm.* & *M. c.* 18. which enacts that persons *outlawed*, except for *treason* or *felony*, may appear by attorney and reverse the same without bail; except special bail shall be ordered by the court: and that persons arrested upon any *capias utlagatum*, except for *treason* or *felony*, may be discharged by an attorney's engagement to appear: and in cases where special bail is required, the sheriff may take bond with sureties.

By the common law the sheriff might *bail* persons arrested on suspicion of felony, or for other offence *bailable*; but he hath lost this power by the stat. 1 *Edw.* IV. *c.* 2. Justices of peace may let to *bail* persons suspected of felony, or others *bailable*, until the next sessions; though where persons are arrested for manslaughter or felony, being *bailable* by law, they are not to be let to *bail* by justices of peace but in open sessions, or where two justices (*quorum unus*) are present; and the same is to be certified with the examination of the offender, and the accusers bound over to prosecute, &c. 3 *Hen.* VII. *c.* 3. 1 and 2 *P.* & *M. c.* 13. § 3. Nor to restrain justices in *London* and *Middlesex*, and towns corporate. 1 and 2 *P.* & *M. c.* 13. § 6. If a

person be dangerously wounded, the offender may be *bailed* till the person is dead; but it is usual to have assurance from some skilful surgeon, that the party is like to do well. 2 *Inst.* 186. A man arrested and imprisoned for felony, being *bailable*, shall be *bailed* before it appears whether he is guilty or not; but when convicted, or if on examination he confesseth the felony, he cannot be *bailed*. 4 *Inst.* 178.

It is to be observed, that the stat. *Westm.* 1. 3 *Edw.* I. *c.* 15. above mentioned, doth not extend to the judges of *B. R.* &c. only to *sheriffs* and other *inferior officers*. *H. P. C.* 98, 99. Likewise, justices of gaol delivery, not being within the restraint of the statute of *Westm.* 1. may bail persons convicted before them of homicide by misadventure, or self-defence, the better to enable them to purchase their pardon. *Cromp.* 154. a. *H. P. C.* 101. *F. N. B.* 246. *S. P. C.* 15.

Also it seems that in discretion they may bail a person convicted before them of manslaughter, upon special circumstances: as if the evidence against him were slight, or if he had purchased his pardon. *H. P. C.* 101. *Cromp.* 153.

The court of *B. R.* has power to bail in all cases whatsoever, and will exercise their discretion in all cases not capital; in capital cases, where innocence may be fairly presumed; and in every case where the charge is not alleged with sufficient certainty. *Leach's Hawk. P. C.* 2. *c.* 15. § 80. in *note*, where several cases are enumerated.

It is to be observed that with respect to the nature of the offence, although this court is not tied down by the rules prescribed by the stat. of *Westm.* 1. yet it will in discretion pay a due regard to those rules, and not admit a person to bail who is expressly declared to be irreplevisable, without some particular circumstances in his favour. 2 *Inst.* 185, 186. 189. *H. P. C.* 104. 1 *Salk.* 61. 3 *Bulst.* 113. 2 *Hawk. P. C. c.* 15. § 80. 5 *Mod.* 454.

And therefore if a person be attainted of felony, or convicted thereof by verdict general or special, or notoriously guilty of treason or manslaughter, &c. by his own confession or otherwise, he is not to be admitted to bail, without some special motive to induce the court to grant it. *Kelynge*, 90. *Dyer*, 79. 1 *Bulst.* 87. 2 *Hawk. P. C. c.* 15. § 80.

Upon a commitment of either house of parliament, when it stands indifferent on the return of the *habeas corpus*, whether it be legal or not, the court of *B. R.* ought not to *bail* a prisoner. *Leach's Hawk. P. C.* 2. *c.* 15. § 73. But if it be demanded in case a subject should be committed by either of the houses, for a matter manifestly out of their jurisdiction, what remedy can he have? I answer, (says the learned and cautious Serjeant *Hawkins*,) as this is a case which I am persuaded will never happen, it seems needless over nicely to examine it. See *Leach's* notes. 2 *Hawk. P. C. cap.* 15. § 72. From the cases cited there, (*viz.* The Hon. *Alex. Murray's*, 1 *Wils.* 229. *John Wilkes's*, 2 *Wils.* 158. *Entick* v. *Carrington*, 11 *St. Tr.* 317. *Brass Crosby's*, 3 *Wils.* 188. 2 *Black.* 755.) it appears that the courts in *Westminster Hall* have been positively of opinion, "that they have no power to decide on the privileges of parliament; that the rights of the house of commons are paramount to the jurisdiction of those courts; that the commons are the exclusive arbiters of their own peculiar privileges; that their power of commitment is inherent in the very nature of their constitution; and finally that their adjudication is tantamount to a conviction, and their commitment equal to an execu-

tion ; and that no court can discharge a prisoner committed in execution by another court."

However, a person committed for a contempt, by order of either house of parliament, may be discharged by *B. R.* after a dissolution or prorogation, which determine all orders of parliament: also it is said on an impeachment, when the parliament is not sitting, and the party has been long in prison, *B. R.* may *bail* him. The court of *B. R.* hath *bailed* persons committed to the *Fleet Prison* by the lord chancellor; when the crime of commitment was not mentioned, or only in general terms, &c. 2 *Hawk. P. C. c.* 15. § 76.

And *B. R.* having the control of all inferior courts, may at their discretion *bail* any person unjustly committed by any of those courts. In admitting a person to *bail* in the court of *B. R.* for felony, &c. a several recognisance is entered into to the king in a certain sum from each of the *bail*, that the prisoner shall appear at a certain day, &c. And also that the *bail* shall be liable for the default of such appearance, body for body. And it is at the discretion of justices of the peace, in admitting any person to *bail* for felony, to take the recognisance in a certain sum, or body for body: but where a person is *bailed* by any court, &c. for a crime of an inferior nature, the recognisance ought to be only in a certain sum of money, and not body for body. 2 *Hawk. c.* 15. § 83. And the *bail* are to be bound in double the sum of the criminal. Where persons are bound body for body, if the offender doth not appear, whereby the recognisance is forfeited, the *bail* are not liable to such punishment to which the principal would be adjudged if found guilty, but only to be fined, &c. *Wood's Inst.* 618. If *bail* suspect the prisoner will fly, they may carry him before a justice to find new sureties ; or to be committed in their discharge. 1 *Rep.* 99.

The courts of *King's Bench*, *Common Pleas* and *Exchequer*, in term time, and the *Chancery* in the term or vacation, may *bail* persons by the *habeas corpus* act. See tit. *Habeas Corpus*.

To refuse *bail* when any one is *bailable* on the one hand ; or on the other to admit any to *bail* who ought not by law to be admitted, or to take slender *bail*, is punishable by fine, &c. 2 *Inst.* 291. *H. P. C.* 97. And see further, 3 *Edw.* I. *c.* 15. 27 *Edw.* I. *st.* 1. *c.* 3. 4 *Edw.* III. *c.* 2. 1 and 2 *P. & M. c.* 13. and 31 *Car.* II. *c.* 2.

No person shall be *bailed* for felony by less than two ; and it is said not to be usual for the *King's Bench* to *bail* a man on a *habeas corpus*, on a commitment of treason or felony, without four sureties ; the sum in which the sureties are to be bound, ought to be never less than 40*l.* for a capital crime ; but it may be higher in discretion, on consideration of the ability and quality of the prisoner, and the nature of the offence ; and the sureties may be examined on oath concerning their sufficiency, by him that takes the bail ; and if a person be *bailed* by insufficient sureties, he may be required, either by him who took the *bail*, or by any other who hath power to bail him, to find better sureties, and on his refusal may be committed; for insufficient sureties are as none. 2 *Hawk. P. C. c.* 15. § 4. *H. P. C.* 97.

But justices must take care, that under pretence of demanding sufficient surety, they do not make so excessive a demand, as in effect amounts to a denial of *bail ;* for this is looked upon as a great grievance, and is complained of as such by 1 *Wm. & M. st.* 2. *c.* 2. (the bill of rights,) by which it is declared, that excessive bail ought not to be required. 2 *Hawk. P. C. c.* 15.

If where a felony is committed, one is brought before a justice on suspicion, the person suspected is to be *bailed* or committed to prison; but if there is no felony done, he may be discharged. *H. P. C.* 98. 106.

Persons committed for treason or felony, and not indicted the next term, are to be bailed. 31 *Car.* II. *c.* 2. § 7.

Where bail may have writ of detainer against the prisoner. See 1 *Ann. st.* 2. *c.* 6. § 3.

Justices of peace are required to bail officers of customs and excise, who kill persons resisting. 9 *Geo.* II. *c.* 35. § 35.

The court of *King's Bench* and *Justiciary* in *Scotland* not restrained from bailing persons committed for felonies, against the laws of customs or excise. 9 *Geo.* II. *c.* 35. § 38. 19 *Geo.* II. *c.* 34. § 12.

For further particulars relative to bail in criminal cases, see *Leach's Hawk. P. C.* 2. *c.* 15. very much at large.

BAILS signify bone fires. *Scotch Dict.*

BAILIFF, *ballivus.*] From the *French* word *beyliff*, that is *præfectus provinciæ*, and as the name, so the office itself was answerable to that of *France*; where there were eight parliaments, which were high courts from whence there lay no appeal, and within the precincts of the several parts of that kingdom which belonged to each parliament there were several provinces to which justice was administered by certain officers called *bailiffs*: and in *England* we have several counties in which justice hath been, and still is, in small suits, administered to the inhabitants, by the officer whom we now call *sheriff* or *viscount*; (one of which names descends from the *Saxons*, the other from the *Normans*;) and though the sheriff is not called *bailiff*, yet it is probable that was one of his names also, because the county is often called *balliva*: as in the return of a writ, where the person is not arrested, the sheriff saith, *Infra-nominatus* A. B. *non est inventus in* balliva *mea*, &c. *Kitch. Ret. Brev. fol.* 285. And in the statute of *Magna Charta*, *cap.* 28. and 14 *Edw.* III. *c.* 9. the word *bailiff* seems to comprise as well sheriffs, as *bailiffs* of hundreds.

As this realm is divided into counties, so every county is divided into hundreds; within which in ancient times the people had justice administered to them by the several officers of every hundred, which were the *bailiffs*. And it appears by *Bracton* (*lib.* 3. *tract.* 2. *cap.* 34.) that *bailiffs* of hundreds might anciently hold plea of appeal and approvers: but since that time the hundred courts, except certain franchises, are swallowed in the county courts; and now the *bailiff's* name and office is grown into contempt, they being generally officers to serve writs, &c. within their liberties. Though in other respects, the name is still in good esteem; for the chief magistrates in divers towns, are called *bailiffs*: and sometimes the persons to whom the king's castles are committed are termed *bailiffs*, as the *bailiff* of *Dover Castle*, &c.

Of the ordinary *bailiffs* there are several sorts, *viz. bailiffs* of liberties; sheriff's *bailiffs*; *bailiffs* of lords of manors; *bailiffs* of husbandry, &c.

Bailiffs of liberties are those *bailiffs* who are appointed by every lord within his liberty, to execute process and do such offices therein, as the *bailiff errant* doth at large in the county; but *bailiffs* errant or itinerant, to go up and down the county to serve process, are out of use.

Bailiffs of liberties and franchises, are to be sworn to take distresses, truly impanel jurors, make returns by indenture between them

and sheriffs, &c. and shall be punished for malicious distresses by fine and treble damages, by ancient statutes. Vide 12 *Edw.* II. *st.* 1. *c.* 5. 14 *Edw.* III. *st.* 1. *c.* 9. 20 *Edw.* III. *c.* 6. 1 *Edw.* III. *st.* 1. *c.* 5. 2 *Edw.* III. *c.* 4. 5 *Edw.* III. *c.* 4. 11 *Hen.* VII. *c.* 15. 27 *Hen.* VIII. *c.* 24. 3 *Geo.* I. *c.* 15. § 10.

The *bailiff* of a *liberty* may make an inquisition and extent upon an *elegit*. The sheriff returned on a writ of *elegit*, that the party had not any lands but within the liberty of *St. Edmund's Bury*, and that *J. S. bailiff* there, had the execution and return of all writs, and that he inquired and returned an extent by inquisition, and the *bailiff* delivered the moiety of the lands extended to the plaintiff, who, by virtue thereof, entered, &c. This was held a good return. *Cro. Car.* 319. These *bailiffs* of liberties cannot arrest a man without a warrant from the sheriff of the county: and yet the sheriff may not enter the liberty himself, at the suit of a subject, (unless it be on a *quo minus*, or *capias utlagatum*,) without clause in his writ, *Non omittas propter aliquam libertatem*, &c. If the sheriff, &c. enters the liberty without such power, the lord of the liberty may have an action against him; though the execution of the writ may stand good. 1 *Vent.* 406. 2 *Inst.* 453.

Sheriffs' bailiffs are such who are servants to sheriffs of counties, to execute writs, warrants, &c. Formerly *bailiffs* of hundreds were the officers to execute writs; but now it is done by special *bailiffs*, put in with them by the sheriff. A *bailiff* of a liberty is an officer which the court takes notice of; though a sheriff's *bailiff* is not an officer of the court, but only the sheriff himself. *Pasch.* 23 *Car.* I. *B. R.* The arrest of the sheriff's *bailiff* is the arrest of the sheriff; and if any rescous be made of any person arrested, it shall be adjudged done to the sheriff: also if the *bailiff* permit a prisoner to escape, action may be brought against the sheriff. *Co. Lit.* 61. 168. Sheriffs are answerable for misdemeanors of their *bailiffs*; and are to have remedy over against them. 2 *Inst.* 19. The latter are therefore usually bound in an obligation for the due execution of their offices, and thence are called *bound bailiffs*; which the common people have corrupted to a more humble appellation.

There are thirty-six serjeants at mace in *London* who may be termed bailiffs, and they each give security to the sheriffs.

By stat. 14 *Edw.* III. *c.* 9. sheriffs shall appoint such bailiffs, for whom they will answer; and by stat. 1 *Hen.* V. *c.* 4. no sheriff's bailiff shall be attorney in the king's court. *R. M.* 1654.

Bailiffs of lords of manors, are those that collect their rents, and levy their fines and amercements: but such a *bailiff* cannot distrain for an amercement without a special warrant from the lord or his steward. *Cro. Eliz.* 698. He cannot give license to commit a trespass, as to cut down trees, &c. though he may license one to go over land, being a trespass to the possession only, the profits whereof are at his disposal. *Cro. Jac.* 337. 377. A *bailiff* may by himself, or by command of another, take cattle damage-feasant upon the land. 1 *Danv. Abr.* 685. Yet amends cannot be tendered to the *bailiff*, for he may not accept of amends, nor deliver the distress when once taken. 5 *Rep.* 76. These *bailiffs* may do any thing for the benefit of their masters, and it shall stand good till the master disagrees; but they can do nothing to the prejudice of their masters. *Lit. Rep.* 70.

Bailiffs of courts-baron summon those courts, and execute the process thereof; they present all pound-breaches, cattle-strayed, &c.

Bailiffs of husbandry are belonging to private men of good estates, and have the disposal of the under-servants, every man to his labour;

they also fell trees, repair houses, hedges, &c. and collect the profits of the land for their lord and master, for which they render account yearly, &c.

Besides these, there are also *bailiffs of the forest*, of which see *Manwood, part* 1. *page* 113.

An Appointment of a *Bailiff* of a Manor.

KNOW all men *by these presents, That I* W. B. *of*, &c. *Esq. lord of the manor of* D. *in the county of* G. Have *made, ordained, deputed, and appointed, and by these presents* do *make, ordain, depute, and appoint* J. G. *of*, &c. *my* bailiff, *for me, and in my name, and to my use, to collect and gather, and to ask, require, demand, and receive of all and every my tenants, that have held or enjoyed, or now do, or hereafter shall hold or enjoy, any messuages, lands, or tenements, from, by, or under me, within my said manor of* D. *all rents, and arrears of rent, heriots, and other profits, that now are, or hereafter shall become payable, due, owing, or belonging to me within the said manor; and, in default of payment thereof, to distrain for the same from time to time, and such distress or distresses to impound, detain and keep, until payment be made of the said rents and profits, and the arrears thereof. And I do* also *further empower and authorise the said* J. G. *to take care of and inspect into all and every my messuages, lands, and woods within the said manor, and to take an account of all defects, decays, wastes, spoils, trespasses, or other misdemeanors, committed or permitted within my said manor, or in any messuages, lands, or woods there: and from time to time, to give me a just and true account in writing thereof: and further to act and do all other things that to the office of a* bailiff *of the said manor belongs and appertains, during my will and pleasure.* In Witness, &c.

BAILIS, are letters to raise fire and sword. *Scotch Dict.*

BAILIWICK, *balliva.*] Is not only taken for the county, but signifies generally that liberty which is exempted from the sheriff of the county, over which the lord of the liberty appointeth a *bailiff*, with such powers within his precinct, as an under-sheriff exerciseth under the sheriff of the county; such as the *bailiff* of *Westminster*, &c. Stat. 27 *Eliz. cap.* 12. *Wood's Inst.* 206.

BAILMENT, from *bailler*, Fr. to deliver.] "A delivery of goods in trust, upon a contract expressed or implied that the trust shall be faithfully executed on the part of the *bailee:*" [the person to whom they are delivered:] 2 *Comm.* 451. which see; to which Sir *W. Jones* adds, "and the goods redelivered as soon as the time or use, for which they were bailed, shall have elapsed or be performed." *Law of Bailments, p.* 117.

It is to be known that there are six sorts of *bailments*, which lay a care and obligation on the party to whom goods are bailed; and which, consequently, subject him to an action, if he misbehave in the trust reposed in him.

1. A bare and naked bailment, to keep for the use of the bailor, which is called *depositum;* and such bailee is not chargeable for a common neglect, but it must be a gross one to make him liable. 2 *Stra.* 1099.

2. A delivery of goods which are useful to keep, and they are to be returned again in specie, which is called *accommodatum*, which is a lending *gratis;* and in such case the borrower is strictly bound to keep them: for if he be guilty of the least neglect, he shall be an-

swerable, but he shall not be charged where there is no default in him. See *post*.

3. A delivery of goods for hire, which is called *locatio*, or *conductio*; and the hirer is to take all imaginable care, and restore them at the time; which care, if he so use, he shall not be bound.

4. A delivery by way of pledge, which is called *vadium*; and in such goods the pawnee has a special property; and if the goods will be the worse for using, the pawnee must not use them; otherwise he may use them at his peril; as jewels pawned to a lady, if she keep them in a bag, and they are stolen, she shall not be charged; but if she go with them to a play, and they are stolen, she shall be answerable. So if the pawnee be at a charge in keeping them, he may use them for his reasonable charge; and if notwithstanding all his diligence he lose the pledge, yet he shall recover the debt. But if he lose it after the money tendered, he shall be chargeable, for he is a wrong-doer; after money paid (and tender and refusal is the same) it ceases to be a pledge, and therefore the pawnor may either bring an action *of assumpsit*, and declare that the defendant promised to return the goods upon request; or trover, the property being vested in him by the tender.

5. A delivery of goods to be carried for a reward, of which enough is said under title *Carrier*. It may here be added, that the plaintiff ought to prove the defendant used to carry goods, and that the goods were delivered to him or his servant to be carried. And if a price be alleged in the declaration, it ought to be proved the usual price for such a stage; and if the price be proved there need no proof, the defendant being a common carrier: but there need not be a proof of a price certain.

6. A delivery of goods to do some act about them (as to carry) without a reward, which is called *by Bracton, mandatum*; in *English*, an acting by commission; and though he be to have nothing for his pains, yet if there were any neglect in him, he will be answerable, for his having undertaken a trust is a sufficient consideration; but if the goods be misused by a third person, in the way, without any neglect of his, he would not be liable, being to have no reward.

The above is taken from Lord Chief Justice *Holt's* opinion, in the case of *Coggs* v. *Bernard*, 2 Ld. *Raym.* 909. as abridged, *Bull. N. P.* 72. See also Sir *W. Jones's Essay on the Law of Bailment*, p. 35. *Com. Rep.* 133. with Mr. *Rose's* notes; and on this subject, 2 *Inst.* 89. 4 *Rep.* 83. 1 *Roll. Abr.* 338. 1 *Inst.* 89. b. *Doct.* and *Stud.* 129. 1 *New Abr.* 243.

Having mentioned Sir *W. Jones's Essay on the Law of Bailment*, we cannot help recommending it to the attention of the rational student; and for the use of such, extracting the following analysis, which will in general be found to be consonant with the determinations in the books, and convey much knowledge in a short compass. Sir *W. Jones* differs in a few points from Lord *Holt* and Lord *Coke*, and his reasons are deserving of much attention.

"I. Definitions. 1. *Bailment*, as before at the beginning of this article. 2. *Deposit* is a bailment of goods to be kept for the bailor without recompense. 3. *Mandate* is a bailment of goods, *without reward*, to be carried from place to place, or to have some act performed about them. 4. *Lending for use* is a bailment of a thing for a certain time to be used by the borrower without paying for it. 5. *Pledging* is a bailment of goods by a debtor to his creditor, to be kept till the debt

be discharged. 6. *Letting to hire* is (1) a bailment of a thing to be used by the hirer for a compensation in money; or (2) a letting out of, work and labour to be done, or care and attention to be bestowed, by the bailee on the goods bailed, and that for a pecuniary recompense; or (3) of care and pains in carrying the things delivered from one place to another, for a stipulated or implied reward. 7. *Innominate bailments* are those where the compensation for the use of a thing, or for labour and attention is not pecuniary; but either (1) the reciprocal use or the gift of some other thing; or (2) work and pains reciprocally undertaken; or (3) the use or gift of another thing in consideration of care and labour; and conversely. 8. *Ordinary neglect* is the omission of that care, which every man of common prudence, and capable of governing a family, takes of his own concerns. 9. *Gross neglect*, is the want of that care, which every man of common sense, how inattentive soever, takes of his own property. See *post*, II. 8. 10. *Slight neglect* is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels. 11. *A naked contract* is a contract made without consideration or recompense.

"II. The Rules which may be considered as axioms flowing from natural reason, good morals, and sound policy, are these. 1. A bailee who derives no benefit from his undertaking, is responsible only for gross neglect. 2. A bailee who alone receives benefit from the bailment, is responsible for slight neglect. 3. When the bailment is beneficial to both parties, the bailee must answer for ordinary neglect. 4. A special agreement of any bailee to answer for more or less, is in general valid. 5. All bailees are answerable for actual fraud, even though the contrary be stipulated. 6. No bailee shall be charged for a loss by inevitable accident or irresistible force, except by special agreement. 7. Robbery by force is considered as irresistible; but a loss by private stealth, is presumptive evidence of ordinary neglect. 8. Gross neglect is a violation of good faith. 9. No action lies to compel performance of a naked contract. 10. A reparation may be obtained by suit for every damage occasioned by an injury. 11. The negligence of a servant acting by his master's express or implied order, is the negligence of the master.

"III. From these rules the following Propositions are evidently deducible. 1. A depositary is responsible only for gross neglect; or in other words for a violation of good faith. 2. A depositary whose character is known to his depositor, shall not answer for mere neglect, if he take no better care of his own goods, and they also be spoiled or destroyed. 3. A mandatary to carry is responsible only for gross neglect, or a breach of good faith. 4. A mandatary to perform a work is bound to use a degree of diligence adequate to the performance of it. 5. A man cannot be compelled by action to perform his promise of engaging in a deposit or a mandate; but, 6. A reparation may be obtained by suit for *damage* occasioned by the non-performance of a promise to become a depositary, or a mandatary. 7. A borrower for use is responsible for slight negligence. 8. A pawnee is answerable for ordinary neglect. 9. The hirer of a thing is answerable for ordinary neglect. 10. A workman for hire must answer for ordinary neglect of the goods bailed, and must apply a degree of skill equal to his undertaking. 11. A letter to hire of his care and attention, is responsible for ordinary negligence. 12. A carrier for hire by land or by water is answerable for ordinary neglect.

" IV. EXCEPTIONS to the above rules and propositions. 1. A man who spontaneously and officiously engages to keep or to carry the goods of another, though without reward, must answer for slight neglect. 2. If a man through strong persuasion and with reluctance undertake the execution of a mandate, no more can be required of him than a fair exertion of his ability. 3. All bailees become responsible for losses by casualty or violence, after their refusal to return the things bailed, on a lawful demand. 4. A borrower and a hirer are answerable in all events, if they keep the things borrowed or hired after the stipulated time, or use them differently from their agreement. 5. A depositary and a pawnee are answerable in all events, if they *use* the things deposited or pawned. 6. An innkeeper is chargeable for the goods of his guest within his inn, if the guest be robbed by the servants or inmates of the keeper. 7. A common carrier by land or by water, must indemnify the owner of the goods carried if he be robbed of them.

" V. It is no exception but a COROLLARY from the rules, that every bailee is responsible for a loss by accident or force, however inevitable or irresistible, if it be occasioned by that degree of negligence for which the nature of his contract makes him generally answerable."

The cases cited and commented on by Sir *Wm. Jones*, besides the above of *Coggs* v. *Bernard*, and which lead to the whole law on this subject, are 1 *Stra.* 128. 145. 2 *Stra.* 1099. *Allen*, 93. *Fitz. Detinue*, 59. (*Bonion's* case, the earliest on the subject.) 8 *Rep.* 32. 1 *Wils.* 281. *Burr.* 2298. 1 *Vent.* 121. 190. 238. *Carth.* 485. 487. 2 *Bulst.* 280. 1 *Roll. Abr.* 2. 4. 10. 2 *Roll. Abr.* 567. 12 *Mod.* 480. 2 *Raym.* 220. *Moor*, 462. 543. *Owen*, 141. 1 *Leon.* 224. 1 *Cro.* 219. *Bro. Abr.* tit. *Bailment. Hob.* 30. 2 *Cro.* 339. 667. *Palm.* 548. *W. Jo.* 159. 4 *Rep.* 83. b. (*Southcote's* case.) 1 *Inst.* 89. a. Many of them, however, more peculiarly applicable to carriers.

The following cases may serve to illustrate the above principles.

A man leaves a chest locked up with another to be kept, and doth not make known to him what is therein; if the chest and goods in it are stolen, the person who received them shall not be charged for the same, for he was not trusted with them. And what is said as to stealing is to be understood of all other inevitable accidents: but it is necessary for a man that receives goods to be kept, to receive them in a special manner, *viz.* to be kept as his own, or at the peril of the owner. 1 *Lill. Abr.* 193, 194. And *vide* 1 *Roll. Abr.* 338. 2 *Show. pl.* 166.

If I deliver 100*l.* *to* A. *to buy cattle*, and he bestows 50*l.* of it in cattle, and I bring an action of debt for all, I shall be barred in that action for the money bestowed and charges, &c. but for the rest I shall recover. *Hob.* 207.

If one deliver his goods to another person, to deliver over to a stranger, the deliverer may countermand his power, and require the goods again; and if the *bailee* refuse to deliver them, he may have an action of account for them. *Co. Litt.* 286.

If *A.* delivers goods to *B.* to be delivered over to *C.* *C.* hath the property, and *C.* hath the action against *B.* for *B* undertakes for the safe delivery to *C.* and hath no property or interest but in order to that purpose. 1 *Roll. Abr.* 606. see 1 *Bulst.* 68, 69. where it is said

that, in case of conversion to his own use, the bailee shall be answerable to *both*.

But if the bailment were not on valuable consideration, the delivery is countermandable ; and in that case, if *A.* the bailor, bring trover, he reduces the property again in himself, for the action amounts to a countermand ; but if the delivery was on a valuable consideration, then *A.* cannot have trover, because the property is altered ; and in trover the property must be proved in the plaintiff. 1 *Bulst.* 68. See 1 *Leon.* 30.

And where a man delivers goods to another, to be redelivered to the deliverer at such a day, and before that day the *bailee* doth sell the goods in market overt ; the *bailor* may at the day seize and take his goods, for the property is not altered. *Godb.* 160.

If *A.* borrows a horse to ride to *Dover*, and he rides out of his way, and the owner of the horse meets him, he cannot take the horse from him ; for *A.* has a special property in the horse till the journey is determined ; and being in lawful possession of the horse, the owner cannot violently seize and take it away ; for the continuance of all property is to be taken from the form of the original bargain, which, in this case, was limited till the appointed journey was finished. *Yelv.* 172. But the owner may have an action on the case against the bailee for exceeding the purposes of the loan : for so far it is a secret and fallacious abuse of his property ; but no general action of trespass, because it is not an open and violent invasion of it. 1 *Roll. Rep.* 128.

As to borrowing a thing perishable, as corn, wine or money, or the like, a man must, from the nature of the thing, have an absolute property in them ; otherwise it could not supply the uses for which it was lent ; and therefore he is obliged to return something of the same sort, the same in quantity and quality with what is borrowed. *Doct. & Stud.* 129.

But if one lend a horse, &c. he must have the *same* restored. If a thing lent for use be used to any other end or purpose than that for which it was borrowed, the party may have his action on the case for it, though the thing be never the worse ; and if what is borrowed be lost, although it be not by any negligence of the borrower, as if he be robbed of it ; or where the thing is impaired or destroyed by his neglect, admitting that he put it to no more service than that for which borrowed, he must make it good : so where one borrows a horse, and puts him in an old rotten house ready to fall, which falls on and kills him, the borrower must answer for the horse. But if such goods borrowed perish by the act of God, (or rather, as Sir *Wm. Jones* says it ought more reverentially to be termed, by *inevitable accident*,) in the right use of them ; as where the borrower puts the horse, &c. in a strong house, and it falls and kills him, or it dies by disease, or by default of the owner, the borrower shall not be charged. 1 *Inst.* 89. 29 *Ass.* 28. 2 *Hen.* VII. 11.

If one delivers a ring to another to keep, and he breaks and converts the same to his own use ; or if I deliver my sheep to another to be kept, and he suffers them to be drowned by his negligence ; or if the *bailee* of a horse, or goods, &c. kill or spoil them, in these cases action will lie. 5 *Rep.* 13. 15 *Edw.* IV. 20. b. 12 *Edw.* IV. 13.

If a man deliver goods to another, the *bailee* shall have a general action of trespass against a stranger, because he is answerable over to the *bailor* ; for a man ought not to be charged with an injury to another, without being able to retire to the original cause of that injury.

and in amends there to do himself right. 13 *Co.* 69. 14 *Hen.* IV. 28. 25 *Hen.* VII. 14.

BAIRMAN, A poor insolvent debtor, left *bare* and naked. Stat. *Wil. Reg. Scot. cap.* 17.

BAIRNS' PART, (Children's part,) Is a third part of the defunct's free moveables, debts deduced, if the wife survived; and a half (if there be no relict) due to the children. *Scotch Dict.*

BAKERS. See *Bread.*

BALANCE OF TRADE, A computation of the value of all commodities which we buy from foreigners, and on the other side, the value of our own native products, which we export into neighbouring kingdoms; and the difference or excess between the one side and the other of such account or computation is called the *balance of trade.*

BALCANIFER, or *baldakinifer, i. e.* A standard bearer. *Matt. Paris. anno* 1237.

BALCONIES to houses in *London*, are regulated by the Building Act, 14 *Geo.* III. *c.* 78. § 48. &c.

BALE, (*Fr.*) A pack, or certain quantity of goods or merchandise; as a *bale* of silk, cloth, &c. This word is used in the statute 16 *Rich.* II. *c.* 3. and is still in use.

BALENGER, By the stat. 28 *Hen.* VI. *c.* 5. seems to have been a kind of *barge*, or water vessel. But elsewhere it rather signifies a man of war. *Walsing. in Rich.* II.

BALEUGA, A territory or precinct. *Chart. Hen.* II. See *Bannum.*

BALISTARIUS, A *balister*, or cross-bowman. *Gerrard de la War* is recorded to have been balistarius *domni regis*, &c. 28 and 29 *Hen.* III.

BALIVA, A bailiwick or jurisdiction. See tit. *Bailiwick.*

BALIVO AMOVENDO, A writ to remove a *bailiff* from his office, for want of sufficient land in the bailiwick. *Reg. Orig.* 78. See tit. *Bailiff, Sheriff.*

BALKERS, Are derived from the word *balk*, because they stand higher, as it were on a balk or ridge of ground, to give notice of something to others. *Sheph. Epitom. vide Conders.*

BALLARE, To dance. *Spelm.* Perhaps in this sense it may be understood in *Fleta, lib.* 2. *c.* 87. *de caseatrice; Anglicè Dairy-maid.*

BALLAST, Is gravel or sand to poise ships and make them go upright: and ships and vessels taking in *ballast* in the river *Thames*, are to pay so much a ton to *Trinity House, Deptford;* who shall employ *ballast men*, and regulate them, and their lighters to be marked, &c. on pain of 10*l.* Stat. 6 *Geo.* II. *c.* 29. continued by several acts. See *Harbours.*

BALLIUM, A fortress or bulwark. *Matt. Westm. anno* 1265.

BAN, or *bans*, from the Brit. *ban, i. e. clamour.*] A proclamation or public notice; any public summons, or edict, whereby a thing is commanded or forbidden. It is a word ordinary among the feudists; and for its various significations, see *Spelman* v. *bannum.* The word *bans*, in its common acceptation, is used for the publishing matrimonial contracts, which is done in the church before marriage; to the end that if any man can speak against the intention of the parties, either in respect of kindred, precontract, or for other just cause, they may take their exception in time, before the marriage is consummated: and in the canon law, Bannæ *sunt proclamationes sponsi et sponsæ in ecclesiis fieri solitæ.* But there may be a faculty or license for the marriage, and then this ceremony is omitted. See tit. *Marriage.*

BANCALE, A covering of ease and ornament for a bench, or other seat. *Monasticon, tom.* 1. *p.* 222.

BANE, from the Sax. *bana*, a murderer.] Signifies destruction or overthrow: as, I will be the *bane* of such a man, is a common saying; so when a person receives a mortal injury by any thing, we say it was his *bane*: and he who is the cause of another man's death, is said to be *le bane*, *i. e.* malefactor. *Bract. lib.* 2. *tract.* 8. *cap.* 1.

BANERET, banerettus, *miles vexillarius.*] Sir *Thomas Smith*, in his *Repub. Angl. cap.* 18. says, is a knight made in the field, with the ceremony of cutting off the point of his standard, and making it, as it were, a *banner*, and accounted so honourable that they are allowed to display their arms in the king's army, as barons do, and may bear arms with supporters. See *Camden* and *Spelman*, from whom it appears *banerets* are the degree between barons and knights. *Spelm.* in v. *Banerettus.* It is said that they were anciently called by summons to parliament: and that they are next to the barons in dignity appears by the stats. 5 *Rich.* II. *stat.* 2. *cap.* 4. and 14 *Rich.* II. *c.* 11. *William de la Pole* was created *baneret* by King *Edward* the third, by letters patent, *anno regni sui*, 13. And those *banerets*, who were created *sub vexillis regiis, in exercitu regali, in aperto bello, et ipso rege personaliter præsente, explicatis*, take place of all *baronets*; as we may learn by the letters patent for creation of baronets. 4 *Inst.* 6. Some maintain that *banerets* ought not to be made in a civil war: but *Hen.* VII. made divers *banerets* upon the *Cornish* commotion, in the year 1495. See *Selden's Titles of Honour*, f. 799.

BANISHMENT, Fr. *banissement; exilium abjuratio.*] Is a forsaking or quitting of the realm; and a kind of civil death, inflicted on an offender: there are two kinds of it, one voluntary and upon oath, called *abjuration*, and the other upon compulsion for some offence. *Staundf. Pl. Cr.* f. 117. See tit. *Abjuration, Transportation.*

BANK, Lat. *bancus*, Fr. *banque.*] In our common law is usually taken for a seat or bench of judgment; as *Bank le Roy*, the King's Bench, *Bank le Common Pleas*, the bench of Common Pleas, or the Common Bench; called also in Latin *Bancus Regis*, and *Bancus Communium Placitorum. Cromp. Just.* 67. 91. *Jus Banci*, or the privilege of the Bench, was anciently allowed only to the king's judges, *qui summam administrant justitiam*; for inferior courts were not allowed that privilege.

There are, in each of the terms, stated days, called *days in bank*, *dies in banco*, that is, days of *appearance* in the court of common pleas. They are generally at the distance of about a week from each other, and regulated by some festival of the church. On some one of these days in bank all original writs must be made returnable; and therefore they are generally called the returns of that term. See tit. *Day.*

A *bank*, in common acceptation, signifies a place where a great sum of money is deposited, returned by exchange, or otherwise disposed of to profit.

The Bank of England is managed by a governor and directors, established by parliament, with funds for maintaining thereof, appropriated to such persons as were subscribers; and the capital stock, which is enlarged by divers statutes, is exempted from taxes, accounted a personal estate assignable over, not subject to forfeiture; and the company make dividends of the profits half yearly, &c. The funds are redeemable by the parliament, on paying the money borrowed: and the company of the *Bank* is to continue a corporation, and enjoy annuities till redeemed, &c. During the continuance of

the *Bank*, no body politic, &c. other than the company, shall borrow any sums on bills payable at demand; and forging the *seal* of the bank, and forging or altering *Bank notes*, or tendering such forged notes in payment, demanding to have them exchanged for money, &c. and forging the names of cashiers of the bank, are all capital felonies. See the several statutes 5 and 6 *Wm. & M. c.* 20. 8 and 9 *Wm.* III. *c.* 20. 11 *Geo.* I. *c.* 9. 12 *Geo.* I. *c.* 32. 15 *Geo.* II. *c.* 13. And officers or servants of the company, that embezzle any *Bank note*, &c. wherewith they are intrusted, being duly convicted, shall suffer death as felons.

By stat. 13 *Geo.* III. *c.* 79. persons not authorized by the bank, making or using moulds for the marking of paper, with the words *Bank of England* visible in the substance, or having such moulds in their possession, are guilty of felony without benefit of clergy: and persons issuing notes and bills engraved to resemble those of the bank, or having the sum expressed in white characters on a black ground, may be punished by imprisonment, not exceeding six months. But innocent persons possessed of such notes, carrying them for payment, not affected.

See stat. 34 *Geo.* II. *c.* 4. to regulate the holding general courts, and courts of directors.

See the several statutes 21 *Geo.* III. *cc.* 14. 60. 22 *Geo.* III. *c.* 8. 23 *Geo.* III. *c.* 35. 24 *Geo.* III. *ses.* 2. *cc.* 10. 39. 25 *Geo.* III. *c.* 32. 29 *Geo.* III. *c.* 37. 39 and 40 *Geo.* III. *c.* 28. and a vast variety of previous statutes, as to the continuance of the bank charter, which is also regularly continued by every loan act, till the stock created by such act is paid. By 39 and 40 *Geo.* III. *c.* 28. § 14. the bank is continued a corporation till the end of twelve months' notice after 1st *August*, 1833.

By stat. 31 *Geo.* III. *c.* 33. the bank is to keep in hand only 600,000*l.* above the sum necessary to pay the current dividends; the remaining surplus to be applied to the use of the public.

Persons making, or assisting in making, transfers of stock in any other name than that of the owner, or forging transfers or dividend warrants, or making false entries in the bank books, are made guilty of felony without clergy. Persons making out false dividend warrants transportable for seven years. 33 *Geo.* III. *c.* 30. 35 *Geo.* III. *c.* 66.

See the acts 41 *Geo.* III. (U. K.) *c.* 39. and 45 *Geo.* III. *c.* 89. for preventing forgery of bank notes, bank bills of exchange, and bank post bills. By these acts, persons not authorized making paper with the bank water-mark, &c. or publishing same, or engraving plates, &c. or having such in their possession, shall be transported for fourteen years. [There is an inaccuracy in the act 45 *Geo.* III. *c.* 89. § 7.]

36 *Geo.* III. *c.* 90. § 1. When trustees, in whose name stock stands in the bank, shall be out of the kingdom, &c. or become bankrupts, the court may order such stock to be transferred, or the dividends paid, &c.

By 37 *Geo.* III. *c.* 28. notes issued by the bank for sums under 5*l.* are declared valid.

By 37 *Geo.* III. *c.* 28. and afterwards by 37 *Geo.* III. *c.* 45. continued and amended by 37. *Geo.* III. *c.* 91. 38 *Geo.* III. *c.* 1. 42 *Geo.* III. *c.* 40. 43 *Geo.* III. *c.* 18. and 44 *Geo.* III. *c.* 1. the bank of *England* is restrained from making payments in cash during the war: and if the amount of any debt is tendered in bank notes, or bank notes and cash,

the party tendering cannot be arrested. [Like provisions are made as to the bank of *Ireland* by the *Irish* act, 37 *Geo.* III. *c.* 51. amended since the Union, by 43 *Geo.* III. *c.* 44. 44 *Geo.* III. *c.* 21.]

Bank of Scotland. This bank was erected by an act of the *Scots* parliament, in 1695, with a capital of 1,200,000*l. Scots.* (1,000,000*l.* sterling.) By *British* acts, 14 *Geo.* III. *c.* 32. 24 *Geo.* III. *c.* 12. 32 *Geo.* III. *c.* 25. 34 *Geo.* III. *c.* 19. and 44 *Geo.* III. *c.* 23. (local and personal,) this capital has been increased to the amount, in the whole, of 1,500,000*l.* sterling.

Bank of Ireland. This was established by an act of the *Irish* parliament, 21 and 22 *Geo.* III. *c.* 16. Payments in cash by this bank are restrained during the war, in the same manner as by the *Bank of England.* See that title. By 42 *Geo.* III. *c.* 87. this bank was enabled to purchase the parliament house in *Dublin;* rendered useless by the Union. See tit. *Ireland.*

BANKERS. The monied goldsmiths first got the name of *bankers* in the reign of King *Charles* II. but *bankers* now are those private persons in whose hands money is deposited and lodged for safety, to be drawn out again as the owners have occasion for it. See the preceding title.

41 *Geo.* III. (U. K.) *c.* 57. penalty on persons unauthorized making paper with name, &c. of any banker appearing in the substance of the paper, or vending the same—first offence six months' imprisonment; and for second offence, transportation for seven years. § 1.

Like punishment for engraving any bill, &c. of any banker, or using any engraved plate, &c. or knowingly having such plate, &c. § 2.

Penalty for engraving, &c. on any plate, any subscriptions to any bill, &c. of any person, or banking company, payable to bearer on demand, or having such in possession—for first offence, imprisonment from three years to twelve months; second offence, transportation for seven years. § 3.

BANKRUPT, A trader, who secrets himself or does certain other acts, tending to defraud his creditors. 2 *Comm.* 285. 471. The word itself is derived from *baneus*, or *banque*, the table or counter of a tradesman; (*Dufresne*, 1. 969.) and *ruptus* broken, denoting thereby one whose shop or place of trade is broken or gone; though others rather choose to adopt the *French* word *route*, a trace or track; a bankrupt, say they, being one who has removed his *banque*, leaving but a trace behind. *Cowel.* 4 *Inst.* 277. It is observable that the title of the first *English* statute concerning this offence, stat. 34 *Hen.* VIII. *c.* 4. "against such persons as do *make* bankrupt," is a literal translation of the *French* idiom, *qui font banque route.* 2 *Comm.* 472. n.

The bankrupt law is a system of positive regulations by various statutes, the construction of which have produced the multiplied cases on the subject, from whence the following principles and rules are extracted. These statutes are, stat. 13 *Eliz. c.* 7. (which almost totally altered the old stat. 34 *Hen.* VIII. *c.* 4. mentioned above.) 1 *Jac.* I. *c.* 15. 21 *Jac.* I. *c.* 19. 10 *Ann. c.* 15. 7 *Geo.* I. *c.* 31. 5 *Geo.* II. *c.* 30. (made perpetual by 37 *Geo.* III. *c.* 124.) 46 *Geo.* III. *c.* 135.

On this subject, recourse has chiefly been had to *Cooke's Bankrupt Laws;* together with the *Commentaries,* and the modern reported determinations.

The matter, to suit the present purpose, has thus been arranged.

I. *Who may be a bankrupt.*
II. *By what* acts *a person may become so.*
III. *A general view of the proceedings on, and effects of a commission of bankruptcy.*

1. As they relate to the bankrupt himself.
2. As they transfer his estate and property.

IV. *To this it has seemed necessary to add some more minute particulars, as to the following parts of the subject:*

1. Of the petitioning creditor's debt.
2. Of the proof of debts.
3. Of creditors by marriage articles.
4. Of contingent debts.
5. Of annuitants, and certain other peculiar creditors.
6. Of removing the assignees.
7. Of partners.

V. *Practical notes and forms.*

I. The stat. 13 *Eliz. c.* 7. enacts, "That any merchant or other person, being subject or denizen, using or exercising the trade of merchandise, by way of bargaining, exchange, rechange, barter, chevisance, or otherwise, in gross or by retail, or seeking his or her trade or living by buying *and* selling," may become bankrupts. Drawing and redrawing *bills of exchange may*, in certain cases, be considered as trading. 1 *Atk.* 128. See *Cowp.* 745.

Every person being a trader, and capable of making binding contracts, is liable to become a bankrupt. As a *nobleman*, *member of parliament*, *clergyman*, &c. And where it is said, that *farmers*, *innkeepers*, &c. cannot be bankrupts, it means, *in respect to that particular description;* and not as affording protection, if in any other shape they come within the bankrupt laws. But *infants* and *married women* cannot be bankrupts. As to the latter, however, there are exceptions; for a *feme covert* in *London*, being a sole trader according to the custom, is liable to a commission of bankruptcy; and, as repeated determinations have settled that a *feme covert*, living apart from her husband as a *feme sole*, is liable to *execution* for debts contracted by her, there seems no doubt that such a married woman is equally liable to a commission of bankruptcy. But if a *feme sole* trader commit an act of bankruptcy, and afterwards marry, and live with her husband, she cannot be made a bankrupt. *Ex parte Mear*, see *Cooke B. L. c.* 3. § 1. 4 *Term Rep.* 362. and this *Dictionary*, tit. *Baron and Feme.*

Buying only, or selling only, will not qualify a man to be a bankrupt; but it must be both buying *and* selling, and thereby attempting to get a livelihood. 2 *Comm.* 476. 2 *Wils.* 171.

There can be no such thing as an equitable bankruptcy; it must be a legal one; and the party must be a trader in his own right; for if a person that is a trader, makes another his executor, who only disposes of the stock of his trade, it will not make the executor a trader, and liable to a commission of bankruptcy. 2 *P. Wms.* 429. 1 *Atk.* 102.

Any person trading to *England*, whether native, denizen or alien, though never resident as a trader in *England*, may be a bankrupt, if he occasionally come to this country, and commit an act of bankruptcy. *Cowp.* 398. 402. *Raym.* 375. *Salk.* 110.

If a merchant gives over his trade, and some years after become insolvent for money he owed while a merchant, he may be a *bankrupt : but if it be for new debts*, or old debts continued on new security, it is otherwise. 1 *Vent.* 5. 29.

To enumerate every trade sufficient to make a man a bankrupt would be tedious. The following seem now settled : and some others are enumerated which have afforded cause of dispute, chiefly from the particular facts of the case. It is to be premised that a chapman, or one that buys *and* sells *any thing*, though his dealing does not come under the denomination of any particular trade, may become a bankrupt.

* Bankers, brokers, coal-dealers, factors, scriveners, vintners, brickmakers, butchers, bakers, brewers, clothiers, goldsmiths, dyers, iron-manufacturers who buy iron and work it into wares, locksmiths, milliners, nailors, plumbers, salesmen, shoemakers, smiths and farriers. 2 *Wils.* 170. 172. 4 *Burr.* 2148. 3 *Mod.* 330. *Cro. Jac.* 585. 2 Ld. *Raym.* 1480. 2 *Comm.* 476. 3 *Mod.* 330. 1 *Roll. Abr.* 60. *pl.* 11.

For the probable principle why the legislature has subjected *traders* to the bankrupt laws, and not suffered other people to be included in them, see *Port* v. *Turton*, 2 *Wils.* 172.

More particularly, who may or may not be bankrupts.

Alehouse-keepers, *not.* *Cooke*, 53. *Cro. Car.* 395.
Allum-manufacturers, *not.* *Cooke*, 34. 46.
Artificers, labourers, &c. *not.* *Cro. Car.* 21. *Cro. Jac.* 585. 3 *Mod.* 330. 2 *Wils.* 171. 2 *Comm.* 476. 4 *Burr.* 2148.
Bankers, *may.* Stat. 5 *Geo.* II. *c.* 30.
Bakers, *may.* See ante.*
Brewers, *may.* See ante.*
Brokers, *may.* Stat. 5 *Geo.* II. *c.* 30.
Brick-makers, *may.* 2 *Wils.* 172. *Brown*, *Ch. Ca.* 173. See the case of *Parker* v. *Wells*, 1 *Brown*, 494. 1 *Term Rep.* 34. *Cooke's B. L. c.* 3. § 2.

[In this case, and that of allum-manufacturers, though they seem to differ, the same principle is recognised, *viz.* "If a man exercises a manufacture upon the produce of his own land, as a necessary and usual mode of reaping and enjoying that produce, and bringing it advantageously to market, he shall not be considered as a trader, though he buys materials or ingredients—as in the case of cheese, cider, allum, and coal mines; and the like. But where the produce of land is merely the raw materials of a manufacture, and used as such, and not as the mode of raising the produce of the land; in short, where the produce of the land is an insignificant article, compared with the expense of the whole manufacture, there in truth he is, and ought to be, considered as a trader. As this distinction turns on the nature and manner of exercising the manufacture, and the motive with which it is carried on, it depends so much upon the light in which a *jury* sees the whole transaction, the law and the fact are so blended together, that it is hardly possible to distinguish them."]

Butchers, *may.* See ante.* 4 *Burr.* 2148.
Carpenters; not merely workmen, but buying timber and materials to carry on trade, *may.* 3 *Mod.* 155. Ld. *Raym.* 741.
Clergymen trading, *may.* *Cowp.* 745.
Clothiers, *may.* See ante.*
Coal-dealers, *may.* See ante.* But not owners or lessees of coal-mines. 2 *Wils.* 169, 170.
Companies or corporations, proprietors of shares in, generally—*not*—except perhaps in the stationers' company. See 2 Ld. *Raym.* 851. And by statute, "no member of the *Bank of England*; of the *East India*, or *English Linen* company; no person circulating exchequer bills; no adventurer in the royal fishing trade, or *Guinea* company; no member of the *London Assurance*, *Royal Exchange*, or *South Sea* companies, shall be deemed a bankrupt, on account of their stock in those companies." Stat. 3 *Geo.* I. *c.* 3. § 43. 13 and 14 *Car.* II. *c.* 24. 4 *Geo.* III. *c.* 37. 6 *Geo.* I. *c.* 18. 8 *Geo.* I. *c.* 21.
Contractors, public, and such other public officers, *not.* 3 *Keb.* 451. Butlers and stewards of Inns of courts; farmers of customs, receivers-general, excisemen, &c. *not*, all on the same principle.
Drovers of cattle, *not.* Stat. 5 *Geo.* II. *c.* 30.
Dyers, *may.* See ante.*
Factors, *may.* Stat. 5 *Geo.* III. *c.* 30.
Farmer, *not.* *Cooke*, 21. But as a potatoe-merchant he *may.* 573.
Funds or stocks, public, dealers in, *not.* 2 *P. Wms.* 308. and see ante, companies.
Goldsmith, *may.* See ante.*
Glaziers, *not.* Stat 5 *Geo.* II. *c.* 30.
Innkeepers, *not.* 3 *Mod.* 329. *Cro. Car.* 395.
Iron-manufacturers, *may.* See ante.*
Labourers, *not.* See ante, artificers.
Land-jobber, *not.* 2 *Wils.* 169.
Members of parliament, *may.* See stat. 4 *Geo.* III. *c.* 33. 45 *Geo.* III. *c.* 124. and *post*, II.
Milliners, *may.* } See ante.*
Nailors, *may.* }
Pawnbrokers—it seems *may.* 1 *Atk.* 206. 218.
Plumbers, *may.* See ante.*
Receiver-general of taxes, *not.* Stat. 5 *Geo.* II. *c.* 30.
Salesmen, *may.* See ante.* *Good.* 12.
Scriveners, *may.* Stat. 21 *Jac.* I. *c.* 19. § 2.
Ship-owner, *not.*—Freighter, *may.* 1 *Vent.* 29. *Comb.* 182. 1 *Sid.* 411.
Shoemaker, *may.* 2 *Wils.* 171.
Smugglers, *may.* 1 *Atk.* 200.
Stock-jobbers, *not.* See Funds.
Tanners, *may.* See ante.*
Taylors, working, *not.* *Cooke*, 45.
Victuallers, *not.* 4 *Burr.* 2067. 2 *Wils.* 382.
Vintners, being wine-merchants, *may.* *Cooke*, 37.

The above Alphabetical List, is probably not so perfect or extensive as it might have been made; but the general principles, already laid down, will serve to direct the student in cases of doubt or difficulty.

II. To LEARN what the particular *Acts of Bankruptcy* are, which render a man a bankrupt, the several statutes must be consulted, and the resolutions of the courts thereon. Among these are to be reckoned;

1. To depart the realm, or from his dwelling-house, with intent to defraud or hinder his creditors. Stat. 13 *Eliz. c.* 7.

2. To begin to keep his house privately, to absent himself from and avoid his creditors. Stat. *ib.*

3. To procure or suffer himself willingly to be arrested, without just or lawful cause; to suffer himself to be outlawed; or to yield himself to prison. Stat. 13 *Eliz. c.* 7. 1 *Jac.* I. *c.* 15. § 2.

4. Willingly or fraudulently to procure his goods, money or chattels, to be attached or sequestered. Stat. 1 *Jac.* I. *c.* 15.

5. To make any fraudulent grant or conveyance of his lands, tenements, goods or chattels, to the intent, or whereby his creditors shall and may be defeated or delayed for the recovery of their just debts. Stat. *ib.*

6. Being arrested for debt, to lie in prison two months after his arrest, upon that or any other arrest or detention for debt. Stat. 21 *Jac.* I. *c.* 19.

7. To obtain privilege, other than that of parliament, against arrest. Stat. *ib.*

8. Being arrested for 100*l.* or more, to escape out of prison. Stat. *ib.*

9. To prefer to any court, any petition or bill against any of the creditors, thereby endeavouring to enforce them to accept less than their just debts, or to procure time, or longer days of payment, than was given at the time of the original contracts. Stat. *ib.*

10. For a bankrupt to pay, satisfy, or secure the petitioning creditor his debt, is an act of bankruptcy which shall supersede that commission, and be sufficient on which to ground another; and such petitioning creditor shall lose his debt, to be divided among the other creditors. See *Cooke's B. L. c.* 4. § 1. Stat. 5 *Geo.* II. *c.* 30. § 24.

11. Neglecting to make satisfaction for any just debt or debts, to the amount of 100*l.* or more, within two months after service of legal process, for such debt, upon any trader, *having privilege of parliament*, is an act of *bankruptcy*. Stat. 4 *Geo.* III. *c.* 33. enforced and explained by 45 *Geo.* III. *c.* 124.

The legislature having thus, by positive laws, declared what acts shall be considered as criterions of insolvency or fraud, whereon to ground a commission, none other can be admitted by inference or analogy. Therefore it is not an act of bankruptcy for a trader secretly to convey his goods out of his house, and conceal them, to prevent their being taken in execution, nor to give money for notice when a writ should come into the sheriff's office. 1 Ld. *Raym.* 725. *Bull. N. P.* 40. So if a trader procure his goods fraudulently to be taken in execution, or makes a fraudulent sale of them, it is not an act of bankruptcy, though void against creditors. 4 *Burr.* 2478. *Cowp.* 429.

Many of the acts of bankruptcy above described are in themselves equivocal, and capable of being explained by circumstances; for, to bring them within the purview and meaning of the statute, it is absolutely necessary they should be done to defraud and delay creditors from recovering their just debts.

The better to obtain a clear and comprehensive view of the decisions on this part of the subject, each act of bankruptcy, on which any question appears to have been raised, shall be considered separately; pre-

raising that the statutes of bankrupts are local, and do not extend to acts done in foreign countries, or other dominions of *Great Britain*. *Cowp.* 398.

Departing the realm will not be an act of bankruptcy, unless done with a view of defrauding or delaying creditors; but if it appear that they are in fact delayed by such absence, it will be the same as if the original departure was fraudulent. *Bull. N. P.* 39. *Com. Dig.* tit. *Bankrupt*, (C. 1.) 1 *Atk.* 196. 240. *Cooke's B. L. Vernon* v. *Hankey*.

Beginning to keep house, or otherwise to absent himself. Denial to a creditor is *primâ facie* evidence of this act of bankruptcy. But as the statute requires it to be with an intent to delay or defraud creditors, the mere denial is therefore capable of being explained by circumstances, such as sickness, company, business, or even the lateness of the hour at which the creditor calls. Neither will an order by the debtor to his servant to deny him be sufficient. For where a trader gave orders to his servant to deny him to creditors on the 26th of *May*, but was not actually denied to a creditor till the 28th, the court held the actual denial, and not the order, constituted the act of bankruptcy, *Bull. N. P.* 39. 1 *Atk.* 201. *Cooke* cites *Hawkes* v. *Sanders*, *T.* 24 *Geo.* III.

Keeping in another man's house or chamber, having no house of his own, or on ship-board, is an act of bankruptcy; so a miller keeping his mill. *Com. Dig.* tit. *Bankrupt*.

Any keeping house for the purpose of delaying a creditor, even for a very short time, will be an act of bankruptcy; notwithstanding the party afterwards goes abroad, and appears in public. 2 *Stra.* 809. 2 *Term Rep.* 59.

A general denial will not be sufficient, but it must be a denial to a creditor who has a debt at that time due; for if he is only a creditor by a note payable at a future day, a denial to him will be no act of bankruptcy. 7 *Vin.* 6. *pl.* 14.

It frequently happens that traders in declining circumstances, call their creditors together to inspect their affairs; and determine whether a commission shall issue against them or not; and if thought advisable, it is usual for the trader to deny himself to a creditor, for the purpose of making an act of bankruptcy. However, it seems doubtful how far such concerted denial will be an act of bankruptcy to affect the interest of third persons. See 1 *Black. Rep.* 441. *Bull. N. P.* 39.

Departing from his dwelling-house may become an act of bankruptcy or not, according to the motive by which the party is impelled; if it be done with a view of defrauding his creditors, or even delaying them, and his absence be but for a single day, it will be an act of bankruptcy; and his very absenting himself is sufficient *primâ facie* evidence of an intention to defraud or delay his creditors; but it must be a voluntary absenting, and not by means of an arrest. 1 *Salk.* 110. 1 *Burr.* 484. 2 *Stra.* 809. *Green*, 53.

Suffering himself to be outlawed. An outlawry in *Ireland* does not make one a bankrupt; but in the county palatine of *Durham* it does. However, an outlawry does not appear to be an act of bankruptcy, unless it be suffered with intent to defraud creditors. *Com. Dig.* tit. *Bankrupt*. *Stone*, 124. *Billing*. 94. *Good*. 23. 1 *Lev.* 13.

Yielding himself to prison, is to be intended of a voluntary yielding for debt; and if a person capable of paying, will, notwithstanding, from fraudulent motives, voluntarily go to prison, it is an act of bankruptcy. *Bill.* 95. *Good.* 25. *Vin.* tit. *Creditor and Bankrupt*, 62.

Willingly or fraudulently procuring his goods to be attached or sequestered; which is a plain and direct endeavour to disappoint his creditors of their security. 2 *Comm.* 478. The attachment here meant, and which the legislature had in view, is that sort of attachment only by which suits are commenced; as in *London* and other places where that species of process is used. *Cowp.* 427.

Making any fraudulent conveyance of his lands or goods. A fraudulent grant, to come within the meaning of the statute, must be by *deed*; therefore a fraudulent sale of goods not by deed, is no act of bankruptcy in itself; but being a scheme concerted at the eve of bankruptcy to cheat innocent persons, in order to secure particular creditors, is such a fraud as shall render the sale void. 4 *Burr.* 2478.

A grant or conveyance fraudulent within stat. 13 *Eliz. c.* 5. or 27 *Eliz. c.* 4. is an act of bankruptcy. *Com. Dig. Cooke.*

A trader before he becomes a bankrupt may prefer one creditor to another; and may pay him his debt; or may make him a mortgage, with possession delivered, or may assign part of his effects; but a preference of one creditor to the rest, by conveying by *deed* all his effects to him, is a fraud upon the whole bankrupt law, and an act of bankruptcy. 1 *Burr.* 467.

Whether a transaction be fair or fraudulent, is often a question of law; it is the judgment of law upon facts and intents; but transactions valid as between the parties may be fraudulent by reason of covin, collusion, or confederacy to injure third persons. 2 *Burr.* 827. 1 *Burr.* 467.

Nor will the case be different, if the assignment is made to indemnify a surety; for the inconvenience and mischief arising from an undue preference is the same. *Cooke's B. L.* 78. *Doug.* 282.

An equal distribution among creditors who equally give a general personal credit to the bankrupt, is anxiously provided for; ever since the act 21 *Jac.* I. *c.* 19. therefore when a bankrupt by deed, conveys *all* his effects to trustees to pay all but one creditor, it is fraudulent and an act of bankruptcy. 1 *Burr.* 477.

But though a conveyance by deed of all a bankrupt's effects, or so much of his stock in trade, as to disable him from being a trader, or all his household goods, is itself an act of bankruptcy; a conveyance of *part* is very different; that may be public, fair, and honest. As a trader may sell, so may he openly transfer many kinds of property by way of security. What assignment of part will or will not be fraudulent, must depend on the particular circumstances of the case; but a colourable exception of a small part of his estate or effects, will not prevent the deed being declared fraudulent; for the law will never suffer an evasion to prevail to take a case out of the general rule, which is so essential to justice. 1 *Black. Rep.* 441. 2 *Black. Rep.* 362. 996. 1 *Burr.* 477.

An assignment by deed of part of a trader's effects, will be good, if made *bonâ fide*, and possession delivered; and indeed the not delivering possession being only evidence of fraud, may be explained by circumstances. 1 *Burr.* 478. 484. But an assignment even of only *part* of a trader's effects, to a fair creditor, will, if done in contemplation of bankruptcy itself, become the very act. 3 *Wils.* 47. *Cowp.* 124.

Procuring any protection except privilege of parliament. If any one be protected as the king's servant, it does not make him bankrupt. *Skin.* 21. By stat. 7 *Ann. c.* 12. § 5. declaring the privilege of ambassadors and their train, it is expressly enacted, That no merchant,

or other trader whatsoever, within the description of any of the statutes against bankrupts, shall have any benefit of that act.

Being arrested for debt, and lying two months in prison. The statute does not make the mere being arrested an act of bankruptcy. The most substantial trader is liable to be arrested; but the presumption of insolvency arises from his lying in prison two months, without being able to get bail; nor will this presumption be obviated by a mere formal bail, put in for the purpose of changing from one custody to another. Where bail is really put in, the bankruptcy only relates to the time of the surrender; but when it is only formal bail, it will have relation to the first arrest. 1 *Burr.* 437. See *Salk.* 109. *Bull. N. P.* 38.

Escape out of prison on arrest for 100*l. or more.* The act clearly intends such an escape as shows he means to run away, and thereby to defeat his creditors; it must be an escape against the will of the sheriff; for a man shall not be made a criminal, where he has not the least criminal intention to disobey any law. 1 *Burr.* 440.

It is not an act of bankruptcy for a banker to refuse payment, if he appears and keeps his shop open. 7 *Mod.* 139. *S. C. C.* 42.

An act of bankruptcy, if once plainly committed, can never be purged, even though the party continues to carry on a great trade. 2 *Term Rep.* 59. But if the act was doubtful, then circumstances may explain the intent of the first act, and show it not to have been done with a view to defraud creditors. But if, after a plain act of bankruptcy, a man pays off and compounds with all his creditors, he becomes a new man. 1 *Burr.* 484. 1 *Salk.* 110. See stat. 46 *Geo.* III. *c.* 135.

III. The Proceedings on a commission of bankrupt, depend entirely on the several statutes of bankruptcy; all which are blended together, and digested into a concise methodical order, in 2 *Comm.* 480. and here adopted with additions.

1. There must be a petition to the lord *chancellor* by one creditor to the amount of 100*l.* or by two to the amount of 150*l.* or by three or more to the amount of 200*l.* which debts must be proved by *affidavit.* (Stat. 5 *Geo.* II. *c.* 30.) Upon which he grants a *commission* to such discreet persons as to him shall seem good, who are then styled commissioners of bankrupt. Stat. 13 *Eliz. c.* 7. Of these commissioners there are several existing lists, which take the commissioners of bankruptcy in turn. The petitioners, to prevent malicious applications, must be bound in a bond to the lord *chancellor* for 200*l.* to make the party amends in case they do not prove him a bankrupt. And if, on the other hand, they receive any money or effects from the bankrupt, as a recompense for suing out the commission, so as to receive more than their ratable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt. These provisions are made, as well to secure persons in good credit from being damnified by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commission. When the commission is awarded and issued, the commissioners are to meet at their own expense, and take an oath for the due execution of their commission, and to be allowed a sum not exceeding 20*s. per diem*, each, at every sitting. And no commission of bankrupt shall abate, or be void by the death of the bankrupt subsequent to the commission. Stat. 1 *Jac.* I. *c.* 15. Nor upon any demise

of the crown. Stat. 5 *Geo.* II. *c.* 30. The granting a commission of bankruptcy is not discretionary, but a matter of right. 1 *Vern.* 153.

By stat. 5 *Geo.* II. *c.* 30. § 25. the petitioning creditor is directed at his own costs, to prosecute the commission until assignees shall be chosen; which costs are to be ascertained by the commissioners at the meeting for the choice of assignees; and are to be paid by the assignees to the petitioning creditor out of the first money or effects received by them, under the commission. But these costs may be taxed by a master in chancery, on petition to the lord *chancellor*. *Cooke's B. L. c.* 1. § 3.

Notwithstanding the statute 5 *Geo.* II. has provided a remedy against maliciously suing out commissions of bankrupt, yet it is held not to take away the common law remedy by an action for damages, but that the party may proceed at law to obtain such redress for the injury he has sustained, as a jury may think he is entitled to. 3 *Burr.* 1418. 1 *Atk.* 144.

If more than two of the commissioners should die, by which means there would not be a sufficient number to execute the commission, or if it should be lost, it must be renewed; upon which renewal only half the fees are paid, and the commissioners under the renewed commission proceed from that step which was left incomplete by the former. *Cooke, B. L.*

The commissioners are first to receive proof of the person's being a trader, and having committed some act of bankruptcy; and then to declare him a bankrupt, if proved so; and to give notice thereof in the *Gazette*, and at the same time to appoint three meetings. At one of these meetings, an election must be made of assignees or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of the creditors; and assignees are to be chosen by the major part in value of the creditors who shall have then proved their debts; and one creditor, if to a sufficient amount, may choose himself assignee; but a provisional assignee or assignees may be, if necessary, originally appointed by the commissioners, and afterwards approved or rejected by the creditors: but no creditor shall be admitted to vote in the choice of assignees, whose debt on the balance of accounts does not amount to 10*l.* And at the third meeting at farthest, which must be on the forty-second day after the advertisement in the *Gazette*, (unless the time be enlarged by the lord *chancellor*; which it may not be for more than fifty days unless on special circumstances of involuntary default by the bankrupt, 1 *Atk.* 222.) the bankrupt, upon notice also served upon him, or left at his usual place of abode, must surrender himself personally to the commissioners; which surrender (if voluntary) protects him from all arrests till his final examination is past: and he must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default of either surrender or conformity, he shall be guilty of felony without benefit of clergy, and shall suffer death, and his goods and estates shall be distributed among his creditors. Stat. 5 *Geo.* II. *c.* 30.

In case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, he may by warrant from any judge or justice of the peace be apprehended and committed to the county gaol in order to be forthcoming to the commissioners; who are also empowered immediately to grant a warrant for seizing his goods and papers. Stat. 5 *Geo.* II. *c.* 30. and see 1 *Atk.* 240.

When the bankrupt appears, the commissioners are to examine him, touching all matters relating to his trade and effects. They may also summon before them, and examine the bankrupt's wife, (stat. 21 *Jac.* I. *c.* 19. see 1 *P. Wms.* 610, 611.) and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And in case any of them should refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison without bail, till they submit themselves and make and sign a full answer: the commissioners specifying in their warrant of commitment the question so refused to be answered. And any gaoler, permitting such person to escape, or go out of prison, shall forfeit 500*l.* to the creditors. Stat. 5 *Geo.* II. *c.* 30.

The bankrupt, upon this examination, is bound upon pain of death to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners; (except the necessary apparel of himself, his wife and children;) or, in case he conceals or embezzles any effects to the amount of 20*l.* or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy; and his goods and estate shall be divided among his creditors. Stat. 5 *Geo.* II. *c.* 30. And unless it shall appear, that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment for such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off. Stat. 21 *Jac.* I. *c.* 19.

And so careful is the law to avoid any fraud, dishonesty or concealment, on the part of the bankrupt, that an agreement by the friends of the bankrupt, to pay a sum, in consideration that the creditors would not examine him as to particular points, is void. *Nerot* v. *Wallace*, 3 *Term Rep.* 17.

After the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to *five per cent.* out of the effects so discovered, and such further reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing the estate of any bankrupt, after the expiration of the two and forty days, shall forfeit 100*l.* and double the value of the estate concealed, to the creditors. Stat. 5 *Geo.* II. *c.* 30.

Hitherto every thing is in favour of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigour and severity. For if the bankrupt hath made an ingenuous discovery, (of the truth and sufficiency of which there remains no reason to doubt,) and hath conformed in all points to the directions of the law; and, if in consequence thereof, the creditors, or four parts in five of them in number and value, (but none of them creditors for less than 20*l.*) will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the lord *chancellor*, and he, or two of the judges whom he shall appoint, on oath made by the bankrupt that such certificate was obtained without fraud, may allow the same; or disallow it upon cause shown by any of the creditors of the bankrupt. Stat. 5 *Geo.* II. *c.* 30.

If no cause be shown to the contrary, the certificate is allowed of course, and then the bankrupt is entitled to a decent and reasonable allowance out of his effects for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one-half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have a competent sum allowed him, not exceeding *three per cent.* but if they pay ten shillings in the pound, he is to be allowed *five per cent.* if twelve shillings and six-pence, then *seven and a half per cent.* and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent.* provided, that such allowance do not in the first case exceed 200*l.* in the second 250*l.* and in the third 300*l.* Stat. 5 *Geo.* II. *c.* 30.

Besides this allowance, he has also an indemnity granted him of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts. And for that among other purposes, all proceedings in commissions of bankrupt are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account; though in general, the production of the certificate, properly allowed, shall be sufficient evidence of all previous proceedings. Stat. 5 *Geo.* II. *c.* 30.

The allowing the certificate of a bankrupt, will not discharge his sureties; but if a bankrupt obtains his certificate before his bail are fixed, it will discharge them; but if not till after they are fixed, they will remain liable notwithstanding the certificate, for it has no relation back; and till allowed it is nothing. And if the creditor proves his debt, with intent to obstruct the certificate, it does not preclude him from pursuing his legal remedies; and even if he had received his debt, or part of it, under the commission, still he might proceed to fix the bail who would be entitled to their remedy, so far as they are oppressed by *audita querela*, or by motion. 1 *Atk.* 84. 1 *Burr.* 244. 2 *Burr.* 716. 2 *Black.* 812.

However, the bankrupt's certificate, obtained after judgment in an action upon a bail-bond against the bankrupt himself, will not discharge the bail-bond, although it discharged the original debt, for it is a new and distinct cause of action. 1 *Burr.* 436. 2 *Stra.* 1196. 1 *Wils.* 41.

The certificate does not discharge a bankrupt from his own express collateral covenant, which does not run with the land. 4 *Burr.* 2443. Nor from a covenant to pay rent. 4 *Term Rep.* 94.

A bankrupt after a commission of bankruptcy sued out, may, in consideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit, under the commission, make such creditor a satisfaction, in part, or for the whole of his debt, by a new undertaking or agreement, and *assumpsit* will lie upon such new promise or undertaking. 1 *Atk.* 67.

If a bankrupt has his certificate, and an action be brought against him afterwards for a debt precedent to the commission, he may plead his certificate, or otherwise he is without relief. 2 *Vern.* 696, 697.

The common method of pleading is, generally, that he became a bankrupt within the intent and meaning of the statutes made and in

force concerning bankrupts, and that the cause of action accrued before he became a bankrupt. This general plea is given by stat. 5 *Geo.* II. *c.* 30. § 7.

Though a creditor of a bankrupt under 20*l.* is excluded from assent or dissent to the certificate, yet as he is affected by the consequence of allowing the certificate, he hath right to petition, and show any fraud against allowing the certificate. 7 *Vin. Abr.* 134. *pl.* 18.

No allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed; and also if any creditor produces a fictitious debt, or is induced by money or notes to sign his certificate, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he loses all title to these advantages. Stat. 24 *Geo.* II. *c.* 57. See *Doug.* 216. 673. Neither can he claim them, if he has given with any of his children above 100*l.* for a marriage portion, unless he had at that time sufficient left to pay all his debts, or if he has lost at any one time 5*l.* or in the whole 100*l.* within a twelvemonth before he became a bankrupt, by any manner of gaming or wagering whatsoever; or, within the same time has lost to the value of 100*l.* by stock-jobbing.

Also to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by a commission of bankrupt, or have compounded with their creditors, or have been delivered by an act of insolvency. Persons who have been once cleared by any of these methods, and afterwards become bankrupts again, unless they pay full 15*s.* in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades. Stat. 5 *Geo.* II. *c.* 30. And an action may accordingly be maintained for such debt. 5 *Term Rep.* 287. But money gained by his trade or profession for the necessary maintenance of himself and family may be recovered by action by an uncertificated bankrupt. *Chippendale* v. *Tomlinson. Co. B. L.*

2. By the stat. 13 *Eliz. c.* 7. the commissioners shall have full power to dispose of all the bankrupt's lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; [and all lands and tenements which were purchased by him jointly with his wife or children to his own use, (or such interest therein as he may lawfully part with,) or purchased with any other person, upon secret trust, for his own use;] and cause them be appraised to their full value and to sell the same *by deed indented and inrolled*, or divide them proportionably among his creditors. This statute expressly included not only freehold, but customary and copyhold lands: and the lord of the manor is thereby bound to admit the assignee, (see *Cro. Car.* 568. 1 *Atk.* 96.) but did not extend to estates-tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 *Jac.* I. *c.* 19. enacts, that the commissioners shall be empowered to sell or convey, by deed indented and inrolled, any lands or tenements of the bankrupt, wherein he shall be seised of an estate-tail in possession, remainder or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issue in tail, remainder-men, and reversioners, whom the bank-

rupt himself might have barred by a common recovery, or other means; and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same, as the bankrupt himself might have done, and after redemption to sell them. And the commissioners may sell a copyhold entailed by custom. *Stone*, 127. *Billing*. 148. And also, by this and a former act, 1 *Jac.* I. *c.* 15. all fraudulent conveyances to defeat the intent of these statutes are declared void; but it is provided, that no purchaser *bonâ fide*, for a good or valuable consideration, shall be affected by the bankrupt laws, unless the commission be sued forth within five years after the act of bankruptcy committed. See *Cooke's B. L. c.* 8.

If there be two joint-tenants, and the one becomes bankrupt and dies, *Billinghurst* is of opinion the bankrupt's part shall be sold, and that there shall be no survivorship; because the bankrupt's moiety is bound by the statutes, and also the bankrupt had power to sell the same in his life-time, and might depart with it. And by stat. 1 *Jac. c.* 15. (see *ante*, III. 1.) the commissioners after the bankrupt's death, may proceed in execution, in and upon the commission, for and concerning the offender's lands, tenements, &c. in such sort as if the offender had been living; which they cannot do, if the survivorship is held to take place.

If the bankrupt be a joint-tenant in fee, for life or years, the commissioners may sell a moiety. So if he be seised in right of his wife, they may sell during the coverture. 1 *Com. Dig.* 530.

In case of a patron becoming bankrupt, the commissioners may sell the advowson of the living; but if the church be void at the time of the sale, the vendee shall not present to the void turn, but the bankrupt himself, because the void turn of the church is not valuable. 1 *Burn's Eccl. Law*, 4th *ed. p.* 125.

The commissioners may sell offices of inheritance and for terms of years; but an office concerning the execution of justice (and therefore within 5 and 6 *Ed.* VI. *c.* 16.) cannot be sold. 1 *Atk.* 213. But a place that does not concern the execution of justice, but only the police, may be sold. 1 *Atk.* 210. 215.

If a mortgage is made by a bankrupt, tenant in tail, without suffering a recovery, the assignees shall take advantage of this defect, and hold the land clear of the mortgage. 1 *Wils.* 276.

The commissioners may assign a possibility of right belonging to the bankrupt. 3 *P. Wms.* 132.

When assignees are chosen under a commission, all the estate and effects of the bankrupt, whether they be goods in actual *possession*, or debts, contracts and legacies, and other *choses in action*, are vested in them by assignment; (but until the assignment, the property is not transferred out of the bankrupt;) and every new acquisition previous to the certificate will vest in the assignees; but as to future real estates, there must be a new assignment of them. 1 *Atk.* 253. *Billing.* 118. 1 *P. Wms.* 385, 386.

The commissioners, by their warrant, may cause any house or tenement *of the bankrupt* to be broken open, in order to enter and seize the same. See 2 *Show.* 247.

When the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them; in which assignment the provisional assignee or assignees (if any have been chosen) must join, and the property of every part of the estate is

thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it. 12 *Mod.* 324.

By stat. 36 *Geo.* III. *c.* 90. § 2. if bankrupts refuse to transfer stock over which they have power, the lord chancellor may order it to be transferred to the assignees.

The commissioners in *England* may sell the bankrupt's goods in *Ireland;* and (notwithstanding a *dictum* of lord *Mansfield* to the contrary, see *Doug.* 151.) it seems now decided, that by the assignment of the commissioners, *all* the bankrupt's property, *whether in England or abroad*, is conveyed to the use of his creditors. See *Hunter* v. *Potts*, 4 *Term Rep.* 182. and *Cooke's B. L. c.* 8. § 10.

If a man sends bills of exchange, or consigns a cargo, and the person to whom he sends them, has paid the value before, though he did not know of the sending them at that time, the sending of them to the carrier will be sufficient to prevent the assignees from taking these goods back, in case of an intervening act of bankrptcy. 4 *Burr.* 2239.

But if the goods were sent in contemplation of bankruptcy, and to give a preference to a former creditor, if the act of bankruptcy is committed before the creditor receives the property, and assents to it, the commissioners may assign it as part of the bankrupt's effects, and it will vest in the assignees. 4 *Burr.* 2235.

All questions of preference turn upon the action being complete, before an act of bankruptcy committed, for then the property is transferred; otherwise an act of bankruptcy, intervening, vests the property in the hands and disposal of the law. If a man were to make a payment but the evening before he becomes bankrupt, independent of the act of parliament, and in a course of dealing and trade, it would be good. Where an act is done, that is right to be done, and the single motive is not to give an unjust preference, the creditor will have a preference. *Cowp.* 123.

If a merchant consigns goods to a trader, and before their arrival the consignee becomes bankrupt, if the merchant can prevent the goods getting into the bankrupt's hands, the commissioners' assignment will not affect them. 2 *Vern.* 203. 1 *Atk.* 248. *Cowp.* 296.

The future profits arising from a *bankrupt's* personal labour are not subject to the assignment. *Chippendale* v. *Tomlinson, T.* 25 *Geo.* III. *B. R.*

The property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for; therefore when the commission is awarded, the commission and the property of the assignees, shall have a relation, or reference, back to the first and original act of bankruptcy. 1 *Burr.* 32. Insomuch that all transactions of the bankrupt, are from that time absolutely null and void; either with regard to the alienation of his property, or the receipt of his debts, from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. Therefore, even if a banker pay the draft of a trader keeping cash with him after knowledge of an act of bankruptcy, the assignees may recover the money. 2 *Term Rep.* 113. 3 *Bro. C. R.* 313. *Vernon* v. *Hankey*, and see 2 *Term Rep.* 287. And, if an execution be sued out, but not served and executed on the bankrupt's effects till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is within the statutes of bankrupts; 1 *Atk.* 262. *W. Jones*, 202. 2 *Show.* 480. for if, after the act of bankruptcy committed, and before

the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby. *Vin. Abr.* tit. *Creditor and Bankrupt*, 104. *Cooke's B. L. c.* 14. § 7.

As these acts of bankruptcy however may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by stat. 19 *Geo.* II. *c.* 32. that no money paid by a bankrupt to a *bonâ fide* or real creditor, in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded. Nor (by stat. 1. *Jac.* I. *c.* 15.) shall any debtor of a bankrupt that pays him his debt, without knowing of his bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader.

By 46 *Geo.* III. *c.* 135. reciting that great inconveniences and injustice have been occasioned by reason of the fair and honest dealings and transactions of and with traders being defeated by secret acts of bankruptcy, in cases not already provided for, or not sufficiently provided for by law, it is enacted, that all conveyances by, all payments by and to, and all contracts with, any bankrupt *bonâ fide* made two months before the date of a commission of bankruptcy, shall be good, notwithstanding any secret act of bankruptcy prior to such conveyance, &c. 46 *Geo.* III. *c.* 135. § 1.

Bonâ fide creditors whose debts might have been proved under a commission of bankruptcy, if no prior act of bankruptcy had been committed, shall be admitted to prove such debts, if they had no notice of such prior act of bankruptcy. § 2.

Where it shall appear that there has been mutual credit given, or mutual debts contracted between the bankrupt and any other person, one debt or demand may be set off against the other, notwithstanding any prior act of bankruptcy, provided the credit was given to the bankrupt two calendar months before the date of the commission, and that the person claiming the benefit of such set-off had not notice of any prior act of bankruptcy by such bankrupt, or that he was insolvent. § 3. The issuing a commission, though afterwards superseded, or the striking a docket, shall be deemed notice of a prior act of bankruptcy, if any such were really committed. § 3.

Bankrupts on obtaining their certificates shall be discharged of debts proveable under this act, as if no secret act of bankruptcy had been committed. § 4.

Commissions of bankrupt shall not be avoided by reason of any secret act of bankruptcy having been committed, prior to the contracting the debt of the petitioning creditor. § 5.

Sale of goods by a *bankrupt* after an act of *bankruptcy*, is not merely void; the contract is good between the parties, but it may be avoided by the commissioners or assignees at pleasure; therefore they may either bring *trover* for the goods, as supposing the contract may be void, or may bring debt or *assumpsit* for the value, which affirms the contract. 3 *Salk.* 59. *pl.* 2. 2 *Term Rep.* 143. 4 *Term Rep.* 216, 217.

And so if a bankrupt on the eve of bankruptcy, fraudulently deliver goods to a creditor. 4 *Term Rep.* 211.

The assignees may pursue *any legal* method of recovering the property vested in them, by their own authority; but cannot commence a suit in *equity*, nor *compound* any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them, in value, at a meeting to be held in pursuance of notice in the gazette. Stat. 5 *Geo.* II. *c.* 30. § 34, 35. 38. See 1 *Atk.* 91. 107. 210. 253. *Cooke's B. L. c.* 14.

When they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after 4, and within 12 months after the commission issued, give 21 days notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required. [And under stat. 5 *Geo.* II. *c.* 30. § 6. by affidavit if living in the country, and if Quakers by affirmation.] And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove their debts. This dividend must be made equally, and in a ratable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages, indeed, for which the creditor has a real security in his own hands, are entirely safe, for the commission of bankrupt reaches only the equity of redemption. *Finch. Rep.* 466. 2 *Rep.* 25. So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution. But, otherwise, judgments and recognisances, (both which are debts of record, and therefore at other times have a priority,) and also bonds and obligations by deed or special instrument, (which are called debts by specialty, and are usually the next in order,) these are all put on a level with debts by mere simple contract, and all paid *pari passu*. Stat. 21 *Jac.* I. *c.* 19. Nay, so far is this matter carried, that, by the express provision of the stat. 7 *Geo.* I. *c.* 31. (see stat. 5 *Geo.* II. *c.* 30. § 22. *Cowp.* 243.) debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, shall be proved and paid equally with the rest, allowing a discount or drawback in proportion. Ld. *Raym.* 1549. *Stra.* 949. 1211. 2 *P. Wms.* 396. 3 *Wils.* 17.

And insurances and obligations upon bottomry or *respondentia*, *bonâ fide* made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy. Stat. 19 *Geo.* II. *c.* 32. § 2. Also annuity bonds, though not forfeited at the time of the bankruptcy. *Cowp.* 540. but see 2 *Black. Rep.* 110. b. And policies of insurances for life. *Doug.* (2d edit.) 166.

Within eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first. Stat. 5 *Geo.* II. *c.* 30. It is the duty of assignees to make a dividend as early as possible after the time given by statute. And if they neglect to do so, and keep the money in their own hands, they will be liable to pay interest for it. 1 *Atk.* 90. *Cooke's B. L. c.* 7. § 3.

And if any surplus remains after selling his estates, and paying every creditor his full debt, it shall be restored to the bankrupt. Stat. 13 *Eliz. c.* 7. This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And if any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence, except that, upon satisfaction made to all the creditors, the commission may be *superseded*. 2 *Cha. Ca.* 144. This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled by a commission to do them that justice which otherwise he wanted to evade. And, therefore, though the usual rule is, that all interest on debts carrying interest shall cease

from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt or his representatives. 1 *Atk.* 244.

A *supersedeas* is a writ issuing under the great seal, to supersede the commission, and this writ may be issued at the discretion of the lord chancellor, when the creditors of the bankrupt agree to supersede the commission; or because the party appears not to have been a trader; that the party had not committed an act of bankruptcy; that the commission was not opened till three months after it issued; or that he has paid all his creditors. 1 *Atk.* 154. 2 *Cha. Ca.* 192. *Sel. Ca. Cha.* 46. 1 *Atk.* 135. 1 *Atk.* 244. *Ex parte Nutt*, 1 *Atk.* 102.

Though the usual course is for the lord chancellor to order a feigned issue to try the bankruptcy at law, yet if it appears plainly to have been taken out fraudulently and vexatiously, the court will at once supersede the commission, and order the petitioning creditor's bond to be assigned. 1 *Atk.* 128. 144. 218.

IV. 1. The acts of parliament relating to bankrupts, being made for the relief of creditors, none but a creditor could at any time have taken out a commission; and now he must have a *legal* demand to the amount specified in stat. 5 *Geo.* II. *c.* 30. § 23. But a debt in equity will in no circumstances be a foundation for a commission; therefore if a legal demand is not in its own nature assignable, the assignee, notwithstanding his equitable claim, cannot be a petitioning creditor. *Forest.* 248. *Ch. Ca.* 191. *Freem.* 270. 1 *Atk.* 147. 2 *Vez.* 407. 2 *Stra.* 899. 1 *P. Wms.* 783.

It is generally understood, that the commission must issue on the petition of some creditor capable of claiming relief under it; and therefore that if the debt of the petitioning creditor appears to have been contracted subsequent to a secret act of bankruptcy committed by the trader, no commission ought to be granted upon his petition. 2 *Stra.* 744. 746. 1042. 1 *Atk.* 73. But see now 46 *Geo.* III. *c.* 135. § 5. *ante*, III. 2.

A debt at law, notwithstanding the statute of limitations has incurred, will support a commission; for the statute does not extinguish the debt, but the remedy, and the least hint will revive it. 2 *Black. Rep.* 703.

It has been determined, that a creditor, by notes bought in at 10*s.* in the pound, was a creditor for the full sum, and might take out a commission. 1 *P. Wms.* 783.

A creditor, before the party entered into trade, may on account of such debt, sue out a commission, but a creditor for a debt contracted after leaving off trade, cannot. But when a commission is sued out, those creditors who have become such since the quitting trade, may come in and share the dividend with those who were creditors before or during the trading, provided they are not barred by a prior act of bankruptcy. 12 *Mod.* 159. Ld. *Raym.* 287. 1 *Sid.* 411. *Doug.* 282.

If a creditor has his debtor in execution, he cannot petition for a commission of bankruptcy; for the body of the debtor being in execution, is a satisfaction of the debt, in point of law. Therefore where a commission had issued on the petition of a creditor who had the bankrupt in execution, it was upon that account superseded. 3 *Wils.* 271. 1 *Stra.* 653.

Nor has the petitioning creditor the ordinary election to sue the bankrupt at law, or come under the commission as other creditors

have ; (see *post*, 2.) for if he was to elect to proceed at law, the commission must be superseded, which would affect those creditors who had proved debts under it. 1 *Atk.* 154.

2. Debts may be proved at any of the public meetings appointed by the commissioners ; the usual proof is the oath of the creditor, which, if not objected to by the bankrupt himself, or any of those creditors, is generally esteemed sufficient ; but if any objection is raised, the demand must be further substantiated by evidence. For though the creditor should make a positive oath of the debt, the commissioners, if they conceive themselves to have just grounds to doubt its fairness, ought to admit it only as a claim ; and if it is not made out to their satisfaction, it may be rejected. 1 *Atk.* 71. 221.

Upon the principle of equality among the creditors proving under the commission, the privilege of debtors to come in and prove their debts, and bankrupts to be discharged therefrom, is coextensive and commensurate ; therefore a man shall not prove a debt, and proceed in an action at law, at the same time. However, the court will not absolutely stop him from bringing an action, but put him to his election ; and should he elect to proceed at law, he will still be allowed to prove his debt for the purpose of assenting to, or dissenting from the certificate ; which permission is absolutely requisite, to make his remedy at law of any avail, for should the bankrupt procure his certificate, he will be thereby discharged from that action, as well as from all debts contracted before the act of bankruptcy. 1 *Atk.* 83. 119. 220. 1 *P. Wms.* 562.

If the creditor, before he proves his debt, proceeds at law against the bankrupt, he cannot be obliged to make his election till a dividend is declared. And where the creditor has already proceeded at law, he is not at liberty to come in and prove his debt under the commission, without relinquishing his proceedings at law ; unless by order from the great seal, for the purpose of assenting to, or dissenting from the certificate. See 1 *Atk.* 219. 2 *Black. Rep.* 1317.

But the modern determinations, supported by some of earlier date, have mostly put the creditor to his election before a dividend, provided a reasonable time is afforded the creditor to inform himself of the bankrupt's affairs. *Cooke's B. L. c.* 6. § 2.

The being chosen assignee, will not prevent the creditor from suing the bankrupt at law, if he has not proved his debt ; for in that case he can only be considered as a creditor at large ; and even if he has proved his debt and chosen himself assignee, he may still elect to proceed at law, and be discharged as a creditor under the commission. 1 *Atk.* 153. 221. But a petitioning creditor has not this election ; see *ante*, 1.

A debt made void by statute, ought not to be permitted to be proved ; as a debt on a usurious contract ; and though the rule of the court of chancery is, upon a bill to be relieved against demands of usurious interest, not to make void the whole debt, but to make the party pay what is really due ; yet in a commission of bankruptcy, the assignees have a right to insist that the whole is void, as a usurious contract. And unless the assignees and creditors submit to pay what is really due, the lord *chancellor* has not power to order it ; and applications of this nature have been frequently refused. 2 *Vez.* 489. 1 *Atk.* 125. See *Doug.* 716.

If the bankrupt's estate is in arrear for taxes, the collector, when he comes to prove the debt, must produce his authority, that the commissioners may judge of the legality of it. Corporations usually

have a clerk or treasurer who is the person to prove debts due to them ; he must however produce his appointment under seal to the commissioners. Every security that a creditor has for his debt, must be produced at the time of his proving, when the commissioners will mark them as having been exhibited. In the same manner, any person acting for another, must produce his authority to the commissioners and they will mark them as exhibits. *Cooke's Bankrupt Law.* One inhabitant of a parish may prove for himself and the other inhabitants. 1 *Atk.* 111. and see *Cooke's B. L. c.* 4. § 1.

In case of debts uncertain in point of liquidation, as between two merchants in balancing accounts, the matter rests upon a claim to ascertain the sum that was due at the time of the bankruptcy. So where a creditor cannot ascertain his debt with certainty sufficient to enable him to swear to it, or is not able in other respects satisfactorily to substantiate it, or where the agent of a creditor cannot produce his authority, and in many other cases where there appears a probable foundation of a demand, though not sufficiently made out, it is usual for the commissioners to suffer *a claim to be entered ;* but that will not entitle the party to a dividend, which he cannot receive without completely proving his debt. If a claim is not substantiated in a reasonable time the commissioners may strike it out ; and they generally do so before a dividend is declared, unless sufficiently reason is offered to them for prolonging the time ; but the creditor is, notwithstanding, afterwards at liberty to prove his debt, and receive his share upon any future dividends. However in such cases where there has not been gross neglect, the *chancellor* will make an order that such creditor shall be paid his proportion of the first dividend out of the money in the assignees' hands, upon condition that it does not break in upon any former dividend. 3 *Wils.* 271. *Cooke's B. L.*

Aliens as well as denizens may come in as creditors ; for all statutes concerning bankrupts extend to aliens. *Hob.* 287. See stat. 21 *Jac.* I. *c.* 19.

3. The distinction of debts payable *in futuro* on a day *certain*, and debts depending upon contingency, has given rise to frequent questions, whether the bankrupt's wife or her trustees should be admitted to prove the sum settled on her by marriage articles, under a commission against her husband.

Lord *Hardwicke*, on a petition *Ex parte Winchester*, (1 *Atk.* 117. *Dav.* 535.) stated the distinctions of the several cases. The *first* head of cases is where a bond is given by a husband to pay a sum of money in his life-time to trustees, to be laid out in trust for himself and his wife, or children ; and in case the husband survives, to the use of himself; if in this case the husband becomes a bankrupt, this being a debt due in his life-time, and before the bankruptcy, the court will let in the trustees to prove such debt, according to the trusts.

The second head is, where a person gives a covenant to pay to trustees a sum of money for the benefit of the wife or children after his death ; and also a judgment by way of collateral security to such covenant, and afterwards becomes bankrupt ; this being a debt at law, may be proved under the commission.

The third is, where the father gives a bond to his intended son-in-law, on the marriage of his daughter, to pay a sum of money after his death, and interest in the mean time, on particular days and times, and there is a breach of the condition of the bond, and the father becomes bankrupt ; this is a legal debt not depending on a contingency, and therefore may be proved.

The fourth head is, where a man covenants, in consideration of a marriage portion paid him, for his heirs, executors and administrators to pay to trustees a sum of money, after his decease, *in case his wife survives him.* This case depending on a contingency, is materially different from the others; because in those there was a remedy at law before the commission issued; and it seems now to be settled, that, on a contingent provision for a wife, she cannot be admitted as a creditor. 3 *Wils.* 271. See 2 *P. Wms.* 497. 2 Ld. *Raym.* 1546. 7 *Vin.* 72. *pl.* 7. *Dav.* 254. 524. 1 *Atk.* 113. 115. 120. And this, though it be particularly conditioned or provided that such debt shall be proveable. *Ex parte Hill. Ex parte Matthews. Cooke's B. L.*

But notwithstanding the general rule seems to be thus established, the case will be different, if the assignees are obliged to come into equity to compel the performance of a trust; for then, as they require equity, they shall be obliged to do equity, and secure the settlement to the wife. 1 *Atk.* 114. 2 *Vern.* 662.

4. *Contingent debts* are said not to be included in stat. 7 *Geo.* I. *c.* 31. because it being uncertain whether they will ever become due or not, it is impossible to make such abatement of 5*l. per cent.* as that act directs, and therefore they cannot be within it. And this doctrine has been constantly followed and admitted, as appears by the cases allowed in the division (3) immediately preceding; the principle, therefore, that contingent creditors cannot be admitted to prove their debts, where the act of bankruptcy is prior to the happening of the contingency, is clear and indisputable. 1 *Atk.* 118. But many questions have arisen as to what debts shall be said to be contingent within the meaning of the rule.

One having only a cause of action, cannot come in and prove it as a debt; because the damages that may be given are considered merely as contingent; even in case of a bond of indemnity, where the condition is broken. 3 *Wils.* 270. 2 *Stra.* 1160. And this, though the surety is called upon, and liable to pay the debt, if it is not actually paid. 1 *Term Rep.* 599.

So, if a lessee plows up meadow ground, for which he is bound to pay the lessor a certain sum of money as a penalty, that penalty cannot be proved as a debt under the commission: nor if a man be bound in an obligation, in a certain sum, to perform covenants, and the obligor, before he becomes a bankrupt, breaks those covenants, the obligee cannot prove this as a debt. If a bond by a principal and surety has not been forfeited, before the surety became bankrupt, the debt cannot be proved under his commission, but he may be sued upon it notwithstanding his certificate. *Doug.* 155. 3 *Wils.* 270. The bankruptcy of the lessee is no bar to an action on *covenant* (made before his bankruptcy) brought against him for rent due after the bankruptcy. 4 *Term Rep.* 94. But when judgment is obtained in any action, it then becomes such a debt as may be proved, and the judgment, when signed, relates to the verdict. *Ib.* 2 *Black.* 1317.

Where a man undertakes to pay a sum of money for another, his undertaking alone will not create a debt capable of being proved under a commission; and if an act of bankruptcy intervenes between the undertaking and the actual payment, it can never be proved, and the creditor can only resort to the bankrupt personally. But if the party engaging to pay the debt of another, is taken in execution for that debt, his imprisonment is considered as a payment and satisfaction of the debt, sufficient to give him a right of proving under the commission. *Cowp.* 525. 3 *Wils.* 13.

If the party engaging to secure the debt of another himself becomes bankrupt before that debt is payable by the principal, the creditor cannot prove under his commission. *Cowp.* 460.

Where a man becomes bail for another, it is considered as a contingent debt. And if the bail commit an act of bankruptcy before the judgment, it cannot be proved under the commission. 2 *Stra.* 1043. 3 *Wils.* 262.

5. The general rule as to common *annuities* is, that where one is entitled to an annuity from another, which is not a rent-charge on land, or on a specific part of the grantor's estate, but personal, to be paid by him, who afterwards becomes bankrupt, it is only a general demand on him and his estate; and nothing is a debt on his estate but the arrears of the annuity at the time of the bankruptcy, unless the penalty of the annuity bond has become forfeited; for otherwise the payments accruing afterwards became a debt after the bankruptcy, and cannot be proved. But where there has been a forfeiture prior to the bankruptcy, in order to prevent the injustice of admitting the creditor only to prove the arrears, and the great inconvenience that would ensue if the annuity should be received from time to time, as an accruing debt on the estate, by which means the division of the estate would be perpetual, and there could be no final dividend during the annuitant's life, the court of *chancery* puts it in another shape of setting a value on the annuity, because it was only a general personal demand. And in setting this value, consideration must be had of the time the annuitant has enjoyed it. 2 *Ves.* 490. 1 *Atk.* 251. 2 *Black.* 1107.

In case of an *apprentice*, where the master becomes bankrupt, commissioners recommend it to the creditors to allow him a gross sum out of the estate, for the purpose of binding him to another master; as it would be hard to make him come in as a creditor under the commission; but this, though it is equitable and just, must be considered as an indulgence, and not a right: for the court can only order him to be admitted as a creditor. 1 *Atk.* 149. 261.

A *bond*, though it be not *assignable* at law, may be proved under the commission by the assignee; but the assignor must join in the deposition that he hath not received the debt, or any part thereof, or any security or satisfaction for the same. *Cooke's B. L.*

In *bills of exchange* and promissory notes, there is a double contract; the first between the principal debtor and creditor; and also an implied contract, that the principal debtor will indemnify the surety, so that if the creditor, the indorsee, comes upon the surety, the indorsor, the indorsor or his assignees may come in against the original or principal debtor. This is the case between principal and surety, and is likewise the case where an indorsor is barely a surety, and no consideration is paid by the original drawer. 1 *Atk.* 123.

The holder of a bill of exchange is entitled to prove his debt under the commission against the drawer, acceptor and indorsor, and to receive a dividend from each, upon his whole debt, provided he does not, in the whole, receive more than 20*s.* in the pound. 1 *Atk.* 107. But in this case, if the creditor has actually received part of his debt under a commission, he can only prove the remainder under another. See 2 *P. Wms.* 89. 407. 1 *Atk.* 109. 129. 2 *Ves.* 114, 115.

Creditors are not allowed to prove *interest* on notes or bills, unless it is expressed in the body of them. But the creditor may prove the full sum for which the notes were given, notwithstanding he received 5*l. per cent.* discount. *Cooke's B. L.* 1 *Atk.* 151.

A *child* living with the father, and earning money for itself, may, if the father receives that money, be admitted a creditor under the commission against him. 2 *Vez.* 675.

A *landlord* having a legal right to distrain goods while they remain on the premises, the issuing a commission of bankrupt against the tenant, and the messenger's possession of the tenant's goods, will not hinder him from distraining for rent: for it is not such a *custodia legis* as an execution: and even there the law allows the landlord a year's rent. And the assignment of the commissioners of the bankrupt's estate and effects is only changing the property of the goods, and while upon the premises they remain liable to be distrained. 1 *Atk.* 101—104.

And as a creditor, after proving his debt, may elect to abide by such proof, or relinquish it, and proceed at law, so a landlord, who is considered in a higher degree than a common creditor, may make his election to waive his proof in his distress for rent. *Cooke's B. L.* But particular circumstances may deprive the landlord of this right; as if he neglects to distrain, and suffers the goods to be sold by the assignees. 1 *Atk.* 104. See 1 *Bro. C. R.* 427. And a landlord may distrain before the end of the term by custom, as in *Norfolk.* 2 *Term Rep.* 600. A proviso in a lease, that it shall be void in case of the bankruptcy of the lessee is valid. 2 *Term Rep.* 133.

If an *executor* becomes bankrupt, as he acts *in auter droit*, his bankruptcy does not take away the right of executorship; and the *legatees* or creditors of the testator cannot prove under the commission, unless the bankrupt has committed a *devastavit*. But though a bankrupt executor may strictly be the proper hand to receive the assets, yet if his assignees have received any of the property, the chancellor may appoint a receiver, with whom the assignees shall account; 1 *Atk.* 101. or direct the bankrupt himself to be admitted a creditor for what he may be entitled to as executor, and order the dividend to be paid into the bank. See *Cooke's B. L. c.* 6. § 3. The effects possessed by a bankrupt as executor, are not liable to the assignment of commissioners. 3 *Burr.* 1369.

Commissioners after a man becomes a bankrupt compute *interest* upon debts no lower than the date of the commission. And a specialty creditor cannot have interest beyond the penalty contained in his security: but a creditor by note, carrying interest may receive the full amount. 1 *Atk.* 79, 80.

If a bankrupt is a *factor*, and goods are consigned to him or his order, which come to his possession, though he has the power of immediately selling them, and taking the money, in which case the consignor can only come as a general creditor upon his estate, yet, notwithstanding the legal property the factor had in, and power over them, if they remain in *specie* in his hands, they shall be delivered to the principal, who has a *lien* upon them as his own property; and the bankrupt only as agent and trustee for him. And even where the factor had sold the goods, and taken notes for them, it has been determined that the original owner had a specific lien upon, and was entitled to the notes. 2 *Vez.* 586. 1 *Atk.* 232.

6. If the assignees misbehave in the trust reposed in them, they may be removed by petition to the chancellor. So, if an assignee himself becomes bankrupt, that will be a sufficient ground for his removal. 3 *Atk.* 97. 7 *Vin. Abr.* 77. Or if the commissioners act improperly at the choice of assignees. When an assignee is removed, he must join with the old assignee and the commissioners in making an assignment

to the new assignee. The common practice where only one assignee is removed, is, to make him join with his companion in assigning to the new assignee, and to the one retained, whereby a man is made to convey to himself, which appears absurd. The most feasible plan seems for the old assignees to convey to a third person, in trust, that he should immediately reconvey to the old and new appointed assignee. See *Cooke's B. L.*

Assignees are in the nature of trustees; and where they employ an agent to receive or pay money, and he abuses this confidence, an assignee cannot be distinguished from any other trustee, who, if his agent deceive him, must answer over to the *cestui que trusts*. For the chief consideration of the creditors in the choice of assignees is certainly the ability of the persons, that they may be responsiblefor the sums they receive from the bankrupt's estate. 1 *Atk.* 88. 90.

But the negligence of one assignee shall not hurt another joint assignee, where he is not at all privy to any private and personal agreement entered into by his brother assignee. *Id. ib.*

If an assignee becomes a bankrupt, and has applied any of the money received by him in that capacity to his own use, the commissioners are to be considered as specialty creditors; because the assignees executed a counterpart of the assignment to them, and the agreement being under hand and seal, makes it in the nature of a specialty debt, and therefore they may come upon his real estate. 1 *Atk.* 89.

7. If there is a joint commission against two partners, they must be each found bankrupts; and though one of them should die, the commission may still go on; but if one of the joint traders be dead at the time of the taking out the commission, it abates, and is absolutely void. *Cooke's B. L.*

It was formerly the practice, where there were several partners, to take out several commissions against each, as well as a joint commission; but this has been since discountenanced, it being the common course of the court, upon petition, to make an order for the separate creditors to come in and prove their debts under the joint commission; and that the assignees should keep distinct accounts of the several estates; and this may be done, because the assignment, in the case of a joint commission is of the whole estate. But on the other hand, where separate commissions are taken out against joint traders, it seems to have been the opinion that joint creditors could not prove their debts under the separate commission, except for the purpose of assenting to, or dissenting from, the certificate; but that they must proceed to take out a joint commission. *Cooke's B. L.* 1 *Atk.* 138. 198. But it seems now to be considered that a joint commission cannot legally be supported while there is a separate one subsisting; because a trader having been declared a bankrupt, the whole of his property is assigned under the first commission, and, till he obtains his certificate, he is incapable of trading or contracting for his own benefit. However it is certain that, in practice, joint commissions are taken out after the parties have been declared bankrupts under separate commissions, by which means great expense is saved, and the joint effects disposed to better advantage; and therefore in a fair case, and where it can be made to appear that the bankrupt's estate will be benefited by prosecuting a joint commission, the lord chancellor, to make it valid, will supersede the prior separate one. *Cowp.* 824. 1 *Atk.* 252. *Cooke's B. L. c.* 1. § 2.

Joint creditors are entitled to a distribution of the joint or partnership estate, without the separate creditors being permitted to partici-

pate with them; but, notwithstanding separate creditors are not entitled to share the dividend of the joint property, until the joint creditors have received 20*s.* in the pound, yet they are, upon petition, let in to prove their respective separate debts under the joint commission, paying contribution to the charge of it; and as the joint or partnership estate is, in the first place, to be applied to pay the joint or partnership debts, so, in like manner, the separate estate shall be, in the first place, applied to pay all the separate debts. This is settled as a rule of convenience; and it is resolved, that if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be allotted in due proportions, to the separate estate of each partner, and applied to pay the separate creditors. And, on the other hand, if there be a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors. 1 *Atk.* 68. 2 *Vern.* 706. *Dav.* 373. 2 *P. Wms.* 501.

Where persons in trade [*e. g. A. B.* and *C.*] have been connected together in various partnerships, and a joint commission taken out against them all, an order has been made for keeping distinct accounts of the different partners, as well as of the separate estates of each partner. But when there have been various partnerships, [*e. g. A.* & *B.* and *A.* & *C.*] and a joint commission is taken out against one *firm*, in which some of the parties were not engaged, there can be only the common order for keeping the distinct accounts of the joint and separate estate. *Cooke's B. L. c.* 6. § 15.

On a joint debt, if separate commissions are taken out against the joint debtors, the creditor may prove his whole debt under each commission, and receive a dividend, so as he does not obtain more than 20*s.* in the whole. *Cooke's B. L.*

Where there is a joint and several creditor, he must, according to the rule of the court now firmly established, make his election whether he will come in upon the joint or the separate estate; that is, which he will come in upon in *preference*; for which ever he may elect, he will be entitled to come in upon the surplus of the other, if there should be any. And in order to make his election, he must have a reasonable time to inquire into the state of the different funds, but he is not entitled to defer such election until a dividend be declared. *Cooke's B. L. c.* 6. § 15.

An act of bankruptcy by one partner is to many purposes a dissolution of the partnership, by virtue of the relation in the statutes, which avoids all the acts of a bankrupt from the day of the bankruptcy; and from the necessity of the thing, all his property being vested in the assignees, who cannot carry on a trade. But after a dissolution of partnership by agreement, by an execution, or by a bankruptcy, the partner out of possession of the partnership effects, has the same lien on any new goods brought in which he had upon the old. One partner has not, after a dissolution, a right to change the possession, or to make an actual division of the specific effects; for one partner may be a creditor of the partnership to ten times the value of all the effects. The other partner, in that case, can only have a right to an account of the partnership, and to the balance due to him, if any on that account; and no person deriving under the partner can be in a better condition than himself; his executor stands in the very same light. So the assignees under a commission of bankruptcy against one partner must be in the same state. They can only be tenants in

common of an undivided moiety, subject to all the rights of the other partner. 4 *Burr.* 2176. *Cowp.* 448. 471. 12 *Mod.* 446.

If a partner is a creditor on the partnership account, he can have no satisfaction but out of the surplus which shall remain after the joint creditors are paid; for the joint creditors rely upon the ostensible state of the fund, and give credit to it accordingly. But Lord *Hardwicke* said, that where there are joint and separate creditors, if one partner lends a sum of money to the partnership, the creditors of his separate estate have a right to this in the first place. 1 *Atk.* 287. *Vez.* jun. 167.

But this has since been determined contrary; as where there was a joint commission against two partners, and a separate one against one of them. The petitioners, assignees under the separate commission, petitioned to be admitted creditors under the joint commission, for a sum of money brought by their bankrupt into the partnership, beyond his share, and as being, therefore, a creditor on the partnership for that sum; but refused on the principle that he cannot be a creditor on the partnership in competition with the joint creditors. *Cooke's B. L. c.* 13.

So, where one partner has taken more than his share out of the joint fund, the joint creditors, as the rule seems to be now settled, cannot be admitted to prove against the separate estate of the partner who drew out the money, until his separate creditors are satisfied, unless it can be shown that the partner acted fraudulently, with a view to benefit his separate creditors, at the expense of the joint creditors. *Cooke's B. L. c.* 13. See tit. *Partners.*

One partner may be a creditor to another, and may, if he continues solvent, prove his debt under a separate commission. 1 *Atk.* 225. 2 *C. R.* 226. *Cooke's B. L. c.* 13.

If there be two partners, and one of them becomes bankrupt, and, on a separate commission being sued out against him, his certificate is allowed; this does not only discharge the bankrupt of what he owed separately, but also of what he owed jointly, and on the partnership account; because, by the act of parliament, the bankrupt, upon making a full discovery, and obtaining his certificate, is to be discharged of *all* debts. 3 *P. Wms.* 24.

Where two partners are bankrupts, and a joint commission is taken out against them, if they obtain an allowance of their certificate, this will bar as well their separate as their joint creditors. 3 *P. Wms.* 24.

Before the statute 10 *Ann. cap.* 15. if there were two partners, and only one party became bankrupt, and a separate commission was taken out against him; there was no doubt but the discharge of that bankrupt, discharged him from all debts which he owed in his joint as well as private capacity; but the great question was, whether, by such discharge of the bankrupt, the partner of the bankrupt should likewise be discharged from such debts as he was discharged of; and therefore that statute has enacted, that the partner shall *not* be discharged.

V. Practical Notes, and Forms.

The first step to be taken towards procuring a commission of bankruptcy, is for the creditor to make an affidavit of his debt before a master in chancery; or if he resides altogether in the country, before a master extraordinary there, to be filed in the secretary of bankrupts' office in *London*, and exhibited to the commissioners at their first meeting. The following is the form of an affidavit:

A. B. of, &c. maketh oath that *John Wilson* of *Chelmsford*, in the county of *Essex*, shop-keeper, is justly and truly indebted unto him, this deponent, and to *Thomas Abel*, his partner, in the sum of 100*l.* and upwards, for goods sold and delivered by this deponent, and his said partner, to and for the use of the said *John Wilson*; and this deponent further saith, that the said *John Wilson* is become a bankrupt, within the true intent and meaning of some or one of the statutes made, and now in force concerning bankrupts, as this deponent hath been informed and believes.

Sworn at the public office, the 1st day of *September*, 1784, before me *Peter Holford*.

When the affidavit is sworn, it is carried to the secretary of bankrupts' office, where the party suing for the commission enters into the bond. See III. 1.

The clerk of the bankrupts fills up a blank petition in the name of the person that makes the affidavit; and annexes the affidavit and bond to the petition, when he prefers the same to the lord chancellor.

This petition is answered in a few days, and the petitioning creditor has a commission without any further trouble.

A Commission of Bankrupt.

GEORGE the Third, by the Grace of God, of *Great Britain*, *France* and *Ireland*, king, defender of the faith, &c. to our trusty and well beloved *William Bumstead*, *Henry Hunter*, *Henry Cowper*, *Henry Russel*, Esquires, and *Richard Hargrave*, gentleman, greeting. Whereas, we are informed that *John Wilson*, of, &c. using and exercising the trade of a merchant by way of bargaining, exchange, bartering, and chevisance; seeking his trade and living, by buying and selling; about —— since, did become bankrupt within the several statutes made against bankrupts, to the intent to defraud and hinder *Thomas Abel*, of, &c. and other his creditors of their just debts and duties to them due and owing: We, minding the due execution as well of the statute touching orders for bankrupts, made in the parliament begun and holden at *Westminster*, the 2d day of *April*, in the thirteenth year of the reign of *Elizabeth*, late queen of *England*, made and provided; as of the stat. &c. [mentioning stats. 1 *Jac.* I. 21 *Jac.* I. and 5 *Geo.* II.] *Upon trust* of the wisdom, fidelity, diligence and provident circumspection, which we have conceived in you, do by these presents, name, assign, appoint, constitute and ordain you our special commissioners; *Hereby* giving full power and authority unto you, four or three of you, to proceed according to the said statutes, and all other statutes in force concerning bankrupts; not only concerning the said bankrupt, his body, lands, tenements, freehold and customary, goods, debts, and all other things whatsoever; but also concerning all other persons, who by concealment, claim, or otherwise, do, or shall offend, touching the premises, or any part thereof, contrary to the true intent and meaning of the said statutes; *And to do and to execute* all and every thing and things whatsoever, as well for and towards satisfaction and payment of the said creditors; as towards and for all other intents and purposes, according to the ordinance, and provision of the same statutes. *Willing* and commanding you, four or three of you, to proceed to the execution and accomplishment of this our commission, according to the true intent and meaning of the same statutes, with all diligence and

effect. *Witness* ourself at *Westminster*, the —— day of ——, in the —— year of our reign. J. YORKE.

Having got the commission, the petitioning creditor must employ one of the messengers to summon a meeting of the major part of the commissioners to open the same ; when the petitioning creditor must come prepared to prove his debt, and the party a bankrupt, within the statutes.

OATH to be administered by the Commissioners to Witnesses, upon their Examination.

YOU are here produced, as witnesses, by virtue of a commission out of the high court of chancery, to us and others directed, to be by us examined, concerning the bankruptcy of *John Wilson*, of, &c. Now to all such questions and interrogatories as shall be asked you, by virtue of this commission of bankrupt concerning the said *John Wilson*, his trade or profession, his absconding, and other acts which he hath done or suffered, by which he may be discovered to be a bankrupt, and also concerning his lands and tenements, goods and chattels, debts and duties, frauds and concealments, and other matters and things, in obedience to the said commission, and pursuant to the several statutes made concerning bankrupts, you, and every of you shall, true and direct answer make, and swear the truth, the whole truth, and nothing but the truth. So help you God.

All the depositions must be signed by the witnesses. If the party is a *Quaker*, then instead of swear, say, " *You shall solemnly, sincerely, and truly, declare, and affirm.*"

Immediately upon the commissioners' declaring the party a bankrupt, they issue their warrant for seizure of his effects, and the messenger by virtue thereof seizes the effects, and continues to keep possession till the commissioners have executed the assignment.

The application to enlarge the time for the bankrupt's surrender, must be by petition to the great seal, six days at least before the last sitting appointed in the *gazette* ; this petition may be either in the name of the bankrupt, or of his assignees.

It is usual for the commissioners to recommend, and the creditors to agree, to return the bankrupts their rings, moneys, &c. particularly the jewels, &c. of their wives.

If the bankrupt happens to be a foreigner, and does not understand *English*, his *English* examination must be interpreted, and read to him in the language he understands, by a person versed in both languages, who must be first sworn to interpret truly ; of which oath and interpretation there must be a memorandum made and annexed to the bankrupt's examination.

If the bankrupt does not surrender himself to the commissioners by 12 o'clock at night of the last day given, the messenger warns him so to do, by a proclamation made by him in the middle of *Guildhall* ; the commissioners continuing sitting till that time.

FORM OF A BANKRUPT'S CERTIFICATE.

To the Right Honourable the Lord High Chancellor of *Great-Britain*.

WE whose names and seals are hereunto subscribed and set, being the major part of the commissioners, named and authorized in and by a commission of bankruptcy, awarded, and issued against *John Thomas*, of, &c. (as described in the commission,) bearing date at *Westminster*, the 8th day of, &c. directed to *William Bumstead*, &c. do humbly certify to your lordship, that the major part of the commissioners by the said commission authorized, having begun to put the said commission into execution, did find that the said *John Thomas* became a bankrupt, since the 10th day of *May*, 1784, and before the date and suing forth of the said commission, within the true intent and meaning of the statutes made, and now in force concerning bankrupts, or some of them; and did thereupon declare and adjudge him a bankrupt accordingly. And we further humbly certify to your lordship, that the said *John Thomas*, being so declared a bankrupt, the major part of the commissioners by the said commission authorized, pursuant to the directions of the act of parliament made in the 5th year of the reign of his late majesty king *George* II. entitled "an act to prevent the committing of frauds by bankrupts," did cause due notice to be given and published in the *London gazette* of such commission being issued, and of the times and places of three several meetings of the said commissioners, within 42 days next after such notice; (the last of which meetings, was appointed to be *on the forty-second day*;) at which time the said *John Thomas* was required to surrender himself to the said commissioners named in the said commission, or the major part of them, and to make a full disclosure and discovery of his estate and effects; and the creditors of the said *John Thomas*, were desired to come prepared to prove their debts, and to assent to or dissent from the making this certificate. And we further humbly certify to your lordship, that such three several meetings of the major part of the commissioners by the said commission authorized, were had pursuant to such notice so given and published; and that at one of those meetings the said *John Thomas* did surrender himself to the major part of the commissioners, by the said commission authorized, and did sign and subscribe such surrender, and did submit to be examined from time to time upon oath, by and before the major part of the commissioners, by the said commission authorized: and in all things to conform to the several statutes made and now in force concerning bankrupts; and particularly to the said act made in the 5th year of his late majesty's reign. And we further humbly certify to your lordship, that at the last of the said three meetings, the said *John Thomas* finished his examination, before the major part of the said commissioners, by the said commission authorized, according to the directions of the said last mentioned act, and upon such his examination made a full disclosure and discovery of his estate and effects; and in all things conformed himself to the several statutes made and now in force concerning bankrupts, and particularly according to the directions of the said statute made in the 5th year of his late majesty's reign; and there doth not appear to us any reason to doubt of the truth of such discovery, or that the same is not a full discovery of all the estate and effects of the said *John Thomas*. And we further humbly certify to your lordship, that the creditors whose names *or marks* are subscribed to this certificate, are full 4 parts in 5 in number and value of the creditors of the above named *John Thomas*, who

are creditors for not less than 20*l.* respectively, and who have duly proved their debts under the said commission; and that it doth appear to us by due proof by affidavit in writing, that such several subscribing creditors, or some person by them respectively duly authorized thereunto, did, before our signing hereof, sign this certificate, and testify their consent to our signing the same, and to the said *John Thomas* having such allowance and benefit, as by the said last-mentioned act are allowed to bankrupts, and to the said *John Thomas* being discharged from his debts, in pursuance of the same act. *In witness* whereof we have hereunto set our hands and seals, this —— day of ——, in the —— year of the reign of, &c. and in the year of our Lord, 1784.

We the creditors of the above named *John Thomas*, whose names or marks are hereunder subscribed, do hereby testify and declare our consent, that the major part of the commissioners, by the above-mentioned commission authorized, may sign and seal the certificate above written; and that the said *John Thomas* may have such allowance and benefit as are given to bankrupts by the act of parliament made in the 5th year of the reign of his late majesty king *George* II. entitled, "an act to prevent the committing of frauds by bankrupts;" and be discharged from his debts in pursuance of the same act.

William Bumstead,
Henry Hunter,
Henry Russel.

(*The creditors' names.*) *A. B.*
C. D.

The messengers have printed forms of certificates, therefore the best way is to get a blank from them.

If any person sign the bankrupt's certificate by virtue of a letter of attorney, such letter of attorney must be left at the bankrupts' office.

The certificate, together with the affidavit of seeing the creditors sign it, and also letters of attorney, (if any such there be,) must be lodged with the secretary of bankrupts; who will thereupon give the messenger an authority to the printer of the *gazette*, to insert an advertisement therein signifying that the acting commissioners have certified to the great seal, that the bankrupt hath conformed, and that the certificate will be allowed and confirmed, unless cause shown to the contrary, within twenty-one days from the date of the said advertisement.

If no cause is shown within the 21 days, against the allowance of the certificate, the lord chancellor will allow the same, by the following subscription on the said certificate:

"—— day of ——, 1784.

WHEREAS the usual notice hath been given in the *London gazette*, of ——, the —— day of —— last, and none of the creditors of the above-named *John Thomas* have shown any cause to the contrary, I do allow and confirm this certificate.

THURLOW, C."

CERTIFCATE for a Judge or Justice of Peace, to grant his Warrant for apprehending and committing a Bankrupt.

In the Matter of *John Thomas*, a Bankrupt.

WE whose names are hereunto subscribed, and seals set, do hereby certify, that a commission of bankrupt, under the great seal of *Great Britain*, grounded upon the several statutes made and now in force concerning bankrupts, bearing date at *Westminster*, the —— day of *June* instant, hath been awarded and issued against *John Thomas*, of, &c. and directed to *William Bumpstead*, &c. thereby giving full power and authority to four or three of them to execute the same. And we do further certify, that we, being the major part of the commissioners, by the said commission authorized, have proceeded in the execution of the said commission, and have found upon the due examination of witnesses, and other good proof upon oath, before us had and taken, that the said *John Thomas*, before the date and suing forth of the said commission, became bankrupt, to all intents and purposes within the compass, true intent and meaning of the several statutes made and now in force concerning bankrupts, or within some or one of them, before the date and suing forth of the said commission. Given under our hands and seals at *Searl's* Coffee-house, *Lincoln's Inn*, in the county of *Middlesex*, this —— day of *June*, in the year of our Lord, 17—.

Witness *John Knight*.

William Bumpstead, (L. S.)
Henry Hunter, (L. S.)
Henry Russel, (L. S.)

The execution of this certificate must be proved by the subscribing witness before the judge or justice, previous to his granting his warrant.

It is usual for the assignees to give notice of the time and place they intend to pay the dividends; if by the assignees, the solicitor signs an authority for that purpose, to the following effect, *viz.*

"*Gentlemen*,

"Please to pay *Mary Combes* the sum of ——, being her dividend of —— shillings in the pound on her debt of ——, proved under the commission of bankrupt against *Francis Gibbons*, of, &c.

"Yours, &c. *John Knight*. 14th *July*, 1780.

"To Messrs. *Partridge* and *Dennis*, said bankrupt's assignees."

The assignees, upon receiving this authority, pay the creditor, and take a receipt in a book to the following purport, *viz.*

"Received this —— day of *July*, 1780, of Messrs. *Partridge* and *Dennis*, assignees of the estate and effects of *Francis Gibbons*, of, &c. bankrupt, the sum of ——, being a dividend of —— shillings in the pound, on my debt of ——, proved under the said commission.

"*Mary Combes*."

WRIT OF SUPERSEDEAS.

GEORGE the Third, by the grace of God, of *Great Britain*, *France* and *Ireland*, king, defender of the faith, and so forth: To our trusty

and well-beloved *William Bumpstead*, *Henry Hunter*, *Henry Russel*, *Henry Cowper*, Esquires, and *Richard Hargrave*, gentleman, greeting: Whereas we being informed that *John Thomas*, of, &c. using and exercising the trade of merchandise, by way of bargaining, exchange, bartering, chevisance, seeking his trade of living by buying and selling, did become bankrupt within the several statutes made against bankrupts, to the intent to defraud and hinder *Charles Jones*, of, &c. and others, his creditors, of their just debts and duties, to them due and owing; and we, minding the due execution of the several statutes made against bankrupts, did, by our commission, under the great seal of *Great Britain*, bearing date at *Westminster*, the —— day of ——, in the —— year of our reign, name, assign, appoint, constitute and ordain you our special commissioners, thereby giving, &c. (*here recite the original commission to* "diligence and effect," *then add*) Now forasmuch as the said *John Thomas*, the bankrupt, by his humble petition, exhibited to our Lord High Chancellor of *Great Britain*, for the reasons therein contained, prayed that the said commission might be superseded, whereunto we graciously inclining, do by these presents, will and command you, and every of you, to stay and surcease all further proceedings upon the said commission, and that you supersede the same accordingly, as our special trust is in you reposed. Witness ourselves at *Westminster*, the —— day of ——, in the —— year of our reign. J. Yorke.

When this writ is obtained, the commissioners must be served therewith, by delivering to each of them a copy, and, at the same time, showing them respectively, the original writ under seal, and then the proceedings are at an end; but it is usual to give notice thereof in the *gazette*.

BANKS. See tit. *Sea Banks*.

BANLEUGA. *Vide Bannum*.

BANNIMUS, The form of an expulsion of any member from the University of *Oxford*, by affixing the sentence in some public places, as a denunciation or promulgation of it. And the word *banning* is taken for an exclamation against, or cursing of another.

BANNITUS, or *Banniatus*.] An outlaw, or banished man. *Pat. Ed.* 2.

BANNUM vel BANLEUGA, The utmost bounds of a manor or town; so used 47 *Hen.* III. *Rot.* 44. &c. *Banleuga de Arundel* is taken for all that is comprehended within the limits or lands adjoining, and so belonging to the castle or town. *Seld. Hist.* of *Tythes*, *fi.* 75.

BAR. See *Barr*.

BARATRY. See tit. *Insurance*.

BARBERS, Were incorporated with the *surgeons* of *London*; but not to practise surgery except drawing of teeth, &c. 32 *Hen.* VIII. *c.* 42. but separated by 18 *Geo.* II. *c.* 15. See *Surgeon*.

BARBICAN, *barbicanum*.] A watch-tower or bulwark.

BARBICANAGE, *barbicanagium*.] Money given for the maintenance of a *barbican*, or watch-tower; or a tribute towards the repairing or building a bulwark. *Carta* 17 *Edw.* III. *Monasticon. tom.* 1. *fi.* 976.

BARCA, A barque. *Gloss.* Sax. *Ælfrici*; a flot-ship.

BARCARIUM, *barcaria*.] A sheep-cote, and sometimes used for a sheep-walk. *MS. de Placit. Ed.* III. See *Bercaria*.

BARGAIN AND SALE, Is an instrument whereby the property of lands and tenements is for valuable consideration granted and transferred from one person to another: it is called a real contract upon a valuable consideration for passing of lands, tenements and hereditaments, by deed indented and enrolled. 2 *Inst.* 672.

Since the introduction of uses and trusts, and the stat. 27 *Hen.* VIII. *c.* 10. for transferring the possession to the use, the necessity of livery of seisin for passing a freehold in corporeal hereditaments, has been almost wholly superseded; and in consequence of it, the conveyance by feoffment is now very little in use. Before the statute of uses, *equitable* estates of freehold might be created through the medium of trusts, without livery; and by the operation of the statute, *legal* estates of freehold may now be created in the same way. They who framed the statute of uses evidently foresaw, that it would render livery unnecessary to the passing of a freehold; and that a freehold of such things as do not lie in grant would become transferable by *parol* only, without any solemnity whatever. To prevent the inconveniences which might arise from a mode of conveyance so uncertain in the proof, and so liable to misconstruction and abuse, it was enacted in the same session of parliament, that an estate of freehold should not pass by bargain and sale only, unless it was by indenture enrolled in one of the courts at *Westminster*, or in the county where the lands lie; such enrolment to be made within six months after the date of the indenture. Stat. 27 *Hen.* VIII. *c.* 16. See 2 *Inst.* 675. *Dyer*, 229. *Poph.* 48. *Dalt.* 63. The objects of this provision evidently were, first, to enforce the contracting parties to ascertain the terms of the conveyance, by reducing it into writing; secondly, to make the proof of it easy by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances, by substituting the more effectual notoriety of enrolment, for the more ancient one of livery. But the latter part of this provision, which if it had not been evaded, would have introduced almost a universal register of conveyances of the freehold, in case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from the omission to extend the statute to bargains and sales for terms of years: (see 8 *Co.* 95. 2 *Roll. Abr.* 204. 2 *Inst.* 671.) and the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold, though created without deed or writing. The inconveniences from this insufficiency of the statute of enrolments are now in some measure prevented by stat. 29 *Car.* II. *c.* 3. which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. 1 *Inst.* 48. a. n. 3.

This may serve at present to illustrate the doctrine of *Bargain and Sale*; but to obtain a clear and distinct idea of this part of the law, see further titles *Conveyance*, *Deed*, *Feoffment*, *Lease and Release*, *Use*, &c. and 1 *Inst.* by *Hargrave and Butler*.

At present it may be fit to consider,

I. *What things may be bargained and sold.*
II. 1. *By whom, to whom, and,*
2. *By what words a bargain and sale may be made.*
III. 1. *Of the consideration, and,*
2. *Inrollment of a Bargain and Sale.*
IV. *Of the manner of pleading Bargains and Sales.*

I. All things, for the most part, that are grantable by *deed* in any other way, are grantable by *bargain and sale;* and lands, rents, advowsons, tithes, &c. may be granted by it in fee-simple, fee-tail, for life, &c. 1 *Rep.* 176. 11 *Rep.* 25.

Any freehold or inheritance in possession, reversion, or remainder upon an estate for years, or life, or in tail, may be bargained and sold, but the deed shall be enrolled. 2 *Co.* 54. *Dyer*, 309. 2 *Inst.* 671.

But if tenant for life *bargains and sells* his land by deed enrolled, it will be a forfeiture of his estate. 4 *Leon.* 251.

But a man seised of a freehold may bargain and sell for years, and this shall be executed by the statute of uses. 27 *Hen.* VIII. *c.* 10.

A man possessed of a term cannot bargain and sell it, so as to be executed by the statute. 2 *Co.* 35, 36. *Poph.* 76.

A *bargain and sale* of the profits of lands, is a *bargain and sale* of the land itself; for the profits and the land are the same thing in substance. *Dyer*, 71.

A rent *in esse* may be bargained and sold, because this is a freehold within the statute; and, before the statute, a rent newly created might be bargained and sold, because when money, as an equivalent was given, and ceremonies or words of law were wanting, the chancery supplied them; but it seems that, since the statute, *a rent newly created* cannot be *bargained and sold*, because there ought to be a freehold in some other person, to be executed in *cestui que use;* but here can be no seisin of his rent in the bargainor, because no man can be seised of a rent in his own land, and consequently there can be no estate to be executed in the bargainee. *Kielw.* 85. 1 *Co.* 126. 1 *And.* 327. 1 *Jones*, 179. *Sed qu. de hoc.*

If *A.* by indenture enrolled, bargains and sells lands to *B.* and his heirs, with a way over other lands of *A.* this is void as to the way; for nothing but a use passes by the deed, and there can be no use of a thing not *in esse*, as a way, common, &c. before they are created. *Cro. Jac.* 189.

II. 1. The king, and all other persons that cannot be seised to a use, cannot bargain and sell; for at common law, when a man had sold his land for money without giving livery, the use only passed in equity, and this is now executed, and becomes a bargain and sale by the statute: but, antecedent to any such execution, there must be a use well raised, which cannot be without a person capable of being seised to a use, which the king is not, there being no means to compel him to perform the use or trust; for the chancery has only a delegated power from the king over the consciences of his subjects; and the king is the universal judge of property, and ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate as a trustee. *Bro. Feoffment to Uses*, 33. *Hard.* 468. *Poph.* 72.

If tenant in tail bargains and sells his land in fee, this passes an estate determinable upon the life of the tenant in tail; for, at common law, the use could not be granted of any greater estate than the party had in him; now tenant in tail had an inheritance in him, but he could dispose of it only during his own life; and therefore, when he sells the use in fee, *cestui que use* has a kind of *an inheritance*, yet determined within the compass of a life; and the statute executes it in the same manner as he has the use, and consequently he will have

some properties of a tenant in fee, and some of a tenant for life only; but if tenant for life bargains and sells in fee, this passes only *an estate for life*, for he could not pass the use of an estate for life to the bargainee, and the statute executes the possession as the party has the use. 10 *Co.* 96. 98. 1 *Saund.* 260, 261. 1 *Co.* 14, 15. *Co. Lit.* 151.

A man may bargain and sell to a corporation, for they may take a use, though the money be given by the governors in their natural capacity. 10 *Co.* 24. 34. 2 *Roll. Abr.* 788.

A man may bargain and sell to his son; but then the consideration of money ought to be expressed, and it ought to have all the other circumstances of bargain and sale; but this shall operate as a covenant to stand seised, if there be none but the consideration of natural love and affection expressed. 7 *Co.* 40. 2 *Co.* 24. *Cro. Eliz.* 394. 1 *Vent.* 137. 1 *Lev.* 56. But if a son and heir bargains and sells the inheritance of his father, this is void, because he hath no right to transfer; the same law of a release. *Kielw.* 84. *Co. Lit.* 265.

If an infant bargains and sells his land by deed indented and enrolled, yet he may plead nonage; for, notwithstanding the statute, the bargainee claims by the deed as at common law, which was, and therefore is, still defeasible by nonage. 2 *Inst.* 673.

If a husband seised of lands, in right of his wife, or tenant in tail, bargains and sells the trees growing on the lands, and dies before severance, the bargainee cannot afterwards cut them down and take them away. *Mo.* 41. See tit. *Baron and Feme*, IV.

If there be two joint-tenants, and one of them makes a bargain and sale *of his own* estate in fee, and then the other dies, the other moiety shall survive to the bargainor: for, since the freehold is in the bargainor, the inheritance continues; but if such joint-tenant had bargained and sold *totum statum suum* in fee, though he died before enrolment; yet, if the deed were afterwards enrolled, the moiety would not survive, but would pass to the bargainee. *Cro. Jac.* 53. *Co. Lit.* 186. 1 *Bulst.* 3.

2. The very words *bargain and sell* are not of absolute necessity in this deed, for other words equivalent will suffice, as if a man, seised of lands in fee, sell the same to another, by the words *alien* or *grant*, the deed being made in consideration of money, and indented and enrolled, will be an effectual *bargain and sale*. In short, whatever words upon valuable consideration would have raised a use of any lands, &c. at common law, the same would amount to a bargain and sale within this act; as if a man by deed, &c. for a valuable consideration, covenants to stand seised to the use of another, &c. 2 *Inst.* 672. *Cro. Jac.* 210. *Mo.* 34. *Cro. Eliz.* 166.

III. 1. There must be a good consideration given, or, at least, said to be given, for lands in these deeds; and, for a competent sum of money, is a good consideration: but not the general words for divers considerations, &c. *Mod. Ca.* 777. Where money is mentioned to be paid in a *bargain and sale*, and in truth no money is paid, some of our books tell us this may be a good *bargain and sale*; because no averment will lie against that which is expressly affirmed by the deed, except it comes to be questioned whether fraudulent or no, upon the statute against fraudulent deeds. *Dyer*, 90. If no consideration of money is expressed in a deed of *bargain and sale*, it may be supplied by an averment that it was made for money: and after a verdict on a trial, it shall be intended that evidence was given at the trial of money paid. 1 *Vent.* 108. If lands are *bargained and sold* for money only,

the deed is to be enrolled according to the statute ; but if it be in consideration of money, and natural affection, &c. the estate will pass without it. 2 *Inst.* 672. 2 *Lev.* 56.

If a man, in consideration of so much money to be paid at a day to come, bargains and sells, the use passes presently, and after the day, the party has an action for the money, for it is a sale, be the money paid presently or hereafter. *Dyer*, 337. *a.*

2. If the deed of bargain and sale be not enrolled within the six months, (which are to be reckoned after twenty-eight days to the month, the day of the date taken exclusively,) it is of no force ; so that if a man bargains and sells his land to me, and the trees upon it, although the trees might be sold by deed without enrolment, yet, in this case, if the deed be not enrolled, it will be good neither for the trees nor the land. *Dyer*, 90. 7 *Rep.* 40. 2 *Bulst.* 8. A bargain and sale of a manor, to which an advowson is appendant by indenture not enrolled, will not pass the advowson or the manor, for it was to go as appendant. *Bro. Cas.* 240.

But in some cases, where a deed will not enure by way of bargain and sale, by reason of some defect therein, it may be good to another purpose. *Dyer*, 90.

If two bargains and sales are made of the same land, to two several persons, and the last deed is first enrolled ; if afterwards, the first deed is also enrolled within six months, the first buyer shall have the land ; for, when the deed is enrolled, the bargainee is seised of the land from the delivery of the deed, and the enrolment shall relate to it. *Hob.* 165. *Wood's Inst.* 259. Neither the death of the bargainor or bargainee, before the enrolment of the deed of bargain and sale, will hinder the passing of the estate to the bargainee : but the estate of freehold is in the bargainor until the deed is enrolled ; so that the bargainee cannot bring any action of trespass before entry had, though it is said he may surrender, assign, &c. *Cro. Jac.* 52. *Co. Lit.* 147.

A bargainee shall have rent which incurs after the bargain and sale, and before the enrolment. *Sid.* 310. Upon the enrolment of the deed, the estate settles *ab initio*, by the stat. 27 *Hen.* VIII. *c.* 16. which says, that it shall not vest, except the deed be enrolled ; and when it is enrolled, the estate vests presently by the statute of uses. 1 *Danv. Abr.* 696.

If several seal a deed of bargain and sale, and but one acknowledge it, and thereupon the deed is enrolled ; this is a good enrolment within the statute. *Sty.* 462. None can make a bargain and sale of lands that hath not the actual possession thereof at the time of the sale ; if he hath not the possession, the deed must be sealed upon the land to make it good. 2 *Inst.* 672. 1 *Lill.* 290.

Houses and lands in *London* and any city, &c. are exempted out of the statute of enrolments. 2 *Inst.* 676. 1 *Nels. Abr.* 342. See further tit. *Inrollment.*

IV. In pleading a bargain and sale the deed itself must be shown under seal. 1 *Inst.* 225. For though the enrolment being on record is of undoubted veracity, being the transaction of the court, yet the private deed has not the sanction of a record, though publicly acknowledged and enrolled ; for it might have been falsely and fraudulently dated, or ill executed. *Co. Lit.* 225. b. 251. b. 2 *Inst.* 673. 4 *Co.* 71. 5 *Co.* 53. 2 *Roll. Rep.* 119.

It must likewise be set forth that the enrolment was within six months, or *secundum formam statuti*, &c. *vide Allen*, 19. *Carter*, 221. *Sty.* 34. *S. C.*

In pleading a bargain and sale, the party ought regularly to aver payment of the money. 1 *Leon.* 170. See *Moor*, 504.

In replevin the case upon the pleadings was, that the defendant made a title under bargain and sale, enrolled within six months, and the statute of uses, and did not show that it was *in consideration of money*; but adjudged that, *after a verdict*, as this case was, it shall be intended, that evidence was given at the trial of money paid. 1 *Vent.* 108.

The party that claims by any bargain and sale, must show in what court the deed is enrolled, because he must show all things in certain that make out his title; otherwise his adversary would be put to an infinite search before he could traverse with security. *Yelv.* 213. *Cro. Jac.* 291. *S. C. Yelv.* 313.

BARKARY, *barkaria, corticulas.*] A tan-house, or place to keep bark in for the use of tanners. *New Book Entr.* tit. *Assise, Corps Polit.* 2.

BARON, *baro.*] Is a *French* word, and hath divers significations here in *England*. First, it is taken for a degree of nobility next to a viscount. *Bracton, lib.* 1. *cap.* 8. says, they are called *barones, quasi robur belli*. In which signification it agrees with other nations, where *baroniæ* are as much as *provinciæ*: so that barons are such as have the government of provinces, as their fee holden of the king; some having greater, and others less authority within their territories. It is probable that, formerly, in this kingdom, all those were called barons that had such seigniories as we now call *courts-baron*; as they were called *seigneurs* in *France*, who had any manor or lordship: and soon after the conquest, all such came to parliament, and set as peers in the lords' house. But when, by experience, it appeared that the parliament was too much thronged by these barons, who were very numerous, it was, in the reign of King *John*, ordained, that none but the *barones majores* should come to parliament, who, for their extraordinary wisdom, interest or quality, should be summoned by writ. After this, men observing the estate of nobility to be but casual, and depending merely upon the king's will, they obtained of the king letters patent of this dignity to them and their heirs male, who were called *barons by letters patent*, or by creation, whose posterity are now, by inheritance, those barons that are called lords of the parliament; of which kind the king may create at his pleasure. Nevertheless, there are still barons by writ, as well as barons by letters patent; and those barons who were first by writ, may now also justly be called *barons by prescription*, for that they and their ancestors have continued barons beyond the memory of man. 2 *Inst.* 48. See tit. *Peers of the Realm.* The original of barons by writ, *Camden* refers to King *Hen.* III. and barons by letters patent or creation, commenced 11 *Rich.* II. *Camb. Brit. page* 109. To these is added a third kind of barons, called *barons by tenure*, which are some of our ancient barons; and likewise the bishops, who, by virtue of baronies annexed to their bishopricks, always had place in the lords' house of parliament, as barons by succession. *Seager of Honour, lib.* 4. *cap.* 13.

There are also *barons by office*; as the *barons of the exchequer, barons of the cinque ports*, &c. In ancient records, the word *baron* includes all the nobility of *England*, because, regularly, all noblemen were barons, though they had a higher dignity; and therefore the

charter of King *Edw.* I. which is an exposition of what relates to barons in *magna charta*, concludes, *testibus archiepiscopis, episcopis, baronibus*, &c. And the great council of the nobility, when they consisted, besides earls and barons, of dukes, marquises, &c. were all comprehended under the name *de la councell de baronage. Glanv. cap.* 4. These barons have given them two ensigns, to remind them of their duties; first, a long robe of scarlet, in respect whereof they are accounted *de magno concilio regis*; and, secondly, they are girt with a sword, that they should ever be ready to defend their king and country. 2 *Inst.* 5. A baron is *vir notabilis et principalis*: and the chief burgesses of *London* were, in former times, barons before there was a lord mayor, as appears by the city seal, and their ancient charters. *Henricus* III. *Rex. Sciatis nos concessisse et hac præsenti charta nostra confirmasse* baronibus *nostris de civitate nostra* London *quod eligant sibi mayor de seipsis singulis annis*, &c. *Spelm. Gloss.* The earls palatine and marches of *England* had anciently their barons under them; but no barons, but those who held immediately of the king, were peers of the realm. 'Tis certain the king's tenants were called barons; as we may find in *Matt. Paris*, and other writers: and in days of old, all men were styled barons, whence the present law term of *baron and feme* for husband and wife; which see.

BARONY, *baronia.*] Is that honour and territory which gives title to a baron; comprehending not only the fees and lands of temporal barons, but of bishops also who have two estates; one as they are spiritual persons, by reason of their spiritual revenues and promotions; the other grew from the bounty of our *English* kings, whereby they have baronies and lands added to their spiritual livings and preferments. The baronies belonging to bishops are by some called *regalia*, because *ex sola liberalitate regum eis olim concessa et a regibus in feudum tenentur. Blount.* Barony, *Bracton* says, (*lib.* 2. *cap.* 34.) is a right indivisible; and, therefore, if an inheritance be to be divided among coparceners, though some capital messuages may be divided, yet *si capitale messuagium sit caput comitatûs vel caput* baroniæ, they may not be parcelled. In ancient times thirteen knight fees and a quarter made a tenure *per baroniam*, which amounted to 400 marks *per annum.*

BARONET, *baronettus.*] Is a dignity of inheritance created by letters patent, and usually descendible to the issue male; a degree of honour which hath precedency before all knights, as knights of the bath, knights bachelors, &c. except *bannerets*, made *sub vexillis regiis in exercitu regali in aperto bello, et ipso rege personaliter præsente.* This order of baronets was instituted by King *James* I. in the year 1611, and was then a purchased honour, for the purpose of raising money to pay troops sent out to quell some insurgents in the province of *Ulster* in *Ireland.* The arms of which province being a red or bloody hand, every baronet has added, on his creation, to his coat of arms. Their number at first was but two hundred; but now they are without limitation: they are created by patent with a *habendum sibi et hæredibus masculis*, &c.

BARON AND FEME. The law term for *Husband and Wife.*

Our law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the ecclesiastical law; the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling of incestuous and unscrip-

tural marriages, is the province of the spiritual court. Taking marriage in a civil light, the law treats it as it does all other contracts; on this part of the subject, therefore, as well as on what relates to marriage promises, marriage settlements, &c. see this *Dict.* tit. *Marriage.*

By marriage, the husband and wife are one person in law; 1 *Inst.* 112. that is, the very being, or legal existence, of the woman is suspended during the marriage; or at least is incorporated and consolidated into that of her husband: under whose wing, protection and *cover*, she performs every thing; and is therefore called in our law-french a *feme covert*, [*fœmina viro cooperta*,] is said to be *covert-baron*, or under the protection and influence of her husband, her *baron* or lord; and her condition during her marriage is called her coverture. Therefore, if an estate be granted or conveyed to a husband and wife, and their heirs, they do not take by moieties, as other joint-tenants, but the entire estate is in both. 2 *Lev.* 89. And if an estate be granted to a husband and wife, and another person, the husband and wife have but one moiety, and the other person the other moiety. *Lit.* § 291. A woman may be attorney for her husband; for that implies no separation from, but is rather a representation of her lord. *F. N. B.* 27. Upon this principle of a union of person in husband and wife, depend almost all the legal rights, duties and disabilities that either of them acquire by the marriage.

We may consider the effect of these rights, duties and disabilities according to the following arrangement:

I. 1. *Of grants and contracts between husband and wife.*
2. *Of their being evidence for or against each other.*

II. *What acts and agreements of the wife before marriage, bind the husband.*

III. 1. *Of the husband's power over the person of his wife, and of her remedy for any injury done to her by him.*
2. *Of actions by him for criminal conversation with her.*

IV. *Of his interest in her estate and property; and hers in his, as to her* paraphernalia.

V. *Where the husband shall be liable to the wife's debts contracted before marriage; and therein of a wife that is executrix or administratrix.*

VI. *Of her contracts during marriage, and how far the husband is bound by such contracts; and where a wife shall be considered as a feme sole.*

VII. *Where she alone shall be punished for a criminal offence, and where the husband shall be answerable for what she does in a civil action.*

VIII. *What acts done by the husband, or wife alone, or jointly with the wife, will bind the wife; and therein of her agreement or disagreement to such acts after the death of the husband.*

IX. *Where the husband and wife must join in bringing actions.*

X. *Where they must be jointly sued.*

XI. *Of the effects of divorce; and of separate maintenance, alimony, and pin money. And see title* Divorce.

I. 1. At common law a man could neither in possession, reversion or remainder, limit an estate to his wife; but by stat. 27 *Hen.* VIII. *c.* 10. a man may covenant with other persons to stand seised to the use of

his wife; or may make any other conveyance to her use, but he may not covenant with his wife to stand seised to her use. A man may devise lands by will to his wife, because the devise doth not take effect till after his death. *Co. Litt.* 112.

As to devises by *femes covert*. See tit. *Devise*, *Will*.

According to some books, by custom of a particular place, as of *York*, the wife may take by *immediate* conveyance from the husband. *Fitz. Prescription*, 61. *Bro. Custom*, 56. And it seems that a *donatio causâ mortis* by husband to wife may be good; because that is in the nature of a legacy. 1 *P. Wms.* 441.

Where the husband or wife act *en autre droit*, the one may make an estate to the other; as if the wife has an authority by will to sell, she may sell to her husband. 1 *Inst.* 112. a. 187. b. and the notes there.

If the *feme* obligee take the obligor to husband, this is a release in law. The like law is if there be two *femes* obligees, and the one take the debtor to husband. 1 *Inst.* 264. b. *Cro. Car.* 551.

In the case of *Smith* v. *Stafford*, (*Hob.* 216.) the husband promised the wife before marriage, that he would leave her worth 100*l*. The marriage took effect, and the question was, whether the marriage was a release of the promise. All the judges but *Hobart* were of opinion, that as the action could not arise during the marriage, the marriage could not be a release of it. The doctrine of this case seems to be admitted in the case of *Gage* v. *Acton*; (1 *Salk.* 325. 12 *Mod.* 290.) The case there arose upon a bond executed by the husband to the wife before marriage, with a condition making it void if she survived him, and he left her 1,000*l*. Two of the judges were of opinion that the debt was only suspended, as it was on a contingency which could not by any possibility happen during the marriage. But Lord Ch. J. *Holt* differed from them; he admitted that a covenant or promise by the husband to the wife, to leave her so much in case she survives him is good, because it is only a future debt on a contingency, which cannot happen during the marriage, and that is precedent to the debt; but that a bond debt was a present debt, and the condition was not precedent but subsequent, that made it a present duty; and the marriage was consequently a release of it. The case afterwards went into chancery; the bond was there taken to be the agreement of the parties and relief accordingly decreed. 2 *Vern.* 481. A like decree was made in the case of *Carnel* v. *Buckle*, 2 *P. Wms.* 243. and see 2 *Freem.* 205. See tit. *Bankrupt* IV. 3.

A. before marriage with *M.* agrees with *M.* by deed in writing, that she, or such as she should appoint, should during the coverture, receive and dispose of the rents of her jointure, by a former husband, as she pleased. It was decreed that, this *agreement being with the feme herself* before marriage, was by the marriage *extinguished*. *Cha. Ca.* 21. But where a man before marriage, *articled with the feme to make a settlement of certain lands, before the marriage should be solemnized*; they *intermarried before the settlement*, and then the baron died. On a bill by the widow for an execution of the articles, it was decreed, *against the heir* at law of the baron, that the articles should be executed. 2 *Vent.* 343.

2. In trials of any sort, husband and wife are not allowed to be evidence, for or against each other; partly because it is impossible their testimony should be indifferent; but principally because of the union of person; and therefore if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, "*nemo in*

propriâ causâ testis esse debet ;" and if *against* each other, they would contradict another maxim, "*nemo tenetur seipsum accusare.*" But where the offence is directly against the person of the wife, this rule has been usually dispensed with ; (*State Trials, vol.* 1. Lord *Audley's* case, *Stra.* 633.) and therfore by stat. 3 *Hen.* VII. *c.* 2. in case a woman be forcibly taken away and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife ; because a main ingredient, her consent, was wanting to the contract ; and also, there is another maxim of law, that no man shall take advantage of his own wrong ; which the ravisher here would do, if by forcibly marrying a woman he could prevent her from being a witness, who is perhaps the only witness to that very fact. 1 *Comm.* 443, 444. See tit. *Marriage.*

The husband cannot be a witness against the wife, nor the wife against the husband, to prove the first marriage on an indictment, on stat. 1 *Jac.* I. *c.* 11. for a second marriage. But the *second* wife or husband may be a witness ; the second marriage being void. *Bull. N. P.* 287. 1 *Hal. P. C.* 593.

In *Raym.* 1. there is an opinion, that a husband and wife may be witnesses against one another in *treason ;* but the contrary is adjudged, 1 *Brownl.* 47. see 2 *Keb.* 403. and 1 *H. P. C.* 301. The rule in Lord *Audley's* case, is denied to be law, 1 *Raym.* 1. and perhaps was admitted on the particular circumstances of the facts which were detestable in the extreme, the husband having assisted in the rape of his wife. In an information against two, one for perjury, and the other for subornation, in swearing on the trial of an ejectment, that a child was suppositious, the husband of one of the defendants was admitted to give evidence of the birth, but refused as to the subornation. *Sid.* 377. 2 *Keb.* 403. *Mar.* 120. And the evidence of a wife has been disallowed even against others, where her husband might be indirectly in danger. *Dalt.* 540. 2 *Leach's Hawk. P. C.* 607, 608. A husband and wife may demand surety of the peace against each other, and their evidence must then of necessity be admitted against each other. 1 *Hawk. P. C.* 253. See *Stra.* 1231. and the other authorities cited by *Hawkins.*

The wife of a bankrupt may be examined by the commissioners. See tit. *Bankrupt*, III. 1.

It seems that a wife may be evidence to prove a fraud on the husband, particularly if she were party thereto, as in case of a marriage-brocage agreement. *Sid.* 431. see *post*, II. And in cases of seduction. *L. E.* 55. And in civil actions, where the husband is not concerned in the action, but the evidence is *collateral* to discharge the defendant, by charging the husband. 1 *Stra.* 504. and see 1 *Stra.* 527.

II. As by marriage the husband and wife become one person in law, therefore such a union works an extinguishment or revocation of several acts done by her before the marriage ; and this not only for the benefit of the husband, but likewise of the wife, who, if she were allowed at her pleasure to rescind and break through, or confirm several acts, might be so far influenced by her husband, as to do things greatly to her disadvantage. 4 *Co.* 60. 5 *Co.* 10. *Keilw.* 162. *Co. Lit.* 55. *Hetl.* 72. *Cro. Car.* 304.

But in things which would be manifestly to the prejudice of both husband and wife, the law does not make her acts void ; and therefore if a *feme sole* makes a lease at will, or is lessee at will, and afterwards marries, the marriage is no determination of her will, so as to make

the lease void; but she herself cannot without the consent of her husband determine the lease in either case. 5 *Co.* 10.

So where a warrant of attorney was given to confess a judgment to a *feme sole*, the court gave leave, notwithstanding the marriage, to enter up judgment; for that the authority shall not be deemed to be revoked or countermanded, because it is for the husband's advantage; like a grant of a reversion to a *feme sole*, who marries before attornment, yet the tenant may attorn afterwards; otherwise if a *feme sole* gives a warrant of attorney, and marries, for that is to charge the husband. 1 *Salk.* 117. 399.

But if a *feme sole* makes her will, and devises her land to *J. S.* and afterwards marries him, and then dies, yet *J. S.* takes nothing by the will, because the marriage was a revocation of it. 4 *Co.* 60. See tit. *Devise*, *Will.*

Equity will set aside the intended wife's contracts, though legally executed, when they appear to have been entered into with an intent to deceive the husband, and are in derogation of the rights of marriage; as where a widow made a deed of settlement of her estate and married a second husband, who was not privy to such settlement; and it appearing to the court, that it was in confidence of her having such estate that the husband married her, the court set aside the deed as fraudulent; so where the intended wife, the day before her marriage, entered privately into a recognisance to her brother, it was decreed to be delivered up. See 2 *Cha. Rep.* 41. 79. 81. 2 *Vern.* 17. 2 *Vez.* 264. see *ante*, I. 2.

But where a widow, before her marriage with a second husband, assigned over the greatest part of her estate to trustees for children by her former husband; though it was insisted that this was without the privity of the husband, and done with a design to cheat him, yet the court thought, that a widow might thus provide for her children before she put herself under the power of a husband; and it being proved that 8,000*l.* was thus settled, and that the husband had suppressed the deed, he was decreed to pay the whole money, without directing any account. 1 *Vern.* 408.

III. 1. By marriage the husband hath power over his wife's person; and by the old law he might give her moderate correction. 1 *Hawk. P. C.* 258. but this power was confined within reasonable bounds. *Moor*, 874. *F. N. B.* 80. In the time of *Charles* II. this power of correction began to be doubted. 1 *Sid.* 113. 3 *Keb.* 433. The courts of law, however, still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour. *Stra.* 478. 875. But if he threaten to kill her, &c. she may make him find surety of the peace, by suing a writ of *supplicavit* out of *chancery*, or by preferring *articles* of the *peace* against him in the court of *king's bench*, or she may apply to the *spiritual court* for a *divorce*, *propter sævitiam*. *Crom.* 28. 136. *F. N. B.* 80. *Hetl.* 149. *cont.* 1 *Sid.* 113. 116. *Dalt. c.* 68. *Lamb.* 7. *Crom.* 133.

So may the husband have security of the peace against his wife. *Stra.* 1207.

But a wife cannot, either by herself or her *prochein amy*, bring a *homine replegiando* against her husband; for he has by law a right to the custody of her, and may, if he thinks fit, confine her, but he must not imprison her; if he does, it will be a good cause for her to apply to the spiritual court for a divorce *propter sævitiam*; and the nature and proceedings in the writ *de homine replegiando* show that it

cannot be maintained by the wife against the husband. *Prec. in Ch.* 492.

The courts of law will grant a *habeas corpus* to relieve a wife from unjust imprisonment.

2. The ground of the action for adultery, is the injury done to the husband, by alienating the affections of his wife, destroying the comforts arising from her company, and that of her children, and imposing on him a spurious issue.

For this among other reasons it has been ruled that action for *crim. con.* can be brought for act of adultery, after separation between husband and wife. 5 *T. R.* 357. This doctrine was shaken in a later case. See *Chambers* v. *Caulfield*, 6 *East*, 244.

In this action the plaintiff must bring proof of the actual solemnization of a marriage; nothing shall supply its place; cohabitation or reputation are not sufficient, nor any collateral proof whatever. 4 *Burr.* 2057. *Bull. N. P.* 27. *Doug.* 162. *Esp. N. P.* 343. But it is not necessary to prove a marriage according to the ceremony of the church of *England;* if the parties are *Jews*, *Quakers*, &c. proof of a marriage according to their rites is sufficient. *Bull. N. P.* 28. The confession of the wife will be no proof against the defendant; but a discourse between her and the defendant may be proved, and the defendant's letters to her; but the wife's letters to the defendant will be no evidence for him. *Id.*

The injury in case of adultery being great, the damages are generally considerable, but depend on circumstances; such on the one hand as go in aggravation of damages, and to show the circumstances and property of defendant; or on the other hand, such as go in extenuation of the offence, and mitigation of damages. *Bull. N. P.* 27. *Esp.* 343, 344. The defendant may prove particular acts of criminality in the wife, previous to her guilt with him, but not her general character, in extenuation. *Id. ib.*

If a woman is suffered by her husband to live as a common prostitute, and a man is thereby drawn into *crim. con.* no action at the suit of the husband will lie; but if the husband does not know this, it goes only in mitigation of damages. *Id. ib.*

It is now determined that if the husband consent to his wife's adultery, this will go in bar of his action. 4 *Term Rep.* 657. in the case of *Duberly* v. *Gunning*. See 12 *Mod.* 232.

It seems to be in the discretion of the court to grant a new trial in this action, on account of excessive damages; but which they will be very cautious in doing. 4 *Term Rep.* 651.

If adultery be committed with another man's wife *without any force, but by her own consent*, though the husband may have assault and battery, and lay it *vi et armis*, yet they shall in that case punish him below for that very offence; for an indictment will not lie for such an assault and battery; neither shall the husband and wife join in an action at common law; and therefore they proceed below, either civilly, that is, to divorce them, or criminally, because they were not criminally prosecuted above. 7 *Mod.* 81.

IV. *As to the lands of the wife.* The freehold or right of possession of all the lands of inheritance, vests in the husband immediately upon the marriage, the right of property still being preserved to her. 1 *Inst.* 351. a. 273. b. 326. b. in note. This estate he may convey to another. An incorrect statement in the book called *Cases in Equity, temp.* Ld. *Talbot, p.* 167. of what was delivered by his lordship in the

case of *Robinson* v. *Cummins*, seems to have given rise to a notion that the husband could not make a tenant to the *præcipe* of his wife's estate, for the purpose of suffering a common recovery of it, without the wife's previously joining in a fine; but it now seems to be a settled point that he can. See *Cruise on Recoveries*; and *post*, tit. *Fine and Recovery*. By stat. 32 *Hen.* VIII. *c.* 28. leases of the wife's inheritance must be made by indenture, to which the husband and wife are both parties, to be sealed by the wife, and the rent to be reserved to the husband and wife, and to the heirs of the wife; and the husband shall not alien the rent longer than during the coverture, except by fine levied by husband and wife. By the same act it is provided, that no fine or other act done by the husband only of the inheritance or freehold of his wife, shall be any discontinuance thereof, or prejudicial to the wife or her heirs, but they may enter according to their rights; fines whereunto the wife is party and privy [and the above mentioned leases] only excepted. As to alienantions of a husband's estate by a woman tenant in dower, &c. see stat. 11 *Hen.* VII. *c.* 20. which makes them void. See *post*, div. VIII. and also tit. *Forfeiture*.

As to chattels real, and things in action of the wife; where the husband survives the wife.

At the common law no person had a right to administer. The ordinary might grant administration to whom he pleased, till the statutes, which gave it to the next of kin, and if there were persons of equal kindred, which ever took administration first, was entitled to the surplus. The statute of distribution was made to prevent this. Where the wife was entitled only to the trust of a chattel real, or to any *chose in action*, or contingent interest in any kind of personalty, it seems to have been doubted, whether, if the husband survived her, he was entitled to the benefit of it or not. See 1 *Inst.* 351. 4 *Inst.* 87. *Roll. Abr.* 346. *All.* 15. *Cro. Eliz.* 466. 3 *C. R.* 37. *Gilb. Cas. Eq.* 234. See tit. *Executor* I. 1. V. 8.

Upon the construction of the statute of distributions, (see tit. *Executor* V. 8.) it has been held that the husband may administer to his deceased wife; and that he is entitled, for his own benefit, to all her chattels real, things in action, trusts, and every other species of personal property, whether actually vested in her, and reduced into possession or contingent, or recoverable only by action or suit. It was, however, made a question after the stat. 29 *Car.* II. *c.* 3. § 25. whether, if the husband having survived his wife, afterwards die, during the suspense of the contingency upon which any part of his wife's property depended, or without having reduced into possession such of her property as lay in action or suit, his representative, or his wife's next of kin, were entitled thereto. But by a series of cases, it is now settled, that the representative of the husband is entitled as much to this species of his wife's property, as to any other; that the right of administration follows the right of the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin of the husband. See Mr. *Hargrave's Law Tracts*, 475. And that if administration *de bonis non* of the wife is obtained by any third person, he is a trustee for the representative of the husband. See 1 *P. Wms.* 378. 382.

If the wife survive the husband. As to this point, there is a material difference with respect to chattels real, and goods, cattle, money, and other chattels personal. All chattels personal become the property of the husband immediately on the marriage; he may dispose of them, without the consent or concurrence of his wife; and at his death,

whether he dies in her life-time, or survives her, they belong to his personal representative. See 10 *Co.* 42. 2 *Inst.* 510.

With respect to her *chattels real*, as leases for years, there is a distinction between those which are in the nature of a present vested interest in the wife, and those in which she has only a possible or contingent interest. To explain this fully, it seems proper to mention, that it was formerly held that a disposition of a term of years to a man for his life, was such a total disposition of the term, that no disposition could be made of the possible residue of the term; or at least, that if it was made, the first devisee might dispose of the whole term, notwithstanding the devise of the residue. This is reported (*Dyer*, 74.) to have been determined by all the judges in a case in 6 *Edw.* VI. The court of chancery first broke through this rule, and supported such future dispositions when made by way of trust; their example was followed by the courts of law in *Mat. Manning's* case, 8 *Rep.* 94. *b.* and *Lampet's* case, 10 *Rep.* 46. *b.* This disposition of the residue of a term, after a previous disposition of it to one for life, operates by way of executory devise, and the interest of the devisee of the residue is called a possibility. This possible interest in a term of years differs from a contingent interest created by way of remainder. If a person limits a real estate to *A.* for life, and after the decease of *A.* and if *B.* dies in *A.'s* life-time, to *C.* for a term of years; this operates not as an executory devise, but as a remainder, and therefore is not to be considered as a possibility, but as a contingent interest.

Now if a person marries a woman possessed of, or entitled to, the trust of a present, actual, and vested, interest in a term of years, or any other chattel real, it so far becomes his property, that he may dispose of it during her life; and if he survives her, it vests in him absolutely; but if he makes no disposition of it, and she survives him, it belongs to her, and not to his representatives: nor is he in this case entitled to dispose of it from her by will. *Prec. Ch.* 418. 2 *Vern.* 270.

If a person marries a woman entitled to a possible or contingent interest in a term of years, if it is a legal interest, that is, such an interest, as, upon the determination of the previous estate, or the happening of the contingency, will immediately vest in possession in the wife; there the husband may assign it; unless, perhaps, in those cases, where the possibility or contingency is of such a nature that it cannot happen during the husband's life-time. 1 *Inst.* 46. b. 10 *Rep.* 51. *a. Hutt.* 17. 1 *Salk.* 326. But it is an exception to this rule, at least in equity, that if a future or executory interest in a term, or other chattel, is provided for the wife, by or with the consent of the husband, there he cannot dispose of it from the wife, as it would be absurd to allow him to defeat his own agreement. But this supposes the provision to be made before marriage; for, if made subsequent, it is a mere voluntary act, and void against an assignee for a valuable consideration. 1 *Cha. Cas.* 225. 1 *Vern.* 7. 18. 1 *Eq. Abr.* 58.

If a wife have a chattel real *en auter droit*, as executor or administrator, the husband cannot dispose of it. 1 *Inst.* 351. a. But if the wife had it as executrix to a former husband, the husband may dispose of it. 3 *Wils.* 277. And if a woman be joint-tenant of a chattel real, and marries and dies, the husband shall not have it, but it survives to the other joint-tenant. 1 *Inst.* 185. b. And the husband hath not power over a chattel real, which the wife hath as guardian. *Plowd.* 294.

Things in action do not vest in the husband till he reduces them into possession. It has been held that the husband may sue alone for a

debt due to the wife upon bond; but that if he join her in the action, and recover judgment and die, the judgment will survive to her. 1 *Vern.* 396. See *All.* 36. 2 *Lev.* 107. 2 *Vez.* 677. The principle of this distinction appears to be, that his bringing the action in his own name alone is a disagreement to his wife's interest, and implies it to be his intention that it should not survive to her; but if he brings the action in the joint names of himself and his wife, the judgment is that they *both* should recover; so that the surviving wife, and not the representative of the husband, is to bring the *scire facias* on the judgment. In 3 *Atk.* 21. Lord *Hardwicke* is reported to say, that at law, if the husband has recovered a judgment for a debt of the wife, and dies before execution, the surviving wife, not the husband's executors, is entitled.

These appear to be the general principles of the courts of *law*, respecting the interest which the husband takes in, and the power given him over, the things in action of his wife; but the courts of *equity* have admitted many very nice distinctions respecting them.

1. A settlement made before marriage, if made in consideration of the wife's fortune, entitled the representative of the husband, dying in his wife's life-time, to the whole of her things in action; but it has been said that, if it is not made in consideration of her fortune, the surviving wife will be entitled to the things in action, the property of which has not been reduced [into his power] by the husband in his life-time; so, if the settlement is in consideration of a particular part of her fortune, such of the things in action, as are not comprised in that part, it has been said, survive to the wife. See *Prec. Ch.* 63. 2 *Vern.* 502. *Talb.* 168. In the case of *Blois* v. *Countess of Hereford*, (2 *Vern.* 501.) a settlement was made for the benefit of the wife, but no mention was made of her personal estate; it was decreed to belong to the representative of the husband; and it was then said, that in all cases where there was a settlement equivalent to the wife's portion, it should be intended that he is to have the portion, though there is no agreement for that purpose. See *Eq. Abr.* 69.

2. If the husband cannot recover the things in action of his wife but by the assistance of a court of equity, the court, upon the principle that he who seeks equity must do equity, will not give him their assistance to recover the property, unless he either has made a previous provision for her, or agrees to do it out of the property prayed for; or unless the wife appears in court, and consents to the property being made over to him. 2 *P. Wms.* 641. 3 *P. Wms.* 12. *Toth.* 179. 2 *Vez.* 669. Neither will the court, where no settlement is made for the wife, direct the fortune to be paid to the husband, in all cases where she does appear personally and consent to it. 2 *Vez.* 579. It appears to be agreed, that the interest is always payable to the husband, if he maintains his wife. 2 *Vez.* 561, 562. yet where the husband receives a great part of the wife's fortune, and will not settle the rest, the court will not only stop the payment of the residue of her fortune, but will even prevent his receiving the interest of the residue, that it may accumulate for her benefit. 3 *Atk.* 21.

3. Volunteers and assignees under a commission of bankruptcy are, in cases of this nature, subject to the same equity as the husband; and are therefore required by the court, if they apply for its assistance in recovering the wife's fortune, to make a proper provision for her out of it. 2 *Atk.* 420. 1 *P. Wms.* 382. But if the husband actually assigns either a trust term of his wife, or a thing in action, for a valuable consideration, the court does not compel the assignee to make a pro-

vision for the wife. 1 *Vern.* 7. See 1 *Vern.* 18. and *Cox's P. Wms.* i. 459. *in note*, where Lord *Thurlow* is reported to have said, in a case before him, "that he did not find it any where decided that, if the husband makes an actual assignment, by contract, for a valuable consideration, the assignee should be bound to make any provision for the wife; but that a court of equity has much greater consideration for an assignment actually made by contract, than for an assignment made by mere operation of law; for in this latter case, the creditor should be exactly in the case of the husband, and subject precisely to the same equity in favour of the wife."

4. But notwithstanding the uniform and earnest solicitude of the courts of equity, to make some provision for the wife out of her fortune, in those cases where the husband, or those claiming under him by act of law, cannot come at it without the assistance of those courts, still it does not appear that they have ever interfered to prevent its being paid the husband, or to inhibit him from recovering it at law. 2 *Atk.* 420. In *Prec. Ch.* 414. it is observed, that if the trustees pay the wife's fortune, it is without remedy.

5. Money due on mortgage is considered as a thing in action. It seems to have been formerly understood, that as the husband could not dispose of lands mortgaged in fee without the wife, the estate remaining in the wife carried the money along with it to her and her representatives; but that as to the trust and the absolute power of a term of years, there was nothing to keep a mortgage-debt, secured by a term, from going to the husband's representatives: but this distinction no longer prevails; and it is now held, that though in the case of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt. See 1 *P. Wms.* 458. 2 *Atk.* 207.

6. If *baron* and *feme* have a decree for money in right of the *feme*, and then the *baron* dies, the benefit of the decree belongs to the *feme*, and not to the executor of the husband. This was certified by *Hyde*, Ch. J. and his certificate confirmed by *lord chancellor*. 1 *Cha. Cas.* 27. If the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without a consideration. So if a judgment be given in trust for a *feme sole*, who marries, and, by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest; and, by the same reason, if the *feme* has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without any consideration, for it is in nature of an extent. 3 *P. Wms.* 200.

The above summary on this part of the law relative to *baron* and *feme*, is principally taken from the ingenious and laborious notes on 1 *Inst.* To which may be added the following miscellaneous observations.

7. If a lease be conveyed by a *feme sole*, in trust for the use of herself, if she afterwards marries, it cannot be disposed of by the husband; if she dies, he shall not have it, but the executors of the wife. *March*, 44. See 2 *Vern.* 270.

If a *feme*, having a rent for life, takes husband, the *baron* shall have action of debt for the rent incurred during the coverture, after the death of the *feme*. 1 *Danv.* 719. And arrears due in the life-time of the husband, after his death shall survive to the wife, if she outlives him, and her administrators after her death. 2 *Lutw.* 1151. A *feme*, lessee for life, rendering rent, takes husband and dies, the *baron* shall

be charged in action of debt for the rent which was grown due during the coverture, because he took the profits out of which the rent ought to issue. *Keilw.* 125. *Raym.* 6.

If a *feme covert* sues a woman in the spiritual court for adultery with her husband, and obtains a sentence against her and costs, the husband may release these costs, for the marriage continues; and whatever accrues to the wife during coverture belongs to the husband; *per Holt*, Ch. J. on motion for prohibition. 1 *Salk.* 115.

But if the husband and wife be divorced *a mensâ et thoro*, and the wife has her alimony, and sues for defamation or other injury, and there has costs, and the husband releases them, this shall not bar the wife, for these costs come in lieu of what she hath spent out of her alimony, which is a separate maintenance, and not in the power of her husband. 1 *Roll. Rep.* 426. 3 *Bulst.* 264. 1 *Roll. Abr.* 343. 2 *Roll. Abr.* 293. 1 *Salk.* 115.

A legacy was given to a *feme covert*, who lived separate from her husband, and the executor paid it to the *feme*, and took her receipt for it: yet on a bill brought by the husband against the executor, he was decreed to pay it over again, with interest. 1 *Vern.* 261.

If husband is attainted of felony, and pardoned on condition of transportation for life, and afterwards the wife becomes entitled to an orphanage share of personal estate, it shall not belong to the husband, but to the wife. 3 *P. Wms.* 37.

Trinkets and jewels given to a wife before marriage, become the husband's again by marriage, and are liable to his debts, if his personal estate is not sufficient. 2 *Atk.* 104.

8. And as the husband may generally acquire a property in all the personal substance of the wife, so, in one particular instance, the wife may acquire a property in some of her husband's goods, which shall remain to her after his death, and not go to his executors. These are called her *paraphernalia*; which is a term borrowed from the civil law, and is derived from the *Greek*, and signifies something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife suitable to her rank and degree; and therefore even the jewels of a peeress, usually worn by her, have been held to be *paraphernalia*. *Moor*, 213. These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives. *Cro. Car.* 343. 7. 1 *Roll. Abr.* 911. 2 *Leon.* 166. Neither can the husband devise by his will such ornaments or jewels of his wife; though, during his life, perhaps, he hath the power to sell or give them away. *Noy's Max. c.* 49. 2 *Comm.* 436. But if she continue in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors, where there is a deficiency of assets. 1 *P. Wms.* 730. And her necessary apparel is protected even against the claim of creditors. *Noy's Max. c.* 49.

That the widow's *paraphernalia* are subject to the debts, but preferred to the legacies of the husband; and that the general rules of marshalling assets are applicable in giving effect to such priority, see not only 1 *P. Wms.* 730. quoted above, but also 2 *P. Wms.* 544. 2 *Atk.* 104. 642. 3 *Atk.* 369. 393. 2 *Vez.* 7. See also *Cha. Cas.* 240. 1 *C. R.* 27.

In one place *Rolle* says, the wife shall have a necessary *bed* and apparel. 1 *Roll.* 911. *l.* 20. See further on the subject of *paraphernalia*, *Com. Dig.* tit. *Baron and Feme*, (F. 3.)

V. If a *feme sole* indebted takes husband; her debt becomes that of the husband and wife, and both are to be sued for it; but the husband is not liable after the death of the wife, unless there be a judgment against both during the coverture. 1 *Roll. Abr.* 351. *F. N. B.* 120. Where there is judgment against a *feme sole*, who marries and dies, the *baron* shall not be charged therewith: though if the judgment be had upon *scire facias* against *baron and feme*, and then the *feme* dies, he shall be charged. 3 *Mod.* 186. In action brought against a *feme sole*, if, pending the action, she marries, this shall not abate the action; but the plaintiff may proceed to judgment and execution against her, according as the action was commenced. 1 *Lill.* 217. *Trin.* 12 *W.* III. And if *habeas corpus* be brought to remove the cause, the plaintiff is to move for a *procedendo* on the return of the *habeas corpus*: also the court of *B. R.* may refuse it, where brought to abate a just action. 1 *Salk.* 8.

In general the husband is liable to the wife's debts, contracted before marriage, whether he had any portion with her or not; and this the law presumes reasonable, because by the marriage the husband acquires an absolute interest in the personal estate of the wife, and has the receipt of the rents and profits of her real estate during coverture; also whatever accrues to her by her labour, or otherwise, during the coverture, belongs to the husband; so that in favour of creditors, and that no person's act should prejudice another, the law makes the husband liable to those debts with which he took her attached. *F. N. B.* 265. 20 *Hen.* VI. 22. *b. Moor*, 468. 1 *Roll. Abr.* 352. 3 *Mod.* 186.

If *baron* and *feme* are sued on the wife's bond, entered into by the *feme* before marriage, and judgment is had thereupon, and the wife dies before execution, yet the husband is liable; for the judgment has altered the debt. 1 *Sid.* 337.

If judgment be against husband and wife, he dies, and she survives, execution may be against her. 1 *Roll. Abr.* 890. *l.* 10. 50. See *post*, X.

Where a man marries a *widow executrix*, &c. her evidence shall not be allowed to charge her second husband with more than she can prove to have actually come to her hands. Agreed *per cur. Abr. Eq. Cas.* 227. *Hil.* 1719.

D. confessed a judgment to F. who made his wife, the plaintiff, *executrix*, and died; she *administered, and married a second husband, and* then, *she alone*, without her husband, *acknowledged satisfaction, though no real satisfaction was made.* The court held that this was not good. *Sid.* 31.

A wife, *administratrix*, under seventeen, shall join with her husband in an action; *per Twisden*, J. *Mod.* 297.

If a *feme executrix takes baron*, and *he releases all actions*, this shall be a bar during the coverture without question; by the justices. *Bro. Releases, pl.* 79.

If a *feme executrix take baron*, and the *baron puts himself in arbitrament for death of the testator*, and *award is made*, and the *baron dies*, the *feme shall be barred; per tot. cur. Brooke* says that from hence it seems to him, that the release of the *baron* without the *feme* is a good bar against the *feme; quod conceditur, anno* 39 *Hen.* V. and therefore he excepted those debts in his release, otherwise they had been extinct. *Bro. Releases, pl.* 79.

If a man marries an administratrix to a former husband, who, in her widowhood, wasted the assets of her intestate, the husband is liable to

the debts of the intestate during the life of the wife; and this shall be deemed a *devastavit* in him. *Cro. Car.* 603.

VI. Every gift, grant, or disposition of goods, lands, or other thing whatsoever; and all obligations and feoffments made by a *feme covert*, without her husband's consent, are void. 1 *Hen.* V. 125. *Fitz. Covert*, 18.

The husband is obliged to maintain his wife in necessaries: yet they must be according to his degree and estate, to charge him; and necessaries may be suitable to a husband's degree of quality, but not to his estate; also they may be necessaries, but not *ex necessitate*, to charge the husband. 1 *Mod.* 129. 1 *Nels. Abr.* 354. If a woman buys things for her necessary apparel, though without the consent of her husband, yet the husband shall be bound to pay it. *Brownl.* 47. And if the wife buys any thing for herself, children, or family, and the *baron* does any act precedent or subsequent, whereby he shows his consent, he may be charged thereupon. 1 *Sid.* 120. The expenses of a *feme covert's* funeral, paid by her father while her husband had left her, and was gone abroad, deemed necessaries. *H. Black. Rep.* 90. Though a wife is very lewd, if she cohabits with her husband, he is chargeable for all necessaries for her, because he took her for better for worse: and so he is if he runs away from her, or turns her away: but *if she goes away from her husband*, then as soon as such separation is notorious, whoever gives her credit doth it at his peril, and the husband is not liable, unless he takes her again. 1 *Salk.* 119. See 1 *Stra.* 647. 706. and as to actions against *femes covert* having eloped, See 2 *Black. Rep.* 1079.

If a man cohabits with a woman, allows her to assume his name, and passes her for his wife, though in fact he is not married to her, yet he is liable to her contracts for necessaries; and therefore *ne unques accouple* is a bad plea in an action on the case for the debt of a wife; it is good only in dower or an appeal. *Bull. N. P.* 136. *Esp. N. P.* 124.

Although a husband be bound to pay his wife's debts for her reasonable provision, yet if she parts from him, especially by reason of any misbehaviour, and he allows her a maintenance, he shall never after be charged with her debts, till a new cohabitation; but if the husband receive her, or come after her, and lie with her but for a night, that may make him liable to the debts. *Pasch.* 3 *Ann. Mod. Cas.* 147. 171. If there be an agreement in writing between husband and wife to live separate, and that she shall have a separate maintenance, it shall bind them both till they both agree to cohabit again; and if the wife is willing to return to her husband, she may; but it has been adjudged, that the husband hath no coercive power over the wife to force her, though he may visit her, and use all lawful means in order to a reconciliation. *Mich. Geo.* I. *Mod. Cas.* in *L.* & *E.* 22.

Where there is a separation by consent, and the wife hath a separate allowance, those who trust her, do it upon her own credit. 1 *Salk.* 116. If a husband makes his wife an allowance for clothes, &c. which is constantly paid her, it is said he shall not be charged. 1 *Sid.* 109. And if he forbids particular persons to trust her, he will not be chargeable: but a prohibition in general, by putting her in the newspapers, is no legal notice not to trust her. 1 *Vent.* 42.

It may now safely be assumed as a principle, that "where the husband and wife part by consent, and she has a separate maintenance from the husband, she shall in all cases be subject to her own debts." This was first finally decided and settled in the case of *Ringstead* v.

Lady Lanesborough, *M.* 23 *Geo.* III. and *H.* 23 *Geo.* III. where in actions against the defendant for goods sold she pleaded coverture; and the plaintiff's replication "that she lived separate and apart from her husband, from whom she had a separate maintenance; and so was liable to her own debts," was on demurrer holden to be good: and plaintiff had judgment. In the above case the plea also stated that the husband lived in *Ireland*, which being out of the process of the court, some stress was laid on it in the decision; but in the case of *Barwell* v. *Brooks*, *H.* 24 *Geo.* III. it was decided as a general principle, that the husband was not liable in any case where the wife lived apart, and had a separate maintenance: and this principle was recognised in *Corbett* v. *Poelnitz*, which followed it. 1 *Term Rep.* 5.

It has been said, that when the husband and wife live apart, the wife must have a separate maintenance *from the husband*, in order to discharge him. 4 *Burr.* 2078. But this opinion seems much shaken by that of Lord *Mansfield*, in 1 *Term Rep.* 5—11. where he says, the cases (already mentioned) do not rest on one or two circumstances, but on the great *principle* which the court has laid down, "that where a woman has a separate estate, and acts and receives credit as a *feme sole*, she shall be liable as such." A principle which extends further than the facts of any cases yet determined. And it seems that now a determination in 12 *Mod.* 603. where coverture and the life of the husband in *Ireland* was given in evidence in an action against a woman who had traded for 12 years as a widow, is not law.

The *baron* in an account shall not be charged by the receipt of his wife, except it came to his use. 1 *Danv.* 707. Yet if she usually receives and pays money, it will bind him in equity. *Abr. Cas. Eq.* 61. And why not in law, in an action for money had and received? For goods sold to a wife, to the use of the husband, the husband shall be charged, and be obliged to pay for the same. *Sid.* 425.

If the wife *pawn her clothes* for money, and afterwards *borrows money to redeem them*, the husband is not chargeable unless he were consenting, or that the first sum came to his use. 2 *Show.* 283.

If a wife takes up clothes, as silk, &c. and *pawns them before made into clothes*, the husband shall not pay for them, because they never came to his use; otherwise if made up and worn, and then pawned; *per Holt*, Ch. J. at *Guildhall*. 1 *Salk.* 118.

A wife may use the goods of her husband, but she may not dispose of them: and if she takes them away, it is not felony, for she cannot by our law steal the goods of her husband; but if she delivers them to an adulterer, and he receives them, it will be felony in him. 3 *Inst.* 308. 310.

If the *baron is beyond sea* in any voyage, *and during his absence the wife buys necessaries*, this is a good evidence for a jury to find that the *baron assumpsit*. *Sid.* 127.

A husband who has abjured the realm, or who is banished, is thereby *civiliter mortuus*; and being disabled to sue or be sued in right of his wife, she must be considered as a *feme sole*; for it would be unreasonable that she should be remediless on her part, and equally hard on those who had any demands on her, that, not being able to have any redress from the husband, they should not have any against her. *Bro. Baron and Feme*, 66. *Co. Litt.* 133. 1 *Roll. Rep.* 400. *Moor*, 851. 3 *Bulst.* 188. 1 *Bulst.* 140. 2 *Vern.* 104.

In *assumpsit* the defendant proved that she was married, and her husband alive in *France*, the plaintiff had judgment, upon which, as a verdict against evidence, she moved for a new trial, but it was denied;

for it shall be intended that she was divorced; besides the husband is an alien enemy, and in that case, why is not his wife chargeable as a *feme sole?* 1 *Salk.* 116. *Deerly* v. *Duchess of Mazarine.*

By the *custom of London*, if a *feme covert* trades by herself, in a trade with which her husband *does not intermeddle*, she may sue and be sued as a *feme sole.* 10 *Mod.* 6.

But in such case she cannot give a bond and warrant of attorney to confess a judgment: and when sued as a *feme sole*, she must be sued in the courts of the city of *London*; for if sued in the courts above, the husband must be joined. So the wife alone cannot bring an action in the courts above, but only in the city courts; and this even though her husband be dead; if the cause of action accrued in his life-time. 4 *Term Rep.* 361, 362. See tit. *London.*

Where a married man is transported for any felony, &c. the wife may be sued alone, for any debt contracted by her, after the transportation. 1 *Term Rep.* 9.

VII. In some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit bare *theft* or *burglary* by the coercion of her husband, (or even in his company, which the law construes a coercion,) she is not guilty of any crime, being considered as acting by compulsion, and not of her own will.

But for crimes *mala in se*, not being merely offences against the laws of society, she is answerable; as for *murder* and the like; not only because these are of a deeper die; but also since in a state of nature, no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In *treason* also, (the highest crime which a member of society can, as such, be guilty of,) no plea of coverture shall excuse the wife: no presumption of the husband's coercion shall extenuate her guilt. 1 *Hale's P. C.* 47. And this as well because of the odiousness and dangerous consequence of the crime itself, as because the husband having broken through the most sacred tie of social community, by rebellion against the state, has no right to that obedience from a wife which he himself as a subject has forgotten to pay. 4 *Comm.* 28, 29. (But she shall not be considered criminal for receiving her husband, though guilty of treason, nor for receiving another offender jointly with her husband. 1 *Leach's Hawk. P. C. c.* 1. § 11. in *note.*) See tit. *Accessary.*

If also a *feme* commit a theft *of her own voluntary act*, or by the bare command of her husband, or be guilty of treason, murder or *robbery*, though in company with, or by coercion of her husband, she is punishable. 1 *Hawk. P. C. c.* 1. § 11. The distinction between her guilt in *burglary* or *theft* and *robbery*, seems to be, that in the former, if committed through the means of her husband "she cannot know what property her husband may claim in the goods taken; 10 *Mod.* 63." but in robbery the wife has an opportunity of judging in what *sort of right* the goods are taken. 1 *Leach's Hawk. P. C. c.* 1. § 9, in *note.*

If the wife receive stolen goods of her own separate act, without the privity of her husband, or if he knowing thereof, leave the house and forsake her company, she alone shall be guilty as accessary. 22 *Ass.* 40. *Dalt.* 157. 1 *Hale's P. C.* 516.

In inferior misdemeanors also, another exception may be remarked; that a wife may be indicted and set in the pillory *with* her husband,

for keeping a brothel; for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex. 1 *Hawk. P. C. c.* 1. § 12. 10 *Mod.* 63.

A *feme covert* generally shall answer, as much as if she were *sole*, for any offence not capital against the common law or statute; and if it be of such nature, that it may be committed by her alone, without the concurrence of her husband, she may be punished for it without the husband by way of indictment, which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is no way privy. 9 *Co.* 71. 1 *Hawk. P. C. c.* 1. § 9. See *Moor*, 813. *Hob.* 93. *Noy*, 103. *Sav.* 25. *Cro. Jac.* 482. 11 *Co.* 61.

A *feme* may be *indicted* alone for a riot. *Dalt.* 447. For selling gin against the stat. 9 *Geo.* II. *c.* 23. *Stra.* 1120. For recusancy. *Id. ib. Hob.* 96. 1 *Sid.* 410. 11 *Co.* 64. *Sav.* 25. For being a common scold. 6 *Mod.* 213. 239. For assault and battery. *Salk.* 384. For forestalling. *Sid.* 410. For usury. *Skin.* 348. For barratry. 1 *Hawk. P. C. c.* 81. § 6. See *c.* 1. § 13. For a forcible entry. 1 *Hawk. P. C. c.* 64. § 35. For keeping a gaming-house. 10 *Mod.* 335. Keeping a bawdy-house, if the husband does not live with her. 1 *Bac. Abr.* See *ante*. For trespass or slander. *Keilw.* 61. *Roll. Abr.* 251. *Leon.* 122. *Cro. Car.* 376. See 1 *Hawk. P. C. c.* 1. § 13. in *note*.

A man must answer for the trespasses of his wife: if a *feme covert* slander any person, &c. the husband and wife must be sued for it, and execution is to be awarded against him. 11 *Rep.* 62. See *post*, X.

Husband and wife may be found guilty of *nuisance*, *battery*, &c. 10 *Mod.* 63.

If the wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same; as he may be generally to any suit for a cause of action given by his wife, and shall be liable to answer what shall be recovered thereon. 1 *Hawk. P. C. c.* 1.

For the punishment of *femes covert*, see tit. *Felony*, *Treason*, &c.

VIII. A wife is *sub potestate viri*, and therefore her acts shall not bind her, unless she levy a fine, &c. when she is examined in private, whether she doth it freely, or by compulsion of her husband; if *baron and feme* levy a fine, this will bar the *feme*: and where the *feme* is examined by writ, she shall be bound; else not. 1 *Danv. Abr.* 708. See *ante*, IV.

If a common recovery be suffered by husband and wife of the wife's lands this is a bar to the wife: for she ought to be examined upon the recovery. *Pl. Com.* 514. a. 10 *Co.* 43. a. 1 *Roll.* 347. l. 19.

So if husband and wife are vouchees in a common recovery the recovery shall be a bar, though the wife be not examined; for though it be proper that she be examined, yet that is not necessary, and is frequently omitted. 1 *Sid.* 11. *Stl.* 319, 320.

A recovery, as well as a fine by a *feme covert*, is good to bar her, because the *præcipe* in the recovery answers the writ of covenant in the fine, to bring her into court, where the examination of the judges destroys the presumption of the law, that this is done by the coercion of the husband, for then it is to be presumed they would have refused her. 10 *Co.* 43. 2 *Roll. Abr.* 395.

By the custom in some cities and boroughs, a bargain and sale by the husband and wife, where the wife is examined by the mayor or other officer, binds the wife after the husband's death. 2 *Inst.* 673. And it seems that by stat. 34 *Hen.* VIII. *c.* 22. all such customary conveyances shall be of force notwithstanding the stat. 32 *Hen.* VIII. *c.* 28. See *ante*, division IV.

So by custom in *Denbigh* in *Wales*, a surrender by husband and wife, where the wife is examined in court there, binds the wife and her heirs as a fine does; and this custom is not taken away by stat. 27 *Hen.* VIII. *c.* 26. for it is reasonable and agreeable to some customs in *England*. *Dyer*, 363. b.

So a surrender of a copyhold by husband and wife, the wife being examined by the steward, binds the wife. *Com. Dig.* tit. *Baron and Feme*, (G. 4.) there cites *Litt.* 274. but which is to a different purpose.

A wife is disabled to make contracts, &c. 3 *Inst.* 110. And if a married woman enters into a bond as *feme sole*, if she is sued as *feme sole*, she may plead *non est factum*, and the coverture will avoid her bond, 1 *Lill. Abr.* 217. A *feme covert* may plead *non assumpsit*, and give coverture in evidence, which makes it no promise, &c. *Raym.* 395.

In case money be due to the husband by bill or bond, or for rent on a lease, and it is paid to the wife; this shall not prejudice him, if after payment he publicly disagrees to it. 19 *Jac.* I. *B. R.* 2 *Shep. Abr.* 426. *Contra*, if she is used to receive money for him, or if it can be proved the money paid came to his use.

If a *feme covert* levies a fine of her own inheritance without her husband, this shall bind her and her heirs, because they are estopped to claim any thing in the land, and cannot be admitted to say she was *covert* against the record: but the husband may enter and defeat it, either during the coverture, to restore him to the freehold he held *jure uxoris*, or after her death to restore himself to his tenancy by the curtesy, because no act of a *feme covert* can transfer that interest which the intermarriage has vested in the husband; and if the husband avoids it during the coverture, the wife or her heirs shall never after be bound by it. *Bro.* tit. *Fines*, 33. 10 *Co.* 43. *Hob.* 225. 7 *Co.* 8. *Co. Lit.* 46.

Lease made *by baron and feme*, shall be said to be the lease of them both, till the *feme* disagrees, which she cannot do in the life of the *baron*. *Br. Agreement, pl.* 6.

The examination of a *feme covert* is not always necessary in levying of fines, because that being provided that she may not at the instance of her husband make any unwary disposition of her property, it follows, that when the husband and wife do not take an estate by the fine, and part with nothing, the *feme* need not be examined; but where she is to convey or pass any estate or interest, either by herself or jointly with her husband, there she ought to be examined; therefore if *A.* levies a fine *come ceo* to *baron and feme*, and they render to the conusor, the *feme* shall be examined; so it is where she takes an estate by the fine rendering rent. 2 *Inst.* 515. 2 *Roll. Abr.* 17.

If *baron* and *feme* by fine *sur concessit*, grant land to *J. S.* for ninety-nine years, and warrant the said land to *J. S.* during the said term, and the *baron* dies, and *J. S.* is evicted by one that hath a prior title, he may thereupon bring covenant against the *feme*, notwithstanding she was covert at the time when the fine was levied. 2 *Saund.* 177. 1 *Sid.* 466. S. C. 1 *Mod.* 290. 2 *Keb.* 684. 703. See tit. *Fines*.

If a husband disseise another to the use of his wife, this does not make her a disseisoress, she having no will of her own, nor will any agreement of hers to the disseisin during the coverture, make her guilty of the *disseisin*, for the same reason: but her agreement after her husband's death will make her a disseisoress, because then she is capable of giving her consent, and that makes her tenant of the freehold, and so subject to the remedy of the disseisee. 1 *Roll. Abr.* 660. *Bro. Disseisin*, 67.

But if a *feme covert* actually enters and commits a disseisin either *sole* or together with her husband, then she is a disseisoress, because she thereby gains a wrongful possession; but such actual entry cannot be to the use of her husband or a stranger, so as to make them disseisors, because though by such entry she gains an estate, yet she has no power of transferring it to another. *Co. Lit.* 357. 1 *Roll. Abr.* 660. *Bro. Disseisin*, 15. 67. See 8 *Hen.* VI. 14. *cont.*

If the husband, seised of lands in right of his wife, makes a lease thereof for years by indenture or deed poll, reserving rent; all the books agree this to be a good lease for the whole term, unless the wife, by some act after the husband's death, shows her dissent thereto; for if she accepts rent which becomes due after his death, the lease is thereby become absolute and unavoidable; the reason whereof is, that the wife, after her intermarriage, being by law disabled to contract for, or make any disposition of, her own possessions, as having subjected herself and her whole will to the will and power of her husband; the law therefore transfers the power of dealing and contracting for her possessions, to the husband, because no other can then intermeddle therewith, and without such power in the husband, they would be obliged to keep them in their own manurance or occupation, which might be greatly to the prejudice of both; but to prevent the husband's abusing such power, and lest he should make leases to the prejudice of his wife's inheritance, the law has left her at liberty after his death, either to affirm and make good such lease, or defeat and avoid it, as she finds it subservient to her own interest; and this she may do, though she joined in such lease, unless made pursuant to statute 32 *Hen.* VIII. *c.* 28. See *ante*, IV. *Bro. Acceptance*, 10. *Bro. Leases*, 24. *Cro. Jac.* 332. 2 *And.* 42. *Co. Lit.* 45. *Plow.* 137. *Cro. Jac.* 563. *Yelv.* 1. *Cro. Eliz.* 769.

Husband and wife make a lease for years, by indenture, of the wife's lands, reserving rent; the lessee enters, the husband before any day of payment dies; the wife takes a second husband, and he at the day accepts the rents, and dies; and it was held, that the wife could not now avoid the lease, for by her second marriage she transferred her power of avoiding it to her husband, and his acceptance of the rent binds her, as her own act before such marriage would have done; for he by the marriage succeeded into the power and place of the wife, and what she might have done either as to affirming or avoiding such lease, before marriage, the same may the husband do after the marriage. *Dyer*, 159. 1 *Roll. Abr.* 475. 1 *Roll. Rep.* 132.

A redelivery by the wife after the death of her husband, of a deed delivered by her during the coverture is a sufficient confirmation of such deed, so as to bind her, without its being re-executed or re-attested—and circumstances alone may be equivalent to such redelivery though the deed be a joint deed by *baron* and *feme* affecting the wife's land; and no fine levied. *Cowp.* 201.

The husband being seised of copyhold lands in right of his wife in fee, makes thereof a lease for years not warranted by the custom,

which is a forfeiture of her estate, yet this shall not bind the wife or her heirs after the husband's death, but that they may enter and avoid the lease, and thereby purge the forfeiture; and the diversity seems between this act, which is at an end when the lease is expired or defeated by the entry of the lord, or the wife after the husband's death, and such acts as are a continuing detriment to the inheritance, as wilful waste by the husband, which tends to the destruction of the manor; so of non-payment of rent, denial of suit or service; for such forfeitures as these bind the inheritance of the wife after the husband's death; but in the other case the husband cannot forfeit by this lease more than he can grant, which is but for his own life. 2 *Roll. Rep.* 344. 361. 372. *Cro. Car.* 7. *Cro. Eliz.* 149. 4 *Co.* 27.

A *feme covert* is capable of purchasing, for such an act does not make the property of the husband liable to any disadvantage, and the husband is supposed to assent to this, as being to his advantage, but the husband may disagree; and that shall avoid the purchase; but if he neither agrees nor disagrees, the purchase is good, for his conduct shall be esteemed a tacit consent, since it is to turn to his advantage; but in this case, though the husband should agree to the purchase, yet after his death she may waive it, for having no will of her own at the time of the purchase, she is not indispensably bound by the contract; therefore if she does not, when under her own management and will, by some act express her disagreement to such purchase, her heirs shall have the privilege of departing from it. *Co. Lit.* 3. a.

Jointress paying off a mortgage was decreed *to hold over* till she or her executor be satisfied, and interest to be allowed her. *Chan. Cases*, 271.

The husband gave a voluntary bond after marriage to make a jointure of a certain value on his wife; the husband accordingly makes a *jointure*; the wife gives up the bond; the jointure is *evicted*; the jointure shall be made good out of the husband's personal estate, there being no creditors in the case; and the delivery up of the bond by a *feme covert* could no ways bind her interest. *Vern.* 427. *pl.* 402.

A *feme covert* agrees to sell *her inheritance*, so as she might have 200*l.* of the money secured to her; the land is sold, and the money put out in a trustee's name accordingly; this money shall not be liable to the *husband's debts*, nor shall any *promise by the wife*, to that purpose, subsequent to the first original agreement, be binding in that behalf. 2 *Vern.* 64, 65. *pl.* 58. *Trin.* 1688.

It is a general rule that a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole*. 2 *Vez.* 190. 1 *Bro. C. R.* 20. and see 1 *Vez.* 163. Where the wife, being authorized by settlement to dispose of her separate estate, contracted to sell it, the court of chancery will bind her to a specific performance. 1 *Vez.* 517. 1 *Bro. C. R.* 20. So the bond of a *feme covert*, jointly with her husband, shall bind her separate estate. 1 *Bro. C. R.* 16. 2 *Vez.* 190.

IX. In those cases where the debt or cause of action will survive to the wife, the husband and wife are regularly to join in action; as in recovering debts due to the wife before marriage; in actions relating to her freehold or inheritance, or injuries done to the person of the wife. 1 *Roll. Abr.* 347. 2 *Mod.* 269.

But if a *feme sole* hath a rent-charge, and rent is in arrear, and she marries, and the baron distrains for this rent, and thereupon a rescous

is made, this is a tort to the *baron* himself, and he may have an action alone. *Cro. Eliz.* 439. *Owen*, 82. S. P. *Moor*, 584. S. C.

So if a *feme sole* hath right to have common for life, and she takes husband, and she is hindered in taking the common, he may have an action alone without his wife, it being *only to recover damages.* 2 *Bulst.* 14.

But if *baron* and *feme* are disseised of the lands of the *feme*, they must join in action for the recovery of this land. 1 *Bulst.* 21.

The *baron* may have an action alone upon the *stat.* 5 *Rich.* II. *st.* 1. *c.* 8. for entering into the land of the *feme ;* trespass and taking charters of the inheritance of the *feme ; quare impedit, &c.* But for personal torts they must join, though the *baron* is to have the damages. 1 *Danv.* 709. 1 *Roll. Rep.* 360. The husband is to join in actions for battery to the wife ; and a wife may not bring any action for wrong to her without her husband. *Co. Lit.* 132. 326. An action for a battery on the wife, brought by husband and wife, must be laid *to the damage of both.* 2 Ld. *Raym.* 1209. For an injury done to the wife alone, action cannot be maintained by the husband alone, without her ; but for assault, and debauching or lying with the wife, or for a loss and injury done to the husband, in depriving him of the conversation and service of his wife, he alone may bring an action ; and these last actions are laid for assault, and detaining, &c. the wife, *per quod consortium amisit, &c. Cro. Jac.* 538. See *Yelv.* 89.

For taking any thing from the wife, the husband only is to bring the action, who has the property ; for the wife hath not the property. *In all cases where the feme shall not have the thing recovered, but the husband only, he alone is to bring the action.* 1 *Roll. Rep.* 360. except as above, &c. For a personal duty to the wife, the baron only may bring the action ; and the husband is entitled to the fruits of his wife's labour, for which he may bring *quantum meruit.* 1 *Lill. Abr.* 227. 1 *Salk.* 114. In case, before marriage, a *feme* enters into articles concerning her estate, she is as a separate person ; and the husband may be plaintiff in equity against the wife. *Prec. in Chan.* 24.

Where the *feme is administratrix*, the suit must be in both their names ; for, by the intermarriage, the husband hath authority to intermeddle with the goods as well as the wife ; but, in the declaration, the granting administration to the *feme* must be set forth. *Vide* the *Books of Entries*, and *Godb.* 40. *pl.* 44.

In action *for goods which the feme hath as executrix*, they must join, to the end that the damages thereby recovered may accrue to her as executrix, in lieu of the goods. *Went. Off. Ex.* 207.

In an action upon a *trover* before marriage, and a *conversion* after, the *baron* and *feme* ought to join ; for this action, as a trespass, disaffirms the property ; but the *baron* alone ought to bring a *replevin, detinue*, &c. for the allegations admit and affirm a property in the *feme* at the time of the marriage, which, by consequence, must have vested in the *baron.* 1 *Sid.* 172. 1 *Keb.* 641. S. C. 1 *Vent.* 261. 2 *Lev.* 107. S. P. and that he may join the wife at his election.

If *A.* declares that the defendant, being indebted to him and his wife, as executrix to one *J. S.* in consideration that *A.* would forbear to sue him for three months, assumed, &c. and avers that he forbore, and that his wife is still alive, the action is well maintainable by the husband alone, for this is on a new contract, to which the wife is a stranger. *Carth.* 462. 1 *Salk.* 117. *Yelv.* 84. *Cro. Jac.* 110. S. P.

Where a right of action doth accrue to a woman before marriage, as where a bond is made to her and forfeited, there, if she marry, she must be joined with the husband in an action of debt against the obligor. *Owen*, 82.

In all actions *real* for the land of the wife, the husband and wife ought to join. *R.* 1 *Bulst.* 21. So, in actions personal for a *chose in action*, due to the wife before coverture. 1 *Roll.* 347. *l.* 63. *Cro. Eliz.* 537. Vide *Com. Dig.*

In the civil law the husband and the wife are considered as two distinct persons ; and may have separate estates, contracts, debts, and injuries : and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband. 2 *Roll. Abr.* 298. See tit. *Action.*

X. The husband is by law answerable for all actions for which his wife stood attached at the time of the coverture, and also for all torts and trespasses during coverture, in which cases the action must be joint against them both: for if she alone were sued, it might be a means of making the husband's property liable, without giving him an opportunity of defending himself. *Co. Litt.* 133. *Doct. Placit.* 3. 2 *Hen.* VI. 4.

If goods come to a *feme covert* by *trover*, the action may be brought against husband and wife, but the conversion may be laid only in the husband, because the wife cannot convert goods to her own use ; and the action is brought against both, because both were concerned in the trespass of taking them. See *Co. Litt.* 351. 1 *Roll. Abr.* 6. *pl.* 7. *Yelv.* 166. *Noy*, 79. 1 *Leon.* 312. *Cro. Car.* 254. 494. 1 *Roll. Abr.* 348. But in *debt* upon a *devastavit* against *baron* and *feme* executrix, it shall not be laid *quod devastaverunt*, for a *feme covert* cannot waste. 2 *Lev.* 145.

An action on the case was brought against *baron* and *feme* for retaining and keeping the servant of the plaintiff, and judgment accordingly. 2 *Lev.* 63.

If a lease for life or years be made to *baron* and *feme*, reserving rent, an action of debt for rent arrear may be brought against both; for this is for the advantage of the wife. 1 *Roll. Abr.* 348.

If an action be brought against a husband and wife, for the debt of the wife when *sole*, and the plaintiff recovers judgment, the *ca. sa.* shall issue to take both the husband and wife in execution. *Moor*, 704. But if the action was originally brought against herself when *sole*, and pending the suit she marries, the *ca. sa.* shall be awarded against her only and not against the husband. *Cro. Jac.* 323. Yet if judgment be recovered against a husband and wife for the contract, nay, even for the personal misbehaviour (*Cro. Car.* 513.) of the wife during her coverture, the *ca. sa.* shall issue against the husband only: which is (says Mr. J. *Blackstone*) one of the many great privileges of *English* wives. 3 *Com.* 414. See 3 *Wils.* 124. See tit. *Arrest*, *Bail*, *Execution*, *Action*, &c. But in an action against husband and wife, for an assault by the wife, it was held that both may be taken in execution. 1 *Wils.* 149. See *Espinasse's N. P.* 327.

Where a woman before marriage becomes bound for the payment of a sum of money, and on her marriage separate property is settled on her, if the obligee can have no remedy against the husband, the wife's separate property is bound. But the obligee must first endeavour to recover against the husband by suing him. 1 *Bro. C. R.* 17. in *note*.

XI. If *baron* and *feme* are divorced *causâ adulterii*, which is a divorce *à mensâ et thoro*, they continue *baron* and *feme*: it is otherwise in a divorce *à vinculo matrimonii*, which dissolves the marriage.

The *feme*, after divorce, shall re-have *the goods which she had before marriage*. *Bro. Coverture*, *pl.* 82. *D.* 13. *pl.* 63. *per Fitzherbert*. *Keilw.* 122. b. *pl.* 75.

But if the husband had given or sold them without collusion before the divorce, there is no remedy; but if by collusion, she may aver the collusion, and have *detinue* for the whole, whereof the property may be known; and as for the rest, which consists of money, &c. she shall sue in the spiritual court. *Bro. Deraignment* and *Divorce*, *pl.* 1. cites 26 *Hen.* VIII. 7.

If *a man is bound to a feme sole*, and after *marries her*, and after they are divorced, *the obligation is revived*. *Bro. Coverture*, *pl.* 82. Because the divorce being *à vinculo matrimonii*, by reason of some prior impediment, as precontract, &c. makes them never husband and wife *ab initio*; but if the husband had made a feoffment in fee of the lands of his wife, and then the divorce had been, that would have been a discontinuance as well as if the husband had died, because there the interest of a third person had been concerned, but between the parties themselves it will have relation to destroy the husband's title to the goods, and it proves no more than the common rule, *viz.* that relations will make a nullity between the parties themselves, but not amongst strangers. Ld. *Raym.* 521. *Hil.* 11 *Wm.* III.

If a man *gives lands in tail to baron and feme*, and they have issue, and after, *divorce is sued*, now they have only frank tenement, and the issue shall not inherit. *Bro. Tail et Dones*, &c. *pl.* 9.

If the *baron* and *feme*, *purchase jointly and are disseised*, *and the baron releases*, and after they are divorced, the *feme* shall have the *moiety*, though before the divorce there were no moieties; for the divorce converts it into moieties. *Bro. Deraignment*, *pl.* 18. cites 32 *Hen.* VIII.

If *baron alien* the *wife's land*, and then there is a divorce *causa præcontractus*, or any other divorce which dissolves the marriage *à vinculo matrimonii*, the wife during the life of the *baron* may *enter* by stat. 32 *Hen.* VIII. *c.* 28. *Dyer*, 13. *pl.* 61. But *vide* Ld. *Raym.* 521.

But if after such alienation and divorce the *baron* dies, she is put to her *cui in vita ante divortium*; and yet the words of the statute are, that such alienation shall be void, but this shall be intended to toll the *cui in vita*. *Mod.* 58. *pl.* 164. *Pasch.* 8 *Eliz. Broughton* v. *Conway*.

Divorce *causâ adulterii* of the husband; afterwards the wife sues in the spiritual court for a *legacy*; the executor pleads the *release of the baron*; the release binds the wife, for the *vinculum matrimonii* continues. *Cro. Eliz.* 908. *Vide* 1 *Salk.* 115.

Holt held, that if *feme covert*, after divorce *à mensâ et thoro*, sues for a legacy, which, if recovered, comes to her husband, there the husband may release it, because there is no alimony: and if he may release the duty, he may release the costs. 1 *Salk.* 115. *pl.* 4. S. C. and S. P. and see 1 *Vern.* 261.

A divorce was *à mensâ et thoro*, and then the husband dies intestate. The wife, by bill, prayed assistance as to *dower and administration*, (it being granted to another,) and *distribution*. The master of the rolls bid her go to law, to try if she was entitled to her dower, there being no impediment, and as to that dismissed the bill; and as to the administration, the granting that is in the ecclesiastical court; but the dis-

tribution more properly belongs to this court; but since in that court she is such a wife as *is not entitled to administration*, he dismissed the bill as to distribution too, and said, if they could repeal that sentence, she then would be entitled to distribution. *Ch. Prec.* 111.

In case of a divorce *à mensâ et thoro* the law allows *alimony* to the wife; which is that allowance which is made to a woman for her support out of the husband's estate, being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. And the ecclesiastical court is the proper court in which to sue for alimony. *Het.* 69. This is sometimes called her *estovers*, for which, if the husband refuses payment there is (besides the ordinary process of excommunication in the ecclesiastical court) a writ at common law *de estoveriis habendis*, in order to recover it. 1 *Lev.* 6. It is generally proportioned to the rank and quality of the parties; but in case of an elopement and living with an adulterer, the law allows her no alimony. *Cowel.* 1 *Inst.* 235. a. 12 *Rep.* 30.

A bill may be brought in chancery for a specific performance of an *agreement* by the husband with a third person, for a separate maintenance of the wife; notwithstanding that alimony belongs to the spiritual court. *Treat. Eq.* 39.

The court of chancery has decreed the wife a separate maintenance out of a trust fund on account of the cruelty and ill-behaviour of the husband, though there was no evidence of a divorce or *agreement* that the fund in dispute should be so applied. 2 *Vern.* 752. And in another case the husband having quitted the kingdom, Lord *Hardwicke* decreed the wife the interest of a trust fund till he should return and maintain her as he ought. 2 *Atk.* 96. Yet in a subsequent case Lord *Hardwicke* observes, that he could find no decree to compel a husband to pay a separate maintenance to his wife, except upon an *agreement* between them, and even then unwillingly. 3 *Atk.* 547. And this latter opinion seems most reconcilable with principle; for the case of a divorce *propter sævitium* (see 2 *Vern.* 493.) may be considered as an implied agreement; and if there be an express or implied agreement, there seems no doubt but that courts of equity may, concurrently with the spiritual court, in proceeding upon it, decree a separate maintenance. *Wood's Inst.* 62. 2 *Vern.* 386. *Guth* v. *Guth*, MSS. The spiritual court, however, would be the more proper jurisdiction if it acted *in rem. Litt. Rep.* 78. 2 *Atk.* 511. But if after an agreement between husband and wife to live separate, they appear to have cohabited, equity will consider the agreement as waived thereby, *Fletcher* v. *Fletcher*, *Mich.* 1788. See *Fonblanque's Treat. Eq.* 96, 97.

Where, on a separation, lands are conveyed by the *baron* in trust for the *feme*, chancery will not bar the *feme* from *suing the baron* in the trustee's name, and a surrender or release by the *baron* shall not be made use of against the *feme*. 2 *Chan. Cas.* 102.

A woman living separate from her husband, and having a separate maintenance, *contracts debts*. The *creditors*, by a bill in this court, may follow the separate maintenance whilst it continues; but when that is determined, and the husband dead, they cannot by a bill charge the jointure with the debts; by Lord Keeper *North*; and the rather, because the executor of the husband, who may have paid the debt, is no party. *Vern.* 326.

Where the husband, during his cohabitation with the wife, makes her an allowance of so much a year for her expenses, if she out of her own good housewifery saves any thing out of it, this will be the

husband's estate and he shall reap the benefit of his wife's frugality; because when he agrees to allow her a certain sum yearly, the end of the agreement is, that she may be provided with clothes and other necessaries, and whatsoever is saved out of this, redounds to the husband; *per* Lord Keeper *Finch. Freem. Rep.* 304.

A term was created on the marriage of *A.* with *B.* for raising 200*l.* a year for pin-money, and in the settlement *A.* covenanted for payment of it. There was an *arrear of one year at A.'s death*, which was decreed, because of the covenant to be charged on a trust-estate, settled for payment of debts, it being in arrear for one year only; *secus* had it been in arrear for several years. *Chan. Prec.* 26.

The plaintiff's relation (to whom he was heir) allowed the wife pin-money; which *being in arrear*, he *gave her a note* to this purpose; *I am indebted to my wife* 100*l. which became due to her such a day*; after *by his will he makes provision out of his lands for payment of all his debts, and all moneys which he owed to any person in trust for his wife*; and the question was, whether the 100*l.* was to be paid within this trust; and my Lord Keeper decreed not; for in point of law it was no debt, because a man cannot be indebted to his wife; and it was not money due to any in trust for her. *Hil.* 1701. between *Cornwall* and the earl of *Montague*. But *quære*; for the testator looked on this as a debt, and seems to intend to provide for it by his will. *Abr. Eq. Ca.* 66.

Where the wife hath a separate allowance *made before marriage*, and *buys jewels with the money* arising thereout, they will not be assets liable to the husband's debts. *Chan. Prec.* 295.

Where there is a provision for the wife's separate use *for clothes*, if the *husband finds her clothes*, this *will bar the wife's claim*; nor is it material whether the allowance be provided out of the estate which was originally the husband's, or out of what was her own estate; for in both cases her *not having demanded it* for several years together, shall be *construed a consent from her that he should receive it*; *per* Lord C. *Macclesfield.* 2 *P. Wms.* 82, 83.

So where 50*l. a year was reserved for clothes and private expenses*, secured by a term for years, and ten years after the husband died, and soon after the wife died; the executors in equity demanded 500*l.* for ten years' arrear of this pin-money; but it appearing that the *husband maintained her*, and *no proof that she ever demanded it*, the claim was disallowed. 2 *P. Wms.* 341.

BARONET. See *Precedence*; *Baron* and *Feme.*

BAR, or BARR, Lat. *barra*, Fr. *barre.*] In a legal sense, is a *plea* or peremptory exception of a defendant, sufficient to destroy the plaintiff's action. And it is divided into *bar* to common intendment, and *bar* special; *bar temporary*, and *perpetual*; bar to a *common intendment* is an *ordinary* or *general* bar, which usually is a bar to the declaration of the plaintiff; bar *special* is that which is more than ordinary, and falls out upon some special circumstances of the fact, as to the case in hand. *Terms de Ley.*

Bar *temporary* is such a bar that is good for the present, but may afterwards fail; and bar *perpetual* is that which overthrows the action of the plaintiff for ever. *Plowd.* 26. But a plea in bar, not giving a full answer to all the matter contained in the plaintiff's declaration is not good. 1 *Lill. Abr.* 211. If one be barred by a plea to the *writ* or to the *action of the writ*, he may have the same writ again, or his right action; but if the plea in bar be to the action itself, and the plaintiff is barred by judgment, &c. it is a bar for ever in *personal*

actions. 6 *Rep.* 7. And a recovery in debt is a good bar to action on the case for the same thing; also a recovery on *assumpsit* in case, is a good bar in debt, &c. *Cro. Jac.* 110. 4 *Rep.* 94.

In all actions *personal*, as debt, account, &c. a bar is perpetual, and in such case the party hath no remedy, but by writ of error or attaint; but if a man is barred in a real action or judgment, yet he may have an action of as high a nature, because it concerns his inheritance; as for instance, if he is barred in a *formedon in descender*, yet he may have a *formedon in the remainder*, &c. 6 *Rep.* 7. It has been resolved, that a bar in any action real or personal by judgment upon demurrer, verdict, or confession, is a bar to that action, or any action of the like nature for ever; but, according to *Pemberton*, Ch. J. this is to be understood, when it doth appear that the evidence in one action would maintain the other; for otherwise the court shall intend that the party hath mistaken his action. *Skin.* 57, 58.

Bar to a *common intent* is good; and if an executor be sued for his testator's debt, and he pleadeth that he had no goods left in his hands at the day the writ was taken out against him, this is a good bar to a common intendment, till it is shown that there are goods; but if the plaintiff can show by way of replication, that more goods have fallen into his hands since that time, then, except the defendant allege a better bar, he shall be condemned in the action. *Plowd* 26. *Kitch.* 215. *Bro.* tit. *Barre.*

There is a bar material, and a bar at large; bar material may be also called special bar; as when one, in stay of the plaintiff's action, pleadeth some particular matter, *viz.* a descent from him that was owner of the land, &c. a feoffment made by the ancestor of the plaintiff, or the like; a bar at large is, when the defendant, by way of exception, doth not traverse the plaintiff's title, by pleading, nor confess, nor avoid it, but only makes to himself a title in his bar. *Kitch.* 68. 5 *Hen.* VII. 29.

See tit. *Abatement*, *Action*, *Judgment*, and especially *Pleading*.

This word Bar is likewise used for the place where serjeants and counsellors at law stand to plead the causes in court; and where prisoners are brought to answer their indictments, &c. whence our lawyers, that are called to the bar, are termed barristers. 24 *Hen.* VIII. *c.* 24.

BARRASTER, BARRISTER, *barrasterias.*] A counsellor learned in the law, admitted to plead at the bar, and there to take upon him the protection and defence of clients. They are termed *jurisconsulti*; and in other countries called *licentiati in jure*; and anciently *barristers* at law were called *apprentices* of the law, (from the French *apprendre* to learn,) in Lat. *apprenticii juris nobiliores. Fortesc.* The time before they ought to be called to the bar, by the ancient orders, was eight years, now reduced to five; and the exercises done by them, (if they were not called *ex gratiâ*,) were twelve grand moots performed in the inns of *chancery*, in the time of the grand readings, and twenty-four petty moots in the term times, before the readers of the respective inns; and a *barrister* newly called was to attend the six (or four) next long vacations the exercise of the house, *viz.* in Lent and Summer, and was thereupon for those three (or two) years styled a vacation *barrister*. Also they are called *utter barristers*, *i. e.* pleaders *ouster* the bar, to distinguish them from benchers, or those that have been readers, who are sometimes admitted to plead within the bar, as the king, queen or prince's counsel are.

From the degrees of barristers and serjeants at law, (see tit. *Serjeant*,) some are usually selected to be his majesty's counsel; the two principal of whom are called his attorney and solicitor-general. The first king's counsel under the degree of serjeant, was Sir *Francis Bacon*, who was made so *honoris causâ*, without either patent or fee; so that the first of the modern order, who are now the sworn servants of the crown with a standing salary, seems to have been Sir *Francis North*, afterwards Lord Keeper to *Charles* II. These king's counsel must not be employed in any cause against the crown without special license, but which is never refused, and costs about 9*l*. A custom now prevails of granting letters patent of precedence to such barristers as the crown thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective patents, sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These, as well as the queen's attorney and solicitor-general, rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts; but receive no salaries and are not sworn, and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately, (except in the court of common pleas, where serjeants only are admitted in term time,) may take upon them the protection and defence of any suitors whether plaintiff or defendant. 3 *Comm.* 27, 28.

A counsel can maintain no action for his fees; (*Davis Pref.* 22. 1 *C. R.* 38.) which are given not as a salary or hire, but as a mere gratuity, which a barrister cannot demand without doing wrong to his reputation. *Davis*, 23.

In order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to unseemly licentiousness, it hath been holden, that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured. *Cro. Jac.* 90. And counsel guilty of deceit or collusion, are punishable by stat. *Westm.* 1. 3 *Edw.* I. *c.* 28. with imprisonment for a year and a day, and perpetual silence in the courts; and the latter punishment is still sometimes inflicted for gross misdemeanors in practice. *Raym.* 376. 3 *Comm.* 29.

Barristers who constantly attend the *king's bench*, &c. are to have the privilege of being sued in transitory actions in the county of *Middlesex*. But the court will not change the venue because some of the defendants are barristers. *Stra.* 610. See tit. *Privilege*. Pleas, before they are filed, must be signed by a barrister or serjeant. See tit. *Abatement*, *Pleading*. See further tit. *Counsellor*, *Non-conformists*, *Oaths*.

BARRATOR, or BARRETOR, Lat. *barractator*, Fr. *barrateur*.] A common mover of suits and quarrels, either in courts, or elsewhere in the country, that is himself never quiet, but at variance with one or other. *Lambard* derives the word *barretor* from the Lat. *balatro*, a vile knave; but the proper derivation is from the Fr. *barrateur*, *i. e.* a deceiver, and this agrees with the description of a common *barretor* in Lord *Coke's* Reports, *viz.* that he is a common mover and maintainer of suits in disturbance of the peace, and in taking and detaining

the possession of houses and lands, or goods by false inventions, &c. 8 *Rep.* 37.

However it seems clear that *no general indictment*, charging the defendant with being a common oppressor, and disturber of the peace, and stirrer up of strife among neighbours is good, without adding the words *common barretor*, which is a term of art appropriated by law to this purpose. 1 *Mod.* 288. 1 *Sid.* 282. *Cro. Jac.* 526. 1 *Hawk. P. C. c.* 81. § 9.

A common *barretor* is said to be the most dangerous oppressor in the law; for he oppresseth the innocent by colour of law, which was made to protect them from oppression. 8 *Rep.* 37. No one can be a *barretor* in respect of one act only; for every indictment for such crime must charge the defendant with being *communis barractator*, and conclude *contra pacem*, &c. And it hath been holden, that a man shall not be adjudged a *barretor* for bringing any number of suits in his own right, though they are vexatious, especially if there be any colour for them; for if they prove false he shall pay the defendant costs. 1 *Roll. Abr.* 355. 3 *Mod.* 98.

A *barrister* at law entertaining a person in his house and bringing several actions in his name, where nothing was due, was found guilty of *barretry*. 3 *Mod.* 97. An attorney is in no danger of being convicted of *barretry*, in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy. *Ibid.* A common solicitor, who solicits suits is a common *barretor*, and may be indicted thereof, because it is no profession in law. 1 *Danv. Abr.* 725.

The punishment for this offence in a common person, is by fine and imprisonment: but if the offender (as is too frequently the case) belongs to the profession of the law, a barretor who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future. See the stat. 12 *Geo.* I. *c.* 29. under tit. *Attornies at Law.* 4 *Comm.* 134. and see stat. 34 *Edw.* III. *c.* 1. 1 *Hawk. P. C. c.* 81.

It seems to be the settled practice not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters which he intends to prove against him; for otherwise it would be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances. 5 *Mod.* 18. 1 Ld. *Raym* 490. 12 *Mod.* 516. 2 *Atk.* 340. 1 *Hawk. P. C. c.* 81. § 13.

To this head may also be referred another offence of equal malignity and audaciousness, that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by stat. 8 *Eliz. c.* 2. to be punished by six months' imprisonment, and treble damages to the party injured. 4 *Comm.* 134.

BARRATRY, see *Insurance* II. 4. This term was applied to the obtaining benefices at *Rome*. *Scotch Dict.*

BARREL, *barilium.*] A measure of wine, ale, oil, &c. Of wine it contains the eighth part of a tun, the fourth part of a pipe, and the moiety of a hogshead; that is, thirty-one gallons and a half. Stat. 1 *Rich.* III. *c.* 13. Of beer it contains thirty-six gallons; and of ale, thirty-two gallons. Stats. 23 *Hen.* VIII. *c.* 4. 12 *Car.* II. *c.* 23. The assise of herring barrels is thirty-two gallons wine measure, containing

in every barrel usually a thousand full herrings. Stat. 13 *Eliz. c.* 11. The eel barrel contains thirty gallons. 2 *Hen.* VI. *c.* 11.

BARRIERS, Fr. *barrieres ; jeu de barres, i. e. palæstra.*] A martial exercise of men armed and fighting together with short swords, within certain bars or rails which separated them from the spectators ; it is now disused here in *England. Cowel.* There are likewise *barrier towns*, or places of defence on the frontiers of kingdoms.

BARRISTER. See BARRASTER.

BARROW, from the Sax. *boerg*, a heap of earth.] A large hillock or mount, raised or cast up in many parts of *England*, which seem to have been a mark of the Roman *tumuli*, or sepulchres of the dead. The Sax. *beora* was commonly taken for a grove of trees on the top of a hill. *Kennet's Gloss.*

To BARTER, from the Fr. *barater*, or Span. *baratar*, *circumvenire.*] To exchange one commodity for another, or truck wares for wares. Stat. 1 *Rich.* III. *c.* 9. Because probably they that exchange in this manner do endeavour, for the most part, one to overreach and circumvent the other. So *bartery* the substantive in stat. 13 *Eliz. c.* 7. of *Bankrupts.*

BARTON or BERTON, a word used in *Devonshire* for the demesne lands of a manor ; sometimes the manor house itself, and in some places for out houses and fold yards. In the stat. 2 and 3 *Edw.* VI. *c.* 12. *barton* lands and demesne lands, are used as *synonyma. Blount* says it always signifies a farm distinct from a mansion—and *bertonarii* were farmers, husbandmen that held bartons at the will of the lord. In the west, they called a great farm a *berton* or *barton ;* and a small farm, a *living. Blountin* v. *Barton* and *Berton.*

BAS CHEVALIERS, Low or inferior knights by tenure of a base military fee ; as distinguished from bannerets, the chief or superior knights ; hence we call our simple knights, *viz.* knights bachelors, *bas chevaliers. Kennet's Gloss.* to *Paroch. Antiq.*

BASE COURT, Fr. *cour basse.*] Is any inferior court, that is not of record, as the court baron, &c. *Kitch. fol.* 95, 96.

BASE ESTATE, Fr. *bas estat.*] Or Base Tenure. That *estate* which *base* tenants have in their lands. And *base* tenants, according to *Lambard*, are those who perform villenous services to their lords ; but there is a difference between a *base estate* and villenage ; for to hold in pure villenage is to do all that the lord will command him ; and if a copyhholder have but a *base estate*, he not holding by the performance of every commandment of his lord, cannot be said to hold in villenage. See *Kitch.* 41. This Dict. tit. *Tenures.*

BASE FEE, Is at tenure in *fee* at the will of the lord, distinguished from socage free tenure ; but Lord *Coke* says, that a *base fee*, or qualified fee, is what may be defeated by limitation, or on entry, &c. *Co. Lit.* 1. 18. *Bassa tenura*, or *base* tenure, was a holding by villenage, or other customary service, opposed to *alta tenura*, the higher tenure in *capite* or by military service, &c. See tit. *Tenure, Tail.*

BASE INFEFTMENT, Is when the vassal disposes lands to be holden of himself. *Scotch Dict.*

BAS VILLE, The suburbs or inferior town, as used in *France.*

BASELS, *basselli*, A kind of coin abolished by King *Hen.* II. *anno* 1158. *Hollingshed's Chron.* p. 67.

BASELARD, or BASILLARD, in the stat. 12 *Rich.* II. *c.* 6. signifies a weapon, which Mr. *Speight*, in his exposition upon *Chaucer*, calls *fugionem vel sicam*, a poniard. *Knighton, lib.* 5. p. 2731.

BASILEUS, A word mentioned in several of our historians signifying King, and seems peculiar to the kings of *England*. *Monasticon, tom.* 1. p. 65. *Ego* Edgar *totius Angliæ basileus confirmavi.* In many places of the *Monasticon* this word occurs; and also in *Ingulphus, Malmesbury, Mat. Paris, Hoveden, &c.*

BASKET-TENURE of lands. See *Canestellus.*

BASNETUM, A *basnet*, or helmet.

BASSINET, A skin with which the soldiers covered themselves. *Blount.*

BASTARD, *bastardus;* fancifully derived from the *Greek;* but more truly from the Brit. *Bastuerd, nothus, spurius;* or according to *Spelman* from the German, *bastart—bas* low, and *start* risen, Sax. *steort;* as up-start, *homo novus* suddenly risen up.] One whose father and mother were not lawfully married to each other, previous to his birth; or as it has been seemingly more incorrectly phrased, "one born out of lawful wedlock."

I. 1. *Who are bastards, and of their incapacities.*
2. *Of the trial of bastardy.*
II. 1. *Of the case of infant bastards, their maintenance and protection.*
2. *Of the murder of infant bastards.*

I. 1. A bastard by our *English* laws, is one that is not only begotten, but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry; and herein they differ most materially from our law; which though not so strict as to require that the child shall be *begotten*, yet makes it an indispensable condition to make it legitimate, that it shall be *born* after lawful wedlock. 1 *Comm.* 454. 2 *Inst.* 96, 97.

Blackstone observes, that the reason of our *English* law is surely much superior to that of the *Roman*, if we consider the principal end and design of the marriage contract taken in a civil light. He then recapitulates several motives, which he concludes we may suppose actuated the peers at the parliament of *Merton*, when they refused to enact that children born before marriage should be esteemed legitimate. 1 *Comm.* 456. And see 1 *Inst.* 244. b. and 245. a. in the notes.

If a man marries a woman grossly big with child by another, and within three days after, she is delivered, the issue is no bastard. 1 *Danv. Abr.* 729. If a child is born within a day after the marriage between parties of full age, if there be no apparent impossibility that the husband should be the father of it, the child is no bastard, but supposed to be the child of the husband. 1 *Roll. Abr.* 358.

As all children born before matrimony are bastards; so are all children born so long after the death of the husband, that by the usual course of gestation they could not be begotten by him. But this being a matter of some uncertainty, the law is not exact as to a few days. *Cro. Jac.* 451. See 1 *Inst.* 123. b. in notes 1 and 2. where the time of gestation as connected with this question is inquired into at great length, and with exquisite nicety and accuracy. On the whole it appears that what is commonly considered as the *usual* period is forty weeks, or 280 days. But though the child is born some time after, it only affords *presumption*, not proof of illegitimacy. The information of the late celebrated anatomist, Dr. *Hunter*, is also given, from which we learn, 1. That the usual period is nine calendar months;

(from 270 to 280 days;) but there is *very commonly* a difference of one, two, or three weeks. 2. A child may be born alive at any time, from three months, but we see none born with powers of coming to manhood, or of being reared before seven calendar months, or near that time; at six months it cannot be. 3. The doctor said he had *known* a woman bear a living child in a perfectly natural way, fourteen days later than nine calendar months: and he *believed* two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception.

This case of birth of children after the death of the husband, gives occasion to the writ *de ventre inspiciendo*. See tit. *Ventre Inspiciendo*.

But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband, in this case he is said to be more than ordinarily legitimate, for he may when he arrives to years of discretion, choose which of the fathers he pleases. 1 *Inst.* 8. For this reason by the ancient *Saxon* laws, in imitation of the civil law, a widow was forbidden to marry for twelve months. *Ll. Ethel. A. D.* 1008. *Ll. Canut. c.* 71. 1 *Comm.* 456, 457. See 1 *Inst.* 8. a. in *note* 7. where it is said, "*Brooke* questions this doctrine, from which it seems as if he thought it reasonable that the circumstances of the case, instead of the choice of the issue, should determine who is the father." See *Bro. Abr. Bastardy*, p. 18. *Palm.* 10. See further, 1 *Inst.* 123. b. in note 1. where additional authorities are cited, to show that in this case a jury ought to decide on the question, according to proof of the woman's condition.

Children born during wedlock, may also in some circumstances be bastards. As if the husband be out of the kingdom of *England*, (or as the law somewhat loosely phrases it, *extra quatuor maria*,) for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards. 1 *Inst.* 244. But generally, during the coverture, access of the husband shall be presumed, unless the contrary can be shown. *Salk.* 123. 3 *P. Wms.* 276. *Stra.* 925. Which is such a negative as can only be proved by showing him to be elsewhere; for the general rule is *præsumitur pro legitimatione*. 5 *Rep.* 98. See also 1 *Inst.* 126. a. in note 2. and as to these phrases *infrà* (or more classically *intrà*) and *extra*, *quatuor maria*, see some incomplete notes in 1 *Inst.* 108. a. note 6. and 261. a. note 1. Although a *feme covert* may on a question of bastardy give evidence of the fact of criminal conversation, yet she shall not be admitted to prove the non-access of her husband. *Annal.* 79.

There are determinations by which it appears that the child of a married woman may be proved a bastard by other circumstantial evidence than that of the husband's *non-access*. 4 *Term Rep.* 251. 356.

In a divorce *à mensâ et thoro*, if the wife has children, they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved; but in a voluntary separation by agreement, the law will suppose access unless the negative be shown; and the children, *primâ facie* shall not be esteemed bastards. *Salk.* 123. In case of divorce in the spiritual court *à vinculo matrimonii*, all the issues born during the coverture are bastards; because such divorce is always upon some cause, that rendered the marriage unlawful and null from the beginning. 1 *Inst.* 235.

If a man or woman marry a second wife or husband, the first being living, and have issue by such second wife or husband, the issue is a *bastard*. See *Bott.* (*ed.* 1793. by *Const.*) 397. *pl.* 521. Before the statute 2 and 3 *Edw.* VI. *c.* 21. one was adjudged a *bastard*, *quia filius sacerdotis*.

A man hath issue a son by a woman before marriage, and afterwards marries the same woman, and hath issue a second son born after the marriage; the first of these is termed in law a *bastard eigné*, and the second a *mulier*, or *mulier puisné*; by the common law, as hath been said, such *bastard eigné* is as incapable of inheriting as if the father and mother had never married; but yet there is one case in which his issue was let into the succession, and that was by the consent of the lord and person legitimate; as if upon the death of the father the *bastard eigné* enters; and the *mulier* during his whole life never disturbs him, he cannot upon the death of the *bastard eigné* enter upon his issue. *Lit. sect.* 399. *Co. Lit.* 245.

To exclude the *mulier* from the inheritance, there must not only be an uninterrupted possession of the *bastard eigné* during his life, but a descent to his issue. *Co. Lit.* 244. 1 *Roll. Abr.* 624. See 2 *Comm. c.* 2. § 5.

No man can bastardize another after his death, that was a *mulier* by the laws of holy church, and who carried the reputation of legitimate during his life; for a man must be bastardized by the rules of the civil or common law; by the rules of the civil law, this person is by supposition legitimate; and if the common law be made the judge, he cannot be bastardized: for it is a rule of common law, that a personal defect dies with the person, and cannot after his death be objected to his successor that represents him; and this rule of law was taken from the humanity of the ancients, which would not allow the calumny of the dead; as also from an important reason of convenience, for pedigrees are often derived through several persons, concerning whom there remains little knowledge or remembrance of any thing, but only of their being; and therefore it were an easy matter to throw on them the aspersion of bastardy by any forged evidence, which cannot be confronted by opposite proof; and so it is fit to limit a time in which all proofs of bastardy are to be disallowed. 7 *Co.* 44. *Jenk. Rep.* 268. 1 *Brownl.* 42. *Co. Lit.* 33. a. *Lit. sect.* 399. *Co. Lit.* 245.

In the case of *Pride* v. *The Earls of Bath and Montague*, it was held that the rule that a person shall not be bastardized after his death, is only good in the case of *bastard eigné* and *mulier puisné*. 1 *Salk.* 120. 3 *Lev.* 410.

If there be an apparent impossibility of procreation on the part of the husband, natural or accidental, as in case of the husband being only eight years old, or disabled by disease, there the issue of the wife shall be a bastard. 1 *Inst.* 244.

The rights of a bastard are very few, being only such as he can acquire, for he can *inherit* nothing, being looked upon as the son of nobody, and sometimes called *filius nullius*, sometimes *filius populi*. *Fortesc. de. Ll. c.* 40. Yet he may gain a surname by reputation, though he has none by inheritance. 1 *Inst.* 3. 123. 6 *Co.* 65.

Where a remainder is limited to the eldest son of *Jane S.* whether legitimate or illegitimate, and she hath issue, a bastard shall take this remainder, because he acquires the denomination of her issue by being born of her body; and so it was never uncertain, who was designed by this remainder. *Noy*, 35.

If parents are married and afterwards divorced, this gives the issue the reputation of children : and so doth a subsequent marriage of the parents. 6 *Co.* 65. *Hugh's Abr.* 363.

If a man, in consideration of natural affection and love, covenants to stand seised to the use of a bastard, this is not good ; for he is not *de sanguine patris ;* but it is said that a woman may give lands in frank marriage with her bastard, because he is of the blood of the mother ; but he hath no father, but from reputation only. *Dyer*, 374. *And.* 79. 6 *Co.* 77. *Noy*, 35.

A court of equity will not supply the want of a surrender of a copyhold estate, in favour of a bastard, as it will for a legitimate child. *Prec. Chan.* 475.

The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs but of his own body ; for being as was before said *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. But though bastards are not looked upon as children to any civil purposes, yet the ties of nature hold as to maintenance, and many other purposes ; as particularly that a man shall not marry his bastard sister or daughter. 3 *Salk.* 66, 67. Ld. *Raym.* 63. *Comb.* 356. And see *post*, II.

A bastard was, in strictness of law, incapable of holy orders, and though that were dispensed, yet he was utterly disqualified from holding any dignity in the church. *Fortesc. c.* 40. 5 *Rep.* 58. But this doctrine seems now obsolete ; and there is a very ancient decision that a felon should have the benefit of clergy, though he were a bastard. *Bro. Clergy*, 20. In all other respects, therefore, except those mentioned, there is no distinction between a bastard and another man. 1 *Comm.* 459.

A bastard may be made legitimate, and capable of inheriting by the transcendant power of an act of parliament, and not otherwise ; 4 *Inst.* 36. as was done in the case of *John of Gaunt's* bastard children, by a stat. of *Rich.* II. 1 *Comm.* 459.

2. Bastardy, in relation to the several manners of its *trial*, is distinguished into general and special bastardy.

Till the stat. of *Merton*, 20 *Hen.* III. the question, whether born before or after marriage, was examined before the ecclesiastical judge, and his judgment was certified to the king or his justices, and the king's court either abided by it or rejected it at pleasure. But after the solemn protest made by the *barons* at *Merton*, against the introduction of the doctrine of the civil and canon law in this respect, *special bastardy* has been always triable at common law ; and *general bastardy* alone has been left to the judgment of the ecclesiastical judge, who in this case agrees with the temporal. 2 *Inst.* 99. *Reeves' Hist. Eng. Law*, 85. 201. And see 1 *Inst.* 126. a. *note* 2. and 245. a. *note* 1.

General bastardy, tried by the bishop, in its notion contains two things. 1st. It should not be a bastard made legitimate by a subsequent marriage. 2dly. That it should be a point collateral to the original cause of action. 1 *Roll. Abr.* 361.

Formerly bastards had a way in such issues to trick themselves into legitimation ; for they used to bring feigned actions, and get suborned witnesses before the bishop to prove their legitimation, and then got the certificate returned of record ; and after that their legitimation could never be contested ; for being returned of record as a point adjudged by its proper judges, and remaining among the memorials

of the court, all persons were concluded by it; but this created great inconveniences, as is taken notice of in the preamble of stat. 9 *Hen.* VI. c. 11. in the case of several persons of quality; for the evidence of the contrary parties concerned were never heard at the trial, and yet their interest was concluded: to remedy this inconvenience without altering the rules of law, it was enacted, that, before any writ to the bishop, there should be a proclamation made in the court, where the plea depends, and after that, the issue should be certified into chancery, where proclamation should be made once in every month for three months, and then the chancellor should certify to the court where the plea depends, and afterwards it shall be again proclaimed in the same court, that all that are concerned may go to the ordinary to make their allegations; and without these circumstances, any writ granted to the ordinary, and all proceedings thereupon, shall be utterly void. 1 *Roll. Abr.* 361.

If the ordinary certify or try bastardy without a writ from the king's temporal courts, it is void; for the spiritual jurisdiction within these kingdoms is derived from the king, and therefore it must be exercised in the manner the king hath appointed; for it would be injurious if they should declare legitimation where the rights of inheritance are so nearly concerned, without any apparent necessity. 1 *Roll. Abr.* 361.

The certificate must be under the seal of the ordinary, and not under the seal of the commissary only: for the command is to the bishop himself to certify, and therefore the execution of the command must appear to be by the bishop in proper person. 1 *Roll. Abr.* 362.

If a man be certified bastard, this binds perpetually, though the person so adjudged a bastard is not party to the action, for all persons are estopped to speak against the memorial of any judicatory; because the act of the public judicatory under which any person lives, is his own act; and were he not thus bound, there might be contradiction in certificates. 1 *Roll. Abr.* 362.

If a man be certified bastard, that doth not bind a stranger till returned of record, because it is no judicial act till recorded in the place appointed to record such transactions; nor doth it bind the party to the action till judgment thereon, because if he avoid the action he avoids all consequences of the action; and therefore if the defendant be certified bastard by the ordinary, yet if the plaintiff be nonsuit they cannot go on to trial, and so the bishop's certificate never appears of record, and therefore is not binding. 1 *Roll. Abr.* 362.

If a man be certified *mulier*, no man is estopped to bastardize him, for though he may be a *mulier* by the spiritual law, yet he may be a bastard by our law; and therefore any man, notwithstanding the certificate, may plead the issue of special bastardy. 1 *Roll. Abr.* 362.

Special bastardy is two fold: 1st. Where the bastardy is the gist of the action, and the material part of the issue. 2dly. Where those are bastards by the common law that are *muliers* by the spiritual law. 1 *New Abr.* 314. *Co. Lit.* 134. 1 *Roll.* 367. *Hob.* 117.

If a man receives any temporal damage by being called a bastard, and brings his action in the temporal courts, and the defendant justifies that the plaintiff is a bastard, this must be tried at common law, and not by writ to the bishop; for otherwise you suppose an action brought in a court which hath not a capacity to try the cause of action. 1 *Brownl.* 1. *Hob.* 179. *Godol.* 479. *Co. Ent.* 29.

If it be found by an assise taken at large, that a man is a bastard, the temporal courts are judges of it; for the jury cannot be estopped to speak truth which may fall within their own knowledge, and what they find becomes the record of the temporal courts, and so within their conusance. *Bro. Bastardy*, 97.

II. 1. By stat. 18 *Eliz. c.* 3. (and see stat. 3 *Car.* I. *c.* 4.) two justices of peace may make an order on the *mother* or *reputed father* of a bastard to maintain the infant by weekly payments or otherwise: and if the party disobey such order, he or she may be committed to gaol, until they give security to perform it; or to appear at the sessions. By stat. 7 *Jac.* I. *c.* 4. § 7. the justices may commit the mother of a bastard, *likely to become chargeable*, to the house of correction for a year; or for a second offence, till she give security for her good behaviour. By stat. 13 and 14 *Car.* II. *c.* 12. § 19. if the putative father or lewd mother run away from the parish, the overseers may, by authority of two justices, *seize*, and by order of the sessions, sell the effects of the father or mother to maintain the child. By stat. 6 *Geo.* II. *c.* 31. the mother of a bastard *may*, *before* or *after* it is born, swear it to any person; and the putative father shall then on application by the overseer of the parish be apprehended and committed; unless he give security to indemnify the parish; or to appear at the next sessions: but if the woman die or marry before delivery, or miscarry, or prove not to be with child, the reputed father shall be discharged. Any justice near the parish, on application of the reputed father in custody, shall summon the overseer to show cause against his being discharged; and if no order be made, in pursuance of stat. 43 *Eliz. c.* 2. (for the maintenance of the child) within six weeks after the woman's delivery, he shall be discharged. By the said stat. 6 *Geo.* II. *c.* 31. § 4. it is expressly provided that "it shall not be lawful for the justice to send for any woman before she shall be delivered, or for a month after, in order to be examined concerning her pregnancy; or to *compel* any woman before her delivery to answer any question relating to her pregnancy." By stat. 13 *Geo.* III. *c.* 82. § 5. bastards born in any licensed hospital for pregnant women, are settled in the parishes to which their mothers belong. And the like provision is made by stat. 20 *Geo.* III. *c.* 36. § 2. as to bastards born in houses of industry.

The putative father of a bastard, although no legal relationship subsists between them, is so far considered as its natural guardian, as to be entitled to the custody of it, for its maintenance and education; 2 *Stra.* 1162. and therefore while under his care and protection, and not likely to become chargeable to the parish, the parish officers have no concern with it. 1 *Mod.* 43. 1 *Sid.* 444. Under the marriage act, stat. 26 *Geo.* II. *c.* 33. which requires the consent of the father, mother or guardian, a bastard being a minor cannot be married without the consent of a guardian named by the court of chancery. See 1 *Term Rep. K. B.* 96. and the case of *Homer* v. *Liddiard*, determined in Doctors Commons, in 1799, and reported by Dr. *Croke*, 8vo. pamph. 1800, and this *Dict.* tit. *Marriage*, *Guardian*.

As however, without the protection of its natural parents, a bastard is settled in the parish in which it is born; (*Salk.* 427. 3 *Burn. J. Paul's P. O.* 81.) [unless such birth be procured by fraud, *Sel. Ca.* 66. or happen under an order of removal; 1 *Sess. Ca.* 33. *Salk.* 121. 474. 532. or in a state of vagrancy; stat. 17 *Geo.* II. *c.* 5. or in the house of correction; 2 *Bulst.* 358. or under a certificate; *Stra.* 186.] and the parish of consequence becomes charged with its maintenance,

then, and not before, the authority of the churchwardens and overseers begins; *Say.* 93. and they may act without an order from the justices. 3 *Term Rep. C. P.* 253. It seems, however, that until a bastard attain the age of seven years, it cannot be separated from its mother; *Cald.* 6. but may be removed to the place of her settlement, while the age of nurture continues; *Carth.* 279. and must under these circumstances be maintained by the parish where it was born. *Doug.* 7.

An order of bastardy must be made by two justices, 2 *Salk.* 478. 1 *Stra.* 475. on complaint; 1 *Barn. K. B.* 261. and the examination of the woman must be taken in the presence of both the justices; 6 *Mod.* 180. 2 *Black. Rep.* 1027. but it is not necessary that the putative father should be present to hear what she deposes, *Cald.* 308. although he must be *summoned* before an order of filiation can be made; 8 *Mod.* 3. 1 *Sett. Ca.* 179. for he cannot be compelled to give security, or be committed until he has made default; Ld. *Raym.* 853. 858. 3 *Salk.* 66. but if an order of filiation is once made, the fact of bastardy is established until the order is reversed. *Cro. Jac.* 535. The justice may commit if the putative father neglect to pay the maintenance therein ordered for the support of the child, unless he give a bond to bear the parish harmless, or to appear at the sessions. 1 *Sid.* 363. 1 *Vent.* 41. Ld. *Raym.* 858. 1157. The order can only be reversed by an appeal to the sessions, which must be to the next sessions after notice of the order; 2 *Salk.* 480. 482. and if the sessions reverse the order of the two justices, yet they may on summons make another, on the same or on any other person; for in this respect they have an *original* jurisdiction. 2 *Bulst.* 355. 1 *Stra.* 475. *Doug.* 632. The order however may before appeal to the sessions be removed by *certiorari*, into *K. B.* and there quashed for errors on the face of it. *Cald.* 172. But no order of bastardy made at sessions can be quashed in *K. B.* unless the putative father is present in court; 2 *Salk.* 475. for on its being quashed, he shall enter into a recognisance to abide the order of the sessions below. 1 *Bl. Rep.* 198.

On this part of the subject, see further *Bott's Poor Laws*, *Const's* edit. 1793.

In an ancient *MS. temp. Edw.* III. it is said that he who gets a bastard in the hundred of *Middleton* in *Kent*, shall forfeit all his goods and chattels to the king.

2. By stat. 21 *Jac.* I. *c.* 27. (now repealed by 43 *Geo.* III. *c.* 58. § 3.) it was enacted, "That if any woman be delivered of any issue of her body, which being born alive, should by the laws of this realm be a bastard, and she endeavour privately, either by drowning, or secret burying thereof, or any other way, either by herself, or the procuring of others, so to conceal the death thereof, as it may not come to light, whether it were born alive or not, but be concealed; in every such case the said mother so offending shall suffer death, as in case of murder; except such mother can make proof by one witness at the least, that the child, whose death was by her so intended to be concealed, was born dead."

Under this act it was determined that where a woman appeared to have endeavoured to conceal the death of such child within the statute, there was no need of any proof that the child was born alive, or that there were any signs of hurt upon the body, but it should be undeniably taken that the child was born alive, and murdered by the mother. 2 *Hawk. P. C. ub. sup.*

But it was adjudged, that where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night, and knocked for help but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the following night, yet she was not within the statute, because she knocked for help. 2 *Hawk. P. C. ub. sup.*

Also, it was agreed, that if a woman confess herself with child beforehand, and afterwards be surprised and delivered, no body being with her, she is not within the statute, because there was no intent of concealment, and therefore in such cases it must appear by signs of hurt upon the body, or some other way, that the child was born alive. 2 *Hawk. P. C. ub. sup.*

Also it was determined that if a woman were with child, and any gave her a potion to destroy the child within her, and she took it, and it worked so strongly that it killed the woman, this was murder. 1 *Hal. H. P. C.* 429, 430.

Before the act 43 *Geo.* III. *c.* 58. it was held that if a woman quick or great with child took, or any other gave her any portion to cause an abortion, or struck her, whereby the child within her was killed; it was not murder nor manslaughter by the law of *England*, because the child is not yet *in rerum naturâ*, nor can it legally be known whether it were killed or not: and so if such child were born alive, and after died of the stroke given to the mother. 1 *Hal. H. P. C.* 433.

By 43 *Geo.* III. *c.* 48. it was enacted, (§ 1.) that any person who shall wilfully, maliciously and unlawfully administer any deadly poison, or other noxious and destructive substance or thing, with intent thereby to cause and procure the miscarriage of any woman quick with child, shall be guilty of felony, without clergy. And (§ 2.) that any person who shall wilfully and maliciously administer to any woman any medicine, drug or thing, or employ any instrument or means whatever with intent to procure the miscarriage of any woman not being, or not being proved to be quick with child, shall be guilty of felony, and may be fined, imprisoned, pilloried, and whipped or transported for 14 years. It is also provided, (§ 3.) that the trials of women charged with the murder of their bastard children shall proceed and be governed by the like rules of evidence and presumption as in other cases of murder, and also, (§ 4.) that if the jury acquit the woman of the murder, they may find that by secret burying or otherwise she endeavoured to conceal the birth of the child: in which case she may be imprisoned for two years. This act extends to *Ireland*.

If a man procure a woman with child to destroy her infant when born, and the child is born, and the woman in pursuance of that procurement kill the infant; this is murder in the mother, and the procurer is accessary. 1 *Hal. H. P. C.* 433.

BASTARDY, *bastardia.*] The defect of birth, objected to one born out of wedlock. *Bract. lib.* 5. *c.* 19. See *Bastardy.*

BASTARD EIGNE. See *Bastard.*

BASTON, *Fr.*] A staff, or club. In the statutes it signifies one of the wardens of the *fleet's* servants or officers who attend the king's courts with a red staff for taking such into custody who were committed by the court. Stat. 1 *Rich.* II. *c.* 12. 5 *Eliz. c.* 23. See *Tipstaff.*

BASUS, *per* basum *tolnetum capere*, To take toll by strike, and not by heap; *per basum*, being opposed to *in cumulo vel cantello.* See *Consuetud. Domûs de Farendon, MS. f.* 42.

BATABLE GROUND. Land that lay between *England* and *Scotland*, heretofore in question, when they were distinct kingdoms, to which it belonged; litigious or *debatable* ground, *i. e.* land about which there is debate; and by that name *Skene* calls *ground* that is in controversy. *Camb. Britain*, tit. *Cumberland.*

BATTELLA, A *boat.*

BATH, Lat. *Bathon*, called by the *Britons Badiza*, has been termed the city of sick men, Sax. *Acemannes Cæster.*] It is a place of resort in *Somersetshire* famous for its medicinal waters. The chairmen are there to be licensed by the mayor and aldermen, by stat. 7 *Geo.* I. *c.* 19. And a public *hospital* or infirmary for poor is established in the city of *Bath*, the governors whereof have power to hold all charitable gifts, &c. and appoint physicians, surgeons and other officers: any persons not able to have the benefit of the *Bath waters*, may be admitted into this hospital, their case being attested by some physician, and the poverty of the patients certified by the minister and churchwardens of the place where they live, &c. Every person so admitted shall have the use of the old hot *bath*, and be entertained and relieved in the hospital; and when cured or discharged, such persons shall be supplied with 3*l.* each, to defray the expense of removing them back to their parishes, &c. Stat. 12 *Geo.* II. *c.* 31.

BATITORIA, A fulling-mill. *Monasticon, tom.* 2. *p.* 32.

BATTEL, Fr. *battaile.*] A trial by combat, anciently allowed of in our laws, (among other cases,) where the defendant in appeal of murder or felony might fight with the appellant, and make proof thereby whether he be culpable or innocent of the crime. When an appellee of felony wages *battel*, he pleads that he is *not guilty*, and that he is ready to defend the same by his body, and then flings down his glove; and if the appellant will join *battel* he replies, that he is ready to make good his appeal by his body upon the body of the appellee, and takes up the glove; and then the appellee lays his right hand on the book, and with his left hand takes the appellant by the right, and swears thus: *Hear this thou who callest thyself* John *by the name of baptism, that I who call myself* Thomas *by the name of baptism, did not feloniously murder thy father* W. *by name, on the day and year of*, &c. *at* B. *as you surmise, nor am any way guilty of the said felony; so help me God.* And then he shall kiss the book and say, *And this I will defend against thee by my body, as this court shall award.* Then the appellant lays his right hand on the book, and with his left hand takes the appellee by the right, and swears to this effect: *Hear this, thou who callest thyself* Thomas *by the name of baptism, that thou didst feloniously on the day, and in the year*, &c. *at* B. *murder my father*, W. *by name; so help me God.* And then he shall kiss the book and say, *And this I will prove against thee by my body, as this court shall award.* This being done, the court shall appoint a day and place for the *battel*; and in the mean while the appellee shall be kept in custody of the marshal, and the appellant shall find sureties to be ready to fight at the time and place, unless he be an approver, in which case he shall also be kept by the marshal: and the night before the day of *battel*, both parties shall be arraigned by the marshal, and shall be brought into the field before the justices of the court where the appeal is depending, at the rising of the sun, bare-headed and bare-legged from the knee downwards, and bare in the arms to the elbows, armed only with bastons an ell long, and four-cornered targets: and before they engage, they shall both make oath, *That they have neither eat nor drank, nor done any thing else by which the law of God may*

be depressed, and the law of the devil exalted: and then, after proclamation for silence under pain of imprisonment, they shall begin the combat, wherein if the appellee be so far vanquished that he cannot or will not fight any longer, he may be adjudged to be hanged immediately, but if he can maintain the fight till the stars appear, he shall have judgment to be quit of the appeal: and if the appellant becomes a crying coward, the appellee shall recover his damages, and may plead his acquittal in bar of a subsequent indictment or appeal; and the appellant shall for his perjury lose his *liberam legem.* If an appellant becomes blind by the act of God after he has waged *battel;* the court will discharge him of the battel; in such case it is said that the appellee shall go free.

This trial by battel is at the defendant's choice; but if the plaintiff be under an apparent disability of fighting, as under age, maimed, &c. he may counterplead the wager of battel, and compel the defendant to put himself upon his country, no champions being allowed in criminal appeals; also any plaintiff may counterplead a wager of battel, by alleging such matters against the defendant, as induce a violent presumption of guilt; as in appeal of death, that he was found lying upon the deceased with a bloody knife in his hand, &c. for here the law will not oblige the plaintiff to make good his accusation in so extraordinary a manner, when in all appearance he may prove it in the ordinary way. It is a good counterplea of battel that the defendant hath been indicted for the same fact; when if appeal be brought, the defendant shall not wage battel. And if a peer of the realm bring an appeal, the defendant shall not be admitted to wage battel, by reason of the dignity of the appellant.

The citizens of *London* are privileged by charter, that in appeals by any of them, there shall be no wager of battel; and by stat. 6 *Rich.* II. *c.* 6. defendant shall not be received to wage battel in an appeal of rape. 2 *Hawk. P. C. c.* 45. This trial by battel is before the constable and marshal; but is now disused. See *Glanv. lib.* 14. *Bract. lib.* 3. *Britton, c.* 22. *Smith, de Rep. Angl. lib.* 2. *Co. Lit.* 294. &c.

For the manner of waging battel in an appeal of treason, *Hawkins* cites *Rushw. Col. part* 2. *vol.* 1. 112—128. and 3 *Comm.* 338. cites *vol.* 2.

This species of trial by *wager of battel,* (says *Blackstone,*) was introduced into *England,* among other *Norman* customs, by *William* the Conqueror; but was only used in three cases, one military, one criminal, and the third civil. The first in the court martial, or court of chivalry and honour; (*Co. Lit.* 261.) the second in appeals of felony; [of which above;] and the third, upon issue joined in a writ of right, the last and most solemn decision of real property. For in writs of right the *jus proprietatis,* which is frequently a matter of difficulty, is in question; but other real actions being merely questions of the *jus possessionis,* which are usually more plain and obvious, our ancestors did not in them appeal to the decision of providence. Another [and as it seems the juster] pretext for allowing it upon these final writs of right, was for the sake of such claimants as might have the true right, but yet by the death of witnesses or other defect of evidence, be unable to prove it to a jury.

Although the writ of right itself, and of course this trial thereof, is at present much disused, yet it is law at this day; and on that account as matter of curiosity the forms of proceeding therein are collected and preserved in 3 *Comm.* 338. &c. and the appendix thereto; and are similar to those above recited in criminal cases.

The last trial by battel that was waged in the court of common pleas at *Westminster*, [though there was afterwards one in the court of chivalry in 1631, 6 *Car.* I. between *Donald Lord Rey*, appellant, and *David Ramsey*, Esquire, defendant, which was compromised; see *Orig. Jurid.* 65. 19 *Raym.* 322. and another in the county palatine of *Durham*, in 1638. *Cro. Car.* 512.] was in 13 *Eliz.* A. D. 1571. as reported by *Dyer*, and held in *Tothill-fields*, *Westminster*. See *Dyer*, 301. and *Spelm.* in v. *Campus*; the latter of whom was present at the ceremony.

In this trial by battel, on a writ of right, the battel is waged by champions, and not by the parties themselves; because in civil actions, if any party to the suit dies, the suit must abate and be at an end for the present: and therefore no judgment could be given for lands in question, if either of the parties were slain; and also that no person might claim an exemption from this trial, as was allowed in criminal cases. *Co. Lit.* 294.

This form of trial by battel, the tenant or defendant in a writ of right, has it in his election at this day to demand. 3 *Comm.* 341. And it was the only decision of such writ of right from the conquest, till *Hen.* II. by consent of parliament introduced the *grand assise*; a particular species of trial by jury, in concurrence therewith, giving the tenant his choice of either the one or the other. See *Glanv. lib.* 2. *c.* 7. See this *Dict.* tit. *Champion*.

BATELLUS, See *Batus*.

BATTERY, See tit. *Assault*.

BATUS, *Lat.* from the Sax. *bat.*] A boat, and *battellus*, a little boat. *Chart. Edw.* I. 20 *Julii* 18 *regni*. Hence we have an old word *batswain*, for such as we now call *boatswain* of a ship.

BAUBELLA, *baubles*. A word mentioned in *Hoveden*, in *Rich.* I. and signifies jewels or precious stones.

BAUDEKIN, *baldicum* and *baldekinum*.] Cloth of *baudekin*, or gold; it is said to be the richest cloth, now called *brocade*, made with gold and silk, or tissue, upon which figures in silk, &c. were embroidered.

BAWDY-HOUSE, *Lupanar*, *fornix*.] A house of ill fame, kept for the resort and commerce of lewd people of both sexes. The keeping of a *bawdy-house* comes under the cognisance of the temporal law as a common nuisance, not only in respect of its endangering the public peace by drawing together dissolute and debauched persons, and promoting quarrels, but also in respect of its tendency to corrupt the manners of the people, by an open profession of lewdness. 3 *Inst.* 205. 1 *Hawk. P. C. c.* 74. Those who keep *bawdy-houses* are punishable with fine and imprisonment; and all such infamous punishment, as pillory, &c. as the court in discretion shall inflict: and a lodger who keeps only a single room for the use of *bawdry*, is indictable for keeping a *bawdy-house*. 1 *Salk.* 382. Persons resorting to a *bawdy-house* are punishable, and they may be bound to their good behaviour, &c. But if one be indicted for keeping or frequenting a *bawdy-house*, it must be expressly alleged to be such a *house*, and that the party knew it; and not by suspicion only. *Poph.* 208. A man may be indicted for keeping bad women in his own house. 1 *Hawk. P. C. c.* 61. § 2. A constable upon information that a man and woman are gone to a lewd *house*, or about to commit fornication or adultery, may, if he finds them together, carry them before a justice of peace without any warrant, and the justice may bind them over to the sessions. *Dalt.* 314.

Constables in these cases may call others to their assistance, enter bawdy-houses, and arrest the offenders for a breach of the peace: in *London* they may carry them to prison; and by the custom of the city, whores and bawds may be carted. 3 *Inst.* 206.

As to a married woman's being indicted for keeping a house of ill fame. See tit. *Baron and Feme* VII.

But it is said, a woman cannot be indicted for being a bawd generally; for that the bare solicitation of chastity is not indictable. 1 *Hawk. P. C. c.* 74. § 1. 1 *Salk.* 382.

It was always held infamous to keep a bawdy house; yet some of our historians mention bawdy-houses, brothel-houses, or stews publicly allowed here in former times, till the reign of *Hen.* VIII. by whom they were suppressed about *A. D.* 1546; and writers assign the number to be eighteen thus allowed on the bank-side in *Southwark*. See *Brothel-houses*.

By stat. 25 *Geo.* II. *c.* 36. made perpetual by stat. 28 *Geo.* II. *c.* 19. if two inhabitants, paying scot and lot, shall give notice to a constable of any person keeping a bawdy-house, the constable shall go with them before a justice of peace, and shall (upon such inhabitants making oath, that they believe the contents of such notice to be true, and entering into a recognisance of 20*l.* each, to give material evidence of the offence) enter into a recognisance of 30*l.* to prosecute with effect such person for such offence at the next sessions; the constable shall be paid his reasonable expenses by the overseers of the poor, to be ascertained by two justices; and if the offender be convicted, the overseers shall pay to the two inhabitants 10*l.* each. On the constable's entering into such recognisance as aforesaid, the justice shall bind over the person accused to the next sessions, and if he shall think proper, demand security for such person's good behaviour in the mean time. A constable neglecting his duty forfeits 20*l.* Any person appearing as master or mistress, or as having the care or management of any bawdy-house, shall be deemed the keeper thereof, and liable to be punished as such. The same act also directs the licensing by magistrates of all public places within 20 miles of the metropolis.

BAY, or *pen*, Is a pond-head made up of a great height, to keep in water for the supply of a mill, &c. so that the wheel of the mill may be driven by the water coming thence, through a passage or flood-gate. Stat. 27 *Eliz. c.* 19. A harbour where ships ride at sea, near some port, is also called a *bay*.

BEACON, from the Sax. *beacn*, *signum*, whence the *English*, *beckon*, to nod or to make a sign.] A signal well known; being a fire maintained on some eminence near the coasts of the sea. 4 *Inst.* 148. Hence *beaconage* (*beaconagium*) money paid towards the maintenance of *beacons*. See stat. 5 *Hen.* IV. *c.* 3. as to keeping watch *on the sea coast*.

Barrington in his observations on this statute, introduces the copy of an order of ancient date cited by *Prynne*, in his remarks on *Coke's* 4 *Inst.* showing the stations fixed on for beacons in *Kent* and *Essex*, *viz.* at the *Isle of Sheppey* in *Kent*; at *Shorebury* in *Essex*; at *Hoo* in *Kent*; at *Tolbing* in *Essex*; at *Cleve* in *Kent*; at *Tilbury* in *Essex*; at *Gravesend* in *Kent*, and at *Famedon* in *Essex*. See *Barr.* 5 edit. *p.* 369.

The erection of beacons, light-houses and sea-marks, is a branch of the royal prerogative; whereof the first was anciently used in order

to alarm the country, in case of the approach of an enemy; and all of them are signally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the king hath the exclusive power, by commission under his great seal, (3 *Inst.* 204. 4 *Inst.* 148.) to cause them to be erected in fit and convenient places, (4 *Inst.* 136.) as well upon the lands of the subject as upon the demesne of the crown; which power is usually vested by letters patent in the office of the Lord High Admiral, (*Sid.* 158. 4 *Inst.* 149.) or the admiralty board. And by stat. 8 *Eliz. c.* 13. the corporation of the Trinity House are empowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any steeple, tree, or other known sea-mark, he shall forfeit 100*l.* or in case of inability to pay it, shall be *ipso facto* outlawed. 1 *Comm.* 265. See the stats. 4 *Ann. c.* 20. and 8 *Ann. c.* 17. for building the *Eddystone* light-house near *Plymouth*, and raising the duties payable by ships for its support; and stat. 3 *Geo.* II. *c.* 36. as to the light-house on the rock *Skerries* near *Holyhead* in the county of *Anglesea*.

BEAD, or *bede*, Sax. *bead*, *oratio*.] A prayer; so that to say over *beads*, is to say over one's prayers. They were most in use before printing, when poor persons could not go to the charge of a manuscript book: though they are still used in many parts of the world, where the *Roman Catholic* religion prevails. They are not allowed to be brought into *England*, or any superstitious things, to be used here, under the penalty of a *præmunire*, by stat. 13. *Eliz. c.* 2.

BEAM, That part of the head of a stag where the horns grow, from the Sax. *beam*, *i. e. arbor*; because they grow out of the head as branches out of a tree. *Beam* is likewise used for a common balance of weights in cities and towns.

BEAMS and BALANCE, for weighing goods and merchandise in the city of *London*. See tit. *Weights and Measures*.

BEARERS, Such as bear down or oppress others, and is said to be all one with maintainors. Justices of assise shall inquire of, hear, and determine maintainors, *bearers*, and conspirators, &c. stat. 4 *Edw.* III. *c.* 11.

BEASTS *of chase*, *feræ campestres*.] Are five, *viz.* the buck, doe, fox, marten and roe. *Manw. part* 1. *page* 342. *Beasts of the forest*, (*feræ silvestres*,) otherwise called *beasts* of venary are the hart, hind, boar and wolf. *Ibid. part* 2. *c.* 4. *Beasts* and *fowls* of the *warren*, are the hare, coney, pheasant, and partridge. *Ibid. Reg. Orig.* 95, 96. &c. *Co. Lit.* 233. See tit. *Game*.

BEAU-PLEADER, *pulchre placitando*, Fr. *beauplaider*, *i. e.* to plead fairly.] Is a writ upon the statute of *Marlbridge*, 52 *Hen.* III. *c.* 11. whereby it is enacted, that neither in the circuit of justices nor in counties, hundreds, or courts-baron, any fines shall be taken for *fair pleading*, *viz.* for not pleading fairly or aptly to the purpose; upon which statute this writ was ordained, directed to the sheriff, bailiff, or him who shall demand such fine, and it is a prohibition not to do it; whereupon an *alias* and *pluries* and *attachment* may be had, &c. *New Nat. Br.* 596, 597. And *beau-pleader* is as well in respect of vitious *pleadings*, as of the *fair pleading*, by way of amendment. 2 *Inst.* 122.

BEDEL, *bedellus*, Sax. *bydel*, Fr. *bedeau*.] A cryer or messenger of a court, that cites men to appear and answer; and is an inferior officer of a parish or liberty, very well known in *London* and the *suburbs*. There are likewise university *bedels* and church *bedels*; now called

summoners and apparitors: and *Manwood* in his *Forest Laws*, saith there are forest *bedels*, that make all manner of garnishments for the courts of the forest, and all proclamations, and also execute the process of the forests, like unto bailiffs errant of a sheriff in his county. *Cowel.*

BEDELARY, *bedelaria.* The same to a *bedel*, as bailiwick to a bailiff. *Lit. lib.* 3. *cap.* 5. *Blount. Cowel.*

BEDEREPE, alias *biderepe*, Sax.] A service which certain tenants were anciently bound to perform, *viz.* to *reap* their landlord's corn at harvest; as some yet are tied to give them one, two, or three days' work, when commanded. This customary service of inferior tenants was called in the Latin *præcaria bedrepiam, &c.* See *Magna Præcaria.*

BEDEWERI, Those which we now call *banditti*; profligate and excommunicated persons. The word is mentioned in *Mat. Paris. anno* 1258.

BEER, As to the exporting, selling, measuring, &c. See tit. *Alehouses, Brewers, Navigation Acts, Weights and Measures.*

BEGGARS, See *Vagrants.*

BEHAVING AS HEIR, is the same as *Gestio pro Hærede*, in the civil law. *Scotch Dict.*

BEHAVIOUR of persons. Vide *Good behaviour.*

BELGÆ, The inhabitants of *Somersetshire, Wiltshire*, and *Hampshire. Blount.*

BELLS. See *Churchwardens.*

BENEFICE, *beneficium.*] Is generally taken for any ecclesiastical living or promotion; and benefices are by stat. 13 *Rich.* II. *st.* 2. *c.* 2. divided into *elective* and *donative*; so also it is used in the canon law. 3 *Inst.* 155. *Duarenus de* Beneficiis, *lib.* 2. *c.* 3. All church preferments and dignities are benefices; but they must be given for life, not for years, or at will. Deaneries, prebendaries, &c. are benefices with cure of souls, though not comprehended as such within the stat. 21 *Hen.* VIII. *c.* 13. of residence; but, according to a more strict and proper acceptation, benefices are only rectories, and vicarages. The word benefice was formerly applied to portions of land, &c. given by lords to their followers for their maintenance; but afterwards, as these tenures became perpetual and hereditary, they left their name of *beneficia* to the livings of the clergy, and retained to themselves the name of *feuds.* And *beneficium* was an estate in land at first granted for life only, so called, because it was held *ex mero beneficio* of the donor; and the tenants were bound to swear fealty to the lord, and to serve him in the wars, those estates being commonly given to military men; but at length, by the consent of the donor, or his heirs, they were continued for the lives of the sons of the possessors, and by degrees past into an inheritance; and sometimes such *benefices* were given to bishops, and abbots, subject to the like services, *viz.* to provide men to serve in the wars; and when they as well as the laity had obtained a property in those lands, they were called *regalia* when given by the king; and on the death of a bishop, &c. returned to the king till another was chosen. *Spelm. of Feuds, c.* 21. *Blount, verb.* Beneficium. See tit. *Tenure.* For matter relating to Ecclesiastical Benefices, and the requisites of the clergy admitted thereto, &c. see tit. *Advowson, Parson.*

BENEFICIO PRIMO ECCLESIASTICO HABENDO, A writ directed from the king to the chancellor, to bestow the *benefice* that shall

first fall in the king's gift, above or under such value, upon such a particular person. *Reg. Orig.* 307.

BENEFIT OF CLERGY. See *Clergy.*

BENEFIT SOCIETIES, See *Friendly Societies.*

BENEFIT OF DISCUSSION, Is that whereby the antecedent heir, such as the heir of line, in a pursuit against the heir of tailzie, &c. must be first pursued to fulfil the defunct's deeds, and pay his debts; this benefit is likewise competent in many cases to cautioners. *Scotch Dict.*

BENERTH, An ancient service which the tenant rendered to his lord with his plough and cart. *Lamb. Itin. p.* 222. *Co. Lit.* 86.

BENEVOLENCE, *benevolentia.*] Is used in the chronicles and statutes of this realm for a voluntary gratuity given by the subjects to the king. *Stow's Annals, p.* 701. And *Stow* saith that it grew from *Edward* the Fourth's days; you may find it also *anno* 11 *Hen.* VII. *c.* 10. yielded to that prince in regard of his great expenses in wars, and otherwise. 12 *Rep.* 19. And by act of parliament, 13 *Car.* II. *c.* 4. it was given to his majesty king *Charles* II. but with a proviso that it should not be drawn into future example; as those benevolences were frequently extorted without a real and voluntary consent, so that all supplies of this nature are now by way of taxes, by grant of parliament; any other way of raising money for the crown is illegal. Stat 1 *Wm. & M. st.* 2. *c.* 2. In other nations *benevolences* are sometimes given to lords of the fee by their tenants, &c. *Cassan de Consuet. Burg. p.* 134. 136. See tit. *Taxes.*

BENEVOLENTIA REGIS HABENDA, The form of purchasing the king's pardon and favour, in ancient fines and submissions, to be restored to estate, title, or place. *Paroch. Antiq.* p. 172.

BENT. See tit. *Sea Banks.*

BERBIAGE. *berbiagium.*] *Nativi tenentes manerii de* Calistoke *reddunt per ann. de certo redditu vocat.* berbiagg, *ad le* Hokeday, *xix. s.* MS. Survey of the Dutchy of *Cornwall. Blount.*

BERBICARIA, A sheep down, or ground to feed sheep. *Leg. Alfred. c.* 9. *Monasticon, tom.* 1. p. 308. See the next article.

BERCARIA, *berchery*, from the Fr. *bergerie.*] A sheep-fold, or other inclosure, for the keeping of sheep; in *Domesday* it is written *berquarium.* 2 *Inst.* 476. *Mon. Angl. tom.* 2. p. 599. *Bercarius* is taken for a shepherd; and *bercaria* is said to be abbreviated from *berbicaria*, and *berbex*; hence comes *berbicus* a ram, *berbica*, an ewe, *caro berbicina*, mutton. *Cowel.*

BEREFELLARII. There were seven churchmen so called, anciently belonging to the church of *St. John* of *Beverly. Cowel. Blount.*

BEREFREIT, BEREFREID. A large wooden tower. *Simeon Dunelm. Anno* 1123. *Blount.*

BERGHMASTER, from the Sax. *berg*, a hill, *quasi*, master of the mountains.] Is a bailiff or chief officer among the *Derbyshire* miners, who also executes the office of a coroner. *Esc. de An.* 16 *Ed.* I. *num.* 34. *in Turri London.* The *Germans* call a mountaineer, or miner, a *bergman. Blount.*

BERGMOTH, or BERGHMOTE, Comes from the Sax. *berg*, a hill, and *gemote*, an assembly; and is as much as to say, an assembly or court upon a hill, which is held in *Derbyshire*, for deciding pleas and controversies among the miners. And on this *court of berghmote*, Mr. *Manlove*, in his *Treatise of the Customs of the Miners*, hath a copy of

verses, with *references* to statutes, &c. Vide *Squire* on the *Anglo Saxon Government*.

BERIA, *berie*, *berry*, A large open field.] Those cities and towns in *England* which end with that word, are built in plain and open places, and do not derive their name from boroughs, as Sir *Henry Spelman* imagines. Most of our glossographers, in the names of places, have confounded the word *beri* with that of *bury* and *borough*, as the appellatives of ancient towns; whereas the true sense of the word *beri* is a flat wide campaign, as is proved from sufficient authorities by the learned *Du Fresne*, who observes that *Beria Sancti Edmundi*, mentioned by *Mat. Paris. sub. anno* 1174. is not to be taken for the town, but for the adjoining plain. To this may be added, that many flat and wide meads and other open grounds, are called by the name of *beries*, and *berry-fields*: the spacious meadow between *Oxford* and *Isley*, was, in the reign of king *Athelstan*, called *Bery*. As is now the largest pasture-ground in *Quarendon*, in the county of *Buckingham*, known by the name of *Beryfield*. And though these meads have been interpreted demesne or manor meadows, yet they were truly any flat or open meadows, that lay adjoining to any vill or farm. *Cowel*.

BERRA, A plain open heath. *Berras assartare*, to grub up such barren heaths. *Cowel*.

BERNET, *Incendium*, comes from the Sax. *byran*, to burn; it is one of those crimes which, by the laws of *Hen.* I. *cap.* 15. *emendari non possunt*. Sometimes it is used to signify any capital offence. *Leges Canuti apud Brompt. c.* 90. *Leg. Hen.* I. *c.* 12. 47.

BERQUARIUM. *Vide Bercaria*.

BERSA, Fr. *bers*.] A limit or bound. A park pale. *Blount*.

BERSARE, Germ. *bersn*, to shoot.] Bersare *in foresta mea ad tres arcus*. *Chart. Ranulf. Comit. Cestr. anno* 1218. *viz.* to hunt or shoot with three arrows in my forest. *Bersarii* were properly those that hunted the wolf. *Blount*.

BERSELET, *berselleta*.] A hound. *Chart. Rog. de Quincy*.

BERTON. See *Barton*.

BEREWICHA, or BERWICA, Villages or hamlets belonging to some town or manor. This word often occurs in *Domesday*; *istæ sunt* berewichæ *ejusdem manerii*.

BERWICK, The town of *Berwick upon Tweed* was originally part of the kingdom of *Scotland*; and as such was, for a time, reduced by king *Edward* I. into the possession of the crown of *England*; and, during such its subjection, it received from that prince a charter, which (after its subsequent cession by *Edward Balliol*, to be for ever united to the crown and realm of *England*) was confirmed by king *Edward* III. with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of king *Alexander*, that is, before its reduction by *Edward* I. Its constitution was new modelled, and put upon an *English* footing by a charter of king *James* I. and all its liberties, franchises, and customs were confirmed in parliament by stats. 22 *Edw.* IV. *c.* 8. and 2 *Jac.* I. c. 28. Though, therefore, it hath some local peculiarities, derived from the ancient laws of *Scotland*; (see *Hale's Hist. C. L.* 183. 1 *Sid.* 382. 462. 2 *Show.* 365.) yet it is clearly part of the realm of *England*, being represented by burgesses in the house of commons, and bound by all acts of the *British* parliament, whether specially named or otherwise. And therefore it was perhaps superfluously declared by stat. 20 *Geo.* II. c. 42. that where *England* only is mentioned in any act of parliament, the same, notwithstanding, hath been, and shall be, deemed to compre-

hend the dominion of *Wales* and town of *Berwick upon Tweed*. And though certain of the king's writs or processes of the courts of *Westminster* do not usually run into *Berwick*, any more than the principality of *Wales*, yet it hath been solemnly adjudged, that all prerogative writs (as those of *mandamus*, *prohibition*, *habeas corpus*, *certiorari*, &c.) may issue to *Berwick*, as well as to every other of the dominions of the crown of *England*; and that indictments and other local matters arising in the town of *Berwick*, may be tried by a jury of the county of *Northumberland*. *Cro. Jac.* 543. 2 *Roll. Abr.* 292. Stat. 11 *Geo.* I. *c.* 4. 2 *Burr.* 834. 1 *Comm.* 99.

BERY, or BURY, The vill or seat of habitation of a nobleman, a dwelling or mansion-house, being the chief of the manor; from the Sax. *beorg*, which signifies a hill or castle; for heretofore, noblemen's seats were castles, situate on hills, of which we have still some remains. As in *Herefordshire*, there are the *beries* of *Stockton*, *Hope*, &c. It was anciently taken for a sanctuary. See *Beria*.

BESAILE, or BESAYLE, Fr. *bésayeul*, *proavus*.] The father of the grandfather: and in the common law it signifies a writ that lies where the great grandfather was seised the day that he died, of any lands or tenements in fee-simple; and, after his death, a stranger entereth the same day upon him, and keeps out the heir. *F. N. B.* 222. See tit. *Mort d' Ancestor*.

BESCHA, from the Fr. *bercher*, *fodere*, to dig.] A spade or shovel. Hence perhaps, *una* Bescata *terra inclusa*. *Mon. Ang. tom.* 2. *fol.* 642. may signify a piece of land usually turned up with the spade, as gardeners fit and prepare their grounds: or may be taken for as much land as one man can dig with a spade in a day.

BESTIALS, *bestiales*.] Beasts or cattle of any sort; stat. 4 *Edw.* III. *c.* 3. it is written *bestayle*; and is generally used for all kinds of cattle, though it has been restrained to those anciently purveyed for the king's provision.

BATACHES, Laymen using glebe lands. *Parl.* 14 *Edw.* II.

BEBERCHES, Bid-works, or customary services done at the bidding of the lord by his inferior tenants. *Cowel.*

BEWARED, An old *Saxon* word signifying *expended*; for, before the *Britons* and *Saxons* had plenty of money, they traded wholly in exchange of *wares*. *Blount.*

BIDALE, or BIDALL, *precaria potaria*, from the Sax. *biddan*, to pray or supplicate.] Is the invitation of friends to drink *ale* at the house of some poor man, who thereby hopes a charitable contribution for his relief: it is still in use in the west of *England*: and is mentioned stat. 26 *Hen.* VIII. *c.* 6. And something like this seems to be what we commonly call *house warming*, when persons are invited and visited in this manner on their first beginning house-keeping.

BIDDING OF THE BEADE, *bidding* from the Sax. *biddan*.] Was anciently a charge or warning given by the parish priest to his parishioners at some special times to come to prayers, either for the soul of some friend departed, or upon some other particular occasion. And at this day, our ministers, on the *Sunday* preceding any festival or holiday in the following week, give notice of them, and desire and exhort their parishioners to observe them as they ought, which is required by our canons.

BIDENTES, Two yearlings, tags, or sheep of the second year. *Paroch. Antiq. p.* 216.

BIDUANA, A fasting for the space of two days. *Matt. Westm. p.* 135.

BIGA, *bigata*, A cart or chariot drawn with two horses coupled side to side; but it is said to be properly a cart with two wheels, sometimes drawn by one horse; and in our ancient records it is used for any cart, wain or waggon. *Mon. Angl. tom.* 2. *fol.* 256.

BIGAMUS, One guilty of bigamy.

BIGAMY, *bigamia.*] A double marriage; this word properly signifies the being twice married; but is now used by an almost universal corruption, to signify the offence of *polygamy*, or the having a plurality of wives or husbands at once. 3 *Inst.* 88.

Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow. Such were esteemed incapable of holy orders; probably on the ground of *St. Paul's* words, 1 *Tim. c.* 5. *v.* 2. "That a bishop should be the husband of one wife," and they were by a canon of the council of *Lyons*, *A. D.* 1274, denied all clerical privileges. This canon was adopted and explained in *England* by the stat. 4 *Edw.* I. *st.* 3. (commonly called the *stat. de bigamis*) *c.* 5. and bigamy, thereupon, became no uncommon counterplea to the claim of the benefit of clergy. The cognisance of the plea of bigamy was declared by stat. 18 *Edw.* III. *st.* 3. *c.* 2. to belong to the court christian, like that of bastardy. But by stat. 1 *Edw.* VI. *c.* 12. § 16. bigamy was declared to be no longer an impediment to the claim of clergy. See *Dal.* 21. *Dyer*, 201. and 1 *Inst.* 80. b. *note* 1.

A second marriage, living the former husband or wife, is, by the ecclesiastical law of *England*, simply void, and a mere nullity; but the legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well-ordered state. By stat. 1 *Jac.* I. *c.* 11. it is enacted, "that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony," within the benefit of clergy; but now, by 35 *Geo.* III. *c.* 67. such offenders are subject to the penalties of grand or petty larceny (*i. e.* transportation, &c.)

The act 1 *Jac.* I. *c.* 11. however, makes exception to five cases, in which such second marriage (though in the three first it is void) is yet no felony. (See 3 *Inst.* 89. *Kel.* 27. 1 *Hal. P. C.* 694.) 1. Where either party has been continually *abroad* for seven years, whether the party in *England* hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years *within* this kingdom; and the remaining party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce; (or separation *à mensâ et thoro*, 1 *Hawk. P. C.* 174.) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence; and the parties loosed *à vinculo matrimonii*; or, 5. Where *either* of the parties was under the age of consent at the time of the first marriage. 1 *Hawk. P. C.* 174. 1 *Inst.* 79.

In the last case the first marriage was voidable by the disagreement of either party; which the second marriage very clearly amounts to. But if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage, and afterwards one of them should marry again, it seems undoubted that such second marriage would be within the reason and penalties of the act. 4 *Comm.* 164.

If the first marriage were beyond sea, and the latter in *England*, the party may be indicted for it here; because the latter marriage is the offence; but not *vice versâ*. See 1 *Hawk. P. C.* 174, 175. 1 *Hale's*

P. C. 692. 1 *Sid.* 171. *Kel.* 80. Lord *Hale* seems most precise on the question. The other writers make a query. See also 3 *Inst.* 88. *Cro. Eliz.* 94.

A sentence in the ecclesiastical court against a marriage, in a suit for jactitation, does not preclude the proof of a marriage on an indictment on the statute. And admitting such sentence were conclusive as to the fact of marriage, the effect may be avoided by evidence of fraud and collusion in obtaining the sentence. 11 *St. Tr.* 262. *Dutchess of Kingston's* case.

As to husband and wife being evidence against each other on trial for this offence, see tit. *Baron and Feme* I. 2.

BIGOT, A compound of several old *English* words.] An obstinate person; or one that is wedded to an opinion, in matters of religion, &c. It is recorded that when *Rollo*, the first duke of *Normandy*, refused to kiss the king's foot, unless he held it out to him, it being a ceremony required in token of subjection for that dukedom, with which the king invested him; those who were present taking notice of the duke's refusal, advised him to comply with the king's desire, who answered them *ne se bigot*; whereupon he was in derision called *bigot*, and the *Normans* are so called to this day. *Blount.*

BILAGINES, Lat.] By-laws of corporations, &c. See *By-laws.*

BILANCIIS DEFERENDIS, A writ directed to a corporation, for the carrying of weights to such a haven, there to weigh the wool that persons by our ancient laws were licensed to transport. *Reg. Orig.* 270.

BILINGUIS, Generally a double tongued man; or one that can speak two languages: but it is used in our law for a jury that passeth betwéen an *Englishman* and a foreigner, whereof part ought to be *English*, and part strangers: properly a jury *de medietate linguæ*, under stat. 28 *Edw.* III. *c.* 13. See tit. *Jury.*

BILL, *billa.*] Is diversly used in law proceedings: it is a declaration in writing, expressing either the wrong the complainant hath suffered by the party complained of, or else some fault committed against some law or statute of the realm: and this *bill* is sometimes addressed to the lord chancellor of *England*, especially for unconscionable wrongs done to the complainant; and sometimes to others having jurisdiction, according as the law directs. It contains the fact complained of, the damage thereby sustained, and petition of process against the defendant for redress; and it is made use of as well in criminal as civil matters. See tit. *Chancery*, *Equity.* In criminal cases, when a grand jury upon a presentment or indictment find the same to be true they indorse on it *billa vera*; and thereupon the offender is said to stand indicted of the crime, and is bound to make answer unto it: and if the crime touch the life of the person indicted, it is then referred to the jury of life and death, *viz.* the petty jury, by whom if he be found guilty, then he shall stand convicted of the crime, and is by the judge condemned to death. *Terms de Ley*, 86. 3 *Inst.* 30. See *Ignoramus and Indictment.*

Many of the proceedings in the king's bench are by *bill*; it is the ancient form of proceeding, and was, and yet should be, filed in parchment, in all suits, not by original. The declaration is a transcript of it, or supposed so to be. See tit. *Amendment*, *Original Privilege*, *Process.*

Bill is also a common engagement for money given by one man to another; being sometimes with a penalty, called a *penal bill*, and sometimes without a penalty, then called a *single bill*, though the

latter is most frequently used. By a *bill* we ordinarily understand a single bond, without a condition ; and it was formerly all one with an obligation, save only its being called a *bill* when in *English*, and an obligation when in *Latin*. *West. Symbol. lib.* 2. § 146. Where there is a *bill* of 100*l.* to be paid on demand, it is a duty presently, and there needs no actual demand. *Cro. Eliz.* 548. And a single obligation or *bill*, upon the sealing and delivery, is *debitum in præsenti*, though *solvendum in futuro*. On a collateral promise to pay money on demand, there must be a special demand ; but between the parties it is a debt, and said to be sufficiently demanded by the action : it is otherwise where the money is to be paid to a third person ; or where there is a penalty. 3 *Keb.* 176. If a person acknowledge himself by *bill* obligatory to be indebted to another in the sum of 50*l.* and by the same *bill* binds him and his heirs in 100*l.* and says not to whom he is bound, it shall be intended he is bound to the person to whom the *bill* is made. *Roll. Abr.* 148. A *bill* obligatory written in a book, with the party's hand and seal to it, is good. *Cro. Eliz.* 613. See 2 *Roll. Abr.* 146.

These kinds of bills are now superseded in use, the single bills by the more modern traffic of *Bills of Exchange*, and the penal bills by *Bonds* or *Obligations*. See those titles.

BILL IN CHANCERY. See tit. *Chancery*, *Equity*.

BILL OF EXCEPTIONS TO EVIDENCE. At common law a writ of error lay for an error in law, apparent in the record, or for error in fact, where either party died before judgment ; yet it lay not for an error in law not appearing in the record ; and therefore, where the plaintiff or demandant, tenant or defendant, alleged any thing *ore tenus*, which was overruled by the judge, this could not be assigned for error, not appearing within the record, not being an error in fact, but in law ; and so the party grieved was without remedy. 2 *Inst.* 426. And therefore by the stat. of *Westm.* 2. 13 *Edw.* I. *c.* 31. " When one impleaded before any of the justices, alleges an exception, praying they will allow it, and if they will not; if he that alleges the exception writes the same, and requires that the justices will put to their seals, the justices shall so do ; and if one will not, another shall ; and if upon complaint made of the justice, the king cause the record to come before him, and the exception be not found in the roll, and the plaintiff show the written exception, with the seal of the justice thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed."

This statute extends to the plaintiff as well as defendant, also to him who comes *in loco tenentis*, as one that prays to be received, or the vouchee ; and in all actions, whether real, personal or mixt. 2 *Inst.* 427.

The statute extends not only to all pleas dilatory and peremptory, but to prayers to be received, *oyer* of records and deeds, &c. also to challenges of jurors, and any material evidence offered and overruled. 2 *Inst.* 427. *Dyer*, 231. *pl.* 3. *Raym.* 486.

The *exceptions* ought to be put in writing *sedente curia*, in the presence of the judge who tried the cause, and signed by the counsel on each side ; and then the bill must be drawn up and tendered to the judge that tried the cause, to be sealed by him ; and when signed there goes out a *scire facias* to the same judge *ad cognoscendum scriptum*, and that is made part of the record, and the return of the judge

with the bill itself, must be entered on the issue-roll; and if a writ of error be brought, it is to be returned as part of the record. 1 *Nels. Abr.* 373. If a bill of *exceptions* is drawn up, and tendered to the judge for sealing, and he refuses to do it, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. 3 *Comm.* 372. *Reg. Br.* 182. 2 *Inst.* 427.

If one of the justices sets his seal to the bill, it is sufficient; but if they all refuse, it is a contempt in them all. 2 *Inst.* 427. *Raym.* 182. S. P. 2 *Lev.* 327. S. P.

When a bill of exceptions is allowed, the court will not suffer the party to move any thing in arrest of judgment on the point on which the bill of exceptions was allowed. 1 *Vent.* 366, 367. 2 *Lev.* 237. 2 *Jones*, 117.

A bill of exceptions is in the nature of an appeal: examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error after judgment given in the court below. 3 *Comm.* 372.

These bills of *exceptions* are to be tendered before a verdict given, 2 *Inst.* 427. and extend only to civil actions, not to criminal. *Sid.* 85. 1 *Salk.* 288. 1 *Lev.* 68.

But in 1 *Leon.* 5. it was allowed in an indictment for trespass; and in 1 *Vent.* 366. in an information in nature of a *quo warranto*.

For a precedent of a bill of exceptions, see *Bull. N. P.* 317.

Bills of exceptions are now seldom used, since the liberality practised by the courts in granting new trials.

BILL OF EXCHANGE, A negotiable security for money, well known among merchants. The laws relating to this subject, and that of PROMISSORY (and *negotiable*) NOTES, being implicated together, are here considered under one head, and thus arranged:

I. *Of the nature of*, 1. *Bills of Exchange*; 2. *Inland and Foreign*; 3. *Promissory Notes*. 4 *The parties to them*. 5. *The distinction and resemblance between the several kinds of bills and notes*. 6. *Bank and Bankers' notes*. 7. *The essential qualities of bills and notes*.
II. *Of the acceptance of bills; how, when, by and to whom made*.
III. *Of the transfers of bills and notes by indorsement, &c.*
IV. *Of the engagements of the several parties*.
V. *Of* 1. *the action and remedy on bills and notes*; 2. *Manner of declaring and pleading*; 3. *The evidence*; *and*, 4. *The defence*.
VI. *Of bills lost, stolen, or forged*; *and see* III.

I. 1. A BILL OF EXCHANGE is an open letter of request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third person shall order it to be paid; or it may be made payable to bearer.

The person who makes the bill is called the *drawer*; he to whom it is addressed, the *drawee*; and when he undertakes to pay the amount, he is then called the *acceptor*. The person to whom it is ordered to be paid is called the *payee*; and if he appoint another to receive the money, that other is called the *indorsee*, as the payee is,

with respect to him, the *indorsor* ; any one who happens, for the time to be in possession of the bill, is called the *holder* of it.

The time at which the payment is limited to be made is various, according to the circumstances of the parties, and the distance of their respective residences. Sometimes the amount is made payable at *sight* : sometimes at so many days *after* sight ; at other times at a certain distance from the *date*. *Usance* is the time of one, two, or three months after the date of the bill, according to the custom of the places between which the exchanges run ; and the nature of which must therefore be shown and averred in a declaration on such a bill. Double or treble usance is double or treble the usual time ; and half usance is half the time. Where the time of payment is limited by months, it must be computed by calendar, not lunar, months ; and where one month is longer than the succeeding one, it is a rule not to go in the computation into the third. Thus, on a bill dated the 28th, 29th, 30th, or 31st of *January*, and payable one month after date, the time expires on the 28th of *February* in common years, and in the three latter cases in leap year, on the 29th. [To which are tobe added the *days of grace*. See *post*.] Where a bill is payable at so many days after sight, or from the date, the day of presentment, or of the date, is excluded. Thus, where a bill, payable 10 days after sight, is presented on the first day of a month, the 10 days expire on the 11th ; where it is dated the 1st, and payable 20 days after date, these expire on the 21st. Ld. *Raym*. 281. *Stra*. 829.

A custom has obtained among merchants, that a person to whom a bill is addressed, shall be allowed a few days for payment beyond the term mentioned in the bill, called *days of grace*. In *Great Britain* and *Ireland, three* days are given ; in other places more. If the last of these three days happen to be *Sunday*, the bill is to be paid on *Saturday*. These days of grace are allowed to promissory notes ; but not to bills payable at sight.

2. Bills of exchange are distinguished by the appellation of *foreign* and *inland* bills ; the first being those which pass from one country to another, and the latter such as pass between parties residing in the *same* country ; and the universal consent of merchants had long since established a system of customs relative to *foreign* bills, which was adopted as part of the law in every commercial state.

It does not appear that *inland* bills of exchange were very frequent in *England* before the reign of *Charles* II. (see 6 *Mod*. 29.) And when they were introduced, they were not regarded with the same favour as foreign bills. At length the legislature, by two different statutes, 9 and 10 *Wm*. III. *c*. 17. and 3 and 4 *Ann*. *c*. 9. set both on nearly the same footing ; so that what was the law and custom of merchants with respect to the one, is now, in mosts respects, the established law of the country with respect to the other.

The following are the most general forms of inland and foreign bills of exchange ; but which are varied according to circumstances.

100*l*. *London, January* 1, 1793.

One month after date please to pay to *A. B.* or order [or to me or my order] the sum of one hundred pounds, and place the same to the account of *T. T.*

To Mr. *C. D.*

[Place of abode and business.]

Acc. *C. D.*

London, January 1, 1793. Exchange for 50*l.* sterling.

At sight [*Or* At sight of this my only bill of exchange] pay to Mr. *A. B.* or order, fifty pounds sterling value received of him, and place the same to account, as *per* advice [*Or* without further advice] from *V. S.*

To Mr. *C. D. &c.*

London, January 1, 1793.

Exchange for 10,000 liv. Tournoises.

At fifteen days after date [*Or*, at *one*, *two*, *&c.* usances] pay this my first bill of exchange, (second and third of the same tenor and date not paid) to Messrs. *A. B. & Co.* or order, ten thousand livres Tournoises, value received of them, and place the same to account, as *per* advice from *C. D.*

To Mr. *E. F.*

Banker in *Paris.*

The two other bills of the foreign set are varied thus "first and third," and "first and second not paid."

3. *A promissory note* is a less complicated kind of security, and may be defined to be, an engagement in writing to pay a certain sum of money mentioned in it, to a person named, or to his order, or to the bearer at large. At first these notes were considered only as written evidence of a debt; for it was held that a promissory note was not assignable or indorsable over, within the custom of merchants; and that if, in fact, such a note had been indorsed or assigned over, the person to whom it was so indorsed or assigned, could not maintain an action within the custom against the drawer of the note; nor could even the person to whom it was in the first instance made payable, bring such action. 1 *Salk.* 129. 2 Ld. *Raym.* 757. 759. But at length they were recognised by the legislature, and put on the same footing with *inland* bills of exchange, by stat. 3 and 4 *Ann. c.* 9. (made perpetual by stat. 7 *Ann. c.* 25. § 3.) which enacts that promissory notes, payable to order or bearer, may be assigned and indorsed, and action maintained thereon, as on inland bills of exchange.

Form of Promissory Notes.

20*l.* *London, January* 1, 1793.

I promise to pay *A. B.* or bearer on demand twenty pounds for value received.

T. T.

20*l.* *London, January* 1, 1793.

Two months after date, we and each of us promise to pay to Mr. *C. B.* or order, twenty pounds, value received.

A. B.
C. D.

4. By the stats. 15 *Geo.* III. *c.* 51. and 17 *Geo.* III. *c.* 30. made perpetual by stat. 27 *Geo.* III. *c.* 16. all negotiable notes and bills for less than 20*s.* are declared void; and notes or bills between that sum and 5*l.* must be made payable within twenty-one days after date; must particularize the name and descriptions of the payees; must bear date at the time and place they are made; must be attested by a subscribing witness, and the indorsement of them must be attended with the same strictness in all respects, and made before the notes or bills become due.

By the act 37 *Geo.* III. *c.* 32. the acts 15 *Geo.* III. *c.* 51. and 17 *Geo.* III. *c.* 30. were suspended, *so far as related to notes under* 5*l. payable on demand to bearer.* This act of suspension (which was explained and continued by 37 *Geo.* III. *cc.* 61. 120. and 39 *Geo.* III. *cc.* 9. 47.) expired on 5th *July*, 1799. By § 8 of 39 *Geo.* III. *c.* 107. (a stamp act, passed 12th *July*, 1799) the said acts 15 and 17 *Geo.* III. were suspended (with a retrospect to *July* 5) till *November* 30, 1802, *respecting such notes for* 1 guinea *and* 1*l. each.* By 43 *Geo.* III. *c.* 1. the said acts were in like manner suspended, with a retrospect to said 30th *November.* By 44 *Geo.* III. *c.* 4. the act 37 *Geo.* III. *c.* 32. was continued; and by 45 *Geo.* III. *c.* 25. it was continued, as amended, during the then war.

By 45 *Geo.* III. *c.* 41. (respecting former acts as to small notes in *Ireland*,) all promissory notes for less than 20*s.* *Irish* currency are declared void.

Bills of exchange and promissory notes must now be drawn on stampt paper. The stamp is proportioned, under the various acts, to the amount of the bill. If foreign bills are drawn here, the whole set must be stampt. But bills drawn abroad, of necessity, are not liable to any stamp duty.

Bills of exchange having been first introduced for the convenience of commerce, it was formerly thought that no person could draw one, or be concerned in the negotiation of it, who was not an actual merchant; but it soon being found necessary for others, not at all engaged in trade, to adopt the same mode of remittance and security, it has been since decided that any person capable of binding himself by a contract, may draw or accept a bill of exchange, or be in any way engaged in the negotiation of it, (and, since the stat. 3 and 4 *Ann. c.* 9. be a party to a promissory note,) and shall be considered as a merchant for that purpose. *Carth.* 82. 2 *Vent.* 292. *Comb.* 152. 1 *Show.* 125. 2 *Show.* 501. *Lutw.* 891. 1585. 12 *Mod.* 36. 380. *Salk.* 126.

But an infant cannot be sued on a bill of exchange. *Carth.* 160. Nor a *feme covert*; except in such cases as she is allowed to act as a *feme sole.* 1 Ld. *Raym.* 147. *Salk.* 116. See tit. *Baron and Feme.*

Where there are two joint-traders, and a bill is drawn on both of them, the acceptance of one binds the other, if it concern the joint trade; but it is otherwise if it concern the acceptor only, in a distinct interest and respect. 1 *Salk.* 126. 1 Ld. *Raym.* 175.

Sometimes exchange is made in the name, and for the account of a third person, by virtue of full power and authority given by him, and this is commonly termed *procuration*; and such bills may be drawn, subscribed, indorsed, accepted and negotiated, not in the name or for the account of the manager or transactor of any or all of these branches of remittances, but in the name and for the account of the person who authorized him. *Lex Merc.*

5. A promissory note, in its original form of a promise from one man to pay a sum of money to another, bears no resemblance to a bill of exchange. When it is indorsed the resemblance begins, for

then it is an order by the indorsor to the maker of the note, who, by his promise, is his debtor, to pay the money to the indorsee. The indorsor of the note corresponds to the drawer of the bill; the maker to the drawee or acceptor; and the indorsee to the payee. When this point of resemblance is once fixed, the law is fully settled to be exactly the same in bills of exchange and promissory notes: and whenever the law is reported to have been settled with respect to the acceptor of a bill, it is to be considered as applicable to the (drawer, or) maker of a note; when with respect to the drawer of a bill, then the first indorsor of a note; the subsequent indorsors and indorsees bear an exact resemblance to one another. 2 *Burr.* 676.

Both bills and notes are in two different forms, being sometimes made payable to such a man or his order, or to the order of such a man; sometimes to such a man or bearer, or simply to bearer.

The first kind have always been held to be negotiable; but where they were made payable to the *order* of such a man, exception has been taken to an action brought by that man himself, on the ground that he had only an authority to indorse: but the exception was not allowed. 10 *Mod.* 286. 2 *Show.* 8. *Comb.* 401. *Carth.* 403. And it is now decided law, that bills and notes payable to *bearer*, are equally transferable as those payable to order; and the transfer in both cases equally confers the right of action on the *bonâ fide* holder. 1 *Black. Rep.* 485. 3 *Burr.* 1516. Stat. 3 and 4 *Ann. c.* 9. § 5. 1 *Burr.* 452. 459. The mode of transfer, however, is different; bills and notes payable to bearer are transferred by mere delivery, the others by indorsement.

6. The bills and notes mentioned above are considered merely as securities for money; but there is a species of each which is considered as money itself. These are *bank notes*, *bankers' cash notes*, and *drafts on bankers* payable on demand.

Bank notes are treated as money or cash in the ordinary course or transactions of business by common consent, which gives them the credit and currency of money to every effectual purpose; they are as much considered to be money as guineas themselves; 1 *Burr.* 457. and it seems are as lawful a tender. See stat. 5 *Wm. & M. c.* 20. § 28. 3 *Term Rep.* 554.

Bankers' cash notes and drafts on bankers, are so far considered as money among merchants, that they receive them in payment as ready cash; and if the party receiving them do not within a reasonable time demand the money he must bear the loss in case of the banker's failure. What shall be construed to be a reasonable time has been subject to much doubt; it was formerly considered as a question of fact depending on the circumstances of the case, to be determined by a jury; but it is now established to be a question of law to be decided by the court, though the precise time is necessarily undetermined. 1 *Black. Rep.* 1. See 1 Ld. *Raym.* 744. 1 *Stra.* 415, 416. 550. 2 *Stra.* 910. 1175. 1248. And on the whole the best rule in these cases seems to be, that drafts on bankers, payable on demand, ought to be carried for payment on the very day on which they are received; if from the distance and situation of the parties that may conveniently be done.

A draft on a banker, post-dated, and delivered before the day of the date, though not intended to be used till that day, must be stamped, by the stat. 31 *Geo.* III. *c.* 25. *Allen* v. *Keeves*, 1 *East*, 435.

Bills of exchange and promissory notes, though according to the general principles of law, they are to be considered only as evi-

dences of a simple contract, are yet in one respect regarded as specialties; and on the same footing with bonds; for unless the contrary be shown by the defendant, they are always presumed to have been made on a good consideration; nor is it incumbent on the plaintiff either to show a consideration in his declaration, or to prove it at the trial. 1 *Black. Rep.* 445. *Peckham* v. *Wood*, *K. B. East*, 18 *Geo.* III. However, though foreign bills were always entitled to this privilege, it was not without some difficulty that it was extended to inland bills: and notes are indebted for it to the statute. 2 Ld. *Raym.* 758. 1 *Black. Rep.* 487.

7. Bills of exchange, contrary to the general nature of *choses in action*, are by the custom of merchants, assignable or negotiable without any fiction, and every person to whom they are transferred may maintain an action in his own name against any one, who has before him in the course of their negotiation rendered himself responsible for their payment. The same privilege is conferred on notes by the statute. But the instrument or writing which constitutes a good bill of exchange according to the custom, or a good note under the statute, must have certain essential qualities. 3 *Wils.* 213.

One of these qualities is, that the bill or note should be for the payment of money *only*; and not for the payment of money *and* the doing some other act; (2 *Stra.* 1271.) for these instruments being originally adopted for the convenience of remittance, and now considered only as securities for the future payment of money must undertake *only* for that; and it must be money in specie, not in good *East India* bonds, or any thing else which can itself be only considered as a security. *Bull. N. P.* 273.

Another requisite quality is, that the instrument must carry with it a *personal* and certain credit, given to the drawer or maker, not confined to credit on any particular fund. 3 *Wils.* 213. But in the application of this principle there seems to be a material distinction between bills and notes. As to the former, where the fund is supposed to be in the hands of the drawee, the objection holds in its full force; not only because it may be uncertain whether the fund will be productive, but because the credit is not given to the *person* of the drawer; but where the fund on account of which the money is payable, either is in the hands of the drawer, or he is accountable for it, the objection will not hold, because the credit is personal to him, and the fund is only the consideration of his giving the bill. With respect to a note, if the drawer promise to pay out of a particular fund, then within his power, the note will be good under the statute: the payment does not depend on the circumstance of the fund's proving unproductive or not, but there is an obligation on his *personal* credit; the bare making of the note being an acknowledgment that he has money in his hands. See *Joscelyne* v. *Lassere*, *Fort.* 281. 10 *Mod.* 294. 316. *Jenny* v. *Herle*, 1 *Stra.* 591. 2 Ld. *Raym.* 1361. 8 *Mod.* 265. *Dawkes et ux.* v. *Deloraine*, 3 *Wils.* 207. 2 *Black. Rep.* 782. On the principle which governed these cases an order from an owner of a ship to the freighter to pay money *on account of freight*, was held to be no bill of exchange. 2 *Stra.* 1211. But such a bill from the freighters of a ship, to any other person, if good in other respects would certainly not be bad, though made payable on account of freight; because indisputably there is a personal credit given to the drawer, the words "on account of freight," only expressing the consideration for which the bill was given. See *Pierson* v. *Dunlop*, *Doug.* 571. And there may be cases where the instrument may appear at

first sight to be payable out of a particular fund, but in reality be only a distinction how the drawee is to reimburse himself, or a recital of the particular species of value received by the maker of a note ; in which cases their validity rests on the personal credit given to the acceptor of the bill, or drawer of the note. 2 Ld. *Raym.* 1481. 1545. 2 *Stra.* 762. *Barn. K. B.* 12.

Another essential quality to make a good bill or note is, that it must be absolutely payable at all events ; and not depend on any particular circumstances which may or may not happen in the common course of things. 3 *Wils.* 213. 1 *Burr.* 325. See 2 Ld. *Raym.* 1362. 1396. 1563. 8 *Mod.* 363. 4 *Vin.* 240. *pl.* 16. 2 *Stra.* 1151. 4 *Mod.* 242. 1 *Burr.* 323. In the case of notes, however, it is not necessary, that the time of payment should be absolutely fixed ; it is sufficient if, from the nature of the thing, the time must certainly arrive on which their payment is to depend ; (2 *Stra.* 1217. 1 *Burr.* 227.) for here the words of engagement make the debt ; and it is no direction to another person ; the former part of the note is a promise to pay the money and the rest is only fixing the particular time when it is to be paid. It is sufficient if it be certainly, and at all events payable at that time, whether the maker live till then, or die in the interim. And it has been decided that a promise to pay "within two months after such a ship shall be paid off," will make a good note ; for the paying off the ship is a thing of a public nature and morally certain. See 1 *Stra.* 24. 1 *Wils.* 262, 263. But this indulgence seems to have been carried almost too far ; and such a latitude seems incompatible with the nature and original intention of a bill of exchange ; its allowance in favour of promissory notes arising entirely from a liberal construction of the statute on which the negotiability of those notes depends.

In most of the cases where the several instruments have been denied the privilege of bills and notes, it is not for that reason to be concluded that they are of no force : when the fund from which they are to be paid, can be proved to have been productive, or the contingency on which they depend has happened, they may be used as evidence of a contract according to the circumstances of the case, or according to the relation in which the parties stand to one another. See 2 *Black. Rep.* 1072.

No precise form of words is necessary to make a bill of exchange or a note under the statute ; any order which cannot be complied with, or promise which cannot be performed, without the payment of money, will make a good bill or note. Thus an order to deliver money, or a promise that such a one shall receive it. 10 *Mod.* 287. 2 Ld. *Raym.* 1396. 1 *Stra.* 629. 706. 1 *Wils.* 263. 3 *Wils.* 213. 8 *Mod.* 364. *All.* 1.

The words *value received* being in general inserted in bills and notes, there seems to have been some doubt whether they were essential ; in one case, (*Banbury* v. *Lissel*, 2 *Stra.* 1212.) where the want of these words was objected, a verdict was given on that account against the instrument, but that case seems a very doubtful authority. On several occasions it appears to have been said incidentally by the court, and at the bar, that these words are unnecessary. *Fort.* 282. *Barn. K. B.* 88. 8 *Mod.* 267. 1 *Show.* 5. 497. 3 Ld. *Raym.* 1556. 1481. *Lutw.* 889. 1 *Mod. Ent.* 310. And the point is now fully settled that these words are not necessary ; for as these instruments are always presumed to have been made on a valuable consideration.

words which import no more cannot be essential. *White* v. *Ledwick*, *K. B. Hil.* 25 *Geo.* III.

Whether it be essential to the constitution of a bill of exchange, that it should contain words which render it negotiable, as *to order* or *to bearer*, seems not hitherto to have received a direct judicial decision. There are two cases in which the want of such words was taken as an exception; but as there were other exceptions, the point was not decided. 2 *Stra.* 1212. 3 *Wils.* 212. In another case, the same exception was taken and overruled, but under such circumstances that the point was not generally determined. 2 *Wils.* 353. If in a doubtful point however it may be allowed to reason on general principles, it should seem, that it being the original intention and the actual use of bills of exchange that they should be negotiable, such drafts as want these operative words are not entitled to be declared on as specialties, however they may be sufficient as evidence to maintain an action of another kind. *Kyd*, 42. But it has been ruled that such words are not necessary in notes, and that the person to whom they are made payable may maintain an action on them, within the statute against the maker. *Moor* v. *Paine*, *Hardw.* 288.

II. An Acceptance is an engagement to pay a bill of exchange according to the tenure of the acceptance. The circumstances which generally concur in an acceptance are that the party to whom it is addressed binds himself to the payment, after the bill has issued, before it has become due and according to its tenor; by either subscribing his name, or writing the word *accepts*, or *accepted*, or *accepted A. B.* But a man may be bound as acceptor without any of these circumstances.

An acceptance may be either written or verbal; if the former, it may be either on the bill itself, or in some collateral writing, as a letter, &c. 1 *Stra.* 648. In foreign bills it has always been understood that a collateral or parol acceptance was sufficient. 1 *Stra.* 648. 3 *Burr.* 1674. *Hardw.* 75. And it is now settled that such acceptance is also good in cases of inland bills; as by word, *Lumley* v. *Palmer*, 2 *Stra.* 1000. or by letter, 1 *Atk.* 717. (613.)

The acceptance is usually made between the time of issuing the bill and the time of payment; but it may also be made before the bill has issued, or after it has become due; when it is made before the bill is issued, it is rather an agreement to accept, than an actual acceptance; but such agreement is equally binding as an acceptance itself. 3 *Burr.* 1663. *Doug.* 284. 1 *Atk.* 715. (611.) When the acceptance is made after the time of payment is elapsed, it is considered as a general promise to pay the money: and if it be to pay according to the tenor of the bill, this shall not invalidate the acceptance, though the time being past, it be impossible to pay according to the tenor; but these words shall be rejected as surplusage. 1 *Salk.* 127. 129. 1 Ld. *Raym.* 364. 574. 12 *Mod.* 214. 410. *Carth.* 459.

Acceptance is usually made by the drawee, and when before the issuing of the bill, is hardly ever made by any other person; but after the issuing the bill it often happens, either that the drawee cannot be found, or refuses to accept, or that his credit is suspected; or that he cannot by reason of some disability render himself responsible: in any of these cases an acceptance by another person, in order either to prevent the return of the bill, to promote the negotiation of it, or to save the reputation of, and prevent an action against the drawer, or some of the other parties, is not uncommon: such an acceptance is

called an acceptance for the honour of the person on whose account it is made.

That engagement which constitutes an acceptance, is usually made to the holder of the bill, or to some person who has it in contemplation to receive it; and then the acceptor must answer to him, and to every one who either has had the bill before, or shall afterwards have it by indorsement; but it is frequently made to the drawer himself; and then it may be binding on the party making the engagement or not, according to the circumstances of the case.

The mere answer of a merchant to the drawer "that he will duly honour his bill," is not of itself an acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement: but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer. *Cowp.* 572. 574. 1 *Atk.* 715. (611.) And an agreement to accept may be expressed in such terms as to put a third person in a better condition than the drawer. If one meaning to give credit to another, make an absolute promise to accept his bill, the drawer or any other person may show such promise on the exchange to procure credit, and a third person advancing his money on it has nothing to do with the equitable circumstances which may subsist between the drawer and acceptor. *Doug.* 286. (299.)

A. in consideration of having commissioned *B.* to receive certain *African bills* payable to him, drew a bill upon *B.* for the amount, payable to his own order; *B.* acknowledged by letter the receipt of the list of the *African* bills, and that *A.* had drawn for the amount, and assured him that it would meet due honour from him. This is an acceptance of the bill by *B.* and the purport of such letter having been communicated by *A.* to third persons, who, on the credit of it, advanced money on the bill to *A.* who indorsed it to them; held that *B.* was liable as acceptor in an action by such indorsees, although after the indorsement, in consequence of the *African* bills having been attached in *B.'s* hands, who was ignorant of his letter having been shown, *A.* wrote to *B.* advising him not to accept the bill when tendered to him; which as between *A.* and *B.* would have been a discharge of *B.'s* acceptance if the bill had still remained in *A.'s* hands. *Clarke and others* v. *Cock*, 4 *East*, 57.

An acceptance is generally according to the tenor of the bill; and then it is called a general and absolute acceptance: but it may differ from the tenor in some material circumstances, and yet, as far as it goes, be binding on the acceptor. Thus it may be for a less sum than that mentioned in the bill; or it may be for an enlarged period. 1 *Stra.* 214. *Marius*, 21. So the drawee may accept a bill which has no time mentioned for payment, and which is held to be payable at sight, to pay, at a distant period; which acceptance will bind him. 11 *Mod.* 190.

A bill was payable the first of *January*; the drawee accepted to pay the 1st of *March*; the holder struck out the 1st of *March*, and inserted the 1st of *January*, and when it was payable according to that date, presented it for payment, which the acceptor refused; on which the holder restored the acceptance to the original form; and the court held that it continued binding. *Price* v. *Shute*, *East.* 33 *Car.* II. So the acceptance may direct the payment to be made at a different place from that mentioned in the bill, as at the house of a banker. See 2 *Stra.* 1195. So also the acceptance may differ from the tenor of the bill in its mode of payment, as to pay half in money, half in bills

Bull. N. P. 270. An acceptance may also be conditional, as "to pay when certain goods consigned to the acceptor, and for which the bill is drawn, shall be sold." 2 *Stra.* 1152.

What shall be considered as an absolute or conditional acceptance is a question of law to be determined by the court, and is not to be left to the jury. 1 *Term Rep.* 182. See 1 *Stra.* 648. 1 *Atk.* 717. (612.) If the acceptance be in writing, and the drawee intend that it should be only conditional, he must be careful to express the condition in writing as well as the acceptance; for if the acceptance should on the face of it appear to be absolute, he cannot take advantage of any verbal condition annexed to it, if the bill should be negotiated and come to the hands of a person unacquainted with the condition; and even against the person to whom the verbal condition was expressed, the burthen of proof will be on the acceptor. *Doug.* 286. A conditional acceptance, when the conditions on which it depends are performed, becomes absolute. *Cowp.* 571. But if the conditions on which the agreement to accept a bill is made, be not complied with, that agreement will be discharged. *Doug.* 297.

An acceptance by the custom of merchants as effectually binds the acceptor, as if he had been the original drawer; and, having once accepted it, he cannot afterwards revoke it. *Cro. Jac.* 308. *Hard.* 487.

A very small matter will amount to an acceptance; and any words will be sufficient for that purpose, which show the party's assent or agreement to pay the bill; as if upon the tender thereof to him, he subscribes, *accepted*, or *accepted by me A. B.* or, *I accept the bill*, &c. these clearly amount to an acceptance. *Molloy, book* 2. *cap.* 10. § 15.

If the party underwrites the bill, *presented* such a day or only the day of the month; this is such an acknowledgment of the bill as amounts to an acceptance. 3 *New Abr.* 610. *Comb.* 401. So if he order a direction to another person to pay it. *Bull. N. P.* 270.

If the party says, *leave your bill with me and I will accept it*, or, *call for it to-morrow and it shall be accepted*; these words, according to the custom of merchants, as effectually bind, as if he had actually signed or subscribed his name according to the usual manner.

But if a man says, *leave your bill with me; I will look over my accounts and books between the drawer and me, and call to-morrow, and accordingly the bill shall be accepted*; this does not amount to a complete acceptance; for the mention of his books and accounts shows plainly that he intended only to accept the bill, in case he had effects of the drawer's in his hands. And so it was ruled by the Lord C. J. *Hale*, at *Guildhall. Molloy, book* 2. *cap.* 10. § 20.

A foreign bill was drawn on the defendant, and being returned for want of acceptance, the defendant said, that *if the bill came back again he would pay it*; this was ruled a good acceptance. 3 *New Abr.* 610. cites *Mich.* 6 *Geo.* I. *B. R. Carr* v. *Coleman.*

If a merchant be desired to accept a bill, on the account of another, and to draw on a third, in order to reimburse himself, and in consequence he draw a bill on that third person; the bare act of drawing this bill will not amount to an acceptance of the other. 1 *Term Rep.* 269.

An agreement to accept or honour a bill, will in many cases be equivalent to an acceptance, and whether that agreement be merely verbal, or in writing, is immaterial: if *A.* having given or intending to give credit to *B.* write to *C.* to know whether he will accept such bills as shall be drawn on him on *B.'s* account; and *C.* return for answer,

that he will accept them; this is equivalent to an acceptance; and a subsequent prohibition to draw on him on *B.'s* account, will be of no avail, if in fact, previous to that prohibition, the credit has been given. 3 *Burr.* 1663.

A letter from the drawees of a bill in *England* to the drawer in *America*, stating that "their prospect of security being so much improved they shall *accept* or *certainly pay the bill*," is *an acceptance in law*; although the drawees had before refused to accept the bill when presented for acceptance by the holder, who resided in *England*, and again after the writing such letter refused payment of it when presented for payment: and although such letter written before were not received by the drawer in *America*, till after the bill became due. *Wynne* v. *Raikes*, 5 *East*, 514.

If a book-keeper or servant, or other person having authority, or who usually transacts business of this nature for the master, accept a bill of exchange, this shall bind such master. 3 *New Abr.* 611.

If a bill be drawn on a servant (as a clerk of a corporation, &c.) with direction to place the money to the account of his employer, and the servant accept it generally, this renders him liable to answer personally to an indorsee. 2 *Stra.* 955. *Hardw.* 1.

If a *bill* be accepted, and the person who accepted the same happens to die before the time of payment, there must be a demand made of his executors or administrators; and on non-payment a protest is to be made, although the money becomes due before there can be administration, &c.

Forging the acceptance of any *bill of exchange*, or the number or principal sum of any accountable receipt, is made felony, by stat. 7 *Geo.* II. *c.* 22.

III. According to the difference in the style of negotiability of bills and notes, the modes of their transfer also differ. Bills and notes payable to bearer are transferred by delivery: if payable to *A. B.* or bearer they are payable to bearer, as if *A. B.* were not mentioned. 1 *Burr.* 452. 3 *Burr.* 1516. 1 *Black. Rep.* 485. But to the transfer of those payable to order, it is necessary in addition to delivery that there should be something, by which the payee may appear to express his order. This additional circumstance is an *indorsement*; so called from being usually (though not necessarily) written on the *back* of the note or bill.

Where no regulation is made by act of parliament (see *ante*, I. 4.) relative to the negotiation of bills or notes, no particular form of words is necessary to make an indorsement; only the name of the indorsor must appear upon it, and it must be written or signed by him, or by some person authorized by him for that purpose.

Indorsements are either in full or in blank; a full indorsement is that by which the indorsor orders the money to be paid to some particular person, by name: a blank indorsement consists only of the name of the indorsor. Blank indorsements are most frequent, indeed almost universal in business. A blank indorsement renders the bill or note afterwards transferable by delivery only, as if it were payable to bearer; for by only writing his name the indorsor shows his intention that the instrument should have a general currency, and be transferred by every possessor. *Doug.* 617. (639.) 611. (633.)

Except where restrained by statute (see *ante*, I. 4.) the transfer of a bill or note may be made at any time after it has issued, even after the day of payment; and in case of bills, where the acceptor resides at a

distance from the drawer, is frequently made before acceptance. 1 Ld. *Raym.* 575. See 3 *Term Rep.* 80. 3 *Burr.* 1516. 1 *Black. Rep.* 485. *Doug.* 611. (633.)

An indorsement may be made on a blank note, before the insertion of any date or sum of money, in which case the indorsor is liable for any sum, at any time of payment that may be afterwards inserted; and it is immaterial whether the person taking the note on the credit of the indorsement knew whether it was made before the drawing of the note or not; for in such a case the indorsement is equivalent to a letter of credit for any indefinite sum. *Doug.* 496. (514.)

On a transfer by delivery, it is said that the person making it ceases to be a party to, or security for the payment of a bill or note; (1 Ld. *Raym.* 442. 12 *Mod.* 241. 1 *Salk.* 128.) yet it seems there can be little doubt that he is liable in another sort of action; as for money had and received, &c. see 3 *Term Rep.* 757. 4 *Term Rep.* 177.

Though a blank indorsement be a sufficient transfer, and may enable the person, in whose favour it is made, to negotiate the instrument, yet it is in his option, to take it either as indorsee, or as servant or agent to the indorsor; and the latter may, notwithstanding his indorsement, declare as holder in an action against the drawer or acceptor. Nothing is more usual than for the holder of a bill or note to indorse it in blank, and send it to some friend for the purpose of procuring the acceptance or the payment; in this case it is in the power of the friend, either to fill up the blank space over the indorsor's name, with an order to pay the money to himself, which shows his election to take as indorsee; or to write a receipt, which shows he is only the agent of the indorsor. 1 *Salk.* 125. 128. 130. 1 *Show.* 163. 2 Ld. *Raym.* 871. And, on this principle, one to whom a bill was delivered with a blank indorsement, and who carried it for acceptance, was admitted, in an action of trover for the bill against the drawee, to prove the delivery of it to the latter. 1 *Salk.* 130. 2 Ld. *Raym.* 871.

The original contract on negotiable bills and notes is to pay to such person or persons, as the payee, or his indorsees, or their indorsees shall direct; and there is as much privity between the last indorsor and the last indorsee, as between the drawer and the original payee. When the payee assigns it over, he does it by the law of merchants, for as a thing in action, it is not assignable by the general law. The indorsement is part of the original contract, is incidental to it in the nature of the thing, and must be understood to be made in the same manner as the instrument was drawn; the indorsee holds it in the same manner and with the same privileges, qualities and advantages as the original payee, as a transferable, negotiable instrument, which he may indorse over to another, and that other to a third, and so on at pleasure; for these reasons an indorsor *for a valuable consideration* cannot limit his indorsement by any restriction on the indorsee, so as to preclude him from transferring it to another as a thing negotiable. 2 *Burr.* 1222, 1223. 1226, 1227. See also *Com.* 311. 1 *Stra.* 457. 2 *Burr.* 1216. 1 *Black. Rep.* 295. and as to the effect of restrictive indorsements, see *Doug.* 615. (637.) 617. (639, 640.)

Where the transfer may be by *delivery* only, that transfer may be made by any person who by any means, whether accident or theft, has obtained the possession; and any holder may recover against the drawer, acceptor or indorsor in blank, if such holder gave a valuable consideration without knowledge of the accident. 1 *Burr.* 452. 3 *Burr.* 1516. 1 *Black. Rep.* 485. The same principle applies also

to the case of a bill negotiated with a blank indorsement; *Peacock* v. *Rhodes et al. Doug.* 611. (613.) where the court held, that there was no difference between a bill or note indorsed blank, and one payable to bearer. They both pass by delivery, and possession proves property in both cases. The holder of either cannot with propriety be considered as assignee of the payee: an assignee must take the thing assigned, subject to all the equity to which the original party was subject: if this rule were applied to bills and notes, it would stop their currency, and would render it necessary for every indorsee to inquire into all the circumstances, and the manner in which the bill came to the indorsor; but the law is now clearly settled, that a holder coming fairly by a bill or note is not to be affected with the transaction between the original parties.

But a transfer by *indorsement* where that is necessary, can only be made by him who has a right to make it, and that is strictly only the payee, or the person to whom he or his indorsees have transferred it, or some one claiming in the right of some of these parties. Bills and notes in favour of partners must be indorsed by them all, or at least by one in the firm of the house; and a bill drawn by two persons payable to them or order, must be indorsed by both. *Doug.* 630. (653.) in *note.*

If a bill or note be made or indorsed to a woman while single, and she afterwards marry, the right to indorse it over belongs to her husband, for by the marriage he is entitled to all her personal property. 1 *Stra.* 516. *Ca. L. E.* 246.

If a man become bankrupt, the property of bills and notes of which he is the payee or indorsee, vests in his assignees, and the right to transfer is in them only. If the holder of a bill or note die, it devolves to his executors or administrators, and they may indorse it, and their indorsee maintain an action, in the same manner as if the indorsement had been made by the testator or intestate. But on their indorsement they are liable *personally* to the subsequent parties, for they cannot charge the effects of the testator. They may also be the *indorsees* of a bill or note in their quality of executors or administrators; as where they receive one from their testator or intestate; and in that character they may bring an action on it against the acceptor, or any of the other parties. 3 *Wils.* 1. 2 *Stra.* 1260. 2 *Barnes*, 137. 2 *Burr.* 1225. 1 *Term Rep.* 487. 10 *Mod.* 315.

When a bill payable to order is expressed to be for the *use* of another person than the payee, yet the right of transfer is in the payee, and his indorsee may recover against the drawer or acceptor. *Carth.* 5. 2 *Vent.* 309. 2 *Show.* 509.

It has been adjudged, that a bill of exchange cannot be indorsed for part, so as to subject the party to several actions. 3 *New Abr.* 610. *Carth.* 466. 1 *Salk.* 65.

IV. By the very act of drawing a bill, the drawer comes under an implied engagement to the payee, and to every subsequent holder, fairly entitled to the possession, that the person on whom he draws is capable of binding himself by his acceptance; that he is to be found at the place at which he is described to be, if that description be mentioned in the bill; that if the bill be duly presented to him, he will accept it in writing on the bill itself, according to its tenor; and that he will pay it when it becomes due, if presented in proper time for that purpose.

In default of any of these particulars, the drawer is liable to an action at the suit of any of the parties before mentioned, on due diligence being exercised on their parts, not only for the payment of the original sum mentioned in the bill, but also, in some cases, for damages, interest and costs; and he is equally answerable whether the bill was drawn on his own account, or on that of a third person; for the holder of the bill is not to be affected by the circumstances that may exist between the drawer and another; the *personal credit* of the drawer being pledged for the due honour of the bill. *Beawes.* See *ante*, I. 7.

If a man write his name on a blank piece of paper, and deliver it to another, with authority to draw on it a bill of exchange to any amount, at any distance of time, he renders himself liable to be called on as the drawer of any bill so formed by the person to whom he has given the authority. 1 *H. Black. Rep.* 313.

If acceptance be refused, and the bill returned, this is notice to the drawer of the refusal of the drawee; and then the period when the debt of the former is to be considered as contracted, is the moment he draws the bill; and an action may be immediately commenced against him; though the regular time of payment, according to the tenor of the bill, be not arrived. For the drawee not having given credit, which was the ground of the contract, what the drawer had undertaken has not been performed. *Doug.* 55. *Mitford* v. *Mayor.* See also 2 *Stra.* 949. cited 3 *Wils.* 16, 17.

When a bill of exchange is indorsed by the person to whom it was made payable, as between the indorsor and indorsee, it is a new bill of exchange; as it is also between every subsequent indorsor and indorsee: the indorsor therefore, with respect to all the parties subsequent to him, stands in the place of the drawer, being a collateral security for the acceptance and payment of the bill by the drawee: his indorsement imposes on him the same engagement that the drawing of the bill does on the drawer; and the period when that engagement attaches is the time of the indorsement. 1 *Salk.* 133. 2 *Show.* 441. 494. 2 *Burr.* 674.

Nothing will discharge the indorsor from his engagement but the absolute payment of the money, not even a judgment recovered against the drawer, or any previous indorsor. 3 *Mod.* 86. 2 *Show.* 441. 494. Neither is the engagement of an indorsor discharged by an ineffectual *execution* against the drawer, or any prior or subsequent indorsor. 2 *Black. Rep.* 1235. and see 4 *Term Rep.* 825.

The engagement of the drawer and indorsors is, however, still but conditional. The holder, in order to entitle himself to call upon them in consequence of it, undertakes to perform certain requisites on his part, a failure in which precludes him from his remedy against them. Where the payment of a bill is limited at a certain time after sight, it is evident the holder must present it for acceptance, otherwise the time of payment would never come: it does not appear that any precise time, within which this presentment must be made, has in any case been ascertained: but it must be done as soon as, under all the circumstances of the case, that can conveniently be done; and what has been said on the presentment of bills and notes payable on demand, seems exactly to apply here. See *ante*, I. 6.

Whether the holder of a bill, payable at a certain time after the date, be bound to present for acceptance immediately on the receipt of it, or whether he may wait till it become due, and then present it for payment, is a question which seems never to have been directly

determined: in practice, however, it frequently happens that a bill is negotiated and transferred through many hands without acceptance; and not presented to the drawee till the time of payment, and no objection is ever made on that account. See 5 *Burr.* 2671. 1 *Term Rep.* 713.

If, however, the holder in fact present the bill for acceptance, and that be refused, he is bound to give regular notice to all the preceding parties to whom he intends to resort for non-payment; to the drawer, that he may know how to regulate his conduct with respect to the drawee, and make other provision for the payment of the bill; and to the indorsors, that they may severally have their remedy in time against the parties on whom they have a right to call; and if, on account of the holder's delay, any loss accrue by the failure of any of the preceding parties, *he* must bear the loss. 5 *Burr.* 2670. 1 *Term Rep.* 712.

It is also the duty of the holder of a bill, whether accepted or not, to present it for payment within a limited time; for otherwise the law will imply that payment has been made; and it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time, when all accounts might be adjusted between him and the drawee. For the old cases on this subject, see 1 *Salk.* 127. 132, 133. 1 *Show.* 155. 1 Ld. *Raym.* 743. 2 *Stra.* 829. This time for demand of payment seems, at present, to be regulated by the cases as to notice to preceding indorsors immediately following.

A presentment either for payment or acceptance must be made at seasonable hours; which are the common hours of business in the place where the party lives to whom the presentment is to be made.

If acceptance or payment be refused, or the drawee of the bill, or maker of the note, has become insolvent, or has absconded, notice from *the holder* himself must be given to the preceding parties; and in that notice it is not enough to say that the drawee or maker refuses, is insolvent, or has absconded, but it must be added, that the holder does not intend to give him credit. The purpose of giving notice is not merely that the indorsor should know default has been made, for he is chargeable only in a secondary degree; but to render him liable, it must be shown that the holder looked to him for payment, and gave him notice that he did so. See 1 *Stra.* 441. 515. 2 *Black. Rep.* 747. as to bills; and 1 *Stra.* 649. 2 *Stra.* 1087. 1 *Term Rep.* 170. as to notes.

What should be considered as reasonable time within which notice should be given, either of non-acceptance or non-payment, has been subject to much doubt and uncertainty; it was once held, that a fortnight was a reasonable time, but that is now much narrowed. 1 *Mod.* 27.

With respect to acceptance, it is usual to leave a bill for that purpose with the drawee till the next day, and that is not considered as giving him time; it being understood to be the usual practice; but if on being called on the next day, he delay or refuse to accept according to the tenor of the bill, the rule now established, where the parties, to whom notice is to be given, reside at a different place from the holder and drawee, is, that notice must be sent by the next post. Under the same circumstances, the same rule obtains in the case of *non-payment.* 1 *Term Rep.* 169. So also, in case the drawee or maker has absconded, or cannot be found, notice of these circumstances, either in case of non-acceptance or non-payment, must be sent by the first post.

The great difficulty has been to establish any general rule, where the party entitled to notice resides in the same place, or at a place at a small distance from that in which the holder lives. On this point, as well as on the question of what shall be considered as a reasonable time for making the *demand* of payment, it has been an object of no little controversy, whether it was the province of the jury or of the judge to decide: (see *ante*, I. 6.) till lately it seems the jury had been permitted to determine on the particular circumstances of each individual case, what time was reasonably to be allowed, either for making demand or giving notice. *Doug.* 515. (681.)

But it having been found that this was productive of endless uncertainty and inconvenience, the court, on several occasions, have laid it down as a principle, that what shall be considered as reasonable time in either case is a question of law; juries have, however, struggled so hard to maintain their privilege in this respect, that in two cases they narrowed the time for demand, contrary to the opinion of the court; and, on a second trial being granted, they, in both cases, adhered to their opinion, contrary to the direction of the judge. In one of them, however, application being made for a third trial, the court would have granted it, had not the plaintiff precluded himself by proving his debt under a commission of bankrupt which had issued against the drawees of the bill between the time of the verdict and the application. See *Doug.* 515. 1 *Term Rep.* 171. and the cases there cited. In a third case, where the struggle by the jury was to give a longer time for notice than was necessary, the court adhered to their principle, and granted no less than three trials. 1 *Term Rep.* 167. 169. *Tindal* v. *Brown*. It seems therefore fully established, that what shall be reasonable time is a question of law; and generally that a demand must be made, and notice given, as soon as under all the circumstances, it is possible so to do.

The reason why the law requires notice is, that it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and that if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he have no effects in the other's hands, then he cannot be injured for want of notice; and if it be proved on the part of the plaintiff, that from the time the bill was drawn, till the time it became due, the drawee never had any effects of the drawer in his hands, notice to the latter is not necessary in order to charge him, for he must know this fact; and if he had no effects in the drawee's hands, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonoured. 1 *Term Rep.* 410. and see 1 *Term Rep.* 405.

Yet, though it appear that the drawer had no effects in the hands of the drawee, no action can be maintained against the *indorsor*, if no notice was given him of the bill being dishonoured; for though the drawer may have received no injury, the indorsor, who must be presumed to have paid a valuable consideration for the bill, probably has. 2 *Term Rep.* 714.

Though in the case where the drawer has effects in the hands of the drawee, the want of notice cannot be waived by a subsequent promise by the drawer, to discharge the bill; yet where he had no effects it may; though it appear that, in fact, he sustained an injury for want of such notice: such a subsequent promise is an acknowledgment that he had no right to draw on the drawee; and if he has in fact sustain-

ed damage, it is his own fault. But where damage in such a case has been sustained, and no subsequent promise appears, it may be very doubtful whether want of notice can be waived. See 2 *Term Rep.* 713, 714.

In the manner in which notice, either of non-acceptance or non-payment, is given, there is a remarkable difference between inland and foreign bills; in the former no particular form of words is necessary to entitle the holder to recover against the drawer or indorsors, the amount of the bill, on failure of the drawee or acceptor; it is sufficient if it appear that the holder means to give no credit to the latter, but to hold the former to their responsibility. 1 *Term Rep.* 170. But in foreign bills other formalities are required; if the person to whom the bill is addressed, on presentment, will not accept it, the holder is to carry it to a person vested with a public character, who is to go to the drawee and demand acceptance, and if he then refuse, the officer is there to make a minute on the bill itself, consisting of his initials, the month, the day and the year, with his charges for minuting. He must afterwards draw up a solemn declaration, that the bill has been presented for acceptance, which was refused, and that the holder intends to recover all damages which he, or the deliverer of the money to the drawer, or any other, may sustain on account of the non-acceptance: the minute is, in common language, termed the *noting* of the bill; the solemn declaration, the *protest;* and the person whose office it is to do these acts, *a public notary:* and to his protestation all foreign courts give credit. *Mal.* 264. *Mar.* 16.

This *protest* must be made within the regular hours of business, and in sufficient time to have it sent to the holder's correspondent by the *very next post* after acceptance refused; for if it be not sent by that time, with a letter of advice, the holder will be construed to have discharged the drawer and the other parties entitled to notice: and noting alone is not sufficient; there must absolutely be a protest to render the preceding parties liable. *Bull. N. P.* 271. 2 *Term Rep.* 713.

But in this case the holder is not to send the bill itself to his correspondent; he must retain it, in order to demand payment of the drawee when it becomes due.

When the bill becomes due, whether it was accepted or not, it is again to be presented for payment within the days of grace, and if payment be refused, the bill must be protested for non-payment, and the bill itself, together with the protest, sent to the holder's correspondent, unless he shall be ordered by him to retain the bill, with a prospect of obtaining its discharge from the acceptor. *Beawes.*

As this protest on foreign bills must be made *on* the last day of grace, and immediate notice sent to the parties concerned, it seems established that such a bill is payable *on demand made, at any time that day,* within reasonable hours; and that the acceptor has not the whole day to pay the bill. 4 *Term Rep.* 170.

Besides the protest for non-acceptance and non-payment, there may also be a protest for better security; this is usual when a merchant, who has accepted a bill, happens to become insolvent, or is publicly reported to have failed in his credit, or absents himself from 'Change, before the bill he has accepted has become due; or when the holder has any reason to suppose it will not be paid; in such cases he may cause a notary to demand better security, and on that being refused, make protest for want of it; which protest must also be sent to the parties concerned by the next post. *Mar.* 27. 1 Ld. *Raym.* 743.

Where the original bill is lost, and another cannot be had of the drawer, a protest may be made on a copy, especially where the refusal of payment is not for want of the original bill, but merely for another cause. 1 *Show.* 164.

The effect of protest for non-acceptance or non-payment, is to charge the drawer or indorsors, not only with the payment of the principal sum, but with interest, damages and expenses; which latter consist usually of the exchange, re-exchange, provision and postage, together with the expenses of the protest. See *Stra.* 649.

Whenever interest is allowed, and a new action cannot be brought for it, which is the case on bills and notes, the interest is to be calculated up to the time of signing final judgment. 2 *Burr.* 1086, 1087. and see 2 *Term Rep.* 52.

The principal difference between foreign and inland bills of exchange at common law, seems to have been this. A protest for non-acceptance or non-payment of a foreign bill was, and still is, essentially necessary to charge the drawer on the default of the drawee; nothing, not even the principal sum, could or can, at this time, be recovered against him without a protest; no other form of notice having been admitted by the custom of merchants as sufficient: but on inland bills, simple notice, within a reasonable time, of the default of the drawee, was held sufficient to charge the drawer, without the solemnity of a protest; the disadvantage arising from thence was this, that notice entitled the holder to recover only the sum in the original bill, which, in many cases, might be a very serious disadvantage: to remedy this inconvenience in some degree, the stat. 9 and 10 *Wm.* III. *c.* 17. and afterwards the stat. 3 and 4 *Ann. c.* 9. were passed; the professed intention of which acts was to put inland bills on the same footing as foreign ones; so far as relates to the recovery of damages, interests and costs, (*i. e.* expenses,) by means of the protest they have done it; but there are several minute particulars, in which, from an attentive perusal of the acts, it will appear they still differ.

To the constitution of a bill of exchange, as has been said before, it is not necessary that the words *value received* should be inserted; and the want of these in a foreign bill cannot deprive the holder of the benefit of a protest; but that benefit, in case of non-payment, is not given by the statutes to inland bills which want these words, and therefore they cannot be protested for non-payment; and the second act provides, that "where these words are wanting, or the value is less than 20*l.* no protest is necessary either for non-acceptance or non-payment," the safest construction of which seems to be, that inland bills, without the words *value received*, or under 20*l.* shall continue as at common law, and shall not be entitled to the privilege of a protest, either for non-acceptance or non-payment.

An inland bill, payable at so many days after *sight*, cannot be protested at all; and no inland bill can be protested till *after* the expiration of the three days of grace; notice of which protest is, by the statute, to be sent within fourteen days after the protest. 4 *Term Rep.* 170.

There appears also to be another difference subsisting between foreign and inland bills of exchange; for where acceptance and payment both are refused on foreign bills, it seems necessary that there should be a protest for each; but under the stat. 3 and 4 *Ann. c.* 9. it seems that one protest for either, on an inland bill, is sufficient.

On inland bills, where damages, interest and costs [expenses] are to be recovered, there is more indulgence in the time allowed for no-

tice of non-payment than where only the principal sum is to be recovered; for when there is no protest for non-payment, presentation for payment must be made so early on the last day of grace, that the holder may give notice of non-payment by the next post. *See before.*

That part of the stat. 3 and 4 *Ann.* c. 9. which puts notes on the same footing with inland bills, makes no express provision for protesting them for non-payment; but there can be no doubt that the practice under which such a protest is frequently made is founded in justice.

As to several niceties relative to qualified acceptances, and protests under peculiar circumstances, see *Beawes' Lex Merc.* See also 1 *Wils.* 185. *Doug.* 249.

When a bill is once accepted absolutely, it cannot in any case be revoked, and the acceptor is at all events bound, though he hear of the drawer's having failed the next moment, even if the failure was before the acceptance. The acceptor may, however, be discharged by an express declaration of the holder, or by something equivalent to such declaration. *Doug.* 237. (249.) But no circumstances of indulgence shown to the acceptor by the holder, nor an attempt by him to recover of the drawer, will amount to an express declaration of discharge. *Doug.* 235. (247.) Neither will any length of time short of the statute of limitations, nor the receipt of part of the money from the drawer or indorsor, nor a promise by indorsement on the bill by the drawer to pay the residue, discharge the holder's remedy against the acceptor. *Doug.* 238. (250.) in *note;* but see *Stra.* 733. See *ante*, II.

Though the receipt of part from the drawer or indorsor be no discharge to the acceptor, yet the receipt of part from the acceptor of a bill, or the maker of a note, is a discharge to the drawer and indorsors in the one case, and to the indorsors in the other, unless due notice be given of the non-payment of the residue; for the receipt of part from the maker or acceptor without notice, is construed to be a giving of credit for the remainder, and the undertaking of the preceding parties is only conditional to pay, in default of the original debtor, on due notice given: but where due notice is given that the bill is not duly paid, the receipt of part of the money from an acceptor or maker, will not discharge the drawer or indorsors; for it is for their advantage that as much should be received from others as may be. 1 Ld. *Raym.* 744. 2 *Stra.* 745. 1 *Wils.* 48. *Bull. N. P.* 271. So the receipt of part from an indorsor, is no discharge of the drawer or preceding indorsor.

In *ex parte Wilson*, in the matter of *Portales*, a bankrupt, it was determined by Lord *Eldon*, "that if a person held the security of a drawer upon an acceptor of a bill of exchange, and such holder gave the acceptor time upon the bill, he, from that moment, had no demand against the drawer, whether *solvent* or *not*." Petitions after *Trin.* term, 1805, (which had been frequently determined by Lord *Thurlow* in preceding cases of a similar nature.)

If the drawer of a note, or the acceptor of a bill, be sued by the indorsee, and the bail pay the debt and costs, this absolutely discharges the indorsor as much as if the principal had paid the note or bill; and the bail cannot afterwards recover against the indorsor in the name of the indorsee. 1 *Wils.* 46.

Though in order to entitle himself to call on any of the preceding parties, in default of the acceptor of a bill, or maker of a note, it be

necessary that the holder should give due notice of such default, to the party to whom he means to resort, yet notice to that party alone is sufficient as against him : it is not necessary that any attempt should be made to recover the money of any of the other collateral undertakers ; or, in case of such attempt being made, to give notice of its being without effect. Thus, in order to entitle himself to recover against an indorsor, it is not necessary for the indorsee to show an attempt to recover against the drawer of a bill of exchange, or the payee-indorsor of a promissory note. See 1 *Salk.* 131. 133. 1 *Stra.* 441. 1 Ld. *Raym*, 443. and, finally, *Heylin* v. *Adamson*, 2 *Burr.* 669. on the principles of all which cases it is now finally settled, that to entitle the indorsee to recover against the indorsor of an *inland* bill of exchange, it is not necessary to demand the money of the first drawer.

By the said stat. 3 and 4 *Ann. c.* 9. § 7. it is enacted, " that if any person accept a bill of exchange for and in satisfaction of any former debt or sum of money formerly due to him, this shall be accounted and esteemed a full and complete payment of such debt; if such person accepting of any such bill for his debt, do not take his due course to obtain payment of it, by endeavouring to get the same accepted and paid, and make his protest according to the directions of the act, either for non-acceptance or non-payment."

V. 1. Before the doctrine of bills of exchange was well understood, and the nature and extent of the customs relative to them fully recognised by the courts, the remedy on them was sought in different forms of action, according to the opinions which were entertained of the applicability of the several forms to the respective situations of the parties. See *Hardr.* 485. 487. 1 *Mod.* 285. 1 *Vent.* 152. 1 *Freem.* 14. 1 *Lev.* 298. 11 *Mod.* 190. *Comb.* 204. 1 *Salk.* 125. 12 *Mod.* 37. 345. *Skinn.* 346. *Stra.* 680. 8 *Mod.* 373. 1 *Mod. Ent.* 312. *pl.* 13. *Morg. Prec.* 548. *Kessebower* v. *Tims*, *B. R. E.* 22 *Geo.* III. *Bailey*, 47. The conclusion resulting from all which cases seems to be, that where a privity exists between the parties, there an action of debt, or of *indebitatus assumpsit* may be maintained; but that where it does not exist, neither of these actions will lie.

A privity exists between the payee and the drawer of a bill of exchange ; the payee and drawer of a promissory note ; the indorsee and his immediate indorsor of either the one or the other ; and perhaps between the drawer and acceptor of a bill : provided that in all these cases, a consideration passed respectively between the parties.

But it seems to be considered, that no privity exists between the indorsee and acceptor of a bill, or the maker of a note, or between an indorsee and a remote indorsor of either.

The action which is now usually brought on a bill of exchange, is a special action on the case, founded on the custom of merchants.

That custom was not at first recognised by the court, unless it was specially set forth, and therefore it was deemed necessary to set forth by way of inducement, so much of it as applied to the particular case, and imposed on the defendant a liability to pay. See 1 *Wils.* 189. 1 Ld. *Raym.* 21. 175. 3 *Mod.* 86. 4 *Mod.* 242.

But when the custom of merchants was recognised by the judges as part of the law of the land, and they declared they would take notice of it, as such, *ex officio*, it became unnecessary to recite the custom at full length ; a simple allegation, that " the drawer, (mentioning him by his name,) *according to the custom of merchants*, drew his bill of exchange," &c. was sufficient. And if the plaintiff, still adhering to

former precedents, thought proper to recite the custom in general terms, and did not bring his case within the custom so set forth; yet if by the law of merchants, as recognised by the court, the case as stated, entitled him to his action, he might recover; and the setting forth of the custom was reckoned surplusage and rejected. See 1 *Show.* 317. 2 Ld. *Raym.* 1542.

Whether the drawer of a bill, or the indorsor of a bill or of a note, receiving the bill or the note in the regular course of negotiation before it has become due, can maintain an action on it against the acceptor or maker, in the character of indorsee, seems undecided; but there is a case which clearly shows that a drawer or indorsor cannot maintain an action against the acceptor in the character of indorsee, *where the indorsement is after the refusal of payment*; because when a bill is returned unpaid either on the drawer or indorsor, its negotiability is at an end. *Beck* v. *Robley*, *Trin.* 14 *Geo.* III. 1 *H. Black. Rep.* 89. in the notes.

The action therefore in which the drawer or indorsor, after payment of the money in default of the acceptor, may recover the first against the acceptor, and the latter against any of the preceding parties, must be brought in their original capacity as drawer or indorsor, and not as indorsee. *Vide Simonds* v. *Parminter*, 1 *Wils.* 185. *Vide Morg. Prec.* 43, 44. 50. 4 *Term Rep.* 82. 85.

If the drawee, without having effects of the drawer, accept and duly pay the bill without having it protested, he may recover back the money in an action for money paid, laid out and expended to the use of the drawer. *Vide Smith* v. *Nissen*, 1 *Term Rep.* 269.

Instead of bringing an action on the custom, or on the statute, the plaintiff may in many cases use a bill or note, only as evidence in another action; and where the instrument wants some of the requisites to form a good bill or note, the only use he can make of it is to give it in evidence; or if the count on the instrument be defective he may give it in evidence, in support of some of the other counts for money had and received, or money lent and advanced, according to the circumstances of the transaction. *Tatlock* v. *Harris*, 3 *Term Rep.* 174.

The holder of the bill or note may sue all the parties who are liable to pay the money; either at the same time, or in succession; and he may recover judgment against all, if satisfaction be not made by the payment of the money before judgment obtained against all; and proceedings will not be staid in any one action but on payment of the debt and costs in that action, and the costs in all the others in which he has not obtained judgment. *Vide Golding* v. *Grace*, 2 *Black. Rep.* 749.

But though he may have judgment against all, yet he can recover but one satisfaction; yet though he be paid by one he may sue out execution for the costs in the several actions against the others. 2 *Vesey*, 115. and see 1 *Stra.* 515. See *ante*, IV. and tit. *Bankrupt* IV. 5. &c.

To this action the defendant may plead the statute of limitations; and by the express provision of the statute of Queen *Anne*, all actions on promissory notes must be brought within the same time as is limited by the statute of *James* with respect to actions on the case. and it is no good replication to this plea, that it was on account between merchants, where it appears to be for value received. *Comb.* 190. 392.

2. As the action on a bill of exchange is founded on the custom of merchants, so that on a promissory note is founded on the statute 3

and 4 *Ann. c.* 9. and usually, though perhaps not necessarily, refers to it. In both cases however it is necessary, that all those circumstances should either be expressly stated, or clearly and inevitably implied, which, according to the characters of the parties to the action, must necessarily concur in order to entitle the plaintiff to recover.

An action lies by the indorsee against the indorsor upon a bill of exchange, immediately on the non-acceptance by the drawee, though the time for which the bill was drawn be not elapsed. *Balingalls* v. *Gloster*, 3 *East*, 481.

In stating the bill or the note, regard must be had to the legal operation of each respectively. 1 *Burr.* 324, 325. It has been decided that the legal operation of a bill, or of a note, payable to a fictitious payee, is, that it is payable to the *bearer*, and therefore it is proper in the statement of such a *bill*, to allege that the drawer thereby requested the drawee to pay so much money to the bearer; in the statement of such a *note*, that the maker thereby promised to pay such a sum to the bearer. *Vere* v. *Lewis*, 3 *Term Rep.* 183. *Minet et al.* v. *Gibson et al. Id.* 485. *Confirmed in Dom. Proc.* See 1 *H. Black. Rep.* 569. *Collis* v. *Emmet*, *H. Black. Rep.* 313. and more fully as to this subject *post*, 3. of this division.

Or in such a case, the plaintiff may state all the special circumstances, and if the verdict correspond with them he will be entitled to recover. See 1 *H. Black. Rep.* 569.

A bill or note payable to the order of a man, may, in an action by him, be stated as payable to himself, for that is its legal import: or it may be stated in the very words of it, with an averment that he made no order.

If a note purport to be given by two, and be signed only by one, a declaration generally, as on a note by that one who signed it will be good; for the legal operation of such a note is, that he who signed, promised to pay. *Semb.* 1 *Burr.* 323.

On a note to pay jointly *and* severally, a declaration against one in the terms of the note will be good. *Burchill* v. *Slocock*, 2 Ld. *Raym.* 1545. So on a note to pay jointly *or* severally, *Cowp.* 832. contrary to former determinations.

Inland bills and notes may be stated to have been made at any place where the plaintiff chooses to lay his action, because the action on them is transitory, and may be stated to have arisen any where. In an action against the acceptor, it must be alleged that he accepted the bill, for the acceptance is the foundation of the action, but the manner of acceptance needs not to be alleged. 2 Ld. *Raym.* 1542. 1 Ld. *Raym.* 364, 365. 374, 375. 1 *Salk.* 127. 129. *Carth.* 459.

If the bill or note was payable to order, and the action by an indorsee, such indorsements must be stated as to show his title; an indorsement by the payee must at all events be stated, because without that, it cannot appear that he made any order, on the existence of which depends the title of the indorsee. If the first indorsement was special, to any person by name, in an action by an indorsee after him, his indorsement must, for the same reason, be stated: so also must all special indorsements.

But if the indorsement was in blank, and the action be against the drawer, acceptor or payee, no other indorsement is necessary to be stated than that of the payee: in an action against a subsequent indorsor, his indorsement at least must be added: in an action on a bill or note payable to bearer, no indorsement need be stated, because it is transferable without indorsement. See *ante*, III.

In an action against the drawer or indorsor of a bill, or against the indorsor of a note, it is absolutely necessary, on account of non-payment of the bill or note, to state a demand of payment from the acceptor of the bill, or the maker of the note, and due notice of refusal given to the party against whom the action is brought; for these circumstances are absolutely necessary to entitle the plaintiff to maintain his action; and a verdict will not help him on a writ of error. The general rule of pleading in this case is, that where the plaintiff omits altogether to state his title or cause of action, it is not necessary to prove it at the trial; and therefore there is no room for presumption that there was actual proof. *Rushton* v. *Aspinall*, *Doug.* 679. (684.) But if the title be only imperfectly stated, with the omission only of some circumstances necessary to complete the title, they shall, after a verdict, be presumed to have been proved; and in some cases no advantage can be taken of the want of them on a general demurrer. *Doug.* 684. in the notes.

3. Most part of what might be said as to the *proof* and *defence* in actions on bills or notes, necessarily arises out of the general doctrine already explained.

The plaintiff must in all cases prove so much of what is necessary to entitle him to his action, and of what must be stated in his declaration, as is not, from the nature of the thing and the situation of the parties, necessarily admitted.

In an action against the acceptor it is a general rule that the drawer's hand is admitted, because the acceptor is supposed to be acquainted with the writing of his correspondent; and by his acceptance he holds out to every one who shall afterwards be the holder, that the bill is truly drawn. 1 Ld. *Raym.* 444. *Stra.* 946. 3 *Burr.* 1354. See 1 *Bl.* 390. In an action against the acceptor, therefore, where the acceptance was on view of the bill, whether in writing on the bill or by parol, it is not necessary to prove the hand-writing of the drawer. That of the acceptor himself must of course be proved; and that of every person through whom the plaintiff, from the nature of the transaction, must necessarily derive his title.

On a bill payable to *bearer*, there is no person through whom the holder derives his title. In an action against the acceptor, therefore, on such a bill, he has only to prove the hand-writing of the acceptor himself. But in an action against the acceptor of a bill payable to *order*, the plaintiff must prove the hand-writing of the very payee who must be the first indorsor. See 4 *Term Rep.* 28. If the indorsement of the payee be general, the proof of his hand-writing is sufficient; if special, that of his indorsee must be proved; but otherwise that of any other of the indorsors is not requisite, though all the subsequent indorsements be stated in the declaration. Any subsequent holder may declare as the indorsee of the first indorsor; but in this case, in order to render the evidence correspondent to the declarations, all the subsequent names must be struck out, either at or before the trial. See *ante*, III.

But the plaintiff in the case of a transfer by delivery (see *ante*, III.) may be called upon to prove that he gave a good consideration for the bill or note, without the knowledge of its having been stolen, or of any of the names of the blank indorsors having been forged. 1 *Burr.* 542. *Doug.* 633. *Peacock* v. *Rhodes*. And though the acceptance be subsequent to the indorsements, yet the necessity of proving the payee's hand-writing is not, by this means, superseded. *Say.* 233. 1 *Term Rep.* 654.

In an action by an indorsee against the drawer, the same rules obtain with respect to the proof of the hand-writing of the indorsors as in an action against the acceptors. See *Collis* v. *Emmet*, 1 *H. Black. Rep.* 313. That of the drawer himself must of course be proved. It must be also proved that the plaintiff has used due diligence. See *ante*, IV.

From the rule, that in an action against the drawer or acceptor of a bill payable to order, there must be proof of the signature of the payee being the drawer or first indorsor, and of all those to whom an indorsement has been specially made, arose the question which long, and greatly, agitated the commercial world, on the subject of indorsements in the name of *fictitious payees*. A bill payable to the order of a fictitious person, and indorsed in a fictitious name, is not a novelty among merchants and traders. See *Stone* v. *Freeland*, *B. R.* Sittings after *Easter*, 1769, alluded to in 3 *Term Rep.* 176. See also *Peacock* v. *Rhodes*, *Doug.* 632. *Price* v. *Neal*, 3 *Burr.* 1354. But in the years 1786, 1787, and 1788, two or three houses connected together in trade, entering into engagements far beyond their capital, and apprehending that the credit of their own names would not be sufficient to procure currency to their bills, adopted, in a very extensive degree, a practice which before had been found convenient on a smaller scale. So long as the acceptors or drawers could either procure money to pay these bills, or had credit enough with the holder to have them renewed, the subject of these fictitious indorsements never came in question. But, when the parties could no longer support their credit, and a commission of bankrupt became necessary, the other creditors felt it their interest to resist the claims of the holders of these bills; and insisted that they should not be admitted to prove their debts, because they could not comply with the general rule of law requiring proof of the hand-writing of the first indorsor. The question came before the chancellor by petition. He directed trials at law, and several were had; three against the acceptor in the King's Bench, and one against the drawer in the Common Pleas, though not all expressly by that direction. See *Tatlock* v. *Harris*, 3 *Term Rep.* 174. *Vere* v. *Lewis*, 3 *Term Rep.* 183. *Minet et al.* v. *Gibson et al.* 3 *Term Rep.* 483. 1 *H. Black. Rep.* 569. *Collis* v. *Emmet*, 1 *H. Black. Rep.* 313. From the decisions on these cases, the principle of which was affirmed in the house of lords, and which have settled that such bills are to be considered as payable to *bearer*, (see *ante*, 2. of this division V.) it follows, that proof of the *acceptor's hand only*, is sufficient to entitle the holder to recover on the bill; and in the case of *Tatlock* v. *Harris*, where a bill was drawn by the defendant and others on the defendant, it was determined that a *bonâ fide* holder for a valuable consideration might recover the amount against the acceptor in an action for *money paid*, or money *had and received*.

[The principal case above alluded to, as affirmed in the house of lords, is that of *Minet et al.* v. *Gibson et al.* already so often mentioned. It is better known by the name of *Gibson and Johnson* v. *Minet and Fector*; and the opinions of the judges in the house of lords, are very fully and accurately reported in 1 *H. Black. Rep.* 561. 1 *Bro. P. C.* 48. The effect of the determination, as there stated, is as follows:

If a bill of exchange be drawn in favour of a *fictitious payee*, with the *knowledge*, as well of the *acceptor* as the drawer; and the name of such payee be indorsed on it by the drawer, *with the knowledge of the acceptor*, which fictitious indorsement purports to be to the drawer

himself or his order; and then the drawer indorses the bill to an innocent indorsee for a valuable consideration, and afterwards the bill is accepted; *but it does not appear that there was an intent to defraud* any particular person; such innocent indorsee for a valuable consideration may recover against the acceptor, as on a bill payable to bearer. Perhaps also, in such case, the innocent indorsee might recover against the acceptor, as on a bill payable *to the order of the drawee*; or on a count stating the special circumstances.

Other cases, *Master et al.* v. *Gibson et al.* and *Hunter* v. *Gibson et al.* were afterwards brought before the house of lords, (*June*, 1793,) on demurrers to evidence; on which the judges gave their opinion, that it was not competent to the defendants to demur; and that on the record, as stated, no judgment could be given. See *Bro. P. C.* A *venire de novo* was accordingly awarded, and a new trial had in *Hunter* v. *Gibson*, in which a bill of exceptions to evidence was tendered; on this the court of *K. B.* gave judgment for plaintiff, and that judgment was affirmed in *Dom. Proc.* See *Bro. P. C.* tit. *Prom. Notes*, *ca.* 2, 3. The whole disclosed a system of bill-negotiation to the amount of a *million a year*, on fictitious credit, which ended in the bankruptcy of many; but which had at least the good effect of showing, that the obligations of *law*, are not so easily eluded, as those of honour and conscience.]

In an action by an indorsee against an indorsor, it is not necessary to prove either the hand of the drawer or of the acceptor, or of any indorsor, before him against whom the action is brought; every indorsor being, with respect to subsequent indorsees or holders, a new drawer. 1 Ld. *Raym.* 174. *Stra.* 444. 2 *Burr.* 675. Where an action is by one indorsor who has paid the money, proof must be given of the payment. 1 Ld. *Raym.* 743.

An indorsor on a note, who has received money from the drawer to take it up, is a competent witness for the drawer, in an action against him by the indorsor, to prove that he had satisfied the note; being either liable to the plaintiff on the note, if the action were defeated, or to the defendant for money had and received, if the action succeeded. And his being also liable in the latter case to compensate the defendant for the costs incurred in the action by such non-payment makes no difference. *Birt* v. *Kershaw*, 2 *East*, 458.

In an action by the *drawer* against the acceptor, where the bill has been paid away and returned, it is necessary to prove the hand-writing of the latter, demand of payment from him, and refusal, the return of the bill and payment by the plaintiff. 10 *Mod.* 36, 37. 1 *Wils.* 185. See *ante*, 1. of this division V.

In an action on the case by the *acceptor* against the drawer, the plaintiff must prove the hand-writing of the defendant, and payment of the money by himself; or something equivalent, as his being in prison on execution. 3 *Wils.* 18.

Where a bill is accepted, or a bill or note is drawn or indorsed by one of two or more partners, on the partnership account, proof of the signature of the partner accepting, drawing, or indorsing, is sufficient to bind all the rest. 1 *Salk.* 126. 1 Ld. *Raym.* 175. See *Carvick* v. *Vickery*, *Doug.* 653.

Where a servant has a general authority to draw, accept or indorse bills or notes, proof of his signature is sufficient against the master; but his authority must be proved, as that it was a general custom for him to do so, &c. See *Comb.* 450. 12 *Mod.* 346.

An action on a bill of exchange being by an executor, and upon a debt laid to be due to testator, it was held necessary to prove that the acceptance was in the testator's life-time. 12 *Mod.* 447.

Where the defendant suffers judgment by default, and the plaintiff executes a writ of inquiry, it is sufficient for the latter to *produce* the note or bill without any proof of the defendant's hand. See 2 *Stra.* 1149. *Barnes*, 233, 234. 2 *Black. Rep.* 748. 3 *Wils.* 155. and finally. 3 *Term Rep.* 301. *Green* v. *Hearne;* in which the court said, that by suffering judgment to go by default, the defendant had admitted the cause of action to the amount of the bill, because that was set out on the record; and the only reason for producing it to the jury on executing the writ of inquiry, was to see whether any part of it had been paid. And now it seems, on such judgment, a writ of inquiry is not necessary; for the court on application by the plaintiff, will, if no good reason be shown to the contrary, refer it to the proper officer, to ascertain the damages and costs, and calculate the interest. Ruled *Anon. B. R. Hil.* 26 *Geo.* III. *Bailey*, 67. *Rashleigh* v. *Salmon*, *H. Black. Rep. C. P.* 252.

4. Besides the different subjects of *defence*, which may be collected from the whole of the general principles here so fully entered into, the most usual are those which arise either from the total want of consideration, or from the illegality of the consideration for which the bill or note was given. See this *Dict.* tit. *Consideration.*

In general no advantage can be taken of the illegality of the consideration, but as between the persons immediately concerned in the transaction; any subsequent holder of the bill or note, for a fair consideration, cannot be affected by it. But there are cases in which it has been determined, that, by the construction of certain statutes, even the innocent indorsee shall not recover against the acceptor of the bill, or drawer of the note. As on stat. 9 *Ann. c.* 14. § 1. which *absolutely invalidates* notes, bills, &c. given for money won at play. 2 *Stra.* 1155. So on stat. 12 *Ann. st.* 2. *c.* 16. § 1. as to securities on usurious contracts. *Lowe* v. *Waller*, *Doug.* 736. And reasoning by analogy, on stat. 5 *Geo.* II. *c.* 30. § 11. against notes given by a bankrupt to procure his certificate, see this *Dict.* tit. *Bankrupt.*

It has however been repeatedly ruled at *nisi prius*, that wherever it appears that a bill or note has been indorsed over, *after it is due*, which is out of the usual course of trade, that circumstance alone throws such a suspicion on it, that the indorsee must take it on the credit of the indorsor, and must stand in the situation of the person to whom it was payable. See 3 *Term Rep.* 80. 83.

VI. See *ante*, III. and the general principles, already exemplified.

If a bank bill payable to *A. B.* or bearer be lost, and it is found by a stranger, payment to him would indemnify the bank; yet *A. B.* may have trover against the finder, though not against his assignee, for valuable consideration, which creates a property. 3 *Salk.* 71.

If the possessor of a bill by any accident loses it, he must cause intimation to be made by a *notary public* before witnesses, that the bill is lost or mislaid, requiring that payment be not made of the same to any person without his privity. And by stat. 9 and 10 *Wm.* III. *c.* 17. if any inland bill of exchange for five pounds or upwards, shall be lost, the drawer of the bill shall give another bill of the same tenor, security being given to indemnify him in case the bill so lost be found again.

If a bill lost by the possessor should afterwards come into the possession of any person paying a full and valuable consideration for it, without knowledge of its having been lost, the drawer (and acceptor, if the bill was accepted) must pay it when due to such fair possessor, so that the provision of the *statute* may, in many cases, be useless to the loser of the bill. But against the person who finds the bill, the real owner may maintain an action of trover. 1 *Salk.* 126. 1 Ld. *Raym.* 738. See *Master* v. *Miller*, 4 *Term Rep.* 320.

Stealing of bills of exchange, notes, &c. is felony in the same degree, as if the offender had robbed the owner of so much money, &c. And the forging bills of exchange, or notes for money, indorsements, &c. is felony by stat. 2 *Geo.* II. *c.* 25. 9 *Geo.* II. *c.* 18. And *vide* stat. 31 *Geo.* II. *c.* 22. § 78.

By stat. 43 *Geo.* III. *c.* 139. persons forging, &c. foreign bills of exchange, &c. or uttering the same, guilty of felony; punished by fourteen years transportation. § 1.

No person shall engrave plates for foreign bills of exchange, &c. nor print them, &c. without written authority. Penalty misdemeanor, punished by imprisonment, fine, &c. and for the second offence by fourteen years transportation. *Idem.* § 2.

*** For the new and additional duties imposed on bills of exchange, &c. see 44 *Geo.* III. *c.* 98.

There are also BILLS OF CREDIT between merchants, of which the following is a form:

THIS present writing *witnesseth*, *That I*, A. B. *of* London, *merchant*, *do undertake*, *to and with* C. D. *of*, &c. *merchant*, *his executors and administrators*, *that if he the said* C. D. *do deliver*, *or cause to be delivered unto* E. F. *of*, &c. *or to his use*, *any sum or sums of money*, *amounting to the sum of*, &c. *of lawful* British *money*, *and shall take a bill under the hand and seal of the said* E. F. *confessing and showing the certainty thereof; that then I, my executors or administrators, having the same* bill *delivered to me or them*, *shall and will immediately*, *upon the receipt of the same*, *pay*, *or cause to be paid*, *unto the said* C. D. *his executors or assigns*, *all such sums of money as shall be contained in the said* bill, *at*, &c. *For which payment*, *in manner and form aforesaid*, *I bind myself*, *my executors*, *administrators and assigns*, *by these presents.* In witness, &c.

BILL OF LADING, A memorandum signed by masters of ships, acknowledging the receipt of the merchants' goods, of which there usually are three parts, one kept by the consignor, one sent to the consignee, and one kept by the captain. See tit. *Factor*, *Merchant.*

BILL OF MIDDLESEX, see tit. *Process.*

BILL OF RIGHTS. The statute 1 *Wm. & M. stat.* 2. *cap.* 2. is so called; as declaring the true *rights* of *British* subjects. See tit. *Liberty*, where this important act is stated at large.

BILL OF SALE, Is a solemn contract under seal, whereby a man passes the right or interest that he hath in goods and chattels; for if a man promises or gives any chattels without valuable consideration, or without delivering possession, this doth not alter the property, because it is *nudum pactum*, *unde non oritur actio*; but if a man sells goods by deed under seal, duly executed, this alters the property between the parties, though there be no consideration, or no delivery

of possession; because a man is estopped to deny his own deed, or affirm any thing contrary to the manifest solemnity of contracting. *Yelv.* 196. *Cro. Jac.* 270. 1 *Brown*, 111. 6 *Co.* 18.

But what is chiefly to be considered under this head, is the statute of 13 *Eliz. cap.* 5. by which it is enacted, "That all fraudulent conveyances of lands, &c. goods and chattels, to avoid the debt or duty of another, shall (as against the party only whose debt or duty is so endeavoured to be avoided) be utterly void, except grants made *bonâ fide*, and on a *good* (which is construed a *valuable*) *consideration*."

A. being indebted to *B.* in 400*l.* and to *C.* in 20*l.* *C.* brings debt against him, and, pending the writ, *A.* being possessed of goods and chattels to the value of 300*l.* makes a secret conveyance of them all, without exception, to *B.* in satisfaction of his debt; but, notwithstanding, continues in possession of them, and sells some of them, and others of them, being sheep, he sets his mark on: and resolved, that it was a fraudulent gift and sale within the aforesaid statute, and shall not prevent *C.* of his execution for his just debt; for though such sale hath one of the qualifications required by the statute, being made to a creditor for his just debt, and consequently on a valuable consideration; yet it wants the other; for the owner's continuing in possession, is a fixed and undoubted character of a fraudulent conveyance, because the possession is the only *indicium* of the property of a chattel, and therefore this sale is not made *bonâ fide*. 3 *Co.* 80. *Mo.* 638. 2 *Bulst.* 226.

As the owner's continuing in possession of goods after his bill of sale of them, is an undoubted badge of a fraudulent conveyance, because the possession is the only *indicium* of the property of a chattel, which is a thing unfixed and transitory; so there are other marks and characters of fraud; as a general conveyance of them all without any exception; for it is hardly to be presumed that a man will strip himself entirely of all his personal property, not excepting his bedding and wearing apparel, unless there was some secret correspondence and good understanding settled between him and the vendee, for a private occupancy of all, or some part of the goods for his support; also a secret manner of transacting such bill of sale, and unusual clauses in it: as that it is made honestly, truly, and *bonâ fide*, are marks of fraud and collusion; for such an artful and forced dress and appearance give a suspicion and jealousy of some defect varnished over with it. 3 *Co.* 81. *Mo.* 638.

If goods continue in possession of the vendor after a bill of sale of them, though there is a clause in the bill that he shall account annually with the vendee for them, yet it is a fraud: since, if such colouring were admitted, it would be the easiest thing in the world to avoid the provisions and cautions of the aforesaid act. *Mo.* 638.

If *A.* makes a bill of sale of all his goods, in consideration of blood and natural affection, to his son, or one of his relations, it is a void conveyance in respect of creditors; for the considerations of blood, &c. which are made the motives of this gift, are esteemed in their nature inferior to valuable considerations, which are necessarily required in such sales, by 13 *Eliz. cap.* 5.

If *A.* makes a bill of sale to *B.* a creditor, and afterwards to *C.* another creditor, and delivers possession at the time of sale to neither; afterwards *C.* gets possession of them, and *B.* takes them out of his possession, *C.* cannot maintain trespass, because, though the first bill of sale is fraudulent against creditors, and so is the second, yet they

both bind *A.* As therefore *B.'s* is the elder title, the naked possession of *C.* ought not to prevail against it.

See further on this subject tit. *Fraud.* See also tit. *Bankrupt* II.

BILL OF STORE, A kind of license granted at the *custom-house* to merchants, to carry such stores and provisions as are necessary for their voyage custom-free. A *bill of sufferance* is a license granted to a merchant, to suffer him to trade from one *English* port to another without paying custom. See tit. *Navigation Acts.*

BILLETS OF GOLD, Fr. *billot.*] Are wedges or ingots of gold, mentioned in the statute 27 *Edw.* III. *c.* 27.

BILLET WOOD, Is small wood for fuel, which must be three foot and four inches long, and seven inches and a half in compass, &c. Justices of peace shall inquire, by the oaths of six men, of the assise of *billet*, and being under size, it is to be forfeited to the poor. Stat. 43 *Eliz. c.* 14. *Vide* 9 *Ann. c.* 15. 10 *Ann. c.* 6. See *Fuel.* 7 *Edw.* VI. *c.* 7.

BILLINGSGATE market to be kept every day, and toll is appointed by statute: all persons buying *fish* in this market may sell the same in any other market by retail; but none but fishmongers shall sell them in shops: if any person shall buy any quantity of fish at *Billingsgate* for others, or any fishmonger shall ingross the market, they incur a penalty of 20*l.* And fish imported by foreigners shall be forfeited, and the vessel, &c. See 10 and 11 *Wm.* III. *c.* 24. 1 *Geo.* I. *stat.* 2. *c.* 18. § 1. 36 *Geo.* III. *c.* 118. § 1. &c. *Vide Fish* and *Fishermen.*

BILLUS, A bill, stick or staff, which in former times was the only weapon for servants. It was long in use for watchmen, and we are told is still carried by those at *Litchfield.* See *Steevens's Shakspeare.*

BIOTHANETUS, One who deserves to come to an untimely end. *Odericus Vitalis*, writing of the death of *William Rufus*, who was shot by *Walter Tyrrel*, tells us, that the bishops, considering his wicked life and bad *exit*, adjudged him *ecclesiasticâ veluti*, biothanetum *absolutione indignum. Lib.* 10. *p.* 782.

BIRRETTUM, A thin cap fitted close to the shape of the head: and is also used for the cap or coif of a judge, or serjeant at law. *Spelm.*

BIRTHS, BURIALS and MARRIAGES, &c. By statute, a duty was granted on *births* and *burials* of persons, from 50*l.* a duke, &c. down to 10*s.* and 2*s.* And the like on *marriages*; also *bachelors*, above twenty-five years of age, were to pay 1*s.* yearly. Stat. 6 and 7 *Wm.* III. *c.* 6. Exp. as to the duties. See tit. *Stamps*, *Taxes.*

BISACUTUS, An iron weapon double-edged, so as to cut on both sides. *Fleta*, *lib.* 1. *c.* 33.

BISANTIUM, *besantine*, or *besant*, An ancient coin, first coined by the western emperors at *Bizantium* or *Constantinople.* It was of two sorts, gold and silver; both which were current in *England. Chaucer* represents the gold *besantine* to have been equivalent to a ducat; and the silver *besantine* was computed generally at two shillings. In some old leases of land there have been reserved, by way of rent, *unum* bisantium, *vel duos solidos.*

BI-SCOT, At a session of *sewers* held at *Wigenhale*, in *Norfolk*, 9 *Edw.* III. it was decreed, that if any should not repair his proportion of the banks, ditches and causeys by a day assigned, 12*d.* for every perch unrepaired should be levied upon him, which is called a *bilaw*: and if he should not, by a second day given him, accomplish the

same, then he should pay for every perch 2*s.* which is called *bi-scot. Hist. of Imbanking and Draining, f.* 254.

BISHOPS and ARCHBISHOPS. A Bishop (*Episcopus*) is the chief of the clergy in his *diocese*, and is the archbishop's suffragan or assistant.

An Archbishop (*Archiepiscopus*) is the chief of the clergy in his *province*, and is that spiritual secular person who hath supreme power under the king in all ecclesiastical causes: and the manner of his creation and consecration, by an *archbishop* and two other bishops, &c. is regulated by stat. 25 *Hen.* VIII. *c.* 20. (See *post*, *Bishop.*) An *archbishop* is said to be inthroned, when a bishop is said to be installed; and there are four things to complete a bishop or *archbishop*, as well as a parson: first, election, which resembles presentation; the next is confirmation, and this resembles admission; next, consecration which resembles institution; and the last is installation, resembled to induction. 3 *Salk.* 72. In ancient times the *archbishop* was bishop over all *England*, as *Austin* was, who is said to be the first *archbishop* here; but, before the *Saxon* conquest, the *Britons* had only one bishop, and not any *archbishop*. 1 *Roll. Rep.* 328. 2 *Roll.* 440.

But at this day the ecclesiastical state of *England* and *Wales* is divided into two provinces or archbishopricks, to wit, *Canterbury* and *York*. Each archbishop hath within his province bishops of several dioceses. The archbishop of *Canterbury* hath under him, within his province, of ancient foundations, *Rochester*, *London*, *Winchester*, *Norwich*, *Lincoln*, *Ely*, *Chichester*, *Salisbury*, *Exeter*, *Bath and Wells*, *Worcester*, *Coventry and Litchfield*, *Hereford*, *Llandaff*, *St. David's*, *Bangor*, and *St. Asaph*; and four founded by King *Henry* VIII. erected out of the ruins of dissolved monasteries, *viz. Gloucester*, *Bristol*, *Peterborough* and *Oxford*. The archbishop of *York* hath under him four, *viz.* the bishop of the county palatine of *Chester*, newly erected by King *Henry* VIII. and annexed by him to the archbishoprick of *York*; the county palatine of *Durham*, *Carlisle* and the *Isle of Man*, annexed to the province of *York* by King *Henry* VIII. but a greater number this archbishop anciently had, which time hath taken from him. *Co. Lit.* 94.

Westminster was one of the new bishopricks created by *Henry* VIII. out of the revenues of the dissolved monasteries. 2 *Burn. E. L.* 78. *Thomas Thirlby* was the only bishop that ever filled that see. He surrendered the bishoprick to *Edw.* VI. *A. D.* 1550, 30th *March*; and, on the same day, it was dissolved, and added again to the bishoprick of *London*. *Rym. Fœd.* 15. *p.* 222. Queen *Mary* afterwards filled the church with *Benedictine* monks, and *Eliz.* by authority of parliament, turned it into a collegiate church, subject to a dean. The *archbishop* of *Canterbury* is now styled *metropolitanus et primus totius Angliæ*; and the *archbishop* of *York* styled *primus et metropolitanus Angliæ*. They are called *archbishops* in respect of the bishops under them; and metropolitans, because they were consecrated at first in the metropolis of the province. 4 *Inst.* 94. Both the *archbishops* have distinct provinces, wherein they have suffragan bishops of several dioceses, with jurisdiction under them. The archbishop hath also his own *diocese*, wherein he exercises episcopal jurisdiction, as in his *province* he exercises archiepiscopal; thus having two concurrent jurisdictions one as ordinary, or the bishop himself within his diocese; the other as superintendant throughout his whole province, of all ecclesiastical matters, to correct and supply the defects of other bishops.

The archbishop is entitled to present, by lapse, to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. (See tit. *Advowson.*) And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own, to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over, by deed, to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose; which is therefore called his *option*, which options are only binding on the bishop himself who grants them, and not on his successors. The prerogative itself seems to be derived from the legatine power formerly annexed, by the popes, to the metropolitan of *Canterbury*.

The *archbishop* of *Canterbury* hath the privilege to crown all the kings of *England*; and to have prelates to be his officers; as for instance, the bishop of *London* is his provincial dean; the bishop of *Winchester* his chancellor; the bishop of *Lincoln* his vice-chancellor; the bishop *of Salisbury* his precentor; the bishop of *Worcester* his chaplain, &c. It is the right of the *archbishop* to call the bishops and clergy of his province to convocation, upon the king's writ: he hath a jurisdiction in cases of appeal, where there is a supposed default of justice in the ordinary; and hath a standing jurisdiction over his suffragans: he confirms the election of bishops, and afterwards consecrates them, &c. And he may appoint coadjutors to a bishop that is grown infirm. He may confer degrees of all kinds; and censure and excommunicate, suspend or depose, for any just cause, &c. 2 *Roll. Abr.* 223. And he hath power to grant dispensations in any case, formerly granted by the see of *Rome*, not contrary to the law of God: but if the case is new and extraordinary, the king and his council are to be consulted. Stats. 25 *Hen.* VIII. *c.* 21. 28 *Hen.* VIII. *c.* 16. § 6. This dispensing power is the foundation of the archbishop's granting special licenses, to marry at any place or time; to hold two livings, and the like; and in this also is founded the right he exercises of conferring degrees in prejudice of the two universities. He may retain eight chaplains; and during the vacancy of any see, he is guardian of the spiritualties. Stats. 21 *Hen.* VIII. *c.* 13. 25 *Hen.* VIII. *c.* 21. 28 *Hen.* VIII. *c.* 16.

The archbishop of *Canterbury* hath the precedency of all the clergy; next to him the archbishop of *York*; next to him the bishop of *London*; next to him the bishop of *Durham*; next to him the bishop of *Winchester*; and then all the other bishops of both provinces, after the seniority of their consecration; but if any of them be a privy councillor, he shall take place next after the bishop of *Durham*. *Co. Lit.* 94. 1 *Ought. Ord. Jud.* 486.

The first archbishop of *York* that we read of, was *Paulinus*, who, by pope *Gregory's* appointment, was made archbishop there, about the year of our Lord 622. *Godol.* 14.

The *archbishop* of *York* hath the privilege to crown the queen-consort, and to be her perpetual chaplain.

The *archbishop* of *Canterbury* is the first peer of the realm, and hath precedence, not only before all the other clergy, but also (next and immediately after the blood royal) before all the nobility of the realm: and as he hath the precedence of all the nobility, so also of all the great officers of state. *Godol.* 13.

The *archbishop* of *York* hath the precedence over all dukes, not being of the blood royal; as also before all the great officers of state, except the lord chancellor. *Godol.* 14.

A BISHOP is elected by the king's *congé d'eslire*, or license to elect the person named by the king, directed to the dean and chapter; and if they fail to make election in twelve days, they incur the penalty of a *præmunire*, and the king may nominate whom he pleases by letters patent. Stat. 25 *Hen.* VIII. *c.* 20. This was to avoid the power of the see of *Rome*. This election or nomination, if it be of a bishop, must be signified by the king's letters patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest and consecrate the person so elected, which they are bound to perform immediately. After which the bishop elect shall sue to the king for his temporalties, shall make oath to the king and none other, and shall take restitution for his secular possessions out of the king's hands only. Archbishops and bishops refusing to confirm such election, incur the penalties of a *præmunire*. On confirmation, a bishop hath jurisdiction in his diocese; but he hath not a right to his temporalties till consecration. The consecration of bishops, &c. is confirmed by act of parliament.

It is directed in the form of consecrating bishops, that a bishop, when consecrated, must be full thirty years of age.

It is held a bishop hath three powers; 1st. His power of ordination, which is gained on his consecration, and not before; and thereby he may confer orders, &c. in any place throughout the world. 2. His power of jurisdiction, which is limited, and confined to his see. 3. His power of administration and government of the revenues; both which last powers he gains by his confirmation: and some are of opinion, that the bishop's jurisdiction, as to ministerial acts, commences on his election. *Palm.* 473—475.

The king may not seize into his hands the temporalties of bishops, but upon just cause, and not for a contempt, which is only finable. See tit. *Temporalties*. Bishops are allowed four years for payment of their first fruits, by stat. 6 *Ann. c.* 27. Every bishop may retain four chaplains. *Vide* stat. 21 *Hen.* VIII. *c.* 13. § 16. 8 *Eliz. c.* 1.

A bishop hath his consistory court, to hear ecclesiastical causes; and is to visit the clergy, &c. He consecrates churches, ordains, admits and institutes priests; confirms, suspends, excommunicates, grants licenses for marriage, makes probate of wills, &c. *Co. Lit.* 96. 2 *Roll. Abr.* 230. He hath his archdeacon, dean and chapter, chancellor, and vicar-general, to assist him; may grant leases for three lives, or twenty-one years, of land usually letten, reserving the accustomed yearly rents. Stats. 32 *Hen.* VIII. *c.* 28. 1 *Eliz. c.* 19. § 5. See this *Dict.* tit. *Leases*.

The chancellor to the bishop is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some university. Stat. 37 *Hen.* VIII. *c.* 17.

By stat. 24 *Geo.* III. *sess.* 2. *c.* 35. the bishop of *London*, or any bishop by him appointed, may admit to the order of deacon or priest, subjects of countries out of his majesty's dominions, without requiring the oath of obedience. But no person shall be thereby enabled to exercise such offices within his majesty's dominions.

By stat. 26 *Geo.* III. *c.* 84. the archbishops of *Canterbury* or *York*, with such other bishops as they shall call to their assistance, may consecrate subjects of countries out of his majesty's dominions to be bishops, without requiring the usual oaths; pursuing the forms prescribed by the act. But no such bishops or their successors, or persons ordained by them, shall exercise their functions within his majesty's dominions.

The right of trial by the lords of parliament, as their peers, it is said, does not extend to bishops; who, though they are lords of parliament, and sit there by virtue of their baronies, which they hold *jure ecclesiæ*, yet are not ennobled in blood, and consequently not peers with the nobility. 3 *Inst.* 30, 31. see 1 *Comm.* 401. 4 *Comm.* 264. and this *Dict.* tit. *Parliament.*

Archbishoprick and *bishoprick* may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior. Therefore a bishop must resign to his metropolitan, but the archbishop can resign to none but the king himself. 1 *Comm.* 382.

The following are some of the popular distinctions between archbishops and bishops. The archbishops have the style and title of *Grace*, and *Most Reverend Father in God by Divine Providence.* The bishops, those of *Lord*, and *Right Reverend Father in God by Divine Permission.* Archbishops are *inthroned*; bishops *installed.*

Mr. *Christian*, in his notes on 1 *Comm.* 380. says, that the supposed answer of a bishop on his consecration, "*Nolo episcopari*," is a vulgar error. See tit. *Parson*, *Advowson*, *Session.*

BISHOPRICK, The diocese of a bishop.

BISSA, Fr. *biche*, *cerva major*, A hind. *Mon. Angl. vol.* 1. *fol.* 648.

BISSEXTILE, *bissextilis.*] Leap year, so called because the sixth day before the calends of *March* is twice reckoned, making an additional day in the month of *February*; so that the bissextile year hath one day more than the others, and happens every fourth year. This intercalation of a day was first invented by *Julius Cæsar*, to make the year agree with the course of the sun. And, to prevent all doubt and ambiguity that might arise thereupon, it is enacted by the statute *de anno bissextili*, 21 *Hen.* III. that the day increasing in the leap-year, and the day next before, shall be accounted but one day. *Brit.* 209. *Dyer*, 17. See tit. *Year.*

BISUS, *bisius*, *mica* bisa, *panis* bisius, Fr. *pain bis.*] Brown bread, a brown loaf. *Cowel.*

BLACK ACT, or WALTHAM BLACK ACT. The stat. 9 *Geo.* I. *cap.* 22. is so called, having been occasioned by some devastations committed near *Waltham*, in *Hampshire*, by persons in disguise, or with their faces *blacked.* By this act, persons hunting armed and disguised, and killing or stealing deer, or robbing warrens, or stealing fish out of any river, &c. or any persons unlawfully hunting in his majesty's forests, &c. or breaking down the head of any fish-pond, or killing, &c. of cattle, or cutting down trees, or setting fire to house, barn or wood, or shooting at any person, or sending anonymous letters, or letters signed with fictitious names, demanding money, &c. or rescuing such offenders, or not surrendering, are guilty of felony without benefit of clergy. This act is made perpetual by 31 *Geo.* II. *c.* 42. And see further, stat. 6 *Geo.* II. *c.* 37. 27 *Geo.* II. *c.* 15.

See also stat. 16 *Geo.* III. *c.* 30. against deer-stealers; the milder punishment inflicted by which act has been thought a virtual repeal

of the punishment inflicted by the Black Act above recited. *Leach's Hawk. P. C.* 1. *c.* 49. § 7. and this *Dict.* tit. *Forest, Game, Deer-stealing.*

BLACK-BOOK, Is a book lying in the *Exchequer.* See *State Annals*, 154.

BLACK LEAD. By stat. 25 *Geo.* II. *c.* 10. entering mines of black lead, with intent to steal, is made felony; and by the same act, offenders committed or transported for entering mines of black lead with intent to steal, escaping or breaking prison, or returning from transportation, are excluded from clergy. By various acts a duty is imposed on foreign black lead imported.

BLACK MAIL, Fr. *maille*, a link of mail, or small piece of metal or money.] Signifies in the north of *England*, in the counties of *Cumberland*, *Northumberland*, &c. a certain rent of money, corn or other thing, anciently paid to persons inhabiting upon or near the borders, being men of name and power, allied with certain robbers within the said counties, to be freed and protected from the devastations of those robbers. But by stat. 43 *Eliz. cap.* 13. to take any such money or contribution, called *black-mail*, to secure goods from rapine, is made a capital felony, as well as the offences such contribution was meant to guard against.

It is also used for rents reserved in work, grain or baser money; which were called *reditus nigri*, in contradistinction to the *blanch farms*, *reditus albi*. See tit. *Alba Firma*, and *Blanch Firmes*.

BLACK ROD. The gentleman *usher of the black rod* is chief gentleman usher to the king; he belongs to the garter, and hath his name from the *black rod*, on the top whereof sits a lion in gold, which he carrieth in his hand. He is called, in the *Black Book*, *fol.* 255. *Lator virgæ nigræ, et hostiarius*; and in other places *virgæ bajulus*. His duty is *ad portandum virgam coram domino rege ad festum sancti* Georgii *infra castrum de* Windsore: and he hath the keeping of the chapter-house door, when a chapter of the order of the garter is sitting; and, in the time of parliament, he attends on the house of peers. His habit is like to that of the register of the order, and garter king at arms; but this he wears only at the solemn times of the festival of *St. George*, and on the holding of chapters. The *black rod* he bears is instead of a mace, and hath the same authority; and this officer hath anciently been made by letters patent under the great seal, he having great power; for to his custody all peers, called in question for any crime, are first committed.

BLACKS OF WALTHAM. See tit. *Black Act.*

BLACK WARD, is when a vassal holds ward of the king; and a sub-vassal holds ward of that vassal. *Scotch Dict.*

BLACKWELL HALL. The public market of *Blackwell Hall*, *London*, is to be kept every *Thursday*, *Friday* and *Saturday*, at certain hours; and the hall-keepers not to admit any buying or selling of *woollen cloth* at the said hall upon any other days or hours, on penalty of 100*l.* Factors selling cloth out of the market shall forfeit 5*l.* &c. Registers of all the cloths bought and sold are to be weekly kept: and buyers of cloth, otherwise than for ready money, shall give notes to the *sellers* for the money payable; and factors are to transmit such notes to the *owners* in twelve days, or be liable to forfeit double value, &c. Stat. 8 and 9 *Wm.* III. *cap.* 9. See also stat. 4 and 5 *P. and M. c.* 5. § 26. 39 *Eliz. c.* 20. § 12. 1 *Geo.* I. *c.* 15.

BLADARIUS, A corn-monger, meal-man, or corn-chandler. It is used in our records for such a retailer of corn. *Pat.* 1. *Edw.* III. *par.* 3. *m.* 13. See tit. *Clothiers.*

BLADE, *bladum.*] In the *Saxon* signifies generally fruit, corn, hemp, flax, herbs, &c. *Will. de Mohun* released to his brother all the manor of *T*—. *Salvo instauro suo et* blado, &c. excepting his stock and corn on the ground. Hence *bladier* is taken for an ingrosser of corn or grain.

BLANCH FIRMES. In ancient times the crown-rents were many times reserved *in libris albis*, or *blanch firmes*: in which case the buyer was holden *de albare firmam, viz.* his base money or coin, worse than standard, was molten down in the *Exchequer*, and reduced to the fineness of standard silver; or instead thereof, he paid to the king 12*d.* in the pound by way of addition. *Lowndes's Essay upon Coins, p.* 5.

BLANDFORD, An act was passed for rebuilding the town of *Blandford* in the county of *Dorset*, burnt down by fire in the year 1731. Stat. 5 *Geo.* II. *c.* 16.

BLANHORNUM, A little bell. *Leg. Adelstan. c.* 8.

BLANK BAR, Is used for the same with what we call a *common bar*, and is the name of a plea *in bar*, which, in an action of trespass, is put in to oblige the plaintiff to assign the certain place where the trespass was committed. 2 *Cro.* 594.

BLANK BOND, Is equivalent to an assignation, and must be intimated. *Scotch Dict.*

BLANKS, Were a kind of white money coined by *Hen.* V. in those parts of *France* which was then subject to *England*, the value whereof was 8*d.* *Stow's Annals, p.* 586. These were forbidden to be current in this realm. 2 *Hen.* VI. *c.* 9. See tit. *Alba Firma.*

BLANKS, In judicial proceedings, certain void spaces sometimes left by mistake. A blank (supposing something material wanting) in a declaration abates the same. 4 *Edw.* IV. 14. 20 *Hen.* VI. 18. And such a blank is a good cause of demurrer. *Blanks* in the imparlance-roll aided *after verdict* for the plaintiff. *Hob.* 76. *Parker* v. *Parker.*

BLASARIUS, Is a word used to signify an incendiary. *Blount.*

BLASPHEMY, *blasphemia.*] Is an injury offered to God, by denying that which is due and belonging to him, or attributing to him what is not agreeable to his nature. *Lindw. cap.* 1. And *blasphemies* of God, as denying his being or providence; and all contumelious reproaches of *Jesus Christ*, &c. are offences by the common law, punished by fine, imprisonment, pillory, &c. 1 *Hawk. P. C.* And by stat. 9 and 10 *Wm.* III. *c.* 32. if any one shall by writing, speaking, &c. deny any of the persons in the *Trinity* to be God; assert there are more Gods than one, &c. he shall be incapable of any office; and, for the second offence, be disabled to sue any action, to be executor, &c and suffer three years' imprisonment. Likewise, by stat. 3 *Jac.* I. *c.* 21. persons jestingly or profanely using the name of *God*, or of *Jesus Christ*, or of the *Holy Ghost*, or of the *Trinity*, in any stage-play, &c. incurs a penalty of 10*l.* See *Religion.*

BLE, Signifies sight, colour, &c. And *blee* is taken for corn: as *Boughton* under the *Blee*, &c.

BLENCH, BLENCH-HOLDING. See tit. *Alba Firma.*

BLENHEIM. See *Marlborough, Duke of.*

BLETA, Fr. *bleche.*] *Peat*, or combustible earth dug up and dried for burning. *Rot. Parl.* 35 *Edw.* I.

BLINKS, Boughs broken down from trees, and thrown in a way where deer are likely to pass.

BLISSOM, Corruptly called *blossom*, is when a ram goes to the ewe, from the *Teutonick Blets*, the bowels.

BLOATED FISH OR HERRING, Are those which are half dried. See tit. *Fishery*.

BLODEUS, Sax. *blod*.] Deep red colour ; from whence comes bloat and bloated, *viz*. sanguine and high-coloured, which, in *Kent*, is called a *blousing* colour ; and a *blouse* is there a red faced wench. The prior of *Burcester*, *A. D.* 1425, gave his liveries of this colour. *Paroch. Antiq*. 376.

BLOOD, *sanguis*.] Is regarded in descents of lands ; for a person is to be the next and most worthy of *blood* to inherit his ancestor's estate. *Co. Lit*. 13. See *Jenk. Cent*. 203. See tit. *Descent*, *Heir*.

BLOODWIT, or *bloudwit*, compounded of the Sax. *blod*, *i. e. sanguis* ; and *wyte*, old *English*, *misericordia*.] Is often used in ancient charters of liberties for an amercement for bloodshed. *Skene* writes it *bloudveit* ; and says *veit*, in *English*, is *injuria* ; and that *bloudveit* is an amerciament or *unlaw* (as the *Scotch* call it) for wrong or injury, as bloodshed is : for he that hath *bloudviet* granted him, hath free liberty to take all amerciaments of courts for effusion of blood. *Fleta* saith, *Quod significat quietantiam misericordiæ pro effusione sanguinis*. *Lib*. 1. *cap*. 47. And according to some writers, *blodwite* was a customary fine paid as a composition and atonement for shedding or drawing of blood ; for which the place was answerable, if the party was not discovered ; and therefore a privilege or exemption from this fine or penalty was granted by the king, or supreme lord, as a special favour. So king *Henry* II. granted to all tenants within the honour of *Willingford*, *Ut quieti sint de Hidagio et* blodewite, &c. *Paroch. Antiq*. 114.

BLOODY-HAND, Is one of the four kinds of circumstances by which an offender is supposed to have killed deer in the king's forest: and it is where a trespasser is apprehended in the forest, with his *hands* or other parts *bloody*, though he be not found chasing or hunting of the deer. *Manwood*. In *Scotland*, in such like crimes, they say taken in the fact, or with the *red hand*. See *Backberind*.

BLUBBER, Whale oil, before it is thoroughly boiled and brought to perfection. It is mentioned in stat. 12 *Car*. II. *c*. 18.

BOCK-HORD, or *book-hoard*, *librorum horreum*.] A place where books, evidences or writings are kept.

BOCKLAND, Sax. *quasi bookland*.] A possession or inheritance held by evidence in writing, See *LL. Allueredi*, *cap*. 36. *Bockland* signifies *deed land* or *charter land* ; and it commonly carried with it the absolute property of the *land* ; wherefore it was preserved in writing, and possessed by the *Thanes* or nobler sort, as *Prædium nobile*, *liberum et immune à servitiis vulgaribus et servilibus*, and was the same as *allodium*, descendible unto all the sons, according to the common course of nations and of nature, and therefore called *gavelkind* ; devisable only by will, and thereupon termed *Terræ Testamentalis*. *Spelm of Feuds*. This was one of the titles which the *English Saxons* had to their *lands*, and was always in writing : there was but one more, and that was *Folkland*, *i. e. Terra Popularis*, which passed from one to another without any writing. See *Squire* on the *Anglo Saxon Government*, and this *Dict*. tit. *Tenure*.

BOIA, Chains or fetters, properly what we call *bernicles*. *Hist. Elien. apud Whartoni Angl. Sax. part* 1. *p*. 618.

BOIS, Fr.] Wood, and *sub-bois*, underwood. See *Boscus*.

BOLHAGIUM, or *boldagium*, A little house or cottage. *Blount.*

BOLT. A *bolt* of silk or stuff, seems to have been a long narrow piece: in the accounts of the priory of *Burcester*. It is mentioned, *Paroch. Antiq. p.* 574.

BOLTING, A term of art used in our *Inns of Court*, whereby is intended a private arguing of cases. The manner of it at *Gray's Inn* is thus: an ancient and two barristers sit as judges, three students bring each a case, out of which the judges choose one to be argued, which done, the students first argue it, and after them the barristers. It is inferior to *mooting*, and may be derived from the Sax. *bolt*, a house, because done privately in the house for instruction. In *Lincoln's Inn*, *Mondays* and *Wednesdays* are the *bolting days*, in vacation time; and *Tuesdays* and *Thursdays* the *moot days*.

BONA FIDE. That we say is done *bonâ fide*, which is done really, with a *good faith*, without any fraud or deceit.

BONA GESTURA, Good abearing, or good behaviour. See *Good Behaviour*.

BONAGHT or *bonaghty*, Was an exaction in *Ireland*, imposed on the people at the will of the lord, for relief of the knights called *bonaghti*, who served in the wars. *Antiq. Hibern. p.* 60.

BONA NOTABILIA. See tit. *Executor* V. 3.

BONA PATRIA, An assise of countrymen, or good neighbours: it is sometimes called *assisa bonæ patriæ*, when twelve or more men are chosen out of any part of the county to pass upon an assise; otherwise called *juratores*, because they are to swear judicially in the presence of the party, &c. according to the practice of *Scotland*. *Skene*. See *Assisors*.

BONA PERITURA, Goods that are perishable. The stat. *Westm.* 1. 3 *Edw.* I. *cap.* 4. as to wrecks of the sea, ordains, that if the goods within the ship be *bona peritura*, such things as will not endure for a year and a day, the sheriff shall sell them, and deliver the money received to answer it. See this *Dict.* tit. *Wreck*.

BONCHA, A bunch, from the old Lat. *bonna*, or *bunna*, a rising bank, for the bounds of fields: and hence *bown* is used in *Norfolk*, for swelling or rising up in a bunch or tumour, &c.

BOND. A *Bond* or *Obligation*, is a deed whereby the *obligor* or person bound, obliges himself, his heirs, executors and administrators, to pay a certain sum of money to another (the *obligee*) at a day appointed.

I. *General rules as to the* nature *and* form *of this security.*
II. *Who may be obligors and obligees.*
III. *The ceremonies necessary to constitute a bond or obligation.*
IV. *Of the condition, and what shall be a performance or breach thereof.*
V. *Of the discharge and satisfaction of bonds*; 1. *by the act of the party*; *or*, 2. *by the act of law.*
VI. *Of actions and pleadings on bonds.*

I. If the bond be without a condition, it is called a single one, *simplex obligatio*; but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void or else shall remain in full force; as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee, with interest; which principal sum is usually one-half

of the penal sum specified on the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor while living, and after his death the obligation descends on his heir, who, (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a *direct*, yet a *collateral* charge upon the lands.

The condition may be either in the same deed, or in another, and sometimes it is included within, and sometimes indorsed upon the obligation: but it is commonly at the foot of the obligation. *Bro. Obl.* 67. A *memorandum* on the back of a *bond* may restrain the same by way of exception. *Moor*, 67.

This security is also called a *specialty*; the debt being therein particularly specified in writing, and the party's seal, acknowledging the debt or duty, and confirming the contract; rendering it a security of a higher nature than those entered into without the *solemnity* of a *seal*.

As to the assignment of bonds, see tit. *Assignment*.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive; or if it be uncertain or insensible, the condition alone is void, and the bond shall stand single, and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void; for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency. *Co. Lit.* 206. See *post*, IV. and tit. *Condition*.

On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law, but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought, *viz.* his principal, interest and expenses, in case the forfeiture accrued by non-payment of money borrowed, the damages sustained upon non-performance of covenants, and the like. And this practice having gained some footing in the courts of law, (see 2 *Keb.* 553. *Salk.* 596, 597. 6 *Mod.* 11. 60. 101.) the stat. 4 and 5 *Ann. c.* 16. at length enacted, in the same spirit of equity, that in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited, and suit commenced thereon, shall be a full satisfaction and discharge.

And this rule of compelling the party to do equity who seeks equity, seems to be the reason why an obligee shall have interest after he has entered up judgment; for though in strictness it may be accounted his own fault why he did not take out execution, and therefore not entitled to interest; yet, as by the judgment he is entitled to the penalty, it does not seem reasonable that he should be deprived of it, but upon paying him the principal and interest, which incurred as well before as after the entering up of the judgment. *Abr. Eq.* 92. 288.

The court of chancery will not generally carry the debt beyond the penalty of a bond. Yet where a plaintiff came to be relieved against such penalty, though it was decreed, it was on the payment of the principal money, interest and costs; and notwithstanding they ex-

ceeded the penalty, this was affirmed. 1 *Vern.* 350. 1 *Eq. Abr.* 92. 16 *Vin.* tit. *Penalty.* 3 *Comm.* 435. And where the condition of a bond is to perform a collateral act, damages may be recovered beyond the penalty, and the court of *K. B.* will not stay the proceedings on payment of the money into court. 2 *Term Rep.* 388. See *White* v. *Sealy*, *Doug.* 49. *semb. contra;* but the authority of which is much shaken by the case in 2 *Term Rep.* 388. where *Buller*, J. remarked, that there were several cases where the judgment had been carried beyond the penalty. In *Elliot* v. *Davis*, (*Bunb.* 23.) interest on a bond was decreed (*in Scac.*) to be paid, though it exceeded the penalty. See also *Collins* v. *Collins*, the case of an annuity, *Burr.* 820. *Holdip* v. *Otway*, 2 *Saund.* 106. *Dewall* v. *Price*, *Show. P. C.* 15.

FORM of a BOND or OBLIGATION, with condition for the payment of money.

KNOW all men by these presents, *That I*, David Edwards, *of* Lincoln's Inn, *in the county of* Middlesex, *esquire, am held and firmly bound to* Abraham Barker, *of* Dale Hall, *in the county of* Norfolk, *esquire, in the penal sum of ten thousand pounds, of lawful money of* Great Britain, *to be paid to the said* Abraham Barker, *or his certain attorney, executors, administrators or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors and administrators, firmly, by these presents, sealed with my seal. Dated the fourth day of* September, *in the forty-sixth year of the reign of our sovereign Lord* George *the Third, by the grace of God, of the United Kingdom of* Great Britain *and* Ireland *king, defender of the Faith, and so forth, and in the year of our Lord one thousand eight hundred and* ——.

The condition of this obligation is such, that if the above bounden *David Edwards*, his heirs, executors or administrators, do and shall well and truly pay, or cause to be paid unto the above-named *Abraham Barker*, his executors, administrators or assigns, the full sum of five thousand pounds of lawful money of *Great Britain*, with lawful interest for the same, on the fourth day of *March* next ensuing the date of the above written obligation, then this obligation shall be void, and of none effect, or else shall be and remain in full force and virtue.

Sealed and delivered, being first duly stamped, in the presence of *A. B.* } *David Edwards.* (L. S.)

For irregular forms of bonds and obligations, see 1 *Leon.* 25. 3 *Leon.* 299. *Cro. Jac.* 208. 607. *Bro.* tit. *Obligation*, &c. from whence, and other authorities, which the regularity of modern practice has rendered uninteresting, it appears that the courts always inclined to support the justice of the plaintiff's case, without much regard to mere errors in form, or arising from accident.

II. All persons who are enabled to contract, and whom the law supposes to have sufficient freedom and understanding for that purpose, may bind themselves in bonds and obligations. 5 *Co.* 119. 4 *Co.* 124. 1 *Roll. Abr.* 340.

But if a person is illegally restrained of his liberty, by being confined in a common gaol or elsewhere, and, during such restraint, en-

ters into a bond to the person who causes the restraint, the same may be avoided for *duress* of imprisonment. *Co. Lit.* 253. 2 *Inst.* 482. *Vide* tit. *Duress.*

So in respect to that power and authority which a husband has over his wife, the bond of a *feme covert* is *ipso facto* void, and shall neither bind her nor her husband. See tit. *Baron and Feme.*

So though an infant shall be liable for his necessaries, such as meat, drink, clothes, physic, schooling, &c. yet if he bind himself in an obligation, with a penalty for payment of any of those, the obligation is void. *Doct. and Stud.* 113. *Co. Lit.* 172. *Cro. Jac.* 494. 560. 1 *Sid.* 112. 1 *Salk.* 279. *Cro. Eliz.* 920. See tit. *Infants.*

Also though a person *non compos mentis* shall not be allowed to avoid his bond, by reason of insanity and distraction, yet may a privy in blood, as the heir, and privies in representation, as the executor and administrator, avoid such bonds; also if a lunatick, after office found, enters into a bond, it is merely void. 4 *Co.* 124. *Beverley's* case. But see 2 *Stra.* 1104. that lunacy may be given in evidence on the general issue. See tit. *Lunaticks.*

But if an infant, *feme covert*, &c. who are disabled by law to contract, and to bind themselves in bonds, enter together with a stranger, who is under none of these disabilities, into an obligation, it shall bind the stranger, though it be void as to the infant, &c. 1 *Roll. Rep.* 41.

If a servant makes a bill in form, "*Memorandum*, that I have received of *A. B.* to the use of my master *C. D.* the sum of 40*l.* to be paid at *Michaelmas* following," and thereto set his seal, this is a good obligation to bind himself; for though in the beginning of the deed the receipt is said to be to the use of his master, yet the repayment is general, and must necessarily bind him who sealed; and the rather, because otherwise the obligee would lose his debt, he having no remedy against the master. *Yelv.* 137. *Talbot* v. *Godbolt.*

Infants, idiots, as also *femes covert*, may be *obligees*; and here the husband is supposed to assent, being for his advantage; but if he disagrees, the obligation hath lost its force; so that after the obligor may plead *non est factum*; but if he neither agrees nor disagrees, the bond is good, for his conduct shall be esteemed a tacit consent, since it is to his advantage. 5 *Co.* 119. b. *Co. Lit.* 3. a. See tit. *Baron and Feme.*

An alien may be an obligee, for since he is allowed to trade and traffick with us, it is but reasonable to give him all that security which is necessary in his contracts, and which will the better enable him to carry on his commerce and dealings amongst us. *Co. Lit.* 129. b. *Moor*, 431. *Cro. Eliz.* 142. 683. *Cro. Car.* 9. 1 *Salk.* 46. 7 *Mod.* 15. See tit. *Alien.*

Sole corporations, such as bishops, prebends, parsons, vicars, &c. cannot be obligees, and therefore a bond made to any of these, shall enure to them in their natural capacities; for no sole body politic can take a chattel in succession, unless it be by custom; but a corporation aggregate may take any chattel, as bonds, leases, &c. in its political capacity, which shall go in succession, because it is always in being. *Cro. Eliz.* 464. *Dyer*, 48. a. *Co. Lit.* 9. a. 46. a. *Hob.* 64. 1 *Roll. Abr.* 515.

If a drunken man gives his bond it binds him; and a *bond* without consideration is obligatory, and no relief shall be had against it, for it is voluntary, and as a gift. *Jenk. Cent.* 109. But see *Cole* v. *Robins*, *Hil.* 2 *Ann. per Holt*, referred to in *Bull. N. P.* 172. that on the gene-

ral issue, defendant may give in evidence that they made him sign the bond when he was so drunk that he knew not what he did. A person enters voluntarily into a *bond*, though there was not any consideration for it, if there be no fraud used in obtaining the same, the *bond* shall not be relieved against in equity: but a voluntary bond may not be paid in a course of administration, so as to take place of real debts, even by simple contract; yet it shall be paid before legacies. 1 *Chan. Cas.* 157. An heir is not bound unless he be named expressly in the *bond*; though the executors and administrators are. *Dyer*, 13.

It is clearly agreed that two or more may bind themselves jointly in an obligation, or they may bind themselves jointly and severally; in which last case, the obligee may sue them jointly, or he may sue any one of them, at his election; but if they are jointly and not severally bound, the obligee must sue them jointly; also in such case, if one of them dies, his executor is totally discharged, and the survivor and survivors only chargeable. 2 *Roll. Abr.* 148. *Dyer*, 19. 310. 5 *Co.* 19. *Dal.* 85. *pl.* 42. 1 *Salk.* 393. *Carth.* 61. 1 *Lutw.* 696.

If three enter into an obligation, and bind themselves in the words following, *Obligamus nos et utrumque nostrum per se pro toto et in solido*, these make the obligation joint and several. *Dyer*, 19. b. *pl.* 114.

III. It is said, that there are only three things essentially necessary to the making a good obligation, *viz. writing* on paper or parchment, *sealing* and *delivery*; but it hath been adjudged not to be necessary, that the obligor should sign or subscribe his name; and that therefore if in the obligation the obligor be named *Erlin*, and he signs his name *Erlwin*, that this variation is not material; because subscribing is no essential part of the deed, *sealing* being sufficient. 2 *Co.* 5. a. *Godard's* case. *Noy*, 21. 85. *Moor*, 28. *Style*, 97. 2 *Salk.* 462. 5 *Mod.* 281.

And though the *seal* be necessary, and the usual way of declaring on a bond is, that the defendant, by his bond or writing obligatory sealed with his seal, acknowledged, &c. yet if the word sealed be wanting, it is cured by verdict and pleading over, for all necessary circumstances shall be intended; and if it were not sealed, it could not be his deed or obligation. *Dyer*, 19. a. *Cro. Eliz.* 571. 737. *Cro. Jac.* 420. 2 *Co.* 5. 1 *Vent.* 70. 3 *Lev.* 348. 1 *Salk.* 141. 6 *Mod.* 306.

Also though sealing and delivery be essential in an obligation, yet there is no occasion in the bond to mention that it was sealed and delivered; because, as Lord *Coke* says, these are things which are done afterwards. 2 *Co.* 5. a.

The name of the obligor subscribed, 'tis said, is sufficient, though there is a blank for his christian name in the *bond*. *Cro. Jac.* 261. *Vide Cro. Jac.* 558. 1 *Mod.* 107. In these cases, though there be a verdict, there shall not be judgment. Where an obligor's name is omitted to be inserted in the *bond*, and yet he signs and seals it, the court of *chancery* may make good such an *accident*; and in case a person takes away a *bond* fraudulently, and cancels it, the obligee shall have as much benefit thereby, as if not cancelled. 3 *Chan. Rep.* 99. 184.

An obligation is good though it wants a date, or hath a false or impossible date; for the date, as hath been observed, is not of the substance of the deed; but herein we must take notice, that the day of the delivery of a deed or obligation is the day of the date, though there

is no day set forth. 2 *Co.* 5. a. *Godard's* case. *Noy*, 21. 85, 86. *Hob.* 249. *Style*, 97. *Cro. Jac.* 136. 264. *Yelv.* 193. 1 *Salk.* 76.

If a man declare on a bond, bearing date such a day, but does not say when delivered, this is good: for every deed is supposed to be delivered and made on the day it bears date; and if the plaintiff declare on a date, he cannot afterwards reply, that it was first delivered at another day; for this would be a departure. *Cro. Eliz.* 773. 2 *Lev.* 348. 1 *Salk.* 141. *Vide* 1 *Brownl.* 104. 1 *Lev.* 196.

A plaintiff may suggest a date in a *bond*, where there is none, or it is impossible, &c. where the parties and sum are sufficiently expressed. 5 *Mod.* 282. A *bond* dated on the same day on which a release is made of all things up to the day of the date is not thereby discharged. 2 *Roll. Rep.* 255.

If the bond was delivered before the date, on issue, *non est factum*, joined on such a deed, the jury are not estopped to find the truth, *viz.* that it was delivered before the date, and it is a good deed from the delivery. 2 *Co.* 4. 6. 3 *Keb.* 332.

A person shall not be charged by a *bond*, though signed and sealed, without delivery, or words, or other thing amounting to a delivery. 1 *Leon.* 140. But a bond or deed may be delivered by words, without any act of delivery; as where the obligor says to the obligee, go and take the said writing, or take it as my deed, &c. So an actual delivery, without speaking any word, is sufficient: otherwise a man that is mute could not deliver a deed. *Co. Lit.* 36. a. *Cro. Eliz.* 835. *Leon.* 193. *Cro. Eliz.* 122.

Interlineation in a bond, in a place not material, will not make the bond void; but if it be altered in a part material, it shall be void. 1 *Nels. Abr.* 391. And a bond may be void by rasure, &c. As where the date, &c. is rased after delivery; which goes through the whole. 5 *Rep.* 23. If the words in a bond at the end of the condition, *That then this obligation to be void*, are omitted, the condition will be void; but not the obligation.

IV. The condition of a bond was, that *A. L.* should pay such a sum upon the 25th of *December*, or appear in *Hilary* term after in the court of *B. R.* He died after the 25th of *December*, and before *Hilary* term, and had not paid any thing: in this case the condition was not broken for non-payment, and the other part is become impossible by the act of God. 1 *Mod. Rep.* 265. And when a condition is doubtful, it is always taken most favourably for the obligor, and against the obligee; but so as a reasonable construction be made as near as can be according to the intention of the parties. *Dyer*, 51.

If no time is limited in a bond for payment of the money, it is due presently, and payable on demand. 1 *Brownl.* 53. But the judges have sometimes appointed a convenient time for payment, having regard to the distance of place, and the time wherein the thing may be performed. And if a condition be made impossible in respect to time, as to make payment of money on the 30th of *February*, &c. it shall be paid presently; *Jones*, 140. See 1 *Leon.* 101.

A bond made to enfeoff two persons, if one dies before the time is past, wherein it should be done, the obligor must enfeoff the survivor of them, or the condition will be broken; and if it be that *B.* and others shall enjoy land, and the obligor and *B.* the obligee do disturb the rest; by this the condition is broken. 4 *Hen.* VII. 1. *Co. Lit.* 384. Where one is bound to do an act to the obligee himself, the doing it to a stranger by appointment of the obligee, will not be a

performance of the condition. 2 *Bulst.* 149. But in such case equity would relieve, and probably a judge, on such action coming before him, would order plaintiff to be nonsuited. If the act be to be done at a certain place, where the obligor is to go, to *Rome*, &c. and he is to do the sole act without limitation of time, he hath term during life to perform the same: if the concurrence of the obligor and obligee is requisite, it may be hastened by the request of the obligee. 6 *Rep.* 30. 1 *Roll. Abr.* 437. Where no place is mentioned for performance of a condition, the obligor is obliged to find out the person of the obligee, if he be in *England*, and tender the money, otherwise the bond will be forfeited: but when a place is appointed, he need seek no further. *Co. Lit.* 210. *Lit.* 340. And if, where no place is limited for payment of money due on a bond, the obligor, at or after the day of payment, meets with the obligee, and tenders him the money, but he goes away to prevent it, the obligor shall be excused. 8 *Edw.* IV.

The obligor, or his servant, &c. may tender the money to save the forfeiture of the bond, and it shall be a good performance of the condition, if made to the obligee, though refused by him; yet if the obligor be afterwards sued, he must plead that he is still ready to pay it, and tender the money in court. *Co. Lit.* 208.

In the performance of the condition of an obligation, the intention of the parties is chiefly to be regarded: and therefore a performance in substance is sufficient, though it differ in words or some material circumstance; as if one be bound to deliver the testament of the testator, if he plead that he had delivered letters testamentary, it is sufficient. *Bro. Condition*, 158. 17 *Edw.* IV. 3. 1 *Roll. Abr.* 426.

If the condition of an obligation be to procure a lawful discharge, this must be by a *release*, or some *discharge* that is *pleadable*, and not by *acquittance*, which is but evidence. 1 *Keb.* 739.

If the party who is bound to perform the condition disables himself, this is a breach; as where the condition is, that the feoffee shall reenfeoff, or make a gift in tail, &c. to the feoffor, and the feoffee, before he performs it, make a feoffment or gift in tail, or lease for life or years *in præsenti* or *futuro* to another person, or marry, or grant a rent-charge, or be bound in a statute, or recognisance, or become professed; in all those cases the condition is broken: for the feoffee has either disabled himself to make any estate, or to make it in the same plight or freedom in which he received it; and being once disabled, he is ever disabled, though his wife should die, or the rent, &c. should be discharged, or he should be deraigned, &c. before the time of the reconveyance. *Co. Lit.* 221, 222. *Poph.* 110. 1 *Co.* 25. a. 1 *Roll. Abr.* 447. 5 *Co.* 21. a.

Where the condition is in the *conjunctive*, regularly both parts must be performed: yet, to supply the intention of the parties, it is held, that if a condition in the *conjunctive* be *not possible* to be performed, it shall be taken in the *disjunctive*; as if the condition be, that he *and* his executors shall do such a thing, this shall be taken in the *disjunctive*, because he cannot have an executor in his life-time; so if the condition be, that he *and* his assigns shall sell certain goods, this shall be taken in the *disjunctive*, because both cannot do it. 1 *Roll. Abr.* 444. *Owen*, 52. 1 *Leon.* 74. *Goulds.* 71.

See further this *Dict.* tit. *Condition*, *Consideration*, *Gaming*, *Marriage*; as to *Resignation Bonds*, see tit. *Parson*.

A bond made with condition not to give evidence against a felon, &c. is void; but the defendant must plead the special matter. 2 *Wils.* 341. &c. Condition of a bond to indemnify a person from any legal

prosecution is against law, and void. 1 *Lutw.* 667. And if a sheriff takes a bond as a reward for doing of a thing, it is void. 3 *Salk.* 75.

V. 1. Where a lesser sum is paid before it is due, and the payment is accepted, it shall be good in satisfaction of a greater sum; but after the money is due, then a lesser sum, though accepted, shall not be a satisfaction for a greater sum. Thus in debt upon bond conditioned to pay 8*l.* defendant pleaded payment of 5*l.* before the day mentioned in the condition, which the obligee accepted in satisfaction of the bond, and upon demurrer this was adjudged a good plea. *Moor*, 677. *Vide* 3 *Bulst.* 301. Payment after the day, of a *less* sum, is not good, as the bond is forfeited, at *common law*; and there is not any statute to relieve.

Debt upon bond of 16*l.* conditioned to pay 8*l.* 10*s.* on a certain day; the defendant pleaded, that before that day, he, at the request of the plaintiff, paid to him 5*l.* which he accepted in satisfaction of the debt; and upon demurrer, the plaintiff had judgment, because the defendant had pleaded the payment of the 5*l. generally*, without alleging that it was *in satisfaction* of the debt. It is true, he sets forth, that it was accepted in satisfaction of the debt, but it ought likewise to be *paid* in satisfaction. 5 *Rep.* 117. Debt upon bond, conditioned, that in consideration the plaintiff had paid 12*l.* to the defendant; he became bound to pay the plaintiff 12*l.* if he lived one month after the date of that bond; and if not paid at that time, then to pay him 14*l.* if he lived six months after the date of the bond; the defendant pleaded, that *after* the six months he paid the plaintiff 8*l.* and then gave him another bond in the penalty of 20*l.* conditioned to pay him 10*l.* on a certain day, in full satisfaction of the other bond, and that the plaintiff did accordingly accept the said bond; upon a demurrer to this plea it was held ill; for admitting that one bond might be given in satisfaction of another, yet it cannot be after the other is forfeited, as it was in this case; because after the forfeiture, the penalty is vested in the obligee, and a less sum cannot be a satisfaction for a greater. 1 *Lut.* 464.

It hath been adjudged, that the acceptance of one bond cannot be pleaded in satisfaction of another bond. *Cro. Car.* 85. *Moor*, 872. *Cro. Eliz.* 716. 727. 2 *Cro.* 579. Thus in debt on a bond of 100*l.* conditioned for the payment of 52*l.* 10*s.* on a *certain day*, the defendant pleaded that *at the day*, &c. he and his son gave a *new bond* of 100*l.* conditioned for the payment of 52*l.* 10*s. at another day* then to come, which the plaintiff accepted in satisfaction of the *old bond*; and upon demurrer it was adjudged for the plaintiff, because the acceptance of a new bond to pay money at another day, could not be a present satisfaction for the money due on the day when it was to be paid on the old bond. *Hob.* 68. But it is otherwise where the second bond is not given by the obligor; as in debt upon bond against the defendant as heir, &c. he pleaded that his ancestor, the obligor, died intestate, and that *W. R.* administered, who gave the plaintiff another bond, in satisfaction of the former: there was a verdict for the defendant: and it being moved in arrest of judgment, this distinction was made; that if the obligor, who gave the first bond, had likewise given the second, it would not have discharged the first; but in this case the second bond was not given by him who gave the first, but by his administrator, which had mended the security, because he may be chargeable *de bonis propriis*; and for that reason the second bond was held to be a discharge of the first. 1 *Mod.* 225.

2. A bond on which neither principal nor interest has been demanded for 20 years, will be presumed in equity to be satisfied, and be decreed to be cancelled; and a perpetual injunction granted to stay proceedings thereon. 1 *Ch. Rep.* 79. *Finch. Rep.* 78. See *Mod. Ca.* 22. But satisfaction may be presumed within a less period, if any evidence be given in aid of the presumption; as if an account between the parties has been settled in the intermediate time, without any notice having been taken of such a demand. Yet length of time is no *legal* bar; it is only a ground for the jury to presume satisfaction. 1 *Term Rep.* 270.

If several obligors are bound jointly and severally, and the obligee make one of them his executor, it is a release of the debt, and the executor cannot sue the other obligor. 8 *Co.* 136. 1 *Salk.* 300. And *vide* 1 *Jon.* 345. But though it be a release in law, in regard it is the proper act of the obligee, yet the debt by this is not absolutely discharged but it remains *assets* in his hands, to pay both debts and legacies. *Cro. Car.* 373. *Yelv.* 160. See tit. *Executor*, IV. 8.

If a *feme sole* obligee take one of the obligors to husband, this is said to be a release in law of the debt, being her own act. 8 *Co.* 136. a. *March.* 128.

If one obligor makes the executor of the obligee his executor, and leaves assets, the debt is deemed satisfied, for he has power, by way of retainer, to satisfy the debt; and neither he nor the administrator *de bonis non*, &c. of the obligee can ever sue the surviving obligor. *Hob.* 10.

But if two are bound jointly and severally to *A.* and the executor of one of them makes the obligee his executor, yet the obligee may sue the other obligor. 2 *Lev.* 73. See tit. *Executor*, IV. 8.

If two are jointly and severally bound in an obligation, and the obligee release to one of them, both are discharged. *Co. Lit.* 232. a.

Three were bound jointly and severally in an obligation, and an action was brought against one of them, who pleaded, that the seal of one of the others was torn off, and the obligation cancelled, and therefore void against all. Upon *demurrer* it was adjudged, that the obligation, by the tearing off the seal of one of the obligors, became void against all, notwithstanding the obligors were severally bound. 2 *Lev.* 220. 2 *Show.* 289. *Sed. qu.*

If the condition of a bond be, that a clerk shall faithfully serve, and account for all money, &c. to the obligee and his executors; this does not make the obligor liable for money received by the clerk in the service of the executors of the obligee, who continue the business, and retain the clerk in the same employment, with the addition of other business, and an increase of salary. 1 *Term Rep.* 287. But such a bond is not discharged by the obligees' taking another partner into their house; it is only a security to the house of the obligees. *Ib.* 291. *n.*

VI. In a *bond* where several are bound severally, the obligee is, at his election, to sue all the obligors together, or all of them apart, and have several judgments and executions; but he shall have satisfaction but once, for if it be of one only, that shall discharge the rest. *Dyer*, 19. 310. Where two or more are bound in a joint *bond*, and only one is sued, he must plead in abatement, that two more sealed the *bond*, &c. and aver that they are living, and so pray judgment *de billa*, &c. And not demur to the declaration. *Sid.* 420.

If action be brought upon a *bond* against two joint and several obligors jointly, and both are taken by *capias*, here the death or escape of one shall not release the other; but the same kind of execution must be taken forth against them: it is otherwise when they are sued severally. *Hob.* 59.

Also, if two or more be jointly bound, though regularly one of them alone cannot be sued, yet if process be taken out against all, and one of them only appears, but the others stand out to an outlawry, he who appeared shall be charged with the whole debt. 9 *Co.* 119.

If a *bond* is made to three, to pay money to one of them, they must all join in the action because they are but as one obligee. *Yelv.* 177.

So if an obligation be made to three, and two bring their action, they ought to show the third is dead. 1 *Sid.* 238. 420. 1 *Vent.* 34.

Though there be several obligees, yet a person cannot be bound to several persons severally; and therefore an obligation of 200*l.* to two, to pay 100*l.* to the one, and the other 100*l.* to the other, is a void condition. *Dyer*, 350. a. *pl.* 20. *Hob.* 172. 2 *Brownl.* 207. *Yelv.* 177.

If *A.* bind himself in a sum to *B.* to pay to *C.* who is a stranger, a payment to *C.* is a payment to *B.* and in an action upon it, the count must be upon a bond payable to *B.* 1 *Sid.* 295. 2 *Keb.* 81.

In debt the declaration was, that the defendant became bound in a bond of ——, for the payment of —— to him, his attorney or assigns, and on oyer of the bond it appeared, that it was to pay to the plaintiff's attorney or assigns, without mention of himself; and on demurrer for this variance 'twas said, that the declaration must not be according to the letter of the obligation, but according to the operation of the law thereupon. 6 *Mod.* 228. *Robert* v. *Harnage.*

So if *A.* makes a bond to *B.* to pay to such person as he shall appoint; if *B.* does appoint one, payment to him is a payment to *B.* and if *B.* appoint none, it shall be paid to *B.* himself. 6 *Mod.* 228.

If *A.* by his bill obligatory, acknowledges himself to be indebted to *B.* in the sum of 10*l.* to be paid at a day to come, and binds himself and his heirs in the same bill in 20*l.* but does not mention to whom he is bound, yet the obligation is good, and he shall be intended to be bound to *B.* to whom he acknowledged before the 10*l.* to be due. 2 *Roll. Abr.* 148. *Franklin* v. *Turner.*

If an infant seal a bond, and be sued thereon, he is not to plead *non est factum*, but must avoid the bond by special pleading; for this bond is only voidable, and not in itself void. 5 *Rep.* 119. But if a bond be made by a *feme covert*, she may plead her coverture, and conclude *non est factum*, &c. her bond being void. 10 *Rep.* 119. Or plead *non est factum*, and give coverture in evidence. If a bond depends upon some other deed, and the deed becomes void, the bond is also void.

As to the pleading of performance, the defendant must set forth in what manner he hath performed it. Thus, in debt on a bond, with condition for performance of several things, the defendant pleads that the condition of the said deed was never broken by him, and held an ill plea: because, for saving the bond, it is necessary for the defendant to show how he hath performed the condition; and this sort of pleading was never admitted. 2 *Vent.* 156.

So if he had pleaded that he performed every thing, it had been ill; for the particulars being expressed in the condition, he ought to plead to each particularly: but if the condition were for performance

of covenants in an indenture, performance were generally a good plea. 1 *Lev.* 302. This must be understood where the covenants are set forth, and appear to be all in the *affirmative*. For if some are in the *affirmative*, some in the *negative*, or any in the *disjunctive*, the defendant should plead *specially*.

In debt on an obligation for payment of money, &c. the defendant pleads, that at the time and place he was ready to pay the money, but that nobody was there to receive it: and held ill on a general demurrer, for want of stating a tender, for the *tender* only is traversable. 3 *Lev.* 104.

In debt on a bond with condition, the defendant pleads a collateral plea, which is insufficient; the plaintiff demurs, and hath judgment, without assigning a breach; for the defendant, by pleading a defective plea, by which he would excuse his non-performance of the condition, saves the plaintiff the trouble of assigning a breach, and gives him advantage of putting himself on the judgment of the court, whether the plea be good or not; but if the plaintiff had admitted the plea, and made a replication which showed no cause of action, it had been otherwise; but if the replication were idle, and the defendant demurred, yet the plaintiff should have judgment without assigning a breach. 1 *Lev.* 55. 84. 3 *Lev.* 17. 24. This must mean, if the plea was bad in substance.

And in all cases of debt on an obligation with condition, (that of a bond to perform an award only excepted,) if the defendant plead a special matter, that admits and excuses a non-performance, the plaintiff need only answer, and falsify the *special matter alleged*; for he that excuses a non-performance admits it, and the plaintiff need not show that which the defendant hath supposed and admitted. *Salk.* 138.

But if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff, in his replication, must show a breach; for then he has no cause of action, unless he show it: and this difference will give the true reason, and reconcile the following cases. 1 *Salk.* 138. 1 *Lev.* 55. 84. 226. 1 *Saund.* 102. 159. 317. 3 *Lev.* 17. 24. 1 *Vent.* 114. *Cro. Eliz.* 320. *Yelv.* 78.

But by stat. 4 *Ann. c.* 16. if an action of debt be brought on single bill, or judgment, after money paid, such payment may be pleaded in bar. So of a bond with a condition, upon payment of principal and interest due by the condition, though such payment was not strictly made according to the condition, yet it may be pleaded in bar.

By stat. 8 and 9 *Wm.* III. *c.* 11. § 8. in actions on bonds for performance of covenants, the plaintiff may assign as many breaches as he pleases, and the jury may assess damages. The defendant paying the damages, execution may be staid; but the judgment to remain to answer any future breach, and plaintiff may then have *sci. fa.* against the defendant; and so *toties quoties*.

In debt on a bond, the defendant may have several pleas in bar; as if the plaintiff sue as executor, the defendant may plead the release of the testator for part, and for the residue the release of the plaintiff; so he may plead payment as to part, and as to the rest an *acquittance*. 1 *Salk.* 180.

But a defendant in an action on a bond cannot plead *non est factum*, and a tender as to part. 5 *Term Rep.* 97.

In debt on an obligation the defendant cannot plead *nil debet*, but must deny the deed by pleading *non est factum*; for the seal of the

party continuing, it must be dissolved *eo ligamine quo ligatur*. *Hard.* 332. *Hob.* 218.

In bonds to save harmless, the defendant being prosecuted, is to plead *non damnificatus*, &c.

The stealing of any bond or bill, &c. for money, being the property of any one, made felony, as if offenders had taken other goods of like value. Stat. 2 *Geo.* II. *c.* 25. See tit. *Felony*.

BONDAGE, Is slavery; and *bondmen*, in *Domesday*, are called *servi*, but rendered different from *villani*. *Et de toto tenemento, quod de ipso tenet in* bondagio *in soca de* Nortone *cum pertin*. *Mon. Angl.* 2. *par. fol.* 609. See *Nativus*.

BOND-TENANTS, *Copyholders*, and *customary-tenants*, are sometimes so called. *Calthorpe on Copyholds*, 51. 54. See tit. *Copyhold Tenures*.

BONIS NON AMOVENDIS, A writ directed to the sheriffs of *London*, &c. where a writ of error is brought; to charge them that the person against whom judgment is obtained be not suffered to remove his goods, till the error is tried and determined. *Reg. Orig.* 131.

BOOKS. By stat. 25 *Hen.* VIII. *c.* 15. no person shall buy any printed books brought from beyond sea to sell the same again, and no one shall buy books by retail brought from beyond sea by any stranger. Likewise the prices of books, excessively increased, shall be qualified by the king's great officers. See tit. *Literary Property*.

By stat. 7 *Ann. c.* 14. § 10. if any book shall be taken, or otherwise lost out of any parochial library, any justice may grant his warrant to search for it; and if it shall be found, it shall, by order of such justice, be restored to the library.

The sole right of printing books, bequeathed to the two universities of *England*, the four universities of *Scotland*, and the colleges of *Eton*, *Westminster* and *Winchester* is secured to them, by stat. 15 *Geo.* III. *c.* 53.

From the seventh to the eleventh century, books were very scarce. To that was chiefly owing the universal ignorance which prevailed during that period. After the *Saracens* conquered *Egypt* in the seventh century, the communication with that country (as to *Europe*, &c.) was almost entirely broken off, and the *papyrus* no longer in use. So that paper was used, and as the price of that was high, books became extremely rare, and of great value. *Vide Robertson's History of Charles the Fifth*, *vol.* I. 233, 234.

In the eleventh century the art of making paper was invented, the number of manuscripts was thereby increased, and the study of the sciences greatly facilitated. See further as to books, tit. *Literary Property*.

BOOK OF RATES. See tit. *Customs*.

BOOK OF RESPONSES, Is that which the director of the chancery keeps, particularly to note a seizure, when he gives order to the sheriff in that part to give it to an heir, whose service has been returned to him. The form of it is *respondeat vice comes*, &c. *Scotch Dict*.

BOOKSELLERS, And authors of books, &c. See tit. *Literary Property*.

BOOTING, or BOTING-CORN, Rent-corn, anciently so called. The tenants of the manor of *Haddenham in com. Bucks*, formerly paid *booting-corn* to the prior of *Rochester*. *Antiq. of Purveyance, fol.* 418.

It is thought to be so called, as being paid by the tenants by way of *bote*, or *boot*, *viz.* as a compensation to the lord for his making them leases, &c.

BORDAGIUM, See *Bordlode.*

BORDARIA, A cottage, from the Sax. *bord*, *domus.*

BORDARII, or BORDIMANNI. These words often occur in *Domesday*, and some think they mean *boors*, husbandmen, or cottagers. In the *Domesday* inquisition they were distinct from the *villani*; and seemed to be those of a less servile condition, who had a *bord* or cottage, with a small parcel of land allowed to them, on condition they should supply the lord with poultry and eggs, and other small provisions, for his *board* or entertainment. Some derive the word *bordarii* from the old *Gall. bords*, the limits or extreme parts of any extent; as the *borders* of a country, and the *borderers*, inhabitants in those parts. *Spelm.*

BORD-HALFPENY, Sax. *bord*, a table, and *halpeny*, or half-penny. *Spelm.*] A small toll, by custom paid to the lord of the town for setting up *boards*, tables, booths, &c. in fairs and markets.

BORDLANDS, The demesnes which lords keep in their hands for the maintenance of their *board* or table. *Bract. lib.* 4. *tract.* 3. *c.* 9. *Spelm.*

BORDLODE, or BORDAGE, A service required of tenants to carry timber out of the woods of the lord to his house: or it is said to be the quantity of food or provision which the *bordarii*, or *bordmen*, paid for their *bord-lands*. The old *Scots* had the term of *burd*, and *meet-burd*, for victuals and provisions; and *burden sack*, for a sack full of provender: from whence it is probable came our word burden. *Spelm.*

BORD-SERVICE, A tenure of *bord-lands*; by which some lands in the manor of *Futham in com. Mid.* and elsewhere, are held of the bishop of *London*, and the tenants do now pay six-pence *per* acre in lieu of finding provision, anciently for their lord's *board*, or table. *Blount.*

BORD-BRIGCH, *borg-bryce*, or *burg-brych*, Sax.] A breach or violation of suretyship, pledge-breach, or breach of mutual fidelity.

BOREL-FOLK, *i. e.* Country people, from the Fr. *boure*, *floccus*, because they covered their heads with such stuffs. *Blount.*

BORGH UPON WEIR OF LAW, Is to find caution to answer as law will. *Scotch Dict.*

BOROUGH, Fr. *burg*, Lat. *burgus*, Sax. *borhoe.*] Signifies a corporate town, which is not a city; and also such a town or place as sends burgesses to parliament. *Verstegan* saith, that *burg*, or *burgh*, whereof we make our *borough*, metaphorically signifies a town having a wall, or some kind of enclosure about it: and all places that, in old time, had among our ancestors the name of *borough*, were one way or other fenced or fortified. *Litt.* § 164. But sometimes it is used for *villa insignior*, or a country town of more than ordinary note, not walled. A borough is a place of safety, protection and privilege, according to *Somner*; and in the reign of King *Hen.* II. *burghs* had so great privileges, that if a bondman or servant remained in a *borough* a year and a day, he was by that residence made a freeman. *Glanville.* And why these were called *free burghs*, and the tradesmen in them *free burgesses*, was from a freedom to buy and sell, without disturbance, exempt from toll, &c. granted by charter. It is conjectured that *borhoe*, or *borough*, was also formerly taken for those companies consisting of ten families, which were to be pledges for one another:

and we are told by some writers that it is a street or row of houses close to one another. *Bract. lib.* 3. *tract.* 2. *cap.* 10. *Lamb. Duty of Const. p.* 8. *Vide Squire's Anglo Saxon Government*, 236. 247. 251. 254. 258. 262. 264. *Trading boroughs* were first formed in the time of *Alfred*. *Squire*, 247. 251.

A borough is now understood to be a town, either corporate or not, that sends burgesses to parliament. 1 *Comm.* 114. See tit. *Burgage-Tenure*, *Parliament*.

BOROUGH COURTS. *Vide Courts.*

BOROUGH-HOLDERS, BORSHOLDERS, or BURSHOLDERS, *quasi borh-calders*. See tit. *Headborough.*

BOROUGH-ENGLISH, A custom relative to the descent of lands, in some ancient *boroughs*, and copyhold manors, that estates shall descend to the *youngest son*; or, if the owner hath no issue, to his *younger brother*; *Litt.* § 165. as in *Edmunton*, &c. *Kitch.* 102.

This is so named, in contradistinction as it were to the *Norman* customs, and is noticed by *Glanville*, *lib.* 7. *c.* 3.

Littleton gives the following reason for this custom. Because the younger son, by reason of his tender age, is not so capable as the rest of his brethern to help himself. Other authors have indeed given a much stranger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding night; and that therefore the youngest son was most certainly the tenant's offspring. But it does not appear that this custom ever prevailed in *England*, (nor even in *Scotland*,) though that error for a long time prevailed. See this *Dict.* tit. *Mercheta Mulierum*. Possibly this custom of *Borough-English* may be the remnant of the pastoral state of our *British* and *German* ancestors, in which the youngest child was necessarily most helpless. See 2 *Comm.* 83.

This custom goes with the land, and guides the descent to the *youngest son*, although there be a devise to the contrary. 2 *Lev.* 138. If a man seised in fee of lands in *Borough-English*, makes a feoffment to the use of himself and the heirs male of his body, according to the course of the common law, and afterwards die seised, having issue two sons, the *youngest son* shall have the lands by virtue of the custom, notwithstanding the feoffment. *Dyer*, 179.

If a copyhold in *Borough-English* be surrendered to the use of a person and his heirs, the right will descend to the *youngest son*, according to the custom. 1 *Mod.* 102. And a *youngest son* shall inherit an estate in tail in *Borough-English*. *Noy*, 106. But an heir at common law shall take advantage of a condition annexed to *Borough-English* land; though the youngest son shall be entitled to all actions in right of the land, &c. 1 *Nels. Abr.* 396. And the eldest son shall have tithes arising out of land *Borough-English*; for tithes of common right are not inheritances descendible to an heir, but come in succession from one clergyman to another. *Ibid.* 347.

Borough-English land being descendible to the youngest son, if a younger son dies without issue male, leaving a *daughter*, such *daughter* shall inherit *jure repræsentationis*. 1 *Salk.* 243. It hath been adjudged where a man hath *several brothers*, the *youngest* may inherit lands in *Borough-English*: yet it is said where a custom is, that land shall go to the *youngest son*, it doth not give it to the *youngest uncle*, for customs shall be taken strictly; and those which fix and order the descents of inheritance, can be altered only by parliament. *Dyer*, 179. 4 *Leon.* 384. *Jenk. Cent.* 220.

By the custom of *Borough-English*, the *widow* shall have the *whole* of her husband's lands in dower, which is called her *free-bench*; and this is given to her the better to provide for the younger children, with the care of whom she is entrusted. *Co. Litt.* 33. 111. *F. N. B.* 150. *Mo. pl.* 566.

Borough-English is one of those customs of which the law takes particular notice; there is no occasion to prove that such custom actually exists, but only that the lands in question are subject thereto. 1 *Comm.* 76. But the extension of the custom to the collateral line must be specially pleaded. *Robins. on Gavelk.* 38. 43. 93. And as *Borough-English* may be extended by special custom, so may it be restrained; and therefore the customary descent may be confined to fee-simple. *Mar.* 54. cited *Robins. Appendix.* See 1 *Inst.* 110. b. in *n.*

BOROUGH GOODS, As to their being *devisable*, see tit. *Will*, *Executor*.

BORROWING. See tit. *Bailment.*

BORSHOLDERS. See tit. *Headborough.*

BORTMAGAD, Sax. *Bord, domus et Magad. ancilla.*] A housemaid. *Spelm.*

BOSCAGE, *boscagium.*] That food which wood and trees yield to cattle; as mast, &c. from the Ital. *bosco, silva:* but *Manwood* observes, to be quit *de boscagio*, is to be discharged of paying any duty of windfall wood in the forest. See *Spelman* in *n.*

BOSCARIA, Wood-houses, from *boscus;* or ox-houses, from *bos.* See *Bostar. Mon. Angl. tom.* 2. *fol.* 302.

BOSCUS, An ancient word, signifying all manner of wood: *bosco*, Ital. *bois*, Fr. *Boscus* is divided into high wood or timber, *hautboys*, and coppice or under-woods, *sub boscus, sub bois:* but the high wood is properly called *saltus*, and in *Fleta* we read it *maeremium.* Cum una Carecta de mortuo *bosco. Pat.* 10 *Hen.* VI.

BOSINNUS, A certain rustical pipe, mentioned in ancient tenures.

BOSTAR, An ox stall. *Mat. Paris. anno* 1234.

BOTE, Sax.] A recompense, satisfaction or amends. The Saxon *bote* is synonymous to the word *estovers.* See tit. *Common of Estovers. House-bote* is a sufficient allowance of wood to repair, or burn in the house; which latter is sometimes called *fire-bote. Plough-bote*, and *cart-bote*, are wood to be employed in making and repairing all instruments of husbandry: and *hay-bote*, or *hedge-bote*, is wood for repairing of hays, hedges or fences. 2 *Comm.* 35. Hence also comes *man-bote*, compensation, or amends for a man slain, &c. In King *Ina's* laws it is declared what rate was ordained for expiation of this offence, according to the quality of the person slain. *Lamb. cap.* 99. From hence, likewise, we have our common phrase *to-boot, i. e. compensationis gratiâ.*

BOTELESS. In the charter of *Hen.* I. to *Tho.* Archbishop of *York*, it is said that no judgment or sum of money shall *acquit* him that commits sacrilege; but he is in *English* called *boteless, viz.* without emendation. *Lib. Albus penes Cap. de Suthnet. int. Plac. Trin.* 12 *Edw.* II. *Ebor.* 48. We retain the word still in common speech; as it is *bootless* to attempt such a thing; that is, it is in vain to attempt it.

BOTELLARIA, A buttery or cellar, in which the *butts* and *bottles* of wine, and other liquors are deposited.

BOTHA, A booth, stall, or standing in a fair or market. *Mon. Angl.* 2. *par. fol.* 132.

BOTHAGIUM, *Boothage*, or customary dues paid to the lord of the manor or soil, for the pitching and standing of booths in fairs or markets. *Paroch. Antiq. p.* 680.

BOTHNA, or *buthna*, seems to be a park where cattle are enclosed and fed. *Hector Boethius, lib.* 7. *cap.* 123. *Bothena* also signifies a barony, lordship, &c. *Skene.*

BOTILER OF THE KING, (*pincerna regis.*) Is an officer that provides the king's wines, who (according to *Fleta*) may, by virtue of his office, choose out of every ship laden with sale wines, one cask before the mast, and one behind. *Fleta, lib.* 2. *cap.* 21. This officer shall not take more wine than he is commanded, of which notice shall be given by the *steward* of the king's house, &c. on pain of forfeiting double damages to the party grieved; and also to be imprisoned and ransomed at the pleasure of the king. Stat. 25 *Edw.* III. *st.* 5. *cap.* 21. See tit. *Customs.*

BOTTOMRY, or *bottomree, fœnus nauticum.*] Is generally where a person lends money to a merchant, who wants it to traffic, and is to be paid a greater sum at the return of a certain ship, standing to the hazard of the voyage; and in this case, though the interest be greater than that allowed by law, it is not usury. See this subject more fully treated under tit. *Insurance.*

BOVATA TERRÆ, As much land as one ox can plough. *Mon. Angl. par.* 3. *fol.* 91. See *Oxgang.*

BOUCHE OF COURT, Commonly called *budge of court*, was a certain allowance of provision from the king, to his knights and servants that attended him in any military expedition. The French *avoir bouche à court*, is to have an allowance at court, of meat and drink: from *bouche*, a mouth. But sometimes it extended only to bread, beer and wine. And this was anciently in use as well in the houses of noblemen, as in the king's court.

BOVERIUM, or *boveria*, An ox-house. *Mon. Angl. par.* 2. *fol.* 210.

BOVETTUS, A young steer or castrated bullock. *Paroch. Antiq. p.* 287.

BOVICULA, A heifer or young cow; which, in the east riding of *Yorkshire*, is called a *whee*, or *whey.*

BOUGH OF A TREE, Seisin of land given by it, to hold of the donor, *in capite*, *Mad. Exch.* 1. 62. See tit. *Entry.*

BOUND, or *boundary*, *bunda.*] The utmost limits of land, whereby the same is known and ascertained. See 4 *Inst.* 318. and tit. *Abuttals.*

BOUND BAILIFFS, See tit. *Bailiffs.*

BOUNTIES ON EXPORTATION, See tit. *Navigation Act.*

BOUNTY OF QUEEN ANNE, for maintaining poor clergymen. See *First Fruits.*

BOW-BEARER, An under officer of the *forest*, whose office is to oversee, and true inquisition make, as well of sworn men as unsworn, in every bailiwick of the forest; and of all manner of trespasses done, either to vert or venison, and cause them to be presented, without any concealment, in the next court of attachment, &c. *Cromp. Juris. fol.* 201.

BOWYERS, One of the ancient companies of the city of *London.* By stat. 8 *Eliz. c.* 10. a *bowyer* dwelling in *London*, was to have always ready fifty *bows* of elm, witch-hasle or ash, well made and wrought, on pain of 10*s.* for every *bow* wanting; and to sell them at certain prices, under the penalty of 40*s.* And by stat. 12 *Edw.* IV. *c.* 2. pa-

rents and masters were to provide for their sons and servants, a *bow* and two *shafts*, and cause them to exercise shooting, on pain of 6*s.* 8*d.* &c. See also stat. 33 *Hen.* VIII. *c.* 6. and tit. *Game.*

BRACELETS, Hounds, or rather beagles of the smaller and slower kind. *Pat.* 1. *Rich.* II. *p.* 2. *m.* 1.

BRACENARIUS, Fr. *braconnier.*] A huntsman, or master of the hounds. *Anno* 26 *Edw.* I. *Rot.* 10. *in dorso.*

BRACETUS, A hound: *brachetus* is in Fr. *brachet*, braco *canis sagax, indagator leporum:* so *braco* was properly the large fleet hound; and *brachetus*, the smaller hound; and *brachete* the bitch of that kind. *Monastic. Ang. tom.* 2. *p.* 283.

BRACINUM, A brewing: the whole quantity of ale brewed at one time, for which *tolsestor* was paid in some manors. *Brecina*, a brew-house, *MS.*

BRANDING *in the hand* or *face*, with a hot iron, a punishment inflicted by law, for various offences, after the offender hath been allowed *clergy*. See tit *Clergy, benefit of.*

BRANDY, A liquor made chiefly in *France*, and extracted from the lees of wine. In the stat 20 *Car.* II. *cap.* 1. upon an argument in the Exchequer, *anno* 1668, whether *brandy* were a *strong water* or *spirit*, it was resolved to be a *spirit:* but in the year 1669, by a grand committee of the whole house of commons, it was voted to be a *strong water* perfectly made. See the stat. 22 *Car.* II. *cap.* 4. See tit. *Customs, Excise, Navigation Act.*

BRASIUM, Malt: in the ancient statutes *brasiator* is taken for a brewer, from the Fr. *brasseur;* and at this day is used for a maltster or malt-maker. *Paroch. Antiq. p.* 496.

BRASS, Is to be sold in open fairs and markets, or in the owners' houses, on pain of 10*l.* and to be worked according to the goodness of metal wrought in *London*, or shall be forfeited: also searchers of *brass* and pewter are to be appointed in every city and borough by head officers, and in counties by justices of peace, &c. and in default thereof, any other person skilful in that mystery, by oversight of the head officer, may take upon him the search of defective *brass*, to be forfeited, &c. Stat. 19 *Hen.* VII. *c.* 6. *Brass* and pewter, bell-metal, &c. shall not be sent out of the kingdom, on pain of forfeiting double value, &c. Stats. 33 *Hen.* VIII. *c.* 7. 2 and 3 *Edw.* VI. *c.* 37.

BRAWLING OR QUARRELLING IN THE CHURCH. See *Church, Churchwarden.*

BREACH OF CLOSE. See tit. *Trespass.*

BREACH OF COVENANT, The not performing of any covenant, expressed or implied, in a deed; or the doing an act, which the party covenanted not to do. See tit. *Covenant.*

BREACH OF DUTY, The not executing any office, employment or trust, &c. in a due and legal manner.

BREACH OF PEACE. Offences against the *public peace*, are either such as are an *actual* breach of the peace, or constructively so, by aiding to make others break it. See tit. *Peace.*

BREACH OF POUND, The breaking any pound or place where cattle or goods distrained are deposited, to rescue such distress. See tit. *Distress, Pound-breach.*

BREACH OF PRISON. See tit. *Escape, Prison-breaking.*

BREACH OF PROMISE, *violatio fidei.*] A breaking or violating a man's word, or undertaking; as where a person commits any *breach* of the condition of a bond, or his covenant, &c. entered into, in an action on the bond, &c. the *breach* must be assigned. In debt on

bond, conditioned to give account of goods, &c. a *breach* must be alleged, or the plaintiff will have no cause of action. 1 *Saund.* 102. See tit. *Bond, Condition, Covenant.*

BREAD AND BEER. The assise of *bread*, *beer*, and *ale*, &c. is granted to the lord mayor of *London* and other corporations: bakers, &c. not observing the assise to be set in the pillory. Stat. 51 *Hen.* III. *st.* 1. *Ord. Pistor.* and 51 *Hen.* III. *st.* 6. *Vide* 2 and 3 *Edw.* VI. *c.* 15.

By stat. 31 *Geo.* II. *c.* 29. (explained and restrained as to time of prosecution to seven days, 33 *Geo.* III. *c.* 37.) containing regulations concerning the assise of bread, and to prevent adulteration, so much of stat. 51 *Hen.* III. *st.* 6. entitled, *assisa panis et cervisiæ*, as relates to the assise of bread, and the stat. 8 *Ann. c.* 18. and all amendments by subsequent acts are *repealed*. The weight of the peck loaf, when well baken, is fixed at 17*lb.* 6*oz. Avdps.* and the rest in proportion. The weight of a sack of flour, at 2 *cwt.* 2 *qrs.* or 280*lb. net*, which is to produce twenty peck loaves, weighing 347*lbs.* 8*oz.* So that 3*lb.* 6*oz.* is added to the weight of the flour by the materials of each peck loaf when baked. And see farther stat. 32 *Geo.* II. *c.* 18. how penalties not appropriated by stat. 31 *Geo.* II. *c.* 29. shall be distributed. See also stat 3 *Geo.* III. *c.* 6. (for *Scotland*,) &c. and *c.* 11. wherein there are farther regulations concerning the assise of bread, and for preventing the adulteration thereof.

See also stat. 13 *Geo.* III. *c.* 62. as to *standard wheaten bread.* And see tit. *Corn.*

See 36 *Geo.* III. *c.* 22. now in force, and amended by 41 *Geo.* III. (U. K.) *c.* 12. respecting inferior sorts of bread. 37 *Geo.* III. *c.* 98. 38 *Geo.* III. *c.* 62. and *c.* 55. 39 and 40 *Geo.* III. *c.* 74. and *c.* 97. and 45 *Geo.* III. *c.* 23. as to the assise and price of bread in *London* and its environs. 39 and 40 *Geo.* III. *c.* 18. and *c.* 74. 41 *Geo.* III. *st.* 1. *c.* 16, 17. and 41 *Geo.* III. (U. K.) *c.* 1, 2. for temporary regulations to prevent the sale of bread till baked twenty-four hours.

By stat. 34 *Geo.* III. *c.* 61. bakers are prohibited from carrying on their trade during *Sundays*, except at certain hours.

Under these statutes bread deficient in weight or quality, may be seized by *justices*, *mayors*, &c. and bread is to be marked by the bakers according to its quality, W. for wheaten, and H. for household.

BREAD OF TREET, or TRITE, *panis tritici.*] Is bread mentioned in the statute 51 *Hen.* III. of assise of bread and ale, wherein are particularized *wastel-bread*, *cocket-bread*, and *bread of treet*, which answer to the three sorts of bread mentioned in the statute of *Anne*, called white, wheaten, and household bread. In religious houses they heretofore distinguished bread by these several names *panis armigerorum*, *panis conventualis*, *panis puerorum et panis famulorum. Antiq. Not.*

BREAKING OF ARRESTMENT, Is an action wherein it is narrated, that though arrestment was laid on, payment, nevertheless, was made; the pursuer therefore concludes, that the breaker should refound him, and besides should be punished according to law. *Scotch Dict.*

BRECCA, From the Fr. *breche.*] A breach or decay. In some ancient deeds there have been covenants for repairing *muros et* breccas *portas et fossata, &c. De* brecca *aquæ inter* Woolwich *et* Greenwich *supervidend. Pat.* 16. *Rich.* II. A duty of 3*d. per* ton on shipping was granted for amending and stopping of *Dagenham breach*, by stat. 12 *Ann. c.* 17.

BRECINA. *Vide Bracinum.*

BREDE, A word used by *Bracton* for broad; as too large and too *brede*, is proverbially too long and too broad. *Bract. lib.* 3. *tract.* 2. *c.* 15. There is also a *Sax.* word *brede* signifying deceit. *Leg. Canut. c.* 44.

BREDWITE, Sax. *bread* and *wite.*] A fine or penalty imposed for defaults in the assise of bread: to be exempt from which was a special privilege granted to the tenants of the honour of *Wallingford* by King *Hen.* II. *Paroch. Antiq.* 114.

BREHON and BREHON LAW. See tit. *Ireland.*

BREISNA, Wether-sheep. *Mon. Angl.* 1. *c.* 406.

BRENAGIUM, A payment in bran, which tenants anciently made to feed their lord's hounds. *Blount.*

BRETOYSE, or BRETOISE, The law of the marches of *Wales*, in practice among the ancient *Britons.*

BREVE, A writ; by which a man is summoned or attached to answer in action; or whereby any thing is commanded to be done in the king's courts, in order to justice, &c. It is called *breve*, from the brevity of it; and is directed either to the chancellor, judges, sheriffs, or other officers. *Bract. lib.* 5. *tract.* 5. *cap.* 17. See *Skene de verb. Breve.* and this *Dict.* tit. *Writ.*

BREVE PERQUIRERE, To purchase a writ or license of trial, in the king's courts, by the plaintiff, *qui* breve *prequisivit:* and hence comes the usage of paying 6*s.* 8*d.* fine to the king, where the debt is 40*l.* and of 10*s.* where the debt is 100*l.* &c. in suits and trials for money due upon bond, &c.

BREVE DE RECTO, A writ of right, or license for a person ejected out of an estate, to sue for the possession of it when detained from him. See tit. *Right.*

BREVIA TESTATA. It is mentioned by the feodal writers. *Vide Feud. l.* 1. 64. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata.* See tit. *Deed.*

BREVIBUS ET ROTULIS LIBERANDIS, A writ or mandate to a sheriff to deliver unto his successor the county, and the appurtenances, with the rolls, briefs, remembrances, and all other things belonging to that office. *Reg. Orig. fol.* 295.

BREWERS. As to the dimensions of their casks, see tit. *Coopers.* By stat. 24 *Geo.* III. *st.* 2. *c.* 41. brewers of strong and small beer are to take out annual licenses from the officers of excise. Brewers are by this and other acts subject to various regulations under the excise laws. Duties of excise are imposed on beer and ale by various acts. Notice to the excise office must be given, and entry made, of places for brewing beer and ale. See stats. 12 *Car.* II. *c.* 24. 15 *Car.* II. *c.* 11. and 5 *Geo.* III. *c.* 43. See also stats. 1 *Wm. & M. st.* 1. *c.* 24. 7 and 8 *Wm.* III. *c.* 30. 8 and 9 *Wm.* III. *c.* 19. 33 *Geo.* III. *c.* 23. 42 *Geo.* III. *c.* 38. to prevent frauds by brewers. Private persons may brew beer in their own houses, for their family, or to give away, but must not lend their brew-house for other purposes, on penalty of 50*l.* Stat. 22 and 23 *Car.* II. *c.* 5. § 10. By stat. 32 *Geo.* III. *c.* 8. § 1. common brewers must not sell beer in less quantities than casks of 4 1-2 gallons. By a by-law of the common council, brewers' drays shall not be in the streets of *London* after eleven in the forenoon in summer, and one in winter. 2 *Stra.* 1085. *Hardw.* 405. *Andr.* 91.

BRIBERY, From the Fr. *briber*, to devour or eat greedily.] Is a high offence, where a person, in a judicial place, takes any fee, gift,

reward or brocage, for doing his office, or by colour of his office, but of the king only. 3 *Inst.* 145. *Hawk. P. C.* 1. *c.* 67.

Taken more largely, it signifies the receiving, or offering, any undue reward, to or by any person concerned in the administration of public justice, whether judge, officer, &c. to influence his behaviour in his office; and sometimes it signifies the taking or giving a reward for appointing another to a public office. 3 *Inst.* 9. 4 *Comm.* 139. To take a bribe of money, though small, is a great fault; and judges' servants may be punished for receiving bribes. If a judge refuse a bribe offered him, the offerer is punishable. *Fortescue, cap.* 51.

Bribery in inferior judicial or ministerial officers is punished by fine and imprisonment, which may also be inflicted on those who *offer* a bribe, though not taken. 4 *Comm.* 140. 3 *Inst.* 147. Bribery in a judge was anciently looked upon as so heinous an offence, that it was sometimes punished as high treason; and it is at this day punishable with forfeiture of office, fine, and imprisonment; and chief justice *Thorpe* was hanged for this offence in the reign of *Edw.* III. And by stat. 11 *Hen.* IV. all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service for ever. 4 *Comm.* 140. cites 3 *Inst.* 146. In the reign of King *James* I. the earl of *Middlesex*, lord treasurer of *England*, being impeached by the commons for refusing to hear petitions referred to him by the king, till he had received great *bribes*, &c. was, by sentence of the lords, deprived of all his offices, and disabled to hold any for the future, or to sit in parliament; also he was fined fifty thousand pounds, and imprisoned during the king's pleasure. 1 *Hawk. P. C. c.* 67. § 7. But the fine was remitted on the accession of *Car.* I. and the proceeding appears to have been instigated rather by revenge than justice. In 11th King *George* I. the lord chancellor was impeached by the commons with great zeal, for bribery, in selling the places of masters in chancery, for exorbitant sums, and other corrupt practices, tending to the great loss and ruin of the suitors of that court; and the charge being made good against him, being before devested of his office, he was sentenced by the lords to pay a fine of thirty thousand pounds, and imprisoned till it was paid. See 6 *S. T.* 112.

By stat. 12 *Rich.* II. *c.* 2. the chancellor, treasurer, justices of both benches, barons of the exchequer, &c. shall be sworn not to ordain or nominate any person in any office for any gift, brocage, &c. And the sale of offices concerning the administration of public justice, &c. is prohibited on pain of forfeiture and disability, &c. by 5 and 6 *Edw.* VI. *c.* 16. In the construction of the last-mentioned statute, it has been resolved that the offices of the ecclesiastical courts are within the meaning of that act, as well as the offices in the courts of common law; but no office in fee is within the statute, and it hath been adjudged, that one who contracts for an office, contrary to the purport of the said statute 5 and 6 *Edw.* VI. *c.* 16. is so disabled to hold the same, that he cannot be restored to the capacity of holding it by any grant or dispensation whatsoever. *Cro. Jac.* 269. 386. 1 *Hawk. P. C. c.* 67. It is said the stat. does not extend to the plantations. *Salk.* 411. 1 *Hawk. P. C. c.* 67. § 5.

To bribe persons either by giving money or promises, to vote at elections for members of corporations, which are erected for the sake of public government, is an offence for which an information will lie. 12 *Mod.* 314. 2 Ld. *Raym.* 1377. 1 *Black.* 383. But the court will

grant such information very cautiously, since the additional penalties by statute. 1 *Black.* 380. See tit. *Parliament.*

An attempt to induce a man to advise the king under the influence of a bribe, is criminal, though never carried into execution. 4 *Burr.* 2499. Offering money to a privy councillor, to procure the reversion of an office in the gift of the crown, has been adjudged a misdemeanor and punishable by information. *Rex* v. *Vaughan*, 1 *Hawk. P. C. c.* 67. § 7. *in note.*

As to officers of customs, &c. taking *bribes*, see tit. *Custom.*

Taking money to excuse persons from serving on juries subjects the offender to a fine, not exceeding ten pounds, at the discretion of the judge. Stat. 3 *Geo.* II. *c.* 25. § 6.

As to bribery in elections to parliament, see tit. *Parliament* VI. (B. 3.) and further in general tit. *Extortion.*

BRIBOUR, Fr. *bribeur.*] Seems to signify in some of our old statutes, one that pilfers other men's goods. 28 *Edw.* II. *cap.* 1.

BRICOLLS, An engine mentioned in *Blount* by which walls were beaten down.

BRICKS AND TILES. By stat. 17 *Edw.* IV. *c.* 4. the earth for tiles is to be digged and cast up before the first of *November* yearly, stoned and turned before the first of *February*, and wrought before the first of *March* following. Every common tile must be 10 1-2 inches long, 6 1-4 broad, and half an inch thick. Roof tiles 13 inches long, &c. And persons selling tiles contrary hereto, forfeit double the value, and are liable to fine.

By stat. 17 *Geo.* III. *c.* 42. bricks when burnt are to be 8 1-2 inches long, 2 1-2 thick, and four wide. Contracts for engrossing and enhancing the price of bricks made void, and a penalty of 20*l.* imposed on the parties, and directions are given as to pan-tiles.

Bricks and tiles are liable to duties of excise, and to regulations for securing that duty, in *Great Britain* and *Ireland.* See 24 *Geo.* III. *st.* 2. *c.* 24. 25 *Geo.* III. *c.* 66. 34 *Geo.* III. *c.* 15. 37 *Geo.* III. *c.* 14, 15. 41 *Geo.* III. (U. K.) *c.* 91. 43 *Geo.* III. *c.* 69. 45 *Geo.* III. *c.* 30.

BRIDGE, *pons.*] A building of stone or wood erected across a river, for the common ease and benefit of travellers. Public bridges, which are of general convenience, are of common right to be repaired by the whole inhabitants of that county in which they lie. *Hale's P. C.* 143. 13 *Co.* 33. *Cro. Car.* 365.

Where a particular district rebuilt a foot bridge over a more convenient part of the stream, and convert it into a bridge for horses, carts and carriages; as the district was not bound by custom to build or repair such a bridge, but a foot-bridge only, and as they built quite a different bridge in a different place, which proved of common public utility to the county, the *county*, and not the district, are bound to repair it. *Burr.* 2594. *Black.* 685.

But a corporation aggregate, either in respect of a special tenure of certain lands, or in respect of a special prescription; also any other person, by reason of such a special tenure, may be compelled to repair them. *Hale's P. C.* 143. *Dalt. c.* 14. 6 *Mod.* 307.

A tenant at will of a house which adjoins to a common bridge, although he is not bound as between landlord and tenant to repair the house, yet if it become dangerously ruinous to the necessary intercourse of the bridge, the tenant is bound by reason of his possession, to repair it so far as to prevent the public being prejudiced. Ld. *Raym.* 856.

At common law those who are bound to repair public bridges, must make them of such height and strength as shall be answerable to the course of the water; and they are not trespassers if they enter on any land adjoining to repair them, or lay the materials necessary for the repairs thereon. *Dalt. cap.* 16. If a man erects a bridge for his own use, and the people travel over it as a common bridge, he shall, notwithstanding, repair it: though a person shall not be bound to repair a bridge, built by himself for the common good and public convenience, but the county must repair it. 2 *Inst.* 701. 1 *Salk.* 359. Where inhabitants of a county are indicted for not repairing a bridge, they must set forth who ought to repair the same, and traverse that they ought. 1 *Vent.* 256. Unless, perhaps, where the real question is, whether it be a public or a common bridge.

A vill may be indicted for a neglect in not repairing a bridge; and the justices of peace in their sessions may impose a fine for defaults. And any particular inhabitant of a county, or tenant of land charged to repairs of a bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the fine assessed by the court for the default of the repairs, who are to have their remedy at law for a contribution from those who are bound to bear a proportionable share of the charge. 6 *Mod.* 307.

If a manor is held by tenure of repairing a bridge or highway, which manor afterwards comes into several hands, in such case every tenant of any parcel of the demesnes and services, is liable to the whole charge, but shall have contribution of the rest; and this though the lord may agree with the purchasers to discharge them of such repairs, which only binds the lord, and doth not alter the remedy which the public hath. 1 *Danv. Abr.* 744. 1 *Salk.* 358.

So if a manor, subject to such charge, comes into the hands of the crown, yet the duty upon it continues; and any person claiming afterwards under the crown, the whole manor, or any part thereof, shall be liable to an indictment or information, for want of due repairs. 1 *Salk.* 358.

If part of a bridge lie within a franchise, those of the franchise may be charged with the repairs for so much: also by a special tenure, a man may be charged with the repairs of one part of a bridge, and the inhabitants of the county are to repair the rest. 1 *Hawk. P. C. c.* 77. § 2. *Raym.* 384, 385.

Indictments for not repairing of bridges, will not lie but in case of common bridges on highways; though it hath been adjudged they will lie for a bridge on a common footway. *Mod. Cas.* 256. Not keeping up a ferry, being a common passage for all the king's people, is indictable, as well as not keeping up bridges. 1 *Salk.* 12.

By stat. 22 *Hen.* VIII. *c.* 5. all householders dwelling in any county or town, whether they occupy lands or not: and all persons who have land in their own possession, whether they dwell in the same county or not, are liable to be taxed as inhabitants, towards the repairs of a public bridge. Where it cannot be discovered who ought to repair a bridge, it must be presented by the grand jury in quarter-sessions; and after their inquiry, and the order of sessions upon it, the justices may send for the constables of every parish, to appear at a fixed time and place, to make a tax upon every inhabitant, &c. but it has been usual, in the levying of money for repairs of bridges, to charge every hundred with a sum in gross, and to send such charge to the high constables of each hundred, who send their warrants to the petty constables, to gather it, by virtue whereof they assess the inhabitants of

parishes in particular sums, according to a fixed rate, and collect it; and then they pay the same to the high constables, who bring it to the sessions.

This method of raising money was long observed; but by statute 1 *Ann. cap.* 18. justices in sessions, upon presentment made of want of reparations, are to assess every town, parish, &c. in proportion, towards the repairs of a bridge; and the money assessed is to be levied by the constables of such parishes, &c. and being demanded, and not paid in ten days, the inhabitants shall be distrained; and when the tax is levied, the constables are to pay it to the high constable of the hundred; who is to pay the same to such persons as the justices shall appoint, to be employed according to the order of the justices, towards repairing of the bridge; and the justices may allow any person concerned in the execution of the act, 3*d.* per pound out of the money collected. All matters relating to the repairing and amending of bridges, are to be determined in the county where they lie, and no presentment or indictment shall be removed by *certiorari*. And by this statute, the evidence of the inhabitants of those places where the bridges are in decay, shall be admitted at any trial upon an information or indictment, &c.

By 14 *Geo.* II. *c.* 33. the justices at their general sessions, may purchase or agree with persons for any piece of land, not above one acre, near to any county bridge, in order to enlarge or more conveniently rebuild it; and the ground shall be paid for out of the money raised by statute of 12 *Geo.* II. *c.* 29. for better assessing, collecting and levying of county rates, &c. See tit. *County Rates*.

By the said stat. 12 *Geo.* II. *c.* 29. § 14. when any public bridges, &c. are to be repaired at the expense of the county, the justices at their general or quarter sessions, after presentment made by the grand jury, of their want of reparation, may contract with any person for rebuilding or repairing the same, for any term not exceeding seven years, at a certain annual sum. They are to give public notice of their intention to make such contracts, which are to be made at the most reasonable prices, and security given by the contractors for performance; which contracts are to be entered with the clerk of the peace.

43 *Geo.* III. *c.* 59. surveyors of county bridges, &c. in England, empowered to get materials for the repair of bridges in the same manner as surveyors of highways, under 13 *Geo.* III. *c.* 78. Quarter sessions may widen and improve or alter the situation of county bridges, &c. *Id.* § 2. Tools and materials provided by the quarter sessions vested in the surveyor. *Id.* § 3. Inhabitants of counties may sue for damage done to bridges in the name of surveyors. *Id.* § 4. What sort of bridges inhabitants of counties shall be liable to repair. *Id.* § 5. Act shall not extend to bridges repaired by tenure. § 7.

No persons are compellable to make a new bridge but by act of parliament: and the inhabitants of the whole county cannot, of their own authority, change a bridge from one place to another.

If a man has toll for men and cattle, passing over a bridge, he is to repair it; and toll may be paid in these cases, by prescription or statute.

BRIDGE-MASTERS. There are *bridge-masters* of *London-bridge*, chosen by the citizens, who have certain fees and profits belonging to their office, and the care of the said *bridge*, &c. *Lex Londin.* 283.

BRIEF, *brevis.*] An abridgment of the client's case, made out for the instruction of counsel, on a trial at law; wherein the case of the party is to be *briefly* but fully stated, the proofs must be placed in due

order, and proper answers made to whatever may be objected against the client's cause, by the opposite side; and herein great care is requisite that nothing be omitted to endanger the cause.

An attachment has been granted against a party and his attorney for surreptitiously getting possession of the brief of a counsel on the other side, and applying the same to an improper purpose in his defence. See *Bateman* v. *Conway*, 1 *Bro. P. C.* 519. 8vo. ed.

Though a brief is not of itself evidence against the party for whom it is prepared, yet, as a discovery of the secrets and merits of his case may be productive of perjury, or subornation of perjury, and thereby obstruct the justice of the court in which the suit is depending; the obtaining of it in a surreptitious manner is an offence highly deserving censure and punishment. *Id.*

BRIEF AL 'EVESQUE, A writ to the bishop, which in *Quare Impedit*, shall go to remove an incumbent, unless he recover, or be presented *pendente lite*. 1 *Keb.* 386.

BRIEF OUT OF THE CHANCERY, Is a writ or command from the king to a judge, to examine by an inquest, whether a man be nearest heir. *Scotch Dict.*

BRIEF OF DISTRESS, Is a writ out of the chancery, after decree obtained against any landlord to distress his readiest goods, according to the old custom, now obsolete. *Scotch Dict.*

BRIEF OF MORTANCESTRY, Is that which is used for entering of all heirs of defuncts. *Scotch Dict.*

BRIEFS, or licenses to make collection for repairing churches, restoring loss by fire, &c. See tit. *Churchwardens*, III. 1.

BRIGA, Fr. *brigue*.] Debate or contention.

BRIGANDINE, Fr. Lat. *lorica*.] A coat of mail or ancient armour, consisting of many jointed and scale-like plates, very pliant and easy for the body. This word is mentioned in *Stat.* 4 & 5 *P. & M. cap.* 2. and some confound it with *hawbergeon*; and others with *brigantine*, a long but low-built vessel, swift in sailing.

BRIGANTES, The ancient name for the inhabitants of *Yorkshire*, *Lancashire*, bishoprick of *Durham*, *Westmorland* and *Cumberland*. *Blount.*

BRIGBOTE, or BRUG-BOTE, Sax. *brig*, *pontus*, and *bote*, *compensatio*.] The contribution to the repair of bridges, [walls and castles,] which, by the old laws of the *Anglo-Saxons*, might not be remitted; but, by degrees, immunities were granted by our kings, even against this duty; and then to be quit of *brig-bote* signified to be exempt from tribute or contribution towards the mending or re-edifying of bridges. *Fleta*, *lib.* 1. *c.* 47. *Selden's Titles of Honour*, *fol.* 622. *Spelm.* v. *Brighote* and *Burghote*.

BRISTOL, A great city, famous for trade. The mayor, burgesses, and commonalty of the city of *Bristol*, are conservators of the river *Avon*, from above the bridge there, to *King-road*, and so down the *Severn* to the two islands called *Holmes*; and the mayor and justices of the said city may make rules and orders for preserving the river, and regulating pilots, masters of ships, &c. Also for the government of their markets; and the streets are to be kept clean and paved, and lamps or lights hung out at night. *Stat.* 11 & 12 *W.* III. *c.* 23. No person shall act as a broker in the city of *Bristol*, till admitted and licensed by the mayor and aldermen, &c. on pain of forfeiting 500*l.* and those who employ any such, to forfeit 50*l.* &c. by stat. 3 *Geo.* II. *c.* 31. By the stat. 22 *Geo.* II. *c.* 20. the stat. 11 & 12 *W.* III. is rendered more effectual, so far as it relates to the paving and enlightening the streets;

and divers regulations are made in relation to the hackney-coachmen, halliers, draymen, and carters, and the markets and sellers of hay and straw, within the said city, and liberties thereof.

BROCAGE, *brocagium.*] The wages or hire of a broker, which is also termed *brokerage.* 12 *Rich.* II. *c.* 2.

BROCELLA. This word, as interpreted by Dr. *Thoroten*, signifieth a wood; and it is said to be a thicket or covert of bushes and brush-wood, from the obsolete Lat. *brusca, terra* bruscosa et brocia, Fr. *broce, brocelle;* and hence is our *brouce* of wood, and *brousing* of cattle.

BROCHA, Fr. *broche.*] An awl, or large packing-needle. A spit in some parts of *England* is called a *broche;* and from this word comes to pierce or *broach* a barrel.

BROCHIA, A great can or pitcher. *Bract. lib.* 2. *tract.* 1. *cap.* 6. Where it seems that he intends *saccus* to carry dry, and *brochia* liquid things.

BRODEHALFPENY, or BROADHALFPENY. See *Bordhalfpeny.*

BROKERS, *broccatores, broccarii et auxionarii.*] Are those that contrive, make, and conclude bargains and contracts between merchants and tradesmen, in matters of money and merchandise, for which they have a fee or reward. These are *Exchange brokers;* and by the stat. 10 *Rich.* II. *cap.* 1. they are called *broggers;* also *broggers of corn* is used in a proclamation of Queen *Elizabeth*, for badgers. *Baker's Chron. fol.* 411. The original of the word is from a trader broken, and that from the Sax. *broc*, misfortune, which is often the true reason of a man's breaking; so that the name of broker came from one who was a broken trader by misfortune, and none but such were formerly admitted to that employment; and they were to be freemen of the city of *London*, and allowed and approved by the lord mayor and aldermen, for their ability and honesty.

By the stat. 6 *Ann. c.* 16. they are to be annually licensed in *London* by the lord mayor and aldermen, who administer an oath, and take bond for the faithful execution of their offices. If any person shall act as brokers, without being thus licensed and admitted, they shall forfeit the sum of 500*l.* And persons employing them 50*l.* and brokers are to register contracts, &c. under the like penalty; also brokers shall not deal for themselves, on pain of forfeiting 200*l.* They are to carry about them a silver medal, having the king's arms, and the arms of the city, &c. and pay 40*s.* a year to the chamber of the city.

As to brokers in *Bristol*, see tit. *Bristol.* And as to *Pawnbrokers*, see that title. As to Brokers illegally dealing in the funds or stocks, who are usually known by the appellation of stock-jobbers, see tit. *Funds.*

BROK, An old sword or dagger.

BROSSUS, Bruised or injured with blows, wounds, or other casualty. *Cowel.*

BROTHEL-HOUSES, Lewd places, being the common habitations of prostitutes. A *brothelman* was a loose, idle fellow; and a *feme bordelier* or *brothelier*, a common whore; and *borelman* is a contraction of *brothelman.* *Chaucer.* See *Bawdy House.*

BRUDBOTE. See *Brigbote.*

BRUERE, Lat. *erica.*] Signifies heath-ground; and *brueria*, briars, thorns, or heath, from the Sax. *bræ*r, *briar. Paroch. Antiq.* 620.

BRUILLUS, A wood or grove, Fr. *breil, bruil*, a thicket or clump of trees in a park or forest. Hence the abbey of *Bruer*, in the forest of *Wichwood*, in *com. Oxon.* and *Bruel, Brehul*, or *Brill*, a hunting seat of our ancient kings in the forest of *Burnwood*, in *com. Bucks.*

BRUILLETUS, A small coppice or wood.

BRUNETA, Properly *Burneta*, which see.

BRUSCIA, Seems to signify a wood. *Monast. tom.* I. *pag.* 753.

BRUSUA and BRUSULA, Brouse or brushwood. *Mon. Angl. tom.* 1. *fol.* 773.

BUBBLES. The South Sea project, and various other schemes, similar in the end intended, that of defrauding the subject, though different as to the means, were called by the name of *bubbles*. The stat. 6 *Geo.* I. *c.* 18. makes all unwarrantable undertakings, by unlawful subscriptions, subject to the penalties of a *præmunire*. See tit. *Funds*.

BUCKLARIUM, A buckler. *Claus.* 26 *Ed.* I. *m.* 8. *intus.*

BUCKSTALL, A toil to take deer, which, by the stat. 19 *Hen.* VII. *c.* 11. is not to be kept by any person that hath not a park of his own, under *penalties*. See also 3 *Jac.* I. *c.* 13. There is a privilege of being quit of amerciaments for *buckstalls*. *Privileg. de Semplingham.* See 4 *Inst.* 306.

BUCKWHEAT, *French* wheat, used in many counties of this kingdom; in *Essex* it is called *brank*, and in *Worcestershire*, *crap*. It is mentioned in the stat. 15 *Car.* II. *c.* 5.

BUCINUS, A military weapon for a footman. *Tenures*, *p.* 74.

BUGGERY, or *Sodomy*, Comes from the Italian *bugarone* or *buggerare*, and it is defined to be a carnal copulation against nature, and this is either by the confusion of species; that is to say, a man or a woman with a brute beast; or of sexes, as a man with a man, or man unnaturally with a woman. 3 *Inst.* 58. 12 *Co. Rep.* 36. This sin against God, nature, and the law, it is said, was brought into *England* by the *Lombards*. *Rot. Parl.* 50 *Ed.* III. *numb.* 58. In ancient times, according to some authors, it was punishable with burning, though others say with burying alive; but at this day it is felony excluded clergy, and punished as other felonies, by stat. 25 *Hen.* VIII. *cap.* 6, enforced by 5 *Eliz. c.* 17.

By the articles of the navy, (*Art.* 29. stat. 22 *Geo.* II. *c.* 33.) if any person in the fleet shall commit the unnatural and detestable sin of buggery or sodomy with man or beast, he shall be punished with death by the sentence of a court martial.

It is felony both in the agent and patient consenting, except the person on whom it is committed be a boy under the age of discretion, (which is generally reckoned at fourteen,) when it is felony only in the agent; all persons present, aiding and abetting to this crime, are all principals, and the statutes make it felony generally. There may be accessaries before and after the fact; but though none of the principal offenders shall be admitted to clergy, the accessaries are not excluded it. 1 *Hale's Hist. P. C.* 670.

In every indictment for this offence, there must be the words *rem habuit veneream et carnaliter cognovit*, &c. and of consequence some kind of penetration and emission must be proved; but any the least degree is sufficient. 1 *Hawk. P. C. c.* 4. The general words of these indictments are, that *A. B.* on such a day, at, &c. with force and arms, made an assault upon *C. D.* and then and there wickedly, devilishly, feloniously, and against the order of nature, committed the venereal act with the said *C. D.* and carnally knew him, and then and there wickedly, &c. did with him that sodomitical and detestable sin called buggery, (not to be named among Christians,) to the great displeasure of God, and disgrace of all mankind, &c. This crime is

excepted out of our acts of general pardon. This, says *Blackstone*, is a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for, if false, it deserves a punishment inferior only to that of the crime itself

BUILDINGS. If a house new built exceeds the ancient foundation, whereby that is the cause of hindering the lights or air of another house, action lies against the builder. *Hob.* 131. In *London* a man may place ladders or poles upon the ground, or against houses adjoining, for building his own, but he may not break ground; and builders of houses ought to have license from the mayor and aldermen, &c. for a *board* in the streets, which are not to be encumbered. *Cit. Lib.* 30. 146. In new building of *London* it was ordained, that the outsides of the buildings be of brick or stone, and the houses for the principal streets to be four stories high, having, in the front, balconies, &c. by stat. 19 *Car.* II. *c.* 3.

The laws for regulating of all buildings in the cities of *London* and *Westminster*, and other parishes and places in the weekly bills of mortality, the parishes of *St. Mary-le-bone* and *Paddington*, *St. Pancras*, and *St. Luke* at *Chelsea*, for preventing mischiefs by fire, are reduced into one act by stat. 14 *Geo.* III. *c.* 78. The regulations of this law being very minute and technical, we must refer the reader to the statute itself. See tit. *Fire*.

BULL, *bulla*.] A brief or mandate of the pope or bishop of *Rome*, from the lead, or sometimes gold seal affixed thereto, which *Mat. Paris*, *anno* 1237, thus describes: *In* bulla *domini papæ stat imago* Pauli *a dextris crucis in medio bullæ figurata et* Petri *a sinistris*. These decrees of the pope are often mentioned in our statutes, as 25 *Ed.* III. 28 *Hen.* VIII. *cap.* 16. 1 & 2 *P. & M. c.* 8. and 13 *Eliz. cap.* 2. They were heretofore used, and of force, in this land; but by the stat. 28 *Hen.* VIII. *c.* 16. it was enacted, That all bulls, briefs, and dispensations had or obtained from the bishop of *Rome*, should be void. And by stat. 13 *Eliz. c.* 2. (see stat. 23 *Eliz. c.* 1.) if any person shall obtain from *Rome* any bull or writing, to absolve or reconcile such as forsake their due allegiance, or shall give or receive absolution by colour of such bull, or use or publish such bull, &c. it is high treason. See *Rome*, *Papist*.

BULL AND BOAR. By the custom of some places, a parson may be obliged to keep a *bull and a boar* for the use of the parishioners, in consideration of his having tithes of calves, pigs, &c. 1 *Roll. Abr.* 559. 4 *Mod.* 241.

BULLIO SALIS, As much *salt* as is made at one *wealing* or *boiling*. A measure of salt, supposed to be twelve gallons. *Mon. Ang. tom.* 2.

BULLION, Fr. *billon*.] The ore or metal whereof gold is made; and signifies with us gold or silver in *billet*, in the mass before it is coined. *Anno* 9 *Edw.* III. *st.* 2. *c.* 2. See tit. *Coin*, *Money*. See 43 *Geo.* III. *c.* 49.

BULTEL, The bran or refuse of meal after dressed; also the bag wherein it is dressed is called a *bulter*, or rather *boulter*. The word is mentioned in the statute *de assisâ panis et cervisiæ*, *anno* 51 *Hen.* III. Hence comes *bulted* or *boulted bread*, being the coarsest bread.

BUNDLES. A sort of records of the *Chancery*, lying in the office of the *Rolls*; in which are contained, the *files* of bills and answers;

of *hab. cor. cum causa ; certioraris ;* attachments, &c. ; *scire faciases ;* certificates of statute-staple ; extents and liberates ; *supersedeases ;* bails on special pardons ; bills from the Exchequer of the names of sheriffs ; letters patent surrendered, and deeds cancelled ; inquisitions ; privy seals for grants ; bills signed by the king ; warrants of escheators, customers, &c.

BURCHETA, from the Fr. *berche.*] A kind of gun used in forests.

BURCIFER REGIS, Purse-bearer, or keeper of the king's privy purse. *Pat.* 17 *Hen.* VIII.

BURDARE, To jest or trifle. *Mat. Paris, Addit. p.* 149.

BURGAGE TENURE. See tit. *Tenures*, III. 11.

TENURE IN BURGAGE, is described by *Glanvil*, (*lib.* 7. *c.* 3.) and is expressly said by *Littleton*, § 162. to be but tenure in socage ; and it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain. *Litt.* § 162, 163.

It is indeed only a kind of town-socage ; as common socage, by which other lands are holden, is usually of a rural nature. A borough is usually distinguished from other towns by the right of sending members to parliament ; (see tit. *Borough ;*) and where the right of election is by burgage-tenure, that alone is a proof of the antiquity of the borough. *Tenure in Burgage*, or *Burgage Tenure*, therefore is, where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage by a certain established rent. 2 *Comm.* 82.

The free socage in which these tenements are held seems to be plainly a remnant of *Saxon* liberty ; which may also account for the great variety of customs affecting many of these tenements so held in ancient burgage, the principal and most remarkable of which is, that called *Borough-English.* See that title.

Other special customs there are, in different burgage-tenures ; as in some, that the wife shall be endowed of *all* her husband's tenements, and not of the third part only, as at common law. *Litt.* § 166. In others that a man might (previous to stat. *Hen.* VIII.) dispose of his tenements by will ; *Litt.* § 167. though this power of disposal was allowable in the *Saxon* times, a pregnant proof that these liberties of socage tenure were fragments of *Saxon* liberty. 2 *Comm.* 84.

BURG, A small walled town, or place of privilege, &c. See *Borough.*

BURGBOTE, from *burg, castellum,* and *bote, compensatio.*] Is a tribute or contribution towards the building or repairing of castles, or walls of a borough or city ; from which divers had exemption by the ancient charters of the *Saxon* kings. *Rastal.* burg-bote *significat quietantiam reparationis murorum civitatis vel* burgi. *Fleta, lib.* 1. *c.* 47. *Spelm.* v. *Burghbote.*

BURGESSES, *burgarii et burgenses.*] Properly men of trade, or the inhabitants of a borough or walled town ; but this name is usually given to the magistrates of corporate towns.

In *Germany*, and other countries, they confound *burgess* and *citizen ;* but we distinguish them, as appears by the stat. 5 *Rich.* II. *c.* 4. where the classes of the commonwealth are thus enumerated : *count, baron, banneret, chivaleer de countée, citizein de citée, burgess de burgh.* See *Co. Lit.* 80. Those are also called *burgesses*, who serve in parliament for any borough or corporation. See tit. *Parliament.* Burgesses

of our towns are called, in *Domesday*, the *homines* of the king, or of some other great man; but this only shows whose protection they were under, and is not any infringement of their *civil liberty*. *Squire, Ang. Sax. Gov.* 260. *n. Burgenses et homines burgorum et villarum, Madox. Excheq.* 1 *V.* 333. The aid of burghs, *ib.* 1 *V.* 600, 601. See tit. *Borough*.

BURGH-BRECHE, *Fidejussionis violatio.* A breach of pledge, *Spelm.*] It is used for a fine imposed on the community of a town, for a breach of the peace, &c. *Leg. Canuti, cap.* 55.

BURGHERISTHE, or *burgberiche*, used in *Domesday-book* for a breach of the peace in a city. *Blount.*

BURGHBOTE. See *Burgbote.*

BURGMOTE, A court of a borough. *LL. Canuti, MS. cap.* 44. *Berghmote* is different; which see.

BURGHWARE, *quasi burgiver.*] A citizen or *burgess.*

BURGLARY, *Burgi latrocinium;* by our ancient law called *hamesecken*, as it is in *Scotland* to this day. 4 *Comm.* 223.] A felony at common law, in (1) *breaking and entering* (2) the *mansion-house* of another, or the walls or gates of a walled town, or a *church*, (see *Sacrilege*,) (3) *in the night*, (4) to the intent to commit some *felony* within the same; whether the felonious intent be executed or not. 1 *Hawk. P. C. c.* 38. § 1. 10. 4 *Comm.* 224.

It seems the plainest method to consider the subject according to the four parts of the above definition; and (5) to add something on the punishment of this offence.

1. There must be both a *breaking* and an *entry* to complete this offence. 1 *Hawk. P. C. c.* 38. § 3.

Every entrance into the house by a trespasser is not a *breaking* in this case, but there must be an *actual breaking*. As if the door of a mansion-house stand open, and the thief enters, this is no breaking. So it is if the window of the house be open, and a thief, with a hook or other engine, draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 *Inst.* 64. But the following acts amount to an actual breaking, viz. opening the casement, or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 *Hale's H. P. C.* 552.

Having entered by a door which he found open, or having lain in the house by the owner's consent, unlatching a chamber-door, or coming down the chimney. 1 *Hawk. P. C. c.* 38. § 4.

If thieves pretend business to get into a house by night, and thereupon the owner of the house opens his door, and they enter and rob the house, this is burglary. *Kel* 42.

So if persons designing to rob a house, take lodgings in it, and then fall on the landlord and rob him; or where persons intending to rob a house, raise a hue and cry, and prevail with the constable to make a search in the house, and having got in by that means, with the owner's consent, bind the constable, and rob the inhabitants; in both these instances they are guilty of burglary, for these evasions rather increase the crime. 1 *Hawk. P. C. c.* 38. § 5.

If a person be within the house, and steal goods, and then open the house on the inside, and go out with the goods, this is burglary, though the thief did not break the house. 3 *Inst.* 64. But this

was not admitted to be law with any certainty; and, therefore, by Stat. 12 *Ann. st.* 1. *c.* 7. it is enacted, "that if any person shall enter into the mansion-house of another, by day or by night, without breaking the same, with an intent to commit felony, or being in such house shall commit any felony, and shall, in the night-time, *break* the said house to get out, he shall be guilty of burglary, and ousted of the benefit of clergy, in the same manner as if he had broken and entered the house in the night-time, with intent to commit felony."

Any the least *entry*, either with the whole, or with but part of the body, or with any instrument or weapon, will satisfy the word *entered* in an indictment for burglary; as if one do put his foot over the threshold, or his hand, or a hook, or pistol, within a window, or turn the key of a door which is locked on the inside, or discharge a loaded gun into a house, &c. 1 *Hawk. P. C. c.* 38. § 7. and the authorities there cited. But where thieves had bored a hole through the door, with a *centre-bit*, and part of the chips were found in the inside of the house, yet as they had neither got in themselves, nor introduced a hand or instrument for the purpose of taking the property, the entry was ruled incomplete. *Id. ib. in note.*

When several come with a design to commit burglary, and one does it while the rest watch near the house, here his act is, by interpretation, the act of all of them. And, upon a like ground, if a servant confederating with a rogue, let him in to rob a house, it has been determined by all the judges, upon a special verdict, that it is burglary both in the servant and the thief. *Leach's Hawk. P. C.* i. *c.* 38. § 9. and *n.*

2. It is certainly a dangerous, if not an incurable fault, to omit the word *dwelling* house in an indictment for a burglary in a house. But it seems not necessary or proper, in an indictment for burglary in a church, which, by all the ancient authorities, is taken as a distinct burglary. See 1 *Hawk. P. C. c.* 38. § 10. and the authorities there cited.

If a man hath two houses, and resides, sometimes in one of the houses, and sometimes in the other, if the house he doth not inhabit is broken by any person in the night, it is burglary. *Poph.* 52.

A chamber in an inn of court, &c. where one usually lodges, is a mansion-house; for every one hath a several property there. But a chamber where any person doth lodge as an inmate, cannot be called his mansion; though, if a burglary be committed in his lodgings, the indictment may lay the offence to be in the mansion-house of him that let them. 3 *Inst.* 65. *Kel.* 83. If the owner of the house breaks into the rooms of his lodgers, and steals their goods, it cannot be burglary to break into his own house, but it is felony to steal their goods. *Wood's Inst.* 378. But see *contrà*, 1 *Hawk. P. C. c.* 38. § 13, 14, 15.

If the owner live under the same roof with the inmates, there must be a separate *outer* door, or the whole is the mansion of the owner; but if the owner inhabit no part of the house; or even if he occupy a shop, or a cellar in it, but do not sleep therein, it is the mansion of each lodger, although there be but one outer door. *Leach's Hawk. P. C. c.* 38. § 15. *in n.* There being only one door, in common to all the inhabitants, makes no difference, where the owner does not sleep in any part of the house, for, in that case, each apartment is a *separate mansion. Id. ib.* § 14. *n.*

Chambers in inns of court, &c. have separate outward doors, which are the extremity of obstruction, and are enjoyed as separate property,

as estates of inheritance for life, or during residence. So a house divided into separate tenements, with a distinct outward door to each, will be separate houses. *Id. ib.* § 13. *n.*

Part of a house divided from the rest, having a door of its own to the street, is a mansion-house of him who hires it. *Kel.* 84.

To break and enter a *shop*, not parcel of the mansion-house, in which the shop-keeper never lodges, but only works or trades there in the day-time, is not burglary, but only larceny; but if he, or his servant, usually or often lodge in the shop at night, it is then a mansion-house in which a burglary may be committed. 1 *Hale's H. P. C.* 557, 558. But see stat. 13 *Geo.* III. *c.* 38. respecting burglary in the work-shops of the plate-glass manufactory, which is made single felony, and punishable with transportation for seven years. If the shop-keeper sleep in any part of the building, however distinct that part is from the shop, it may be alleged to be his mansion-house, provided the owner does not sleep under the same roof also. *Leach's Hawk. P. C.* i. *c.* 38. § 16. *in n.*

A lodger in an inn hath a special interest in his chamber, so that if he opens his chamber-door, and takes goods in the house, and goes away, it seems not to be burglary. And where *A.* enters into the house of *B.* in the night, by the doors open, and breaks open a chest, and steals goods, without breaking an inner door, it is no burglary by the common law, because the chest is no part of the house; though it is felony, ousted of clergy, by stat. 3 *W. & M. c.* 9. and if one break open a counter or cupboard, fixed to a house, it is burglary. 1 *Hale's H. P. C.* 554.

All out-buildings, as barns, stables, warehouses, &c. adjoining to a house, are looked upon as part thereof, and consequently burglary may be committed in them. And if the warehouse, &c. be parcel of the mansion-house, and within the same, though not under the same roof, or contiguous, a burglary may be committed therein. But an out-house occupied with, but separated from the dwelling-house by an open passage, eight feet wide, and not within or connected by any fence, enclosing both, is not within the curtilage or homestall. *Leach's Hawk. P. C.* i. *c.* 38. § 12. *n.* 4 *Comm.* 225.

No burglary can be committed by breaking into any ground enclosed, or booth, or tent, &c. but by stat. 5 & 6 *Edw.* VI. *c.* 9. clergy is taken from this offence. See *Larceny*, II. 1.

3. In the day-time there is no burglary. As to what is reckoned night, and what day, for this purpose, anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but the better opinion seems to be, that if there be day-light, or *crepusculum*, enough begun or left to discern a man's face withal, it is no burglary. But this does not extend to moon-light; the malignity of the offence, not so properly arising from its being done in the dark, as at the dead of night, when sleep has disarmed the owner, and rendered his castle defenceless. 4 *Comm.* 224. 1 *Hawk. P. C. c.* 38. § 1.

4. The breaking and entry must be with a felonious intent, otherwise it is only a trespass; and it is the same whether such intent be actually carried into execution, or only demonstrated by some attempt, of which the jury is to judge. And therefore such breaking and entry, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary. Nor does it make any difference, whether the offence were felony at common law, or only created so by statute. 4 *Comm.* 227. 1 *Hawk. P. C. c.* 38. § 18, 19.

One of the *servants* of the house opened his lady's chamber-door, which was fastened with a brass bolt, with design to commit a rape; and it was ruled to be burglary, and the defendant was convicted and transported. *Stra.* 481. *Kel.* 67.

A servant embezzled money entrusted to his care; left ten guineas in his trunk; quitted his master's service; returned; broke and entered the house in the night, and took away the ten guineas, and adjudged no burglary. *Leach's Hawk. P. C.* i. *c.* 38. § 18. *n. Sed vide* 1 *Show.* 53.

5. Every man's house is considered as his castle, as well for defence against injury and violence, as for repose. 5 *Co.* 92. To violate this security is considered of so atrocious a nature, that the alarmed inhabitant, whether he be an owner or a mere inmate, (*Cro. Car.* 544.) is by stat. 24 *Hen.* VIII. *c.* 5. expressly permitted to repel the violence by the death of the assailants, without incurring the penalties even of excusable homicide. For a course of time, however, the life of a burglar was saved by the plea of clergy; but as the increase of national opulence furnished further temptations, additional terrors became necessary; therefore, by stat. 18 *Eliz. c.* 7. clergy is taken away from the *offence;* and by stat. 3 & 4 *W. & M. c.* 9. from accessaries before the fact.

Still further to encourage the prosecution of offenders, it is enacted by stat. 10 & 11 *W.* III. *c.* 23. that whoever shall convict a burglar, shall be exempted from parish and ward offices where the offence was committed. To this, stats. 5 *Ann. c.* 31. and 6 *Geo.* I. *c.* 23. have superadded a reward of 40*l.* And if an accomplice, being out of prison, shall convict two or more offenders, he is entitled also to a pardon of the felonies as enumerated in the act. See tit. *Accessary, Rewards.*

See likewise stats. 25 *Geo.* II. *c.* 36. 27 *Geo.* II. *c.* 3. and 18 *Geo.* III. *c.* 19. which provide, That the charges of prosecuting and convicting a burglar shall be paid by the treasurer of the county where the burglary was committed, to the prosecutor and poor witnesses.

To remove one inducement to the frequent commission of burglaries, stat. 10 *Geo.* III. *c.* 48. provides, that buyers or receivers of stolen jewels, gold, or silver plate, where the stealing shall have been accompanied by burglary, (or robbery,) may be tried and transported for fourteen years, before the conviction of the principal.

And to check this offence in its progress, stat. 23 *Geo.* III. *c.* 88. enacts, That any person apprehended, having upon him any pick-lock key, &c. or other implement, with intent to commit a burglary, shall be deemed a rogue and a vagabond, within stat. 17 *Geo.* II. *c.* 5.

For further matter, see tit. *Clergy, Felony, Larceny.*

BURI, Husbandmen. *Mon. Angl. tom.* 3. *p.* 183.

BURIALS. Persons dying are to be *buried* in woollen, on pain of forfeiting 5*l.* And affidavit is to be made of such burying before a justice, &c. under the like penalty. Stat. 30 *Car.* II. *c.* 3. 34 *Geo.* III. *c.* 11. repeals the duty imposed by 23 *Geo.* III. *c.* 67. 25 *Geo.* III. *c.* 75. on the registry of burials, &c. But act not to affect the validity of any register.

BURNETA, Cloth made of dyed wool. A *burnet* colour must be dyed; but *brunus* colour may be made with wool without dying, which are called medleys or russets. *Lyndewood.* Thus much is mentioned because this word is sometimes wrote *bruneta.*

BURNING IN THE HAND. *Vide Branding.*

BURNING, Of houses, out-houses, malicious burnings, &c. See tit. *Arson*. To the malicious burnings mentioned under tit. *Arson*, may be added, that by stat. 6 *Geo.* I. *c.* 23. assaulting with intention to burn the *garments* of another in the public street, (by aqua-fortis, &c.) is punishable with transportation. By stat. 22 & 23 *Car.* II. *c.* 11. and 1 *Ann. st.* 2. *c.* 9. to burn any *ship* to the prejudice of the owners or freighters; and by stat. 4 *Geo.* I. *c.* 12. to the prejudice of the underwriters, is made felony without clergy. By stat. 12 *Geo.* III. *c.* 24. to burn the king's ships of war afloat or building, dock-yards, or any of the arsenals or stores, &c. therein, is also made felony without clergy. By stat. 27 *Geo.* II. *c.* 15. *threatening*, by anonymous or fictitious letters, to burn houses, barns, &c. is felony without clergy. As to penalty on servants setting fire to houses by negligence, see tit. *Fire*. See further titles, *Felons*, *Navy*, *Ships*, *Insurance*.

BURNING TO DEATH. See tit. *Felony*, *Treason*.

BURROCHIUM, A burrock, or small wear over a river, where wheels are laid for the taking of fish. *Cowel*.

BURROWS OR BURGH, By our ancient style, signifies caution. *Scotch Dict.*

BURSA, A purse. *Ex Chart. vet.*

BURSARIA, The *bursery*, or exchequer of collegiate and conventual bodies; or the place of receiving and paying, and accounting by the *bursarii* or *bursars*. *Paroc. Antiq. p.* 288. But the word *bursarii* did not only signify the *bursars* of a convent or college; but formerly stipendiary scholars were called by the name of *bursarii*, as they lived on the *burse* or fund, or public stock of the university. At *Paris*, and among the *Cistertian monks*, they were particularly termed by this name. *Johan. Major. Gest. Scot. lib.* 1. *c.* 5.

BURSE, *bursa*, *cambium*, *basilica*.] An exchange or place of meeting of merchants.

BURSHOLDERS. See tit. *Headborough*.

BUSONES COMITATUS. *Bract. lib.* 3. *tract.* 2. *cap.* 1. *Blount* says, *busones* is used for *barons*.

BUSSA, A ship. *Blount's Dict.* The vessels used in the herring fisheries are called *Busses* and *Smacks*.

BUSSELLUS, A bushel; from *buza*, *butta*, *buttis*, a standing measure; and hence *butticella*, *butticellus*, *bussellus*, a less measure. Some derive it from the old Fr. *bouts*, leather continents of wine; whence come our leather *budget* and *bottles*. *Kennet's Gloss.*

BUSTA and BUSTUS, *busca*, and *buscus*, &c. See *Brucia* and *Brusula*.

BUSTARD, A large bird of game, usually found on downs and plains, mentioned in the stat. 25 *Hen.* VIII. *c.* 11. See tit. *Game*.

BUTCHERS. These were anciently compelled by statute to sell their meat at reasonable prices, or forfeit double the value, to be levied by warrant of two justices of peace, &c. And were not to buy any fat cattle to sell again, on pain of forfeiting the value; but this not to extend to selling calves, lambs, or sheep, dead, from one butcher to another. Stat. 23 *Edw.* III. *c.* 6. By stat. 2 & 3 *Edw.* VI. *c.* 15. (revived, continued and confirmed by stat. 22 & 23 *Car.* II. *c.* 19. which is now expired,) butchers (and others) conspiring to sell their victuals at certain rates, are liable to 10*l.* penalty, or twenty days imprisonment for the first offence—20*l.* or pillory for the second—and 40*l.* or pillory, and loss of ear for the third. The offence to be tried by the sessions or leet. See tit. *Conspiracy*. By stat. 4 *Hen.*

VII. *c.* 3. no butcher shall slay any beast within any walled town, except *Carlisle* and *Berwick*. By the *ordinance for bakers, incert. temp.* butchers are not to sell swine's flesh meazled, or flesh dead of the murrain. By stat. 3 *Car.* I. *c.* 1. butchers are not to kill or sell meat on *Sunday*. By stats. 1 *Jac.* I. *c.* 22. and 9 *Ann. c.* 11. regulations are made as to the watering and gashing hides; and the selling putrefied and rotten hides by butchers; and by the said stat. 1 *Jac.* no butcher shall be a tanner or currier.

See further tit. *Cattle*, *Forestalling*, *Victuals*.

BUTLER. See *Botiler*.

BUTLERAGE. See *Prisage*.

BUTHSCARLE, *butsecarl*, *buscarles*, (*buscarli et buthsecarli*,) Mariners or seamen. *Selden's Mare Clausum*, *fol.* 184.

BUTT, *butticam*.] A measure of wine, &c. well known among merchants, and containing 126 gallons of *Malmsey* wine, by stat. 1 *Rich.* III. *c.* 13.

BUTTER AND CHEESE. By stat. 9 *Hen.* VI. *c.* 8. a weigh of cheese shall contain thirty-two cloues, each cloue 7*lb.*=2*cwt.* Every kilderkin of butter shall contain 112 pounds, the firkin 56, and pot 14 pounds of good butter, (every pound 16*oz.*) besides the casks and pots; and old bad butter shall not be mixed with good, nor shall butter be repacked for sale, which incurs forfeiture of double value, &c. And sellers and packers of butter shall pack it in good casks, and set their names thereon, with the weight of the cask and butter, on pain of 10*s.* *per cwt.* *Stat.* 13 & 14 *Car.* II. *cap.* 26. Buyers of butter are to put marks on casks; and persons opening them afterwards, or putting in other butter, &c. shall forfeit 20*s.* 4 & 5 *W. & M. c.* 7. The said stat. 4 & 5 *W. & M. c.* 7. also contains regulations to compel warehouse keepers, weighers, searchers, and shippers, to receive all butter and cheese for the *London* market, without undue preference. The stats. 8 *Geo.* I. *c.* 27. and 17 *Geo.* II. *c.* 8. regulate the sale of butter; the former in the city of *York*, the latter at *New Malton*; explained by § 18. of stat. 36 *Geo.* III. *c.* 86. 38 *Geo.* III. *c.* 73. § 1. such regulations not to extend to vessels not containing more than 14*lb.* nor to *Scotland*. See tit. *Weights* and *Measures*.

BUTTONS. Foreign buttons are not to be imported on penalty of 100*l.* on the importer, and 50*l.* on the seller, by stats. 13 & 14 *Car.* II. *c.* 13. and 4 *W. & M. c.* 10. And by the same statutes, a justice may issue his warrant to search for and seize the same.

By stat. 10 *W.* III. *c.* 2. no person shall *make*, *sell*, or *set on*, any buttons made of wood only, and turned in imitation of other buttons, under penalty of 40*s.* a dozen. A shank of wire being added to the button makes no difference. Ld. *Raym.* 712.

By the said stat. *W.* III. no person shall *make*, *sell*, or *set on*, buttons made of cloth, or other stuffs of which clothes are usually made, on penalty of 40*s.*

By stat. 8 *Ann. c.* 6. no *taylor*, or *other person*, shall make, sell, set on, *use* or bind, on any clothes, any buttons or button-holes of cloth, &c. on pain of 5*l.* a dozen. By this act no power is given to make distress.

Stat. 4 *Geo.* I. *c.* 7. is said in *Burn's Justice* (tit. *Buttons*) to be a loose, injudicious, ungrammatical act, and which, by its *garb*, may seem to have been drawn up by taylors, or button makers. This act imposes (indistinctly enough) 40*s.* a dozen, on all such buttons and button-holes, with an exception of velvet; it seems levelled against

the taylors only, but clothes with such buttons and button holes exposed to sale, are to be forfeited and seized.

By stat. 7 *Geo.* I. *st.* 1. *c.* 12. no person shall *use or wear*, on any clothes, (velvet excepted,) any such buttons or button-holes, on pain of 40*s.* a dozen, half to the witness on whose oath they are convicted; an application of the penalty deservedly reprobated as nearly singular, and on a principle not reconcileable to the usual rules of evidence. This statute is also incorrect, particularly in making no disposal of a moiety of the penalty, in case of conviction or confession by the party.

These acts are seldom enforced, and do not seem very consistent with general policy. See tit. *Taylors*. See 36 *Geo.* III. *c.* 60. regulates the making and vending of metal buttons.

BUTTS, The place where archers meet with their bows and arrows to shoot at a mark, which we call shooting at the *butts*. Also *butts* are the ends or short pieces of land in arable ridges and furrows; *buttum terræ*, a *butt* of land. See tit. *Abuttals*.

BUTLERAGE OF WINES. See tit. *Customs*.

BUZONIS, The shaft of an arrow, before it is fledged or feathered. Stat. *Ed.* I.

BY. Words ending in *by* or *bee*, signify a dwelling-place or habitation, from the Sax. *by*, *habitatio*.

BY-LAWS, *bilagines*, from Sax. *by*, *pagus*, *civitas*, and *lagen*, lex. i. e. the laws of cities, *Spelm.v. Bellagines*. Or perhaps laws made *obiter*, or by the *by*.] Certain orders and constitutions of corporations, for the governing of their members; of courts-leet and court-baron; commoners or inhabitants in vills, &c. made by common assent, for the good of those that made them, in particular cases, whereunto the public law doth not extend; so that they lay *restrictions* on the parties, not imposed by the common or statute law. Guilds and fraternities of trades, by letters patent or incorporation, may likewise make *by-laws*, for the better regulation of trade among themselves, or with others. *Kitch.* 45. 72. 6 *Rep.* 63.

In *Scotland* those laws are called laws of *birlaw*, or *burlaw*, which are made by neighbours elected by common consent in the *birlaw-courts*, wherein knowledge is taken of complaints betwixt neighbour and neighbour; which men so chosen are judges and arbitrators, and styled *birlaw-men*. And *birlaws*, according to *Skene*, are *leges rusticorum*, laws made by husbandmen, or townships, concerning neighbourhood amongst them. *Skene*, *p.* 33.

The power of making *by-laws*, being included in the very act of incorporating a corporation, and most by-laws being made by corporations, it seems more regular to consider the nature and effect of them under that head. See tit. *Corporations*.

In this place, therefore, we shall chiefly consider, 1. who may make by-laws; and, 2. the general requisites of them.

1. The inhabitants of a town, without any custom, may make ordinances or *by-laws*, for repairing of a church, or highway, or any such thing, which is *for the general good* of the public; and in such cases, the greater part shall bind all; though if it be for their own private profit, as for the well ordering of their common, or the like, they cannot make *by-laws* without a custom to warrant it; and if there be a custom, the greatest part shall not bind the rest in these cases, unless it be warranted by the custom. 5 *Rep.* 63. A custom to make a *by-law*, may be alleged in an ancient city or borough. So in an upland

town, which is neither city nor borough. 1 *Inst.* 110. *b.* *Cro. Car.* 498. *Hob.* 212.

The freeholders in a court-leet may make by-laws relating to the public good, which shall bind every one within the leet. 2 *Danv.* 457. *Mo.* 579. 584. And a court-baron may make by-laws, by custom, and add a penalty for the non-performance of them. So by custom the tenants of a manor may make by-laws, for the good order of the tenants. 1 *Roll. Abr.* 366. *l.* 35. *Mo.* 75. *Hob.* 212. So may the homage. 1 *Roll. Abr. Dyer*, 322. (*a*). But not without a custom. *Sav.* 74. And a custom that the steward with the consent of the homage may make them, is not good. 3 *Lev.* 49.

2. All by-laws are to be *reasonable;* and ought to be for the *common benefit*, and not private advantage of any particular persons; and must be consonant to the public laws and statutes, as subordinate to them. And by stat. 19 *Hen.* VII. *c.* 7. by-laws made by corporations are to be approved by the Lord Chancellor, or Chief Justices, &c. on pain of 40*l.*

A by-law may be reasonable, though the penalty be to be paid to those who make the by-law. 1 *Salk.* 397. And generally it shall be reasonable, if it be for the public good of the corporation. *Carth.* 482.

By-laws made in *restraint* of trade are not favoured, but the distinction between such as are made to *restrain*, and those made to *regulate* trade seems very nice. See tit. *Corporation*. Under a general power to make *by-laws*, a by-law cannot be made to restrain trade. 1 *Burr.* 12. A *custom* that no foreign tradesman shall use or exercise a trade in a town, &c. will warrant that which a *grant* cannot do; and where custom has restrained, a by-law may be made, that upon composition foreigners may exercise a trade. *Carter*, 120. See 4 *Burr.* 1951.

So by-laws may regulate, but not totally restrain a private right, as in cases of *common*, &c. See *Com. Dig.* tit. *By-law*, (B. 2.) and (C. 4.)

If a by-law impose a charge without any apparent benefit to the party, it will be void. *R. Raym.* 328. And a by-law being entire, if it be unreasonable for any particular, shall be void for the whole. 2 *Vent.* 183.

A by-law cannot impose an oath, nor empower any person to administer it. *Stra.* 536.

Where by-laws are good, notice of them is not necessary, because they are presumed for the better government and benefit of all persons living in those particular limits where made; and therefore all persons therein are bound to take notice of them. 1 *Lutw.* 404. *Cro. Car.* 498. 5 *Mod.* 442. 1 *Salk.* 142. *Carth.* 484.

If a by-law does not mention how the penalty shall be recovered, *debt* lies for it. 1 *Roll. Abr.* 366. *l.* 48. See 5 *Co.* 64. *Hob.* 279. Or action on the case on *assumpsit*. 2 *Lev.* 252. It seems that a by-law to levy the penalty by *distress*, *sale*, or *imprisonment*, is void, unless by custom. See *Com. Dig.* tit. *By-law*, (D. 2.) (E. 1, 2.)

The court of *K. B.* will not enter into a question on the validity of a by-law, on the return of a *hab. cor. cum causâ*, from any corporation except the city of *London*, where it always doth; but the plaintiff must declare there, and defendant may demur if he has objections to the by-law. 2 *Burr.* 775.

C.

CABALLA, from the Lat. *caballus.*] Belonging to a horse. *Domesday.*

CABBAGES. See *Turnips.*

CABINET COUNCIL. See *Privy Council.*

CABLISH, *cablicium.*] Signifies brush-wood, according to the writers of the forest laws; but *Spelman* thinks it more properly windfall-wood, because it was written of old *cadibulum*, from *cadere*; or if derived from the Fr. *chabilis*, it also must be windfall-wood.

CABLES, For shipping, made of old or damaged materials, liable to forfeiture; and the regulations for manufacturing them settled by stat. 25 *Geo* III. *c.* 56.

CACHEPOLUS, or CACHERELLUS, An inferior bailiff, a catchpole. See *Consuetud. domus de Farendon, MS. fol.* 23. and *Thorn.*

CADE, Of herrings is 500, of sprats 1,000. But it is said, that anciently, 600 made the *cade* of herrings, and six score to the hundred, which is called *Magnum Centum.*

CADET, The younger son of a gentleman, particularly applied to a volunteer in the army, waiting for some post.

CAEP GILDUM. See *Ceapgilde.*

CAGIA, A cage or coop for birds. *Rot. Claus.* 38 *Hen.* III.

CALANGIUM AND CALANGIA, A challenge, claim, or dispute. *Mon. Angl. tom.* 2. *fol.* 252.

CALCETUM, CALCEA, A causey, or common hard way, maintained and repaired with stones and rubbish, from the Lat. *calx*, chalk, Fr. *chaux*, whence their *chaussée* and our *causeway*, or path raised with earth, and paved with chalkstones, or gravel. *Calcearium operationes* were the work and labour done by the adjoining tenants; and *calcagium* was the tax or contribution paid by the neighbouring inhabitants towards the making and repairing such common roads; from which some persons were especially exempted by royal charter. *Kennet's Gloss.*

CALEFAGIUM, A right to take fuel yearly. *Blount.*

CALENDAR. See stat. 24 *Geo.* II. *c.* 23. for the establishment of the new style, and stat. 25 *Geo.* II. *c.* 30. which enacts, that the opening of common lands, and other things depending on the moveable feasts shall be according to the new calendar. See tit. *Bissextile*, *Year.*

CALENDAR MONTH, Consists of 30 or 31 days, (except *Feb.* 28, and in Leap Year 29,) according to the calendar. See the preceding article, and stat. 16 *Car.* II. *c.* 7. See tit. *Time*, *Month.*

CALENDAR OF PRISONERS, A list of all the prisoners' names, in the custody of each respective sheriff. Where prisoners are capitally convicted at the assises, the judge may command execution to be done, without any writ. And the usage now is, for the judge to sign the calendar, which contains all the prisoners' names, without their several judgments in the margin, and this calendar is left with the sheriff. As, for a capital felony, it is written opposite to the prisoner's name, "hanged by the neck." Formerly in the days of Latin and abbreviation, "*sus. per coll.*" for "*suspendatur per collum.*"

Staundeford's P. C. 182. See 4 *Comm.* 403. and tit. *Trial*, *Felon*, *Pardon*.

CALENDS, *calendæ*.] Among the *Romans* was the first day of every month, being spoken of by itself, or the very day of the new moon, which usually happen together; and if *pridie*, the day before, be added to it, then it is the last day of the foregoing month, as *pridie calend. Septemb.* is the last day of *August*. If any number be placed with it, it signifies that day in the former month, which comes so much before the month named; as the tenth *calends* of *October* is the 20th day of *September;* for if one reckons backwards, beginning at *October*, the 20th day of *September* makes the 10th day before *October*. In *March*, *May*, *July*, and *October*, the *calends* begin at the sixteenth day, but in other months at the fourteenth; which *calends* must ever bear the name of the month following, and be numbered backwards from the first day of the said following months. *Hopton's Concord, p.* 69. In the dates of deeds, the day of the month, by *nones*, *ides*, or *calends*, is sufficient. 2 *Inst.* 675. See *Ides*.

CALIBURNE, The famous sword of the great King *Arthur*. *Hoveden* and *Brompton in Vita R.*

CALICO. No person shall wear in apparel any printed or dyed calico, on pain of forfeiting 5*l*. And drapers selling any such calico, shall forfeit 20*l*. But this does not extend to calicoes dyed all blue, stat. 7 *Geo.* I. *c.* 7. Persons may wear stuff, made of linen yarn and cotton wool, manufactured and printed with any colours in *Great Britain;* so as the warp be all linen yarn, without incurring any penalty, by stat. 9 *Geo.* II. *c.* 4. By stat. 14 *Geo.* III. *c.* 72. stuffs wholly made of raw cotton wool within this kingdom, are not to be considered as calicoes, and every person may use the same. These are distinguished by three blue stripes in the selvage. See tit. *Linen*, and *Burn's Justice*, tit. *Excise* X.

CALLING THE PLAINTIFF. It is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily *nonsuited*, or withdraw himself; whereupon the crier is ordered to *call the plaintiff;* when neither he nor any for him appears. See tit. *Nonsuit*, *Trial*.

CALLIS, The king's highway, mentioned in some of our ancient authors. *Huntingdon*, *lib.* 1.

CAMBRICK. There were formerly several statutes against the importation and use of *Cambricks*, or *French* lawns, (stats. 18 *Geo.* II. *c.* 36. 21 *Geo.* II. *c.* 26.) but now by 43 *Geo.* III. *c.* 68. (consolidation of customs) the duty payable on the importation of cambricks and lawns, commonly called French lawns, is regulated; and French lawns (commonly called cambricks or French lawns) legally imported, and having paid duty, may be worn and sold in *Great Britain*. § 21.

By stats. 4 *Geo.* III. *c.* 37. and 7 *Geo.* III. *c.* 43. several regulations are made concerning the manufacturing and stamping cambricks and lawns made in *England;* and forging or counterfeiting the stamp is felony without clergy. See further tit. *Linen*, *Navigation Acts*.

CAMERA, From the old Germ. *Cam. Cammer*, crooked; whence comes our English, *kimbo*, arms in kimbo. But *camera* at first signified any winding or crooked plat of ground; as *unam* cameram *terræ*, i. e. a nook of land. *Du Fresn.* Afterwards the word was applied to any vaulted or arched building; and it was used in the Latin law

proceedings, for the judge's chamber, &c. *Camera Stellata*, the Star Chamber, &c.

CAMISIA, A garment belonging to priests, called the *Alb-Pet. Blesensis.*

CAMOCA, A garment of silk, or something better. *Mon. Angl. tom.* 3. *fo.* 81.

CAMPANA BAJULA, A small hand-bell, much in use in the ceremonies of the Roman church; and retained among us by sextons, parish clerks and criers. *Girald. Camb. apud Wharton, Angl. Sacr. par.* 2. *fo.* 637

CAMPARTUM, Any part or portion of a larger field or ground; which would otherwise be in gross or common. *Prinne Histor. Col. vol.* 3. *fo.* 89.

CAMPERTUM, A corn-field. *Pet. in Parl.* 30 *Edw.* I.

CAMP-FIGHT, The fighting of two champions or combatants in the field. 3 *Inst.* 221. See *Acre-Fight*, *Battel*, *Champion.*

CAMPUS MAII, or MARTII, An assembly of the people every year in *March* or *May*, where they confederated together to defend the country against all enemies. *Leges Edw. Confessor*, *cap.* 35. *Sim. Dunelm. Anno* 1094.

CANCELLING DEEDS AND WILLS, See those titles.

CANDLES AND CHANDLERS. If any wax-chandlers mix with their wares any thing deceitfully, &c. the candles shall be forfeited. Stat. 23 *Eliz. c.* 8. Tallow-chandlers and wax-chandlers, are by stat. 24 *Geo.* III. *st* 2. *c.* 41. to take out annual licenses. And by stat. 25 *Geo.* III. *c.* 74. makers of candles shall be only such persons as are rated to the parish rates. The duties are regulated by stat. 27 *Geo.* III. *c.* 13. (1-2*d. per lb.* of which was repealed by stat. 32 *Geo.* III. *c.* 7.) These duties, and the various regulations to enforce them, form one of the numerous branches of the Excise Laws, and depend on a variety of statutes; a provision in one of which is not much known, though generally interesting, viz. "during the continuance of the duties upon candles, no person shall use in the inside of his house any lamp, wherein any oil or fat (other than oil made of fish within *Great Britain*) shall be burned for giving light, on pain of 40*s.* Stat. 8 *Ann. c.* 9. § 18. The makers of candles are not to use melting-houses without making a true entry, on pain of 100*l.* and to give notice of making candles to the Excise officer for the duties, and of the number, &c. or shall forfeit 50*l.* Stats. 8 *Ann. c.* 6. 11 *Geo.* I. *cap.* 30. *Vide* stat. 23 *Geo.* II. *c.* 21. 36 *Geo.* III. *c.* 5. prohibited the exportation of candles for a limited time.

CANDLEMAS-DAY, The feast of the *purification* of the *Blessed Virgin Mary*, being the *second* day of *February*, instituted in memory and honour of the purification of the virgin in the temple of *Jerusalem*, and the presentation of our blessed Lord. It is called *Candlemas*, or a *Mass of Candles*, because before mass was said that day, the *Romish* church consecrated and set apart, for sacred use, *candles* for the whole year; and made a procession with hallowed *candles* in remembrance of the divine light wherewith our Saviour illuminated the whole church at his presentation in the temple.

This festival is no day in court, for the judges sit not; and it is the grand day in that term of all the inns of court, whereon the judges anciently observed many ceremonies, and the societies seemed to vie with each other, in sumptuous entertainments, accompanied with music, and almost all kinds of diversions.

CANES OPERTIÆ, Dogs with whole feet, not lawed. *Antiq. Custumar. de Sutton Colfield.*

CANESTELLUS, A basket. In the inquisition of serjeancies, and knights' fees, *anno* 12 & 13 of King *John*, for *Essex* and *Hertford*, it appears that one *John* of *Liston* held a manor by the service of making the king's baskets. *Ex Libro Rub. Scacc. fol.* 137.

CANFARA, A trial by hot iron formerly used in this kingdom. See *Ordeal.*

CANIPULUS, A short sword. *Blount.*

CANA, A rod, or distance in the measure of ground. *Ex Registr. Walt. Giffard Archiepisc. Ebor. f.* 45.

CANON, A law or ordinance of the church; from the *Greek* word *canon*, a rule.

The Canon Law consists partly of certain rules taken out of the scripture; partly of the writings of the ancient fathers of the church; partly of the ordinances of general and provincial councils; and partly of the decrees of the Popes in former ages. And it is contained in two principal parts, the decrees and the decretals. The decrees are ecclesiastical constitutions made by the Popes and Cardinals, and were first gathered by *Ivo* bishop of *Carnat*, who lived about the year 1114, but afterwards perfected by *Gratian*, a *Benedictine* monk, in the year 1149, and allowed by Pope *Eugenius*, to be read in schools, and alleged for law. They are the most ancient, as having their beginning from the time of *Constantine* the Great, the first Christian Emperor of *Rome*.

The *decretals* are canonical epistles written by the Pope, or by the Pope and Cardinals, at the suit of one or more persons for the ordering and determining of some matter of controversy, and have the authority of a law; and of these there are three volumes, the first whereof was compiled by *Raymundus Barcinius*, chaplain to *Gregory* the Ninth, and at his command about the year 1231. The second volume is the work of *Boniface* the Eighth, collected in the year 1298. And the third volume, called the *Clementines*, was made by Pope *Clement* the Fifth, and published by him in the council of *Vienna*, about the year 1308. And to these may be added some novel constitutions of *John* XXII. and some other bishops of *Rome*.

As the *decrees* set out the origin of the canon law, and the rights, dignities and decrees of ecclesiastical persons, with their manner of election, ordination, &c. so the *decretals* contain the law to be used in the ecclesiastical courts; and the first title in every of them, is the title of the Blessed Trinity, and of the catholic faith, which is followed with constitutions and customs, judgments and determinations in such matters and causes as are liable to ecclesiastical cognisance, the lives and conversation of the clergy, of matrimony and divorces, inquisition of criminal matters, purgation, penance, excommunication, &c. But some of the titles of the canon law are now out of use, and belong to the common law; and others are introduced, such as trials of wills, bastardy, defamation, &c.

Trials of tithes were anciently in all cases had by the ecclesiastical law; though at this time this law only takes place in some particular cases.

Thus much for the canon law in general; and as to the *canon laws of this kingdom*, by the stat. 25 *Hen.* VIII. *c.* 19. revived and confirmed by stat. 1 *Eliz. c.* 1. it is declared, that all canons not repugnant to the king's prerogative, nor to the laws, statutes and customs of the realm, shall be used and executed.

As for the canons enacted by the clergy under *Jac.* I. *A. D.* 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity; whatever regard the clergy may think proper to pay them. *Stra.* 1057.

Lord *Hardwicke* cites the opinion of Lord *Holt*, and declares it is not denied by any one, that it is very plain all the clergy are bound by the canons, confirmed by the king only; but they must be confirmed by the parliament to bind the laity. 2 *Atk.* 605. Hence if the Archbishop of *Canterbury* grants a dispensation to hold two livings distinct from each other, more than thirty miles, no advantage can be taken of it by lapse, or otherwise in the temporal courts; for the restriction to thirty miles was introduced by a canon made since the stat. 25 *Hen.* VIII. See 2 *Black. Rep.* 968.

There are four species of courts in which the canon laws (and the *civil laws* also, see tit. *Civil Laws*) are permitted under different restrictions to be used. 1. The courts of the archbishops and bishops, and their derivative officers; usually called in our law courts, Christian, or *The Ecclesiastical Courts*. 2. The Military Courts, or *Courts of Chivalry*. 3. The *Courts of Admiralty*. 4. The *Courts of the two Universities*. In all, the reception of those laws in general, and the different degree of that reception, are grounded entirely upon custom; corroborated as to the Universities by act of parliament, ratifying those charters which confirm their customary laws. 1 *Comm.* 83.

For the peculiar jurisdiction, &c. of these courts. See this *Dict.* tit. *Courts*. The following particulars relate to them all, and to this subject, in general.

1. The courts of common law have the *superintendency* over these courts, to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess; and in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces the sentence, so declared to be illegal. See tit. *Jurisdiction, Prohibition*.

2. The common law has reserved to itself the exposition of all such *statutes* as concern either the extent of these courts, or the matters depending before them. And therefore if these courts either refuse to allow those acts of parliament, or will expound them in any other sense than what the law puts on them, the courts at *Westminster* will grant prohibitions to restrain and control them. See tit. *Statutes*.

3. An *appeal* lies from all these courts to the king in the last resort; which proves that the jurisdiction exercised in them, is derived from the crown of *England*, and not from any foreign potentate, or intrinsic authority of their own. See stat. 25 *Hen.* VIII. *c.* 21.

From these three strong marks and ensigns of superiority, it appears beyond a doubt that the canon (and civil) laws, though admitted in some cases by custom in some courts, are only subordinate, *et leges sub gravi ore lege;* and that thus admitted, restrained, altered, new-modelled and amended, they are by no means a distinct, independent species of laws, but inferior branches of the customary or unwritten laws of *England*, properly called *the King's ecclesiastical, military, maritime*, or *academical* laws. 1 *Comm.* 84.

CANON RELIGIOSORUM, A book wherein the *Religious of convents* had a fair transcript of the rules of their order, which were

frequently read among them as their local statutes; and this book was therefore called *Regula* and *Canon*. The public books of the religious were the four following. 1. *Missale*, which contained all their offices of devotion. 2. *Martyrologium*, a register of their peculiar saints and martyrs, with the place and time of passion. 3. *Canon* or *Regula*, the institutions and rules of their order. 4. *Necrologium* or *Obituarium*, in which they entered the deaths of their founders and benefactors, to observe the days of commemoration of them. *Kennet's Gloss.*

CANTEL, *cantellum.*] Seems to signify the same with what we now call lump, as to buy by measure, or by the lump; but according to *Blount*, it is that which is added above measure. Stat. *de Pistor. cap.* 9. Also, a piece of any thing, as a *cantel* of *bread*, and the like.

CANTRED, *cantredus*, a *British* word from *cant*, or *cantre*, Brit. *centum*, and *tref*, a town or village.] In *Wales* a hundred villages; for the *Welsh* divide their counties into *cantreds*, as the *English* do into hundreds. This word is used stat. 28 *Hen.* VIII. *c.* 3. See *Mon. Angl. par.* 1. *fol.* 319. where it is written *Kantref.*

CAPACITY, *capacitas.*] An ability, or fitness to receive; and in law it is where a man, or body politic, is able to give or take lands, or other things, or to sue actions. Our law allows the king two capacities; a natural and a politic. In the first, he may purchase lands to him and his heirs; in the latter, to him and his successors. An alien born hath sufficient *capacity* to sue in any personal action, and is capable of personal estate; but he is not capable of lands of inheritance. See tit. *Alien.* Persons attainted of treason or felony, idiots, lunatics, infants, feme coverts without their husbands, &c. are not capable to make any deed of gift, grant or conveyance, unless it be in some special cases. *Co. Litt.* 171, 172. See tit. *Age*, *Infant*, and other suitable titles.

CAPE, *Lat.* A writ judicial, touching plea of lands or tenements; so termed, as most writs are, of that word in it which carries the chief intention or end thereof; and this writ is divided into *cape magnum* and *cape parvum*, both of which concern things immoveable. *Termes de la ley.*

CAPE MAGNUM, or the *Grand Cape*, Is a writ that lies before appearance to summon the tenant to answer the default, and also over to the demandant; and in the *Old Nat. Brev.* it is defined to be, where a man hath brought a *præcipe quod reddat* of a thing touching plea of land, and the tenant makes default at the day to him given in the original writ, then this writ shall go for the king to take the land into his hands; and if the tenant come not at the day given him thereby, he loseth his land, &c. See *Reg. Jud. fol.* 1. *Bract. lib.* 3. *tract.* 3. *c.* 1

CAPE PARVUM, or *petit cape*, Is where the tenant is summoned in plea of land, and comes on the summons, and his appearance is recorded; if at the day given him he prays the view, and having it granted makes default; then this writ shall issue for the king, &c. *Old Nat. Brev.* 162.

The difference between the *grand cape* and *petit cape* is, that the *grand cape* is awarded upon the tenant's not appearing or demanding the view in such real actions, where the original writ does not mention the particulars demanded; and the *petit cape* is after appearance or view granted; and whereas the *grand cape* summons the tenant to answer the default, and likewise over to the demandant; *petit cape* summons the

tenant to answer the default only; and therefore it is called *petit cape*, though some say it hath its name, not because it is of small force, but by reason it consists of few words. *Reg. Jud. fol.* 2. *Fleta, lib.* 2. *c.* 44. *Termes de la ley.*

Cape ad Valentiam. This is a species of *cape magnum*, and is where I am impleaded of lands, and vouch to warrant another, against whom the *summons ad warrantizandum* hath been awarded, and he comes not at the day given; then if the demandant recover against me, I shall have this writ against the vouchee, and recover so much *in value* of the lands of the vouchee, if he hath so much; if not, I shall have execution of such lands and tenements, as shall afterwards descend to him in fee; or if he purchases afterwards, I shall have against him a resummons, &c. And this writ lies before appearance. *Old Nat. Brev.* 161. See tit. *Fine and Recovery.*

CAPELLA, Before the word chapel was restrained to an oratory or depending place of divine worship; it was used also for any sort of chest, cabinet, or other repository of precious things, especially of religious reliques. *Kennet's Paroch. Antiq. p.* 580.

CAPELLUS, A cap, bonnet, or other covering for the head. *Tenures, p.* 32. *Capellus ferreus*, a helmet or iron head-piece. *Hoveden, p.* 61. *Capellus militis* is likewise a helmet or military head piece. *Consuetud. domus de Farendon, MS. fol.* 21.

CAPIAS, A writ or process of two sorts; one whereof in the court of *C. P.* is called *capias ad respondendum*, before judgment, where an original is sued out, &c. to take the defendant and make him answer the plaintiff; and the other a writ of execution, after judgment, being of divers kinds, as *capias ad satisfaciendum*, *capias utlagatum*, &c.

The Capias ad Respondendum in *C. B.* is drawn from the *præcipe*, which serves both for the *original* and *capias*, and the return of the original is the teste of the *capias*. If a *capias* be special, in case, covenant, &c. the cause of action must be recited at large, and the substance of the intended declaration set forth, as also in the original.

This *capias* is a writ commanding the sheriff to *take* the body of the defendant, if he may be found in his bailiwick or county, and him safely to keep, so that he may have him in court, on the day of the return, to answer to the plaintiff of a plea of debt, trespass, &c. as the case may be.

In cases of injury accompanied with force, the law, to punish the breach of the peace, and prevent its disturbance, provided a process against the defendant's *person*, in case he neglected to appear on the process of attachment against his goods, or had no substance whereby to be attached, (see tit. *Attachiamenta bonorum* and *Process*,) subjecting his body to imprisonment by this writ of *capias ad respondendum. 3 Rep.* 12. But the immunity of the defendant's person, in case of *peaceable*, though fraudulent injuries, producing a great contempt of the law in indigent wrong-doers, a *capias* was also allowed to arrest the person in actions of *account*, though no breach of the peace be suggested by stat. *Marlb.* 52 *Hen.* III. *c.* 23. *Westm.* 2. 13 *Edw.* I. *c.* 11. In actions of *debt* and *detinue* by stat. 25 *Edw.* III. *c.* 17. And in all actions *on the case* by stat. 19 *Hen.* VII. *c.* 9.

Before this last statute, a practice had been introduced of commencing the suit, by bringing an original writ of trespass *quare clausum fregit*, for breaking the plaintiff's close *vi et armis*, which by the old common law, subjected the defendant's person to be arrest-

ed by writ of *capias*; and then afterwards by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury. This practice (through custom rather than necessity, and for saving some trouble and expense, in suing out a special original adapted to the particular injury) still continues in almost all cases, except in actions of debt; though now by virtue of the above and other statutes, a *capias* might be had upon almost every species of complaint. See tit. *Common Pleas*, *Ac etiam*, *Process*.

It is now also usual in practice to sue out the *capias* in the first instance, on a supposed return of the sheriff, (that the defendant being summoned or attached, made default, or that he had no substance whereby to be attached,) and afterwards a fictitious original is drawn up, if the party is called upon so to do, with a proper return thereupon, in order to give the proceedings a colour of regularity. When this *capias* is delivered to the sheriff, he, by his undersheriff, grants a warrant to his bailiffs to execute it.

If the sheriff of the county in which the injury is supposed to be committed, and the action is laid, cannot find the defendant in his jurisdiction, he returns *non est inventus*; whereupon another writ issues, called a *testatum capias*, directed to the sheriff of the county where the defendant is supposed to reside, reciting the former writ, and that it is testified, *testatum est*, that the defendant lurks or wanders in *his* bailiwick, wherefore *he* is commanded to take him, as in the former *capias*. Here also when the action is brought in one county, and the defendant lives in another, it is usual for saving trouble, time and expense, to make out a *testatum capias* at the first; supposing not only an original, but also a former *capias* to have been granted. And this fiction being beneficial to all parties, is readily acquiesced in, and is now become the settled practice.

But where the defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a *capias*. And if the sheriff cannot find the defendant upon the first writ of *capias*, and returns a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former; only after these words, *We command you*, this clause is inserted, *as we have formerly* (*alias*) *or often* (*pluries*) commanded you. See further tit. *Outlawry*. On the subject also of process in *C. P.* see this *Dict.* tit. *Common Pleas*, and 3 *Comm.* 282. &c.

A Capias is also in use in *criminal cases*. The proper process on an indictment for any petty misdemeanor, or on a penal statute, is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear. And if by the return to such *venire*, it appears that the party hath lands in the county whereby he may be distrained, then a *distress infinite* shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, then upon his non-appearance, a writ of *capias* shall issue, which commands the sheriff to take his body, and have him at the next assises; and if he cannot be taken upon the first *capias*, an *alias* and a *pluries* shall issue. But on indictments for treason or felony, a *capias* is the first process; and for treason or homicide, only one shall be allowed to issue, or two in the case of other felonies, by stat. 25 *Edw.* III. *c.* 14. though the usage is to issue only one in any felony, the provisions of this statute being in most cases found impracticable. 2 *Hale's P. C.* 195. And so in the case of misdemeanors, it is now the usual practice for any judge of the court of *K. B.* upon certificate of an indictment found, to award a writ of *capias* immediately, in order

to bring in the defendant. But in this, as in civil cases, if he absconds, and it is thought proper to pursue him to an outlawry, a greater exactness is necessary. 4 *Comm.* 318. See tit. *Outlawry*.

Capias ad Satisfaciendum, (shortly termed a Ca. Sa.) A judicial writ of execution which issues out on the record of a judgment, where there is a recovery in the courts at *Westminster*, of debt, damages, &c. And by this writ the sheriff is commanded to take the body of the defendant in execution, and him safely to keep, so that he have his body in court at the return of the writ, to satisfy the plaintiff his debt and damages. Vide 1 *Lill. Abr.* 249. And if he does not then make satisfaction he must remain in custody till he does. When the body is taken upon a *ca. sa.* and the writ is returned and filed, it is an absolute and perfect execution of the highest nature against the defendant, and no other execution can be afterwards had against his lands or goods; except where a person dies in execution, then his lands and goods are liable to satisfy the judgment, by stat. 21 *Jac.* I. *c.* 24. See *Roll. Abr.* 904.

Properly speaking, this writ cannot be sued out against any but such as were liable to be taken upon the *capias* mentioned in the preceding article. 3 *Rep.* 12. *Mo.* 767. The intent of it is to imprison the body of the debtor, till satisfaction be made for the debt, costs and damages; this writ, therefore, doth not lie against any privileged persons, peers, or members of parliament; nor against executors or administrators; (except on a *devastavit* returned by the sheriff. 1 *Lill.* 250.) nor against such other persons as could not be originally held to bail.

This writ may be sued out (as may all other executory process) for costs, against a plaintiff as well as a defendant, where judgment is had against him.

In case two persons are bound jointly and severally, and prosecuted in two courts, whereupon the plaintiff had judgment, and execution by *ca. sa.* against one of them; if he after have an *elegit* against the other, and his lands and goods are delivered upon it, then he that is in prison shall have *audita querela*. *Hob.* 2. 57. Where one taken on a *ca. sa.* escapes from the sheriff, and no return is made of the writ, nor any record of the award of the *capias*; the plaintiff may bring a *scire facias* against him, and on that what execution he will. *Roll.* 904. And if the defendant rescue himself, the plaintiff shall have a new *capias*, the first writ not being returned. *Ibid.* 901.

If a defendant cannot be taken upon a *ca. sa.* in the county where the action is laid, there may issue a *testatum ca. sa.* into another county; and so of the other writs. See *ante*, tit. *Capias*.

For further matter, see tit. *Execution*, *Fieri facias*.

Capias Utlagatum, Is a writ that lies against a person who is outlawed in any action, by which the sheriff is commanded to apprehend the body of the party outlawed, for not appearing upon the *exigent*, and keep him in safe custody till the day of return, and then present him to the Court, there to be dealt with for his contempt; who, in the Common Pleas, was in former times to be committed to the *Fleet*, there to remain till he had sued out the king's pardon, and appeared to the action. And by a special *capias utlagatum*, (against the body, lands, and goods in the same writ,) the sheriff is commanded to seize all the defendant's lands, goods and chattels, for the contempt to the king; and the plaintiff (after an inquisition taken thereupon, and returned into the Exchequer) may have the lands extended, and a grant of the goods, &c. whereby to compel the defendant to appear; which,

when he doth, if he reverse the outlawry, the same shall be restored to him. *Old Nat. Brev.* 154. When a person is taken upon a *capias utlagatum*, the sheriff is to take an attorney's engagement to appear for him, where special bail is not required; and his bond with sureties to appear, where it is required. Stat. 4 & 5 *W. & M. c.* 18. See *Outlawry.*

CAPIAS PRO FINE. Anciently, when judgment was given in favour of the plaintiff, in any action in the king's courts, it was considered that the plaintiff be arrested for his wilful delay of justice, or *capiatur* be taken till he paid a *fine* to the king, considering it as a public misdemeanor coupled with the private injury. But now in cases of *trespass, ejectment, assault, and false imprisonment*, it is provided by stat. 5 & 6 *W. & M. c.* 12. that no writ of *capias* shall issue *for the fine*, nor any fine be paid; but the plaintiff shall pay 6*s.* 8*d.* to the proper officer, and be allowed it against the defendant among his other costs. See tit. *Judgment.* See also tit. *Fines for Offences.*

CAPIAS IN WITHERNAM, A writ lying (where a distress taken is driven out of the county, so that the sheriff cannot make deliverance in replevin) commanding the sheriff to take as many beasts of the distrainer, &c. *Reg. Orig.* 82, 83. See tit. *Distress, Withernam.*

CAPIATUR. See tit. *Capias pro fine.*

CAPITA, *distribution per.*] i. e. To every man an equal share of *personal* estate, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis.* See tit. *Executor*, V. 8.

CAPITA, *succession per.*] Where the claimants are next in degree to the ancestor, in their own right, and not by right of representation. See tit. *Descent.*

CAPITALE, A thing which is stolen, or the value of it. *Leg. Hen.* I. *cap.* 59.

CAPITALE VIVENS, Live cattle. *Leg. Athelstan.*

CAPITE, from *caput.* i. e. *Rex, unde tenere in* capite, *est tenere de rege, omnium terrarum* capite.] TENURE IN CAPITE, was an ancient tenure, whereby a man held lands of the king immediately as of the crown, whether by knight's service, or in socage. This tenure was likewise called, tenure holding of the person of the king; and a person might hold of the king, and not in *capite;* that is, not immediately of the crown, but by means of some honour, castle, or manor belonging to it. According to *Kitchen*, one might hold land of the king by *knight's service*, and not in *capite;* because it might be held of some honour in the king's hands descended to him from his ancestors, and not immediately of the king, as of his crown. *Kitch.* 129. *Dyer*, 44. *F. N. B.* 5.

The very ancient tenure in *capite*, was of two sorts; the one *principal* and *general*, and the other *special* or *subaltern.* The *principal* and *general* was of the king, as *caput regni, et caput generalissimum omnium feodorum*, the fountain whence all feuds and tenures have their main original; the *special* was of a particular subject, as *caput feudi, seu terræ illius*, so called from his being the first that granted the land in such manner of tenure; from whence he was styled *capitalis dominus*, &c. But tenure in *capite* is now abolished; and by stat. 12 *Car.* II. *c.* 24. *all tenures* are turned into *free* and *common socage;* so that tenures hereafter to be created by the king are to be in common socage only; and not by *capite*, knight's service, &c. *Blount.* See tit. *Tenures.*

CAPITILITIUM, Poll-money. *Dict.*

CAPITITIUM, A covering for the head. It is mentioned in the stat. 1 *Hen.* IV. and other old statutes, which prescribe what *dresses* shall be worn by all degrees of persons.

CAPITULI AGRI, The head-lands, lands that lie at the head or upper ends of the lands or furrows. *Kennet's Paroch. Antiq. p.* 137.

CAPITULA RURALIA, Assemblies, or chapters held by rural deans and parochial clergy within the precinct of every distinct deanery; which at first were every three weeks, afterwards once a month, and more solemnly once a quarter. *Cowel.*

CAPTAIN, *capitaneus.*] One that leadeth or hath the command of a company of *soldiers;* and is either general, as he that hath the governance of the whole army; or special, as he that leads but one band. There is also another sort of *captains. Qui urbium præfecti sunt, &c. Blount.*

CAPTION, *captio.*] That part of a legal instrument, as a *commission, indictment, &c.* which shows where, when, and by what authority it is *taken, found,* or *executed.* Thus, when a commission is executed, the commissioners subscribe their names to a certificate, declaring when and where the commission was executed. These kinds of *captions* relate chiefly to business of three kinds, i. e. to commissions to take fines of lands, to take answers in chancery, and depositions of witnesses; on the taking of a fine it is thus: *Taken and acknowledged the —— day of, &c. at, &c.* The word *caption* is also used (rather vulgarly) for an *arrest.* See tit. *Indictment.*

CAPTIVES. An act was made for relief of *captives,* taken by *Turkish, Moorish,* and other pirates, and to prevent the taking of others in time to come. Stat. 16 & 17 *Car.* II. *c.* 24. See tit. *Negro, Slavery.*

CAPTURE, *captura.*] The taking of a prey, an arrest, or seizure; and it particularly relates to *prizes* taken by privateers, in time of war. See tit. *Admiral, Insurance, Navy, Privateer.*

CAPUTAGIUM. Some think this word signifies head or poll-money, or the payment of it; but it seems rather what we otherwise call *chevagium.*

CAPUT ANNI, New-year's day, upon which of old was observed the *festum stultorum.*

CAPUT BARONIÆ, Is the castle or chief seat of a nobleman; which descends to the eldest daughter, if there be no son, and must not be divided amongst the daughters, like unto lands, &c. See tit. *Coparceners, Dower.*

CAPUT JEJUNII, In our records is used for *Ash Wednesday,* being the head, or first day of the beginning of the *Lent Fast. Paroch. Antiq. p.* 132.

CAPUT LOCI. The head or upper end of any place; *ad caput villæ,* at the end of the town.

CAPUT LUPINUM. Anciently an outlawed felon was said to have *caput lupinum,* and might be knocked on the head like a wolf. *Now* the wilful killing of such a one would be murder. 1 *Hale's P. C.* 497. Vide *Bracton, fol.* 125. See tit. *Outlawry.*

CAR AND CHAR, The names of places beginning with *car* and *char* signify a city, from the Brit. *caer, Civitas;* as *Carlisle, &c.*

CARAVANNA, A *caravan,* or joint company of travellers in the eastern countries, for mutual conduct and defence. *Gaufrid. Vinesau Richardi Regis, Iter Hierosol. lib.* 5. *cap.* 52.

CARCAN, Is sometimes expounded for a pillory; as is *carcannum* for a prison. *LL. Canuti Regis.*

CARCATUS, Loading; a ship freighted. *Pat.* 10 *Rich.* II.

CARDS AND DICE. Duties, under the control of the stamp commissioners, are imposed in *Great Britain*, on cards, 2*s.* 6*d.* per pack, and dice 1*l.* per pair, by 44 *Geo.* III. *c.* 98. In *Ireland*, cards 2*s.* and dice 15*s.* under the Excise. 45 *Geo.* III. *c.* 19.

By stat. 10 *Ann. c.* 19. no playing cards or dice shall be imported. Selling second-hand cards incurs a penalty of 20*l.* stat. 29 *Geo.* II. *c.* 13. § 10. and of 5*l.* per pack by stat. 16 *Geo.* III. *c.* 34. Several other regulations are made by statute to prevent frauds in manufacturing the above articles. If cards or dice unstamped are *used* in any public gaming house, a penalty of 5*l.* attaches on the *seller*. 10 *Ann. c.* 19. § 162. See also stat. 5 *Geo.* III. *c.* 46. § 9—17. and the acts for imposing the duties.

CARECTA AND CARECTATA. A cart and cart-load. *Mon. Angl. tom.* 2. *fol.* 340.

CARETARIUS, OR CARECTARIUS, A carter. *Blount.* See *Carreta.*

CHRISTIA, Dearth, scarcity, dearness. *Pat.* 8 *Edw.* I.

CARITAS, *Ad* caritatem, *poculum* caritatis.] A grace-cup; or an extraordinary allowance of the best wine, or other liquor, wherein the religious at festivals drank in commemoration of their founders and benefactors. *Cartular. Abat. Glaston. A. S. fol.* 29. See *Cowel.* It is sometimes written *Karite.*

CARK, A quantity of wool, whereof thirty make a sarpler. Stat. 27 *Hen.* VI. *c.* 2.

CARLE. See *Karle.*

CARNARIUM, A charnel-house, or repository for the bones of the dead.

CARNO. This word hath been used for an immunity or privilege, as appears in *Cromp. Jurisdict. fol.* 191.

CARPEMEALS, Cloth made in the northern parts of *England*, of a coarse kind, mentioned in 7 *Jac.* I. *cap.* 16.

CARR, Is a kind of cart with wheels. Vide *Caruca.*

CARRAT, A weight of four grains in diamonds, &c. And this word, it is said, was formerly used for any weight or burden.

CARRETA, A carriage, cart or wain load; as *Carreta fœni* is used in an old charter for a load of hay. *Kennet's Gloss.*

CARRELS, Closets, or apartments for privacy and retirement. Three pews or carrels, where every one of the old monks, after they had dined, did resort, and there study. *Davie's Mon. of Durham, p.* 31.

CARRICK, or CARRACK, *carrucha.*] A ship of great burden, so called of the *Italian* word *carico* or *carco*, which signifies a burden or charge. It is mentioned in the statute 2 *Rich.* II. *c.* 4. They were not only used in trade, but also in war. See *Walsingh.* in *Hen.* V. *fol.* 394.

CARRIER. A person that carries goods for others for his hire.

I. *Who are to be considered as Carriers; and generally how chargeable.*

II. *For what Defaults answerable; and the Exceptions in their favour.*

III. *What Circumstances must concur to charge them.*

I. All persons carrying goods for hire, as masters and owners of ships, lightermen, stage-coachmen, (but not hackney-coachmen in *Lon-*

don,) and the like, come under the denomination of common carriers; and are chargeable on the general custom of the realm for their faults or miscarriages. See 1 *Com. Rep.* 25. *Bull. N. P.* 70. And as to the duty and engagement of a carrier, see tit. *Bailment* 5. and V.

In an action on the case upon the custom of the realm against the defendant, master of a *stage-coach*, the plaintiff set forth, that he took a place in the coach for such a town, and that in the journey the defendant, by negligence, lost the plaintiff's trunk; upon *not guilty* pleaded, the evidence was, that the plaintiff gave the trunk to the man who drove the coach, who promised to take care of it, but lost it; and the question was, whether the *master* was chargeable; and adjudged that he was not, unless the *master* takes a *price* for the *carriage of the goods* as well as for the *carriage of the person*, and then he is within the custom as a carrier; that a *master* is not chargeable for the acts of his *servant*; but when they are done in execution of the authority given by the master, then the act of the servant is the act of the master. 1 *Salk.* 282. But by the custom and usage of stages, every passenger pays for the carriage of goods above a certain weight; and there the coachman shall be charged for the loss of goods beyond such weight. 1 *Com. Rep.* 25.

If a common carrier loses goods he is entrusted to carry, a special action on the case lies against him, on the custom of the realm; and so of a common carrier by boat. 1 *Roll. Abr.* 6. An action will lie against a porter, carrier or bargeman, upon his bare receipt of the goods, if they are lost by negligence. 1 *Sid.* 36. Also a lighterman spoiling goods he is to carry, by letting water come to them, action on the case lies against him on the common custom. *Palm.* 528.

If one be not a common carrier, and takes hire, he may be charged on a special *assumpsit*; for where hire is taken, a promise is implied. *Cro. Jac.* 262. So if a man who is not a common carrier, and who is not to receive a premium, undertakes to carry goods safely, he is answerable for any damages they may sustain through his neglect or default. This was the express point determined in *Coggs* v. *Bernard*, 1 *Com. Rep.* 133. *&c.* See tit. *Bailment*.

Where a carrier entrusted with goods, opens the pack, and takes away and disposes of part of the goods, this, showing an intent of stealing them, will make him guilty of felony. *Hale's P. C.* 61. And it is the same if the carrier receives goods to carry them to a certain place, and carrieth them to some other place, and not to the place agreed. 3 *Inst.* 367. That is, if he do it with intent to defraud the owner of them. If a carrier, after he hath brought goods to the place appointed, take them away privately, he is guilty of felony; for the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a mere stranger. 1 *Hawk. P. C. c.* 33. § 5. See *Larceny*, *&c.*

If a common carrier, who is offered his hire, and who has convenience, refuse to carry goods, he is liable to an action in the same manner as an innkeeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. 2 *Show. Rep.* 327. But a carrier may refuse to admit goods into his warehouse at an unseasonable time, or before he is ready to take his journey. Ld. *Raym.* 652.

A common carrier may have action of trover or trespass for goods taken out of his possession by a stranger; he having a special property in the goods, and being liable to make satisfaction for them to

the owner; and where goods are stolen from a carrier, he may bring an indictment against the felon as for his own goods, though he has only the possessory, and not the absolute property; and the owner may likewise prefer an indictment against the felon. *Kel.* 39.

By stat. 3 *Car.* I. *c.* 1. carriers are not to travel on the Lord's Day.

By the stat. 3 *W. & M. c.* 12. the justices are annually to assess the price of land-carriage of goods to be brought into any place within their jurisdiction, by any common carrier, who is not to take more, under the penalty of 5*l.* And by the stat. 21 *Geo.* II. *c.* 28. § 3. a carrier is not to take more, for carrying goods from any place *to London*, than is settled by the justices for the carrying goods *from London* to such a place, under the same penalty.

By stat. 24 *Geo.* II. *c.* 8. § 9. commissioners for regulating the navigation of the river *Thames* are to rate the price of water carriage.

By stat. 30 *Geo.* II. *c.* 22. § 3. justices of the city of *London* are to assess the rates of carrying goods between *London* and *Westminster*.

Carriers and waggoners are to write or paint on their waggons or carts their names and places of abode. See tit. *Carts*, *Highways*.

II. At common law a carrier is liable by the custom of the realm to make good *all losses* of goods entrusted to him to carry, except such losses as arise (1) from the act of God, or inevitable accident; or (2) from the act of the king's enemies; to which may be added (3) the default of the party sending them. 1 *Inst.* 89. *Coggs* v. *Bernard*, 2 Ld. *Raym.* 909. *Esp. N. P.* 619.

1. Where the defendant's hoy in coming through *London bridge*, was by a *sudden gust of wind* driven against the arch and sunk, the owner of the hoy was held not to be liable, the damage having been occasioned by the act of God, which no care of the defendant could provide against or foresee. But in this case it was held that if the hoyman had gone out voluntarily in bad weather, so that there was a probability of his being lost, he would have been liable. *Amies* v. *Stephens*, 1 *Stra.* 128.

Upon this ground of its being the act of God, if a bargeman in a tempest, for the safety of the lives of his passengers, throws overboard any trunks or packages of value, he is not liable for the loss. 1 *Roll. Rep.* 79. and see *Bulst.* 280. and 1 *Vent.* 190. 1 *Wils.* 281.

The defendant having lodged his waggon in an inn, an accidental fire broke out, which consumed it; he was adjudged liable, and it was held that negligence does not enter into the grounds of this action, for though *the carrier uses all proper care*, yet in case of a loss he is liable. *Forward* v. *Pittard*, 1 *Term Rep.* 27.

But where a common carrier, between two places, (*Stourport* and *Manchester*,) employed to carry goods from one place to the other, to be forwarded from thence to a third place, (*Stockport*,) carried them to *Stourport*, there put them in his warehouse, in which they were destroyed by an accidental fire, before he had an opportunity of forwarding them: in this case the carrier was held not to be liable, the keeping them in the warehouse in this case being not for the convenience of the carrier, but of the owner. 4 *Term Rep. K. B.* 581.

2. If a carrier is *robbed*, he shall be liable for the loss; not on the ground that he may charge the hundred under the statute of *Winchester*, but because if it were otherwise, he might by collusion with robbers, defraud the owner of the goods; and so in other cases, where the grounds are the same. 1 *Roll. Abr.* 338. 1 *Salk.* 143.

But if a carrier be robbed of goods, either he or the owner may bring an action against the hundred, to make it good. 2 *Saund.* 380.

Where in the case of a master of a ship it appeared there was a sufficient crew for the ship, but that at night eleven persons boarded the ship as pirates under the pretence of pressing, and plundered her of the goods, it was adjudged the master (the ship being *infra corpus comitatus*) was liable, for superior force shall not excuse him. *Morse* v. *Slue*, 1 *Vent.* 109. 2 *Lev.* 69. 1 *Mod.* 85. *Barclay* v. *Higgins*, *E.* 24 *Geo.* III. cited 1 *Term Rep.* 33.

3. In an action against a carrier, for negligently carrying a pipe of wine, which by that means burst, and the wine was spilt, it was good evidence for the defendant that the loss happened while he was driving gently, and arose from the wine being in a ferment; so that the loss was occasioned by its being sent in that state. *Bull. N. P.* 74. So if a carrier's waggon is full, and yet a person forces goods on him, and they are lost, the carrier is not liable. *Lovert* v. *Hobbs*, 2 *Show.* 127.

4. But the following exemptions by statute have been found necessary for the security of *owners* of ships.

By stat. 7 *Geo.* II. *c.* 15. no owners of any ship shall be liable to answer any loss by reason of *embezzlement* by the master *or* mariners, of any gold, silver, or other *goods* shipped on board, or for *any act* done by the master *or* mariners, without the owner's privity; beyond the value of the ship and freight.

By stat. 26 *Geo.* III. *c.* 86. no owners of any ship shall be subject to make good any loss by reason of any *robbery* embezzlement, secreting or making away with any *gold*, silver, jewels, diamonds, precious stones or *other goods* from on board; or for *any act* or forfeiture done or occasioned without the knowledge of such owner, beyond the value of the ship and freight, *although* the master or mariners shall *not be* concerned in, or privy to, such robbery, &c.

These acts do not impeach any remedy for fraudulent embezzlement, and if several proprietors or freighters sustain such loss, and the value of the ship and freight is not sufficient to make full compensation, the loss shall be averaged amongst them.

No *owner* shall be subject to answer for loss happening by fire on board ship. Stat. 26 *Geo.* III. *c.* 86. § 2.

No *master* or *owners* shall be subject to answer for *any loss* of gold, silver, diamonds, &c. by reason of any robbery, &c. unless the shipper of such goods insert the *true nature*, *quality*, and *value* of the gold, &c. in his bills of lading. Stat. 26 *Geo.* III. *c.* 86.

Previous to this last statute it was determined, that the owner of a ship was not liable beyond the value of the ship and freight, under stat. 7 *Geo.* II. *c.* 15. in the case of a *robbery*, (of dollars,) in which one of the mariners was concerned, by giving intelligence, and afterwards sharing the spoil; *Sutton* v. *Mitchell*, 1 *Term Rep.* 18. where it was said, the statute was made to protect the owners against *all treachery* in the master or mariners.

A carrier by water contracting to carry goods for hire, *impliedly* promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage. And this, though he had given notice "that he would not be answerable for *any* damage *unless* occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10 *per cent.* upon such damage, so as the whole did not exceed the value of the vessel and freight." For a loss happening by the *personal* default of the carrier himself, (such as the not providing a sufficient vessel,) is not within the scope

of such notice, which was meant to exempt the carrier from losses by accident or chance, &c. even if it were competent to a common carrier to exempt himself by a special exceptance from the responsibility cast upon him by the common law for a reasonable reward to make good all losses not arising from the act of God, or the king's enemies. *Lyon* v. *Mells*, 5 *East*, 428.

Where no lien exists at common law, it can only arise by contract with the particular party, either express or implied; it may be implied either from previous dealings between the same parties upon the footing of such a lien, or even from a usage of the trade so general as that the jury must reasonably presume that the parties knew of and adopted it in their dealing. But whereas in the case of a common carrier claiming a lien for his general balance, such a lien is against the policy of the common law and custom of the realm, which only gives him a lien for the carriage price of the particular goods, there ought to be very strong evidence of a general usage for such a lien to induce a jury to infer the knowledge and adoption of it by the particular parties in their contract, and the jury having negatived such a general usage, though proved to have been frequently exercised by the defendant and various other common carriers throughout the north for ten or 12 years before, and in one instance, so far back as 30 years, and not opposed by other evidence, the court refused to grant a new trial. *Rushforth* v. *Handfield*, 7 *East*, 224.

III. In order to *charge the carrier*, these circumstances are to be observed.

1. The goods must be lost while in the possession of the carrier himself, or in his sole care. Therefore, where the plaintiffs, the *East India Company*, sent their servants with the goods in question on board the vessel, who took charge of them, and they were lost, defendant was held not to be liable. 1 *Stra.* 690.

2. The carrier is liable only so far as he is *paid*, for he is chargeable by reason of his reward.

One brought a box to a carrier, in which there was a large sum of money, and the carrier demanded of the owner what was in it; he answered it was filled with silks, and such like goods; upon which the carrier took it, and was robbed; and adjudged, that the carrier was liable to make it good; but a special acceptance, as *provided there is no charge of money*, would have excused the carrier. 1 *Vent.* 238. 4 *Rep.* 83.

A person delivered to a carrier's book-keeper two bags of money sealed up, to be carried from *London* to *Exeter*, and told him that it was 200*l.* and took his receipt for the same, with promise of *delivery* for 10*s. per cent.* carriage and risk; though it be proved that there was 400*l.* in the bags, if the carrier be robbed, he shall answer only for 200*l.* because there was a particular undertaking for the carriage of that sum and no more, and his reward, which makes him answerable, extends no farther. *Carth.* 486.

3. Under a special or qualified acceptance the carrier is bound no further than he undertakes.

For where the owner of a stage-coach puts out an advertisement, "That he would not be answerable for money, plate or jewels above the value of 5*l.* unless he had notice, and was paid accordingly;" all goods received by that coach are under that special acceptance; and if money or plate be sent by it without notice, and being paid for, if

lost, the coach owner is not liable; *Gibbon* v. *Paynton*, 4 *Burr.* 2298. *Izett* v. *Mountain*, 4 *East*, 371. *Nicholson* v. *Willan*, 5 *East*, 507. not even to the extent of the 5*l.* or the sum paid for booking, *Clay* v. *Willan*, *H. Black. Rep.* 298. In these cases a personal communication is not necessary to constitute a special acceptance. Advertisements, notices in the warehouse, and handbills, which it is probable the plaintiff saw, or which he might have seen, are sufficient.

From these cases and the opinion of Lord *Mansfield*, it seems safest, that in all instances of sending things of value by a carrier, the carrier should have notice and be paid accordingly. See *ante*, II. 4.

4. A delivery to the carrier's servant is a delivery to himself, and shall charge him; but they must be goods, such as it is his custom to carry, not out of his line of business. *Salk.* 282.

5. Where goods are lost which have been put on board a ship, the action may be brought, either against the master or against the owners. 2 *Salk.* 440. If one owner only is sued, he must plead it in abatement, that there are other partners; for he shall not be allowed to give it in evidence, and nonsuit the plaintiff. 5 *Burr.* 2611. See *ante*, II. 4.

6. It is not necessary in order to charge the carrier that the goods are lost *in transitu*, while immediately under his care; for he is *bound to deliver them* to the consignee, or send notice to him according to the direction, and though they are carried safely to the inn, yet if left there till they are spoiled, and no notice given to the consignee, the carrier is liable. 3 *Wils.* 429. 2 *Bl. Rep.* 916.

As to the *proof* necessary in an action against a carrier, see tit. *Bailment*, 5. That a carrier may retain goods for his hire, see 1 Ld. *Raym.* 166. 752.

CART-BOTE. See tit. *Bote*.

CARTS. By the stat. 2 *W. & M.* stat. 2. *c.* 8. § 19, 20. and 18 *Geo.* II. *c.* 33. the wheels of every cart or dray for the carriage of any thing from and to any place where the streets are paved, within the bills of mortality, &c. shall contain six inches in the felloe, not to be shod with iron, nor be drawn with above two horses, under the penalty of 40*s.* By the stat. 18 *Geo.* II. *c.* 33. they may be drawn with three horses and not more, and the wheels being of six inches breadth, when worn, may be shod with iron, if the iron be of the full breadth of six inches, made flat, and not set on with rose-headed nails; and no person shall drive any cart, &c. within the limits aforesaid, unless the name of the owner, and number of such cart, &c. be placed in some conspicuous place of the cart, &c. and his name be entered with the commissioners of hackney-coaches, under the penalty of 40*s.* and every person may seize and detain such cart till the penalty be paid. By the stats. 1 *Geo.* I. *st.* 2. *c.* 57. and 24 *Geo.* II. *c.* 43. the driver of any such cart, &c. riding upon such cart, &c. not having a person on foot to guide the same, shall forfeit 10*s.* And by stat. 24 *Geo.* II. *c.* 43. the *owner* so guilty shall forfeit 20*s.* and any person may apprehend the offender.

On changing property, new owners' names to be affixed, 30 *Geo.* II. *c.* 22. § 2. and to be entered with the commissioners of hackney-coaches. And see stat. 24 *Geo.* III. *st.* 2. *c.* 27. to compel the entry of all carts *driven*, within five miles of *Temple Bar*.

CARVAGE. See post, *Carucate*.

CARUCA, Fr. *charrue*.] A plough, from the old Gallic *carr*, which is the present *Irish* word for any sort of wheeled carriage. Hence *chart* and *car*, a ploughman or rustic. Vide *Karle*.

CARUCAGE, *carucagium.*] A tribute imposed on every plough, for the public service; and as *hidage* was a taxation by hides, so *carucage* was by carucates of land. *Mon. Angl. tom.* 1. *fol.* 294.

CARUCATE, or CARVE OF LAND, *carucata terræ.*] A plough-land; which in a deed of *Thomas de Arden*, 19 *Edw.* II. is declared to be one hundred acres, by which the subjects have sometimes been taxed; whereupon the tribute so levied was called *carvagium*, or *carucagium. Bract. lib.* 2. *cap.* 26. But *Skene* says, it is as great a portion of land as may be tilled in a year and a day by one plough; which also is called *hilda*, or *hida terræ*, a word used in the old *British* laws. And now by stat. 7 & 8 *Wm.* III. *c.* 29 a plough-land, which may contain houses, mills, pasture, meadow, wood, &c. is 50*l. per annum.*

Littleton, in his chapter of tenure in socage, saith, that soca *idem est quod* carucata, a soke or plough-land are all one. *Stow* says, King *Hen.* III. took *carvage*, that is, two marks of silver of every knight's fee, towards the marriage of his sister *Isabella* to the Emperor. *Stow's Annals, p.* 271.

Rastal, in his exposition of words, says *carvage* is to be quit, if the king shall tax all the lands by *carves*; that is, a privilege whereby a man is exempted from *carvage*. The word carve is mentioned in the stat. 28 *Edw.* I. of wards and reliefs, and in *Magna Charta, c.* 5. And A. D. 1200, on peace made between *England* and *France*, King *John*, *lent* the King of *France* thirty thousand marks, for which *carvage* was collected in *England*, viz. iii*s.* for each plough. *Spelm* v. *Carua. Kennet's Gloss.* 2 *Inst.* 69. and *n.*

CARUCATARIUS, He that held lands in *carvage*, or plough-tenure. *Paroch. Antiq. p.* 354.

CASE, Action on; see tit. *Action*, and also *Com. Dig.* 1 *V.* tit. *Action.*

CASES OR REPORTS. See *Law Books*, *Libel.*

CASSATUM AND CASSATA, By the *Saxons* called *hide*; by *Bede*, *familia*, is a house with lands sufficient to maintain one family; *Rex Angl. Ethelred*, de 310 Cassatis, *unum trierem*, &*c.* Hoveden, anno 1008. And *Hen. Huntingdon*, mentioning the same thing, instead of *cassata*, writes *hilda.*

CASHLITE, *Sax.* A mulct or fine. *Blount.*

CASSIDILE, A little sack, purse, or pocket. *Mat. Westm.*

CASK, An uncertain quantity of goods; and of sugar, contains from eight to eleven hundred weight. There are also *casks* for liquors, of divers contents; and by stat. 25 *Eliz. c.* 11. none were to transport any wine *casks*, &*c.* except for victualling ships, under a certain penalty.

CASSOCK, or CASSULA, A garment belonging to the priest, *quasi minor cassa.* See *Tassale.*

CASTEL, or CASTLE, *castellum.*] A fortress in a town; a principal mansion of a nobleman. In the time of *Hen.* II. there were in *England* 1115 castles; and every castle contained a manor; but during the civil wars in this kingdom, these castles were demolished, so that generally there are only the ruins or remains of them at this day. 2 *Inst.* 31.

CASTELLAIN, *castellanus.*] The lord, owner, or captain of a castle, and sometimes the constable of a fortified house. *Bract. lib.* 5. *tract.* 2. *cap.* 16. 3 *Edw.* I. *cap.* 7. It hath likewise been taken for him that hath the custody of one of the king's mansion-houses, called by the *Lombards curtes*, in English, courts; though they are not

castles or places of defence. 2 *Inst.* 31. And *Manwood*, in his *Forest Laws*, says, there is an officer of the forest called *castellanus*.

CASTELLARIUM, CASTELLARII, The precinct or jurisdiction of a castle. *Et unum toftum juxta* castellarium. *Mon. Angl. tom.* 2. *fol.* 402.

CASTELLORUM OPERATIO, Castle-work, or service and labour done by inferior tenants, for the building and upholding of castles of defence; towards which some gave their personal assistance, and others paid their contribution. This was one of the three necessary charges, to which all lands among our *Saxon* ancestors were expressly subject. And after the conquest an immunity from this burthen was sometimes granted. As King *Hen.* II. granted to the tenants within the honour of *Wallingford*, *Ut sint quieti de* operationibus castellorum. *Paroch. Antiq. p.* 114. It was unlawful to build any castle without leave of the king, which was called *castellatio*. *Du Fresne*.

CASTIGATORY for *scolds*. A woman indicted for being a common scold, if convicted, shall be sentenced to be placed on a certain engine of correction, called the tre bucket, *tumbrel*, *tymborella*, *castigatory*, or *cuckingstool*, which in the *Saxon* language signifies the scolding stool; though now it is frequently corrupted into *ducking stool*, because the residue of the judgment is, that when she is so placed therein, she shall be plunged in the water for her punishment. 3 *Inst.* 219. 4 *Comm.* 169. It is also termed *goginstole* and *cokestole*, and by some is thought corrupted from *choaking stool*. Though this punishment is now disused, a former editor of *Jacob's Dict.* (Mr. *Morgan*,) mentions that he remembers to have seen the remains of one, on the estate of a relation of his in *Warwickshire*, consisting of a long beam, or rafter moving on a fulcrum, and extending to the centre of a large pond, on which end the stool used to be placed.

At *Banbury* in *Oxfordshire*, this punishment has been used towards common whores, within the memory of persons now (1793) living; and the pool for the purpose yet retains the name of *the cucking pool*, but the engine was not long since removed. See *Lamb. Eiren. lib.* 1. *c.* 12.

In Domesday-book it is called *Cathedra Stercoralis*, and was used by the *Saxons* for the same purpose, and by them called *scealfing stole*. It was anciently also a punishment inflicted on *brewers* and *bakers* transgressing the laws, who were ducked in *stercore*, in stinking water.

CASTING VOTE. See *Parliament*, vii.

CASTLE-WARD, *Castlegardum*, *vel wardum castri*.] An imposition laid upon such persons as dwelled within a certain compass of any castle, towards the maintenance of such as watch and ward the castle. *Magna Charta*, *cap.* 15. 20. 32 *Hen.* VIII. *cap.* 48. It is sometimes used for the circuit itself, which is inhabited by those that are subject to this service. *Castle guard rents* were paid by persons dwelling within the liberty of any castle, for the maintaining of watch and ward within the same. By stat. 22 & 23 *Car.* II. *c.* 24. § 2. these and other rents in the Duchy of *Lancaster*, payable to the king, were vested in trustees to be sold.

CASTER, and CHESTER. The names of places ending in these words are derived from the Lat. *Castrum*; for this termination at the end was given by the *Romans* to those places where they built castles.

CASTRATION. See tit. *Maihem.*

CASUAL EJECTOR, In ejectment, a nominal defendant, and who continues such until appearance by or for the tenant in possession. See tit. *Ejectment.*

CASUALTY OF WARDS, Are the mails and duties due to the superiors in Ward-holdings. *Scotch Dict.*

CASU CONSIMILI, Is a *writ* of *entry* granted where *tenant* by the *curtesy*, or *tenant* for *life*, *aliens in fee*, or *in tail*; or *for another's life*; and is brought by him *in reversion* against the *party to whom* such tenant so aliens to his prejudice, and in the tenant's life-time. It takes its name from this, that the clerks of the Chancery did, by their common assent, frame it to the *likeness* of the writ called *in casu proviso*, according to the authority given them by the stat. *Westm.* 2. (13 *Edw.* I.) *cap.* 24. which statute, as often as there happens a new case in Chancery something like a former, yet not specially fitted by any writ, authorizes them to frame a new form answerable to the new case, and as *like* the former as they may. 7 *Rep.* 4. See *F. N. B. fol.* 206. *Terms de la ley.* See 3 *Comm.* 51.

CASU PROVISO, A *writ* of *entry*, given by the stat. of *Gloucester*, *cap.* 7. where a *tenant in dower*, aliens in *fee*, or *for life*, *&c.* and it lies for him in *reversion* against the *alienee*. *F. N. B.* 205. This writ, and the writ of *casu consimili*, supposes the tenant to have alienated in fee, though it be for life only; and a *casu proviso* may be without making any title in it, where a lease is made by the demandant himself to the tenant that doth alien; but if an ancestor lease for life, and the tenant alien in fee, &c. the heir in reversion must have this with the title included therein. *F. N. B.* 206, 207.

CASUS OMISSUS, Is where any particular thing is omitted out of, and not provided against by a statute, &c.

CATALS, *Catalla*, Goods and chattels. See *Chattels.*

CATALLIS CAPTIS NOMINE DISTRICTIONIS, Anciently a writ that lay where a house was within a borough, for rent going out of the same; and which warranted the taking of doors, windows, &c. by way of distress for rent. *Old Nat. Brev.* 66. This writ is now obsolete.

CATALLIS REDDENDIS, An ancient writ which lay where goods being delivered to any man to keep till a certain day, are not, upon demand, delivered at the day. It may be otherwise called a *writ of detinue*, and is answerable to *actio depositi* in the Civil Law. See *Reg. Orig.* 139. and *Old Nat. Brev.* 63.

CATAPULTA, A warlike engine to shoot darts; or rather a cross-bow.

CATASCOPUS. An archdeacon. *Du Cange.*

CATCHLAND. In *Norfolk* there are some grounds which it is not known to what parish they certainly belong, so that the minister who first seizes the tithes, does by that right of preoccupation, enjoy them for that year; and the land of this dubious nature is there called *catchland*, from this custom of seizing the tithes. *Cowel.*

CATCHPOLE, See *Cachepollus.* Sheriffs' officers are commonly so called.

CATHEDRAL, *ecclesia cathedralis.*] The church of the bishop, and head of the diocese; wherein the service of the church is performed with great ceremony. See tit. *Church.*

CATHEDRATICK, *cathedraticum.*] A sum of 2*s.* paid to the bishop by the inferior clergy, *in argumentum subjectionis et ob honorem cathedræ.* *Hist. procurat. et Synodals, p.* 82.

CATZURUS, A hunting horse. *Tenures*, *ft.* 68. Vide *Chacurus*.

CATTLE. Several ancient laws were made to regulate the number of sheep to be kept by any farmer. See tit. *Sheep*.

As to the *importation of cattle*. By stat. 5 *Geo.* III. *c.* 43. bestials may be freely imported from the *Isle of Man*. By the 6th article of the Union, 5 *Ann. c.* 8. no *Scotch* cattle carried into *England* shall be liable to any other duties than the cattle of *England* are. By stat. 5 *Geo.* III. *c.* 10. which was of temporary continuance, but made perpetual by stat. 16 *Geo.* III. *c.* 8. all sorts of cattle may be imported from *Ireland*, duty free. And this notwithstanding stat. 18 *Car.* II. *c.* 2. 20 *Car.* II. *c.* 7. and 32 *Car.* II. *c.* 2. See stat. 32 *Geo.* III. *c.* 32. by which stat. 6 *Geo.* III. *c.* 50. is revived, and stat. 28 *Geo.* III. *c.* 38. explained, and the conveyance of horses permitted between *Cowes*, *Southampton* and *Portsmouth*.

As to *buying and selling* cattle, &c. No person shall buy any ox, cow, calf, &c. and sell the same again alive in the same market or fair, on pain of forfeiting double the value. Stats. 3 & 4 *Edw.* VI. *c.* 19. 3 *Car.* I. *c.* 49. § 7. 8. And the said act 3 & 4 *Edw.* VI. *c.* 19. is not repealed by stat. 12 *Geo.* III. *c.* 71. which repeals the general forestalling act of 5 & 6 *Edw.* VI. *c.* 14. and other subsequent acts enforcing the same, but hath no reference to any preceding act. By stat. 31 *Geo.* II. *c.* 40. no salesman, broker, or factor employed in buying cattle for others, shall buy and sell for himself, in *London*, or within the bills of mortality, on penalty of double the value of the cattle bought or sold.

By several statutes made from time to time, the king has been empowered to make regulations to prevent the spreading of distempers among horned cattle; and by stat. 9 *Geo.* III. *c.* 39. he may prohibit the importation of hides, skins, horns, &c.

By stat. 3 *Car.* I. *cap.* 1. no *drovers* are to travel with cattle on *Sundays*, on penalty of 20*s*.

By stat. 21 *Geo.* III. *c.* 67. several wholesome regulations are made, to prevent the cruelties of *drovers* and others, in driving cattle in *London*, *Westminster*, and the bills of mortality, by which a fine, from 20*s*. to 5*s*. is imposed on them for misbehaviour, or one month's imprisonment; and power is given to the lord mayor and aldermen of *London*, to make regulations to further the purposes of the act, and which was accordingly done.

As to *killing*, *maiming*, and *stealing* cattle. By stat. 37 *Hen.* VIII. *c.* 6. whoever shall cut out the tongue of any tame beast, the property of another person, the beast being alive, shall pay treble damages, and forfeit 10*l*.

By stat. 22 & 23 *Car.* II. *c.* 7. maliciously, unlawfully and willingly to kill any horses, sheep, or other cattle in the night-time, is felony; but the felon may make his election to be transported for seven years.

And if any shall maliciously *maim*, *wound*, or *hurt* such cattle in the night-time, he shall forfeit treble damages, by action of trespass, or on the case, to be tried before three justices of peace and a jury.

By stat. 14 *Geo.* II. *c.* 6. and 15 *Geo.* II. *c.* 34. feloniously driving away or stealing any oxen, bulls, cows, sheep, &c. or killing them with intent to steal the carcase, or any part of it, is made felony without benefit of clergy; and any person prosecuting an offender to conviction shall have a reward of 10*l*.

By the *Black Act*, (see that tit.) 9 *Geo.* III. *c.* 22. unlawfully and maliciously to maim or wound any cattle, is felony without clergy, and

the hundred shall be answerable as far as 200*l.* and persons convicting offenders shall receive 50*l.* reward. See 4 *Comm.* 240. *n.* 1.

To prevent the stealing of horses and other cattle for the purpose of selling them, merely for their skin, the stat. 26 *Geo.* III. *c.* 71. provides that every person keeping a slaughter-house for cattle, not killed for butchers' meat, shall take out licenses and be subject to an inspector, and shall not slaughter, but at certain times, &c. &c. See tit. *Horses.*

CAVALRY, (provisional.) See *Defence of the Realm.*

CAUDA TERRÆ, A land's end, or the bottom of a ridge in arable land. *Cartul. Abbat. Glaston, fol.* 117.

CAVEAT, Is a kind of process in the *spiritual courts* to stop the institution of a clerk to a benefice, or probate of a will, &c. When a caveat is entered against an institution, if the bishop afterwards institutes a clerk, it is void; the *caveat* being a *supersedeas;* but a caveat has been adjudged void when entered in the life-time of the incumbent. Though if it is entered "dead or dying" it will last good one month, and if the incumbent dies, till six months after his death. So a caveat entered against a will stands in force for three months; and this is for the caution of the ordinary, that he do no wrong; though it is said the temporal courts do not regard these sort of caveats. 1 *Roll. Rep.* 191. 1 *Nels. Abr.* 416, 417.

CAVERS, Offenders relating to the mines in *Derbyshire*, who are punishable in the *bergmote*, or miners' court.

CAULCEIS. See stat. 6 *Hen.* VI. *cap.* 5. respecting sewers. Ways pitched with flint, or other stones. See *Calcetum.*

CAURCINES, *Caursini.*] *Italians* that came into *England* about the year 1235, terming themselves the *Pope's merchants*, but driving no other trade than letting out money; and having great banks in *England*, they differed little from *Jews*, save (as history says) that they were rather more merciless to their debtors; *Cowel* says, they have their name from *Caorsium, Caorsi*, a town in *Lombardy*, where they first practised their arts of usury and extortion; from whence spreading themselves, they carried their cursed trade through most parts of *Europe*, and were a common plague to every nation where they came. The then bishop of *London* excommunicated them; and King *Henry* III. banished them from this kingdom in the year 1240. But being the Pope's solicitors and money-changers, they were permitted to return in the year 1250; though in a very short time after, they were driven out of the kingdom again for their intolerable exactions. *Mat. Paris.* 403.

CAUSA MATRIMONII PRÆLOCUTI, Is a writ which lies where a woman gives land to a man in fee-simple, &c. to the intent he should marry her, and he refuseth to do it in any reasonable time, being thereunto required. *Reg. Orig.* 66. If a woman makes a feoffment to a stranger of land in fee, to the intent to enfeoff her, and one who shall be her husband; if the marriage shall not take effect, she shall have the writ of *causa matrimonii prælocuti*, against the stranger, notwithstanding the deed of feoffment be absolute. *New Nat. Brev.* 456. A woman enfeoffed a man upon condition that he should take her to wife, and he had a wife at the time of the feoffment; and afterwards the woman, for not performing the condition, entered again into the land, and her entry was adjudged lawful, though upon a second feoffee. *Lib. Ass. anno* 40 *Edw.* III. The husband and wife may sue the writ *causa matrimonii prælocuti* against another who ought to have married her; but if a man give lands to a woman to

the intent to marry him, although the woman will not marry him, &c. he shall not have his remedy by writ *causa matrimonii prælocuti*. *New Nat. Brev.* 455.

CAUSAM NOBIS SIGNIFICES, A writ directed to a mayor of a town, &c. who was by the king's writ commanded to give seisin of lands to the king's grantee, on his delaying todo it, requiring him to *show cause why* he so delays the performance of his duty.

CAUSES and EFFECTS. In most cases the law hath respect to the *cause*, or beginning of a thing, as the principal part on which all other things are founded; and herein the *next*, and not the *remote* cause is most looked upon, except it be in covinous and criminal things; and therefore that which is not good at first will not be so afterwards; for such as is the cause, such is the effect. *Plowd.* 208. 268. If an infant or feme covert make a will, and publish it, and after die of full age, or sole, the will is of no force, by reason of the original *cause* of infancy and coverture. *Finch.* 12. Where the cause ceaseth, the effect or thing will cease. *Co. Lit.* 13.

CAUTIONE ADMITTENDA, A writ that lies against a bishop, who holds an excommunicated person in prison for contempt, notwithstanding he offers sufficient *caution* or security to obey the orders and commandment of the church for the future. *Reg. Orig.* 66. And if a man be excommunicated, and taken by a writ of *significavit*, and after offers caution to the bishop to obey the church, and the bishop refuseth it; the party may sue out this writ to the sheriff to go against the bishop, and to warn him to take caution, &c. but if he stands in doubt whether the sheriff will deliver him by that writ, the bishop may purchase another writ, directed to the sheriff reciting the case and the end thereof: *Tibi præcipimus, quod ipsum* A. B. *à prisona prædict. nisi in præsentia tua cautionem fignorat. ad minus eidem episc. de satisfaciend. obtulerit, nullatenus deliberas absque mandato nostro seu ipsius episcopi in hac parte speciali, &c.* When the bishop hath taken caution, he is to certify the same in the *Chancery*, and thereupon the party shall have a writ unto the sheriff to deliver him. *New Nat. Brev.* 142.

CEAPGILDE, From Sax. *ceap*, *pecus*, cattle; and *gild*, i. e. *solutio*.] Hence it is *solutio pecudis*: from this *Saxon* word *gild*, it is very probable we have our English word *yield*; as yield, or pay. *Cowel.*

CELER LECTI, The top, head, or tester of a bed. *Hist. Elien. apud Whartoni, Angl. Sax. par.* 1. *p.* 673.

CELLERARIUS, The butler in a monastery. In the Universities, they are sometimes called *manciple*, and sometimes *caterer*, and steward.

CENDULÆ, Small pieces of wood laid in form of tiles, to cover the roof of a house. *Pat.* 4 *Hen.* III. *p.* 1. *m.* 10.

CENEGILD, An expiatory mulct, paid by one who killed another, to the kindred of the deceased. *Spelm.*

CENELLÆ, Acorns, from the oak. In our old writings, *pessona cenellarum*, is put for the pannage of hogs, or running of swine, to feed on acorns.

CENNINGA, Notice given by the buyer to the seller, that the thing sold was claimed by another, that he might appear and justify the sale. It is mentioned in the laws of *Athelstan, apud Brompton, cap.* 4.

CENSARIA, A farm, or house and land, let *ad censum*, at a standing rent. It comes from the Fr. *cense*, which signifies a farm.

CENSARII, Farmers. *Blount.*

CENSUALES, A species or class of the *oblati*, or voluntary slaves of churches or monasteries, i. e. those who, to procure the protection of the church, bound themselves to pay an annual tax or quit-rent out of their estates to a church or monastery. Besides this, they sometimes engaged to perform certain services. *Robert. Hist. Emp. Charles* V. 1 *V.* 271, 272. *Potgiesserus de Statu Servorum, lib.* 1. *cap.* 1. § 6, 7.

CENSURE, from Lat. *census.*] A custom called by this name, observed in divers manors in *Cornwall* and *Devon*, where all persons residing therein above the age of sixteen are cited to swear fealty to the lord, and to pay 1 1*d.* per poll, and 1*d.* per *ann.* ever after; and these thus sworn are called *censers. Survey of the Duchy of Cornwall.*

CENTENARII, Petty judges, under-sheriffs of counties, that had rule of a *hundred*, and judged smaller matters among them. 1 *Vent.* 211.

There were anciently inferior judges so called in *France;* who were set over every hundred freemen, and were themselves subject to the count or *comes.* 1 *Comm.* 115.

CEOLA, A large ship. *Malmsbury, lib.* 1. *c.* 1.

CEPI CORPUS, A return made by the sheriff, upon a *capias*, or other process to the like purpose, that he *hath taken the body* of the party. *F. N. B.* 26.

CEPPAGIUM, The stumps or roots of trees which remain in the ground after the trees are felled. *Fleta, lib.* 2. *cap.* 41.

CERAGIUM, Cerage, a payment to find candles in the church. *Mat. Paris.* See *Waxscot.*

CERTAINTY, Is a plain, clear, and distinct setting down of things so that they may be understood. 5 *Rep.* 121. A convenient certainty is required in writs, declarations, pleadings, &c. But if a writ abate for want of it, the plaintiff may have another writ. It is otherwise if a deed become void, by uncertainty, the party may not have a new deed at his pleasure. 11 *Rep.* 25. 121. *Dyer*, 84. That has certainty enough, that may be made certain; but not like what is certain of itself. 4 *Rep.* 97. See generally tit. *Pleading*, and particularly tit. *Deed*, *Fine*, *Will.*

CERTIFICANDO DE RECOGNITIONE STAPULAE. A writ commanding the mayor of the staple to certify to the Lord Chancellor a statute staple taken before him, where the party himself detains it, and refuseth to bring in the same. *Reg. Orig.* 152. There is the like writ to certify a statute merchant, and in divers other cases. *Ibid.* 148. 151. &c.

CERTIFICATE, A writing made in any court to give notice to another court of any thing done therein, which is usually by way of transcript, &c. And sometimes it is made by an officer of the same court, where matters are referred to him, or a rule of court is obtained for it; containing the tenor and effect of what is done. The clerks of the crown, assise, and peace, are to make certificates into *B. R.* of the tenor of indictments, convictions, &c. under penalties, by the stat. 34 & 35 *Hen.* VIII. *c.* 14. 3 *W. & M. c.* 9. See tit. *Clergy*, *benefit of.*

If a question of *mere law* arises in the course of a cause in Chancery, (as whether by the words of a will, an estate for life or in tail is created, or whether a future interest devised by a testator, shall operate as a remainder, or an executory devise,) it is the practice of that court, to refer it to the opinion of the judges of the court of K.

B. or C. P. upon a case stated for the purpose; wherein all the material facts are admitted, and the point of law is submitted to their decision, who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such *certificate*, the decree is usually founded. 3 *Comm.* 453.

The Trial by Certificate, Is allowed in such cases, where the evidence of the person certifying, is the only proper criterion of the point in dispute. Thus, 1. The question whether one were absent with the king in his army out of the realm, in time of war, might be tried by the certificate of the marshal of the king's host under seal. *Litt.* § 102. 2. If in order to avoid an outlawry, it be alleged the defendant was in prison, &c. at *Bourdeaux* or *Calais*, this, when those places belonged to the crown of *England*, was allowed to be tried by the certificate of the mayor. 9 *Rep.* 31. 2 *Roll. Abr.* 583. And therefore, by parity of reason, it should now hold that in similar cases arising at *Jamaica*, &c. the trial should be by certificate from the governor. 3 *Comm.* 334.

3. For matters within the realm; the *customs* of the city of *London* shall be tried by the certificate of the mayor and aldermen, certified by the mouth of the recorder, upon a surmise from the party alleging it, that it should be so tried; else it must be tried by the country, as it must also if the corporation of *London* be a party, or interested in the suit. 1 *Inst.* 74. 4 *Burr.* 248. *Bro. Abr.* 1. *Trial, pl.* 96. *Hob.* 85. But see 1 *Term Rep.* 423. If the recorder has once certified a custom, the court are in future bound to take notice of it. *Doug.* 380.

4. In some cases the *Sheriff of London's* certificate shall be the final trial; as if the issue be whether the defendant be a citizen of *London*, or a foreigner, in case of privilege pleaded to be sued only in the city courts. 1 *Inst.* 74. Of a nature somewhat similar to which is the trial of the privilege of either university *when the chancellor claims cognisance* of the cause; in which case the charters confirmed by parliament, allow the question to be determined by the certificate of the chancellor under seal. But in case of an issue between two parties themselves, the trial shall be by jury. 2 *Roll. Abr.* 583. 3 *Comm.* 335.

5. In matters of ecclesiastical jurisdiction, as *marriage*, *general bastardy*, *excommunication*, and *orders*, these and other like matters, shall be tried by the bishop's certificate. See tit. *Bastardy*, &c. Ability of a clerk presented, admission, institution and deprivation of a clerk, shall also be tried by certificate from the ordinary or metropolitan. 2 *Inst.* 632. *Show. P. C.* 88. 2 *Roll. Abr.* 583. &c. But *induction* shall be tried by a jury; being the corporal investiture of the temporal profits. *Dyer*, 229. Resignation of a benefice may be tried either way, but seems most properly to fall within the bishop's cognisance. 2 *Roll. Abr.* 583. 3 *Comm.* 336.

6. The trial of all customs and practices of the courts shall be by certificate from the proper officer of those courts respectively; and what return was made on a writ by a sheriff or under sheriff, shall be only tried by his own certificate. 9 *Rep.* 31. 3 *Comm.* 336.

As to certificates in cases of *Costs*, of *Bankrupts*, or relative to the settlement of the *Poor*, see those titles in this *Dictionary*.

CERTIFICATION, i. e. Assurance. *Scotch Dict.*

CERTIFICATION, Is when the judge doth ascertain the party called, and not compearing what he will do in that case. *Scotch Diet.*

CERTIFICATE, or CERTIFICATION OF ASSISE, *certificatio assisæ novæ dissesinæ, &c.*] A writ anciently granted for the re-examining or retrial of a matter passed by assise before justices; used where a man appearing by his bailiff to an assise, brought by another, lost the day; and having something more to plead for himself, which the bailiff did not, or might not plead for him, desired a farther examination of the cause, either before the same justices, or others, and obtained letters patent to them to that effect; whereupon he brought a writ to the sheriff to call both the party for whom the assise passed, and the jury that was impanelled on the same, before the said justices at a certain day and place, to be re-examined. It was called a certificate, because therein mention is made to the sheriff, that upon the party's complaint of the defective examination, as to the assise passed, the king hath directed his letters patent to the justices for the better *certifying* of themselves, whether all points of the said assise were duly examined. *Reg. Orig.* 200. *F. N. B.* 181. *Bracton, lib.* 4. *c.* 13. *Horn's Mirr. lib.* 3. This writ is now entirely superseded by the remedy afforded by means of *new trials*. See 3 *Comm.* 389.

CERTIORARI.

This is an Original Writ, issuing out of the court of chancery or K. B. directed in the king's name to the judges or officers of the inferior courts, commanding them to certify, or to return the records of a cause depending before them; to the end the party may have the more sure and speedy justice before the king, or such justices as he shall assign to determine the cause. See *F. N. B.* 145. 242.

This writ is either returnable in the king's bench, and then hath these words, "send to us," or in the *common bench*, and then has "to our justices of the bench," or in the chancery, and then hath "*in our chancery*," *&c.*

On this subject we may briefly consider, 1. In what cases this writ is grantable, or not. 2. In what manner. 3. The effect of it when granted. And, 4. Of the return, with the form of that and the writ.

1. A writ of certiorari may be had at any time before trial, to certify and remove *indictments*, with all the proceedings thereon from any inferior court of criminal jurisdiction, into the court of K. B. the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of four purposes. 1. To consider and determine the validity of appeals and indictments, and the proceedings thereon, and to quash or confirm them accordingly. 2. To have the prisoner or defendant tried at the bar of the courts, or before justices of *Nisi Prius* where it is surmised that a partial or insufficient trial will probably be had in the inferior court. 3. To plead the king's pardon in the court of K. B. 4. To issue process of outlawry against the offender, in those counties or places where the process of inferior judges will not reach him. 2 *Hale's P. C.* 210. 4 *Comm.* 320.

A certiorari lies in all judicial proceedings, in which a writ of error does not lie; and it is a consequence of all inferior jurisdictions, erected by act of parliament to have their proceedings returnable in K. B. Ld. *Raym.* 469. 580.

But without laying a special ground before the court, it cannot be sued out to remove proceedings in an action from the courts of the counties palatine. *Doug.* 749. It does not lie to judges of oyer and terminer to remove a recognisance of appearance. *Lucas*, 278. Nor to remove a poor's rate. *Stra.* 932. 975. See *Leach's Hawk. P. C.* ii. *c.* 27. § 23. *in n.*

A certiorari lies to justices of the peace and others, even in such cases, which they are empowered by statute *finally* to hear and determine; and the superintendency of the court of K. B. is not taken away without express words. 2 *Hawk. P. C. c.* 27. § 22, 23.

If an order of removal be confirmed at the sessions, and both orders be removed into *B. R.* by certiorari on a case reserved, and that court disapprove of the orders, for want of jurisdiction of the removing magistrates, appearing on the face of the original order; the court will quash both orders, without remitting back to the sessions to quash the original order, for the purpose of enabling them to give maintenance according to stat. 9 *Geo.* I. *c.* 7. § 9. and at any rate they will not admit an application for amending their judgment for quashing both orders made in the term subsequent to the judgment so pronounced. *Rex* v. *Moor Critchell Parish*, 2 *East*, 222.

That a certiorari does not lie to remove any other than judicial acts, see *Cald.* 309. *Say.* 6.

Where a *certiorari* is by law grantable for an indictment, at the suit of the king, the court is bound to award it, for it is the king's prerogative to sue in what court he pleases; but it is at the discretion of the court to grant or not, in case of private prosecutions, and at the prayer of the defendant; and the court will not grant it for the removal of an indictment before justices of gaol delivery, without some special cause; or where there is so much difficulty in the case, that the judge desires it may be determined in *B. R. &c. Burr.* 2456. Also on indictments of perjury, forgery, or for heinous misdemeanors, the court will not generally grant a *certiorari* to remove at the instance of the defendant. 2 *Hawk. P. C. c.* 27. § 27, 28. But see 2 Ld. *Raym.* 1452.

But in particular cases, the court will use their discretion to grant a certiorari; as if the defendant be of good character, or if the prosecution be malicious, or attended with oppressive circumstances. *Leach's Hawk. P. C.* ii. *c.* 27. § 28. *n.*

Where issue is joined in the court below, it is a good objection against granting a *certiorari;* and if a person doth not make use of this writ till the jury are sworn, he loses the benefit of it. *Mod. Ca.* 16. Stat. 43 *Eliz. c.* 5. After conviction a *certiorari* may not be had to remove an indictment, &c. unless there be special cause; as if the judge below is doubtful what judgment is proper to be given, when it may. See *Stra.* 1227. *Burr.* 749. And after conviction, &c. it lies in such cases where writ of error will not lie. 1 *Salk.* 149. The court on motion in an extraordinary case will grant a *certiorari* to remove a judgment given in an inferior court; but this is done where the ordinary way of taking out execution is hindered in the inferior court. 1 *Lill. Abr.* 253.

In common cases a *certiorari* will not lie to remove a cause out of an inferior court, after verdict. It is never sued out after a writ of error but where diminution is alleged; and when the thing in demand does not exceed 5*l.* a *certiorari* shall not be had, but a writ of error or attaint. Stat. 21 *Jac.* I. *cap.* 23. See stat. 12 *Geo.* I. *c.* 29. A *certiorari* is to be granted on matter of law only; and in many cases there must be a judge's hand for it. 1 *Lill.* 252. *Certioraris* to remove indictments, &c. are to be signed by a judge; and to remove orders, the *fiat* for making out the writ must be signed by some judge. 1 *Salk.* 150.

Certiorari lies to the courts of *Wales*, and the cinque ports, counties palatine, &c. 2 *Hawk. P. C. c.* 27. § 24, 25.

Things may not be removed from before justices of peace, which cannot be proceeded in by the court where removed; as in case of refusing to take the oaths, &c. which is to be certified and inquired into, according to the statute. 1 *Salk.* 145. And where the court which awards the *certiorari* cannot hold plea on the record, there but a tenor of the record shall be certified; for otherwise if the record was removed into *B. R.* as it cannot be sent back, there would be a failure of right afterwards. 1 *Danv. Abr.* 792. But a record sent by *certiorari* into *B. R.* may be sent after by *mittimus* into *C. B. Ibid.* 789. And a record into *B. R.* may be certified into chancery, and from thence be sent by *mittimus* into an inferior court, where an action of debt is brought in an inferior court, and the defendant pleads that the plaintiff hath recovered in *B. R.* and the plaintiff replies, *Nul tiel record*, &c. 1 *Saund.* 97. 99.

The court of *B. R.* will grant a new *certiorari* to affirm a judgment, &c. though generally one person can have but one certiorari. *Cro. Jac.* 369.

A *certiorari* may not be had to a court superior, or that has equal jurisdiction, in which case day is given to bring in the record, &c.

Besides the statutes hereafter mentioned, there are several which restrain, and many which absolutely prohibit a *certiorari*, in order to avoid frivolous and unfounded delays in justice. For a complete list of these, if needed, the student should consult index to the statutes. The following seem to have deserved a short mention in this place.

By stats. 12 *Car.* II. *cc.* 23, 24. no certiorari shall be allowed in certain cases of transgression of the *Excise Laws*.

By stat. 13 *Geo.* III. *c.* 78. (which see at large tit. *Highways*,) no presentment, &c. of any highway shall be removed from the sessions, until it be traversed, except the right to repair be the question. Or by stat. 5 & 6 *W. & M. c.* 11. may come in question. But this means on the part of the defendant only, for on the part of the prosecution it lies before. No other proceedings under the highway act may be removed by certiorari; but if the sessions manifestly exceed their authority in making orders, they may be removed into *K. B.* by certiorari and quashed. *Leach's Hawk. P. C.* ii. *c.* 27. § 37. and *n.*

By stat. 16 *Geo.* III. *c.* 30. against *deer-stealers*, no certiorari shall issue, unless the party convicted shall become bound to the prosecutor in 100*l.* to pay full costs and damages within thirty days, and to the justice in 60*l.* to prosecute the *certiorari* with effect. But in appeal to the sessions, he may sue out a certiorari on six days' notice, to prosecute. And the like in effect is enacted by stats. 4 & 5 *W. & M. c.* 23. and 5 *Ann. sess.* 2. *c.* 14. concerning game. 2 *Hawk. P. C. c.* 27. § 60, 61.

Also by stat. 1 *Ann. c.* 18. concerning the repair of *bridges*, *no certiorari* shall be allowed. Nor by stat. 8 *Geo.* II. *c.* 20. for punishing destroyers of *turnpikes*. Nor by *st.* 12 *Geo.* II. *c.* 29. for assessing *county rates*. Nor on *st.* 19 *Geo.* II. *c.* 21. against *cursing* and *swearing*. Nor on *st.* 23 *Geo.* II. *c.* 13. against *seducing artificers*. Nor on *st.* 25 *Geo.* II. *c.* 36. against *bawdy-houses*. Nor on 29 *Geo.* II. *c.* 40. against *stealing lead*, *iron*, &c. Nor on 30 *Geo.* II. *c.* 21. for preserving *fish* in the *Thames*. Nor on 30 *Geo.* II. *c.* 24. for restraining *gaming* in public houses. Nor on 31 *Geo.* II. *c.* 29. for regulating *bread*. Nor on 2 *Geo.* III. *c.* 30. for preventing thefts in bumb-boats. Nor on 10 *Geo.* III. *c.* 18. against *dog-stealers*.

For a long detail of further matter on the subject of *certiorari*, see 2 *Hawk. P. C. c.* 27.

2. By stat. 1 & 2 *P. & M. c.* 13. no [habeas corpus or] *certiorari* shall be granted to remove any *recognisance*, unless signed by the Chief Justice, or in his absence by one of the other judges.

By stats. 5 & 6 *W. & M. c.* 11. and 8 & 9 *Wm.* III. *c.* 33. a *certiorari* may be granted in vacation time by any of the judges of *B. R.* and security is to be found before it is allowed. No *certiorari* is to be granted out of *B. R.* to remove an *indictment*, or presentment, before justices of peace at the sessions before trial, unless motion be made in open court, and the party indicted find security by two persons in 20*l.* each to plead to the indictment in *B. R.* &c. And if the defendant prosecuting the *certiorari* be convicted, the court of *B. R.* shall order costs to the prosecutor of the indictment. In case of *certiorari* granted in vacation, the name of the judge and party applying to be endorsed on the writ. See tit. *Habeas Corpus.*

If on a *certiorari* to remove an indictment the party do not find manucaptors in the sum of 20*l.* to plead to the indictment and try it, according to the statute, it is no *supersedeas*. *Mod. Ca.* 33. And a *procedendo* may be granted where bail is not put in before a judge, on a *certiorari*. As to costs, see 1 *Wils.* 139. 1 *Burr.* 54. 2 *Term Rep.* 47.

No judgment or order to be removed by *certiorari*, without sureties found to the amount of 50*l.* Stat. 5 *Geo.* II. *c.* 19.

The 12th section of the stat. 38 *Geo.* III. *c.* 52. providing that no indictment shall be removed into the next adjoining county, *except the person applying for such removal* shall enter into a recognisance in 40*l.* for the extra costs, and does not relate to indictments sent by *B. R.* to be tried in the next adjoining county, after a removal thither by *certiorari*. *Rex* v. *Nottingham*, 4 *East*, 208.

Certiorari, to remove convictions, orders, or proceedings of justices, to be applied for within six calendar months, and upon six days' notice to the justices. Stat. 13 *Geo.* II. *c.* 18. See *Stra.* 991. and this *Dict.* tit. *Sessions.*

It is said a certiorari to remove an indictment is good, although it bear date before the taking thereof; but on a certiorari the very record must be returned, and not a transcript of it; for if so, then the record will still remain in the inferior court. 2 *Lill.* 253. In *B. R.* the very record itself of indictments is removed by *certiorari*; but usually in Chancery, if a *certiorari* be returnable there, it removes only the tenor of the record; and therefore, if it be sent from thence into the King's Bench, they cannot proceed either to judgment or execution, because they have but such tenor of the record before them. 2 *Hale's Hist. P. C.* 215. In *London* a return of the tenor only is warranted by the city charters. 2 *Hawk. P. C. c.* 27. § 26. 76.

On a *certiorari* to remove a record out of an inferior court, the style of their court, and power to hold plea, and before whom, ought to be shown on their certificate. *Jenk. Cent.* 114. 232.

A *certiorari* to remove an order of bastardy should be applied for in six months. *Rex* v. *Howlett*, 1 *Wils.* 35.

If a *certiorari* be prayed to remove an indictment out of *London* or *Middlesex*, three days' notice must be given the other side, or the *certiorari* shall not be granted. *Raym.* 74.

3. After a certiorari is allowed by the inferior court, it makes all the *subsequent* proceedings, on the record that is removed by it, erroneous. 2 *Hawk. P. C. c.* 27. § 62. 64. But if a certiorari for the removal of an indictment before justices of peace, be not delivered

before the jury be sworn for the trial of it, the justices may proceed. 2 *Hawk. P. C. c.* 27. § 64. And the justices may set a fine to complete their judgment after a certiorari delivered. Ld. *Raym.* 1515. See *ante*, 1.

A certiorari removes all things done between the teste and return. Ld. *Raym.* 835. 1305. And as it removes the record itself out of the inferior court, therefore if it remove the record against the principal, the accessary cannot be tried there. 2 *Hawk. P. C. c.* 29. § 54. And if the defendant be convicted of a capital crime, the *person* of the defendant must be removed by *habeas corpus*, in order to be present in court, if he will move in arrest of judgment. And herein the case of a conviction differs from that of a special verdict. *Burr.* 930.

Although on a *habeas corpus* to remove a person, the court may bail or discharge the prisoner; they can give no judgment upon the record of the indictment against him, without a *certiorari* to remove it, but the same stands in force as it did, and new process may issue upon it. 2 *Hale's Hist. P. C.* 211. If an indictment be one, but the offences several, where four persons are indicted together; a *certiorari* to remove this indictment against two of them, removes it not as to the others, but as to them the record remains below. 2 *Hale's Hist.* 214.

If a cause be removed from an inferior court by *certiorari*, the pledges in the court below are not discharged; because a defendant may bring a *certiorari*, and thereby the plaintiff may lose his pledges. *Skin. Rep.* 244. 246. A certiorari from K. B. is a supersedeas to restitution in a forcible entry. 1 *Hawk. P. C. c.* 64. § 62.

4. The return of a *certiorari* is to be under seal; and the person to whom a *certiorari* is directed may make what return he pleases, and the court will not stop the filing of it, on *affidavit* of its falsity, except where the public good requires it; the remedy for a false return is action on the case, at the suit of the party injured, and information, &c. at the suit of the king. 2 *Hawk. P. C. c.* 27. § 70.

If the person to whom the certiorari is directed, do not make a return, then an *alias*, then a *pluries*, *vel causam nobis significes quare*, shall be awarded, and then an attachment. *Cromp.* 116.

Form of a Certiorari To certify the Record of a Judgment.

GEORGE *the Third*, &c. *To the Mayor and Sheriffs of our city of* E. *and to every of them, in our court at the Guildhall there greeting: Whereas* A. B. *hath lately in our said court in the said city, according to the custom of the same court, impleaded* C. D. *late of*, &c. *in an action of debt upon demand of thirty pounds; and thereupon, in our said court before you, obtained judgment against the said* C. *for the recovery of the said debt; and we, being desirous for certain reasons, that the said record should by you* be certified *to us, Do command you, that you send under your seals the record of the said recovery, with all things touching the same, into our court before us at* Westminster, *on the day*, &c. *plainly and distinctly, and in as full and ample manner as it now remains before you, together with this writ; so that we on the part of the said* A. *may be able to proceed to the execution of the said judgment, and do what shall appear to us of right ought to be done.* Witness, &c.

The return of certiorari may be thus: First, on the back of the writ endorse these or similar words—"*The execution of this writ appears in a schedule to the same writ annexed.*" Which schedule may be in the following form, on a piece of *parchment*, (not paper, 1 *Barn. K. B.* 113.) by itself, and filed to the writ.

Middlesex.—*I*, A. B. *one of the keepers of the peace and justices of our lord the king, assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses and other misdemeanors in the same county committed, by virtue of this writ to me delivered, do under my seal certify unto his Majesty in his court of King's Bench, the indictment, of which mention is made in the same writ, together with all matters touching the said indictment. In witness whereof, I the said* A. B. *have to these presents set my seal. Given at* ——, *in the said county, the* —— *day of* ——, *in the* —— *year of the reign of* ——.

Then take the record of the indictment, and close it within the above schedule, and seal up, and send them both together with the certiorari.

CERT-MONEY, *quasi* certain *money.*] *Head-money* paid yearly by the resiants of several manors to the lords thereof, for the *certain* keeping of the leet; and sometimes to the hundred; as the manor of *Hook*, in *Dorsetshire*, pays *cert-money* to the hundred of *Egerdon*. In ancient records this is called *certum letæ*. See *Common Fine*.

CERVISARII. The *Saxons* had a duty called *drinclean*, that is, *retributio potus*, payable by their tenants; and such tenants were in *Domesday* called *cervisarii*, from *cervisia*, ale, their chief drink; though *cervisarius* vulgarly signifies a beer or ale brewer.

CERURA, A mound, fence, or enclosure. *Cart. priorat. de Theles ford, MS.*

CESSAT EXECUTIO. In trespass against two persons, if it be tried and found against one, and the plaintiff takes his execution against him, the writ will abate as to the other; for there ought to be a *cessat executio* till it is tried against the other defendant. 10 *Edw.* IV. 1. See tit. *Execution*, &c.

CESSAVIT, A writ which lies (by the stats. of *Gloucester*, 6 *Edw.* I. *c.* 4. and *Westm.* 2. 13 *Edw.* I. *cc.* 21. 41.) when a man who holds by rent or other services, neglects or *ceases* to perform his services for two years together; or where a religious house hath lands given it, on condition of performing some certain spiritual service, as reading prayers, or giving alms, and neglects it; in either of which cases if the *cesser* or neglect shall have continued for two years, the lord or donor and his heirs shall have a writ of *cessavit* to recover the land itself. *F. N. B.* 208. In some instances relating to religious houses, called *Cessavit de Cantariâ*.

By the stat. of *Gloucester*, the *cessavit* does not lie for lands let upon fee-farm rents, unless they have lain fresh and uncultivated for two years, and there be not sufficient distress upon the premises, or unless the tenant hath so enclosed the land, that the lord cannot come upon it to distrain. *F. N. B.* 209. 2 *Inst.* 298. For the law prefers the simple and ordinary remedies, by distress, &c. to this extraordinary one of forfeiture; and therefore the same statute has provided farther, that on tender of arrears, and damages before judgment, and giving security for the future performance of the services, (that he

will *no more cease*,) the process shall be at an end, and the tenant, shall retain his land, to which the stat. of *Westm.* 2. conforms so far as may stand with convenience and reason of law. 2 *Inst.* 401. 460.

The stats. 4 *Geo.* II. *c.* 28. and 11 *Geo.* II. *c.* 19. seem evidently borrowed from the above ancient writ of *cessavit.* The former of these statutes permits landlords who have a right of re-entry for non-payment of rent, to serve an ejectment on their tenants when half a year's rent is due, and no sufficient distress on the premises. See tit. *Ejectment.* And the same remedy is in substance adopted by the stat. 11 *Geo.* II. *c.* 16. which enacts, that where any tenant at rack rent shall be one year's rent in arrear, and shall desert the demised premises, leaving the same uncultivated or unoccupied, so that no sufficient distress can be had, two justices of the peace (after notice affixed on the premises for fourteen days) may give the landlord possession thereof; and the lease shall be void. See tit. *Distress*, *Lease*, *Rent.*

By stat. *Westm.* 2. § 2. the heir of the demandant may maintain a *cessavit* against the heir or assignee of the tenant. But in other cases, the heir may not bring this writ for *cessure* in the time of his ancestor; and it lies not but for *annual service*, *rent*, and *such like; not* for *homage* or *fealty. Termes de la ley. New Nat. Brev.* 463, 464.

The lord shall have a writ of *cessavit* against tenant for life, where the remainder is over in fee to another; but the donor of an estate-tail shall not have a *cessavit* against the tenant in tail; though if a man make a gift in tail, the remainder over in fee to another, or to the heirs of the tenant in tail, there the lord of whom the lands are holden *immediate*, shall have a *cessavit* against the tenant in tail, because that he is tenant to him, &c. *Ibid.* If the lord distrains pending the writ of *cessavit* against his tenant, the writ shall abate.

The writ *cessavit* is directed to the sheriff, *To command* A. B. *that, &c. he render to* C. D. *one messuage, which he holds by certain services, and which ought to come to the said* C. *by force of the statute, &c. because the said* A. *in doing those services* had ceased *two years, &c.* Dict.

CESSE, Signifies an *assessment* or tax, and is mentioned in the stat. 22 *Hen.* VIII. *cap.* 3. *Cesse* or *cease*, in *Ireland*, is an exaction of victuals, at a certain rate, for soldiers in garrison. *Antiq. Hiberniæ.*

CESSIO BONORUM. A process in the law of *Scotland*, similar in effect to that under the statutes relating to *Bankruptcy* in *England.*

CESSION, *Cessio.*] A ceasing, yielding up, or giving over. When an ecclesiastical person is created bishop, or a parson of a parsonage takes another benefice, without dispensation, or being otherwise not qualified, &c. in both cases their first benefices are become void, and are in the law said to be void by *cession;* and to those benefices that the person had who was created bishop, the king shall present for that time, whoever is patron of them; and in the other case, the patron may present. *Cowel.*

But cession in the case of bishops does not take place till consecration. *Dyer*, 223. See tit. *Commendam*, *Advowson* II.

No person is entitled to dispensation, but *chaplains* of the king and others mentioned in the stat. 21 *Hen.* VIII. *c.* 13. the brethren, and the sons of lords and knights, (not of baronets,) and doctors and bachelors of divinity and law in the Universities of this realm. 1 *Comm.* 392. See tit. *Chaplain.*

Both the livings must have cure of souls; and the statute expressly excepts deaneries, archdeaconries, chancellorships, treasurerships, chanterships, prebends and sinecure rectories. See tit. *Chaplain, Parson.*

In case of a cession under the statute, the church is so far void upon institution to the second living, that the patron *may* take notice of it, and present if he pleases; but it seems that a lapse will not incur from the time of *institution* against the patron, unless notice be given him; but it will from the time of *induction.* 2 *Wils.* 200. 3 *Burr.* 1504. See tit. *Advowson* II.

CESSOR, *Lat.*] He who *ceaseth*, or neglects so long to perform a duty, that he thereby incurs the danger of the law. *Old Nat. Brev.* 136.—See tit. *Cessavit.*

CESSURE, or *cesser; ceasing*, giving over; or departing from. Stat. *Westm.* 2. *c.* 1. See tit. *Cessavit.*

CESTUI QUE TRUST, [or, *cestui à que trust.*] Is he in trust for whom, or to whose use or benefit, another man is enfeoffed or seised of lands or tenements. By Stat. 29 *Car.* II. *c.* 3. land of *cestui que trust* may be delivered in execution. See tit. *Trusts, Uses.*

CESTUI QUE USE, [more accurately as in old Law Tracts, cestui à que use, Fr. *cestui à l'use de qui.*] He to whose *use* any other man is enfeoffed of lands or tenements. 1 *Rep.* 133. Feoffees to uses were formerly deemed owners of the lands; but now the possession is adjudged in *cestui que use*, and without any entry he may bring assise, &c. Stat. 27 *Hen.* VIII. *c.* 10. *Cro. Eliz.* 46. See tit. *Use.*

CESTUI [à] QUE VIE, He for whose life any lands or tenements are granted. *Perk.* 97. See tit. *Occupant.*

CHACEA, A station of game more extended than a park, and less than a forest; and is sometimes taken for the liberty of chasing or hunting within such a district. And according to *Blount* it hath another signification, *i. e.* the way through which cattle are drove to pasture, commonly called in some places a *drove way. Bracton, lib.* 4. *c.* 44. Vide *Chase.*

CHACEARE *ad lepores, vel vulpes:* To hunt hare or fox. *Cartular. Abbat. Glaston. MS.* 87.

CHACURUS, from the Fr. *chasseur.*] A horse for the chase; or rather a hound or dog, a courser. *Rot.* 7 *Johan.*

CHAFE, from the Fr. *chaufer*, to heat, whence our *chafing* dish.

CHAFEWAX, An officer in *Chancery*, that fitteth the *wax* for sealing of the writs, commissions, and such other instruments as are there made to be issued out.

CHAFFERS, Seem to signify wares or merchandise; and *chaffering* is yet used for buying and selling, or rather a kind of bartering of one thing for another. The word is mentioned in the stat. 3 *Edw.* IV. *c.* 4.

CHAINS, *Hanging* in. See tit. *Murder.*

CHAIRS, See *Coaches.*

CHALDRON or CHALDER of coals. See tit. *Coals.*

CHALKING, The merchants of the staple require to be eased of divers new impositions, as *chalking*, ironage, wharfage, &c. *Rot. Parl.* 50 *Edw.* III.

CHALLENGE, *Calumnia*, from the Fr. *chalenger.*] An exception taken either against persons or things. *Persons* as to *jurors*, or any one or more of them: or in case of felony, by the prisoner at the bar against *things*, as a declaration, &c. *Terms de la ley*, 109.—The former is the most frequent signification in which this term is used, and

which shall here be shortly mentioned; referring for further matter to tit. *Jury*, *Trial*, in this *Dictionary*.

There are two kinds of challenge; either to the *array*, by which is meant the whole jury as it stands *arrayed* in the *panel*, or little square *pane* of parchment, on which the jurors' names are written; or to the *polls*, by which are meant the several particular persons or *heads* in the array. 1 *Inst.* 156. 158.

Challenge to jurors is also divided into *challenge principal* or *peremptory; and challenge pur cause; i. e.* upon cause or reason alleged: *challenge* principal or peremptory, is that which the law allows without cause alleged, or further examination; as a prisoner at the bar, arraigned for felony, may *challenge* peremptorily the number allowed him by law, one after another, alleging no cause, but his own dislike, and they shall be put off, and new taken in their places: but yet there is a difference between *challenge* principal, and *challenge* peremptory; the latter being used only in matters criminal, and barely without cause alleged; whereas the former is in civil actions for the most part, and by assigning some such cause of exception, as, being found true, the law allows. *Staundf. P. C.* 124. 157. *Lamb. Eiren. lib.* 4. *cap.* 14.

Challenge to the favour, which is a species of challenge for cause, is where the plaintiff or defendant is tenant to the sheriff, or if the sheriff's son hath married the daughter of the party, &c. and is also when either party cannot take any principal *challenge*, but showeth cause of favour; and causes of favour are infinite. If one of the parties is of affinity to a juror, the juror hath married the plaintiff's daughter, &c. If a juror hath given a verdict before in the cause, matter or title; if one labours a juror to give his verdict; if after he is returned, a juror eats and drinks at the charge of either party; if the plaintiff, &c. be his master, or the juror hath any interest in the thing demanded, &c. these are *challenges* to the favour. 2 *Roll. Abr.* 636. *Hob.* 294.

CHALLENGE TO FIGHT. It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight, &c. 1 *Hawk. P. C. c.* 63. § 3.

By Stat. 9 *Ann. c.* 14. § 8. (See tit. *Gaming*;) "Whoever shall [assault and beat,] or challenge, or provoke to fight, any other person or persons whatsoever, upon account of any money won by gaming, playing, or betting at any of the games mentioned in that act, shall, on conviction by indictment or information, forfeit all their goods, chattels and personal estate, and suffer imprisonment without bail, in the county prison, for two years."

It is now every day's practice for the court of *K. B.* to grant informations against persons sending challenges to *justices of the peace*, and in other heinous cases.

For further matter, See tit. *Murder*.

CHAMBERDEKINS, or *Chamber-deacons*, were certain poor *Irish* scholars, clothed in mean habit, and living under no rule; or rather beggars banished *England* by stat. 1 *Hen.* V. *cap.* 7, 8.

CHAMBERLAIN, *Camerarius.*] Is variously used in our laws, statutes and chronicles: as first there is *Lord Great Chamberlain of England*, to whose office belongs the government of the palace at *Westminster;* and upon all solemn occasions the keys of *Westminster-Hall*, and the court of *Requests* are delivered to him; he disposes of the sword of state to be carried before the king when he comes to the parlia-

ment, and goes on the right hand of the sword next to the king's person; he has the care of providing all things in the House of Lords in the time of parliament; to him belongs livery and lodgings in the king's court, &c. And the gentleman usher of the black rod, yeoman usher, &c. are under his authority.

The office of *Lord Great Chamberlain of England* is hereditary; and where a person dies seised in fee of this office, leaving two sisters, the office belongs to both sisters, and they may execute it by deputy: but such deputy must be approved of by the king, and must not be of a degree inferior to a knight. 2 *Bro. P. C.* 146. 8*vo. ed.*

The Lord Chamberlain of the Household has the oversight and government of all officers belonging to the king's chamber, (except the bed-chamber, which is under the groom of the stole,) and also of the wardrobe; of artificers retained in the king's service, messengers, comedians, revels, music, &c. The serjeants at arms are likewise under his inspection; and the king's chaplains, physicians, apothecaries, surgeons, barbers, &c. And he hath under him a vice-chamberlain, both being always privy counsellors.

There were formerly chamberlains of the king's courts. 7 *Edw.* VI. *cap.* 1. And there are chamberlains of the Exchequer, who keep a controlment of the pells, of receipts and *exitus*, and have in their custody the leagues and treaties with foreign princes, many ancient records, the two famous books of antiquity called *Domesday*, and the *Black Book of the Exchequer*; and the standards of money, and weights and measures, are kept by them. There are also under-chamberlains of the Exchequer, who make searches for all records in the treasury, and are concerned in making out the tallies, &c. The office of chamberlain of the Exchequer is mentioned in the stat. 34 & 35 *Hen.* VIII. *cap.* 16. Besides these, we read of a chamberlain of *North Wales*. *Stowe*, p. 641.

A chamberlain of *Chester*, to whom it belongs to receive the rents and revenues of that city, and when there is no Prince of *Wales*, and Earl of *Chester*, he hath the receiving and returning of all writs coming thither out of any of the king's courts. See tit. *Counties Palatine.*

The chamberlain of *London*, who is commonly the receiver of the city rents payable into the chamber; and hath great authority in making and determining the rights of freemen; as also concerning apprentices, orphans, &c. See tit. *London.*

CHAMBERS OF THE KING, *Regiæ cameræ.*] The havens or ports of the kingdom are so called in our ancient records. *Mare Claus. fol.* 242.

CHAMBRE DEPEINTE, Anciently *St. Edward's chamber*, now called the *painted chamber.* See tit. *Parliament.*

CHAMPARTY or CHAMPERTY, *campi partitio*, because the parties in *champerty* agree to divide the land, &c. in question.] A bargain with the plaintiff or defendant in any suit, to have part of the land, debt, or other thing sued for, if the party that undertakes it prevails therein. Whereupon the Champertor is to carry on the party's suit at his own expense. See 4 *Comm.* 135. 1 *Inst.* 368. It is a species of *maintenance*, and punished in the same manner. This seems to have been an ancient grievance in our nation; for notwithstanding the several statutes of *Westm.* 1. 3 *Edw.* I. *cap.* 25. *Westm.* 2. 13 *Edw.* I. *c.* 49. 28 *Edw.* I. stat. 3. *c.* 11. and 33 *Edw.* I. stat. 3. &c. and a form of a writ framed to them; yet stats. 4 *Edw.* III. *c.* 11. and 32 *Hen.* VIII. *cap.* 9. enacted, That whereas former statutes provided

redress for this evil in the *King's Bench* only, from henceforth it should be lawful for justices of the *Common Pleas*, justices of assise, and justices of peace in their quarter sessions, to inquire, hear and determine this and such like cases, as well at the suit of the king, as of the party: and this offence is punishable by common law and statute; the stat. 33 *Edw.* I. stat. 3. makes the offenders liable to three years' imprisonment, and a fine at the king's pleasure. By the stat. 28 *Edw.* I. *c.* 11. it is ordained, that no officer, nor any other, shall take upon him any business in suit, to have part of the thing in plea; nor none upon any covenant, shall give up his right to another; and if any do, and be convicted thereof, the taker shall forfeit to the king so much of his lands and goods as amounts to the value of the part purchased.

In the construction of these statutes, it hath been adjudged, that under the word *covenant*, all kinds of promises and contracts are included, whether by writing, or parol: that rent granted out of land in variance, is within the statute of *champerty*: and grants of part of the thing in suit made merely in consideration of the maintenance, or champerty, are within the meaning of this statute; but not such as are made in consideration of a precedent honest debt, which is agreed to be satisfied with the thing in demand when recovered. *F. N. B.* 172. 2 *Inst.* 209. 2 *Roll. Abr.* 113.

It is said not to be material, whether he who brings a writ of *champerty*, did in truth suffer any damage by it; or whether the plea wherein it is alleged be determined or not. 1 *Hawk. P. C. c.* 84. A conveyance executed pending a plea, in pursuance of a bargain made before, is not within the statutes against *champerty*; and if a man purchase land of a party, pending the writ, if it be *bonâ fide*, and not to maintain, it is not *champerty*. *F. N. B.* 272. 2 *Roll. Abr.* 113. But it hath been held, that the purchase of land while a suit of equity concerning it is depending, is within the purview of the statute 28 *Edw.* I. stat. 3. *c.* 11. *Moor*, 665. A lease for life, or years, or a voluntary gift of land, is within the statutes of *champerty*; but not a surrender made by a lessee to his lessor; or a conveyance relating to lands in suit, made by a father to his son, &c. 1 *Hawk. P. C. c.* 84.

The giving part of the lands in suit, after the end of it, to a counsellor for his reward, is not *champerty*, if there be no precedent bargain relating to such gift; but if it had been agreed between the counsellor and his client before the action brought, that he should have part for his reward, then it would be *champerty*. *Bro. Champert.* 3. And it is dangerous to meddle with any such gift, since it carries with it a strong presumption of *champerty*. 2 *Inst.* 564. If any attorney follow a cause to be paid in gross, when the thing in suit is recovered, it hath been adjudged, that this is *champerty*. *Hob.* 117. Every *champerty* implies maintenance; but every maintenance is not *champerty*. *Crom. Jur.* 39. 2 *Inst.* 208.

To this head may be referred the provision of the stat. 32 *Hen.* VIII. *c.* 9. that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant; *or* hath been in actual possession of the land, or of the reversion or remainder; on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor. See tit. *Maintenance.*

CHAMPERTORS, Are defined by statute to be those who move pleas or suits, or cause them to be moved, either by their own procurement or by others, and sue them at their proper costs, to have

part of the land in variance, or part of the gain. 33 *Edw.* I. stat. 2. See the preceding article.

CHAMPION, *campio.*] Is taken in the law not only for him that fights a combat in his own cause, but also for him that doth it in the place or quarrel of another. *Bract. lib.* 3. *tract.* 2. *cap.* 21. And in Sir *Edward Bishe's* notes on *Upton*, *fol.* 36. it appears, that *Henry de Fernebergh*, for thirty marks fee, did by charter covenant to be *champion* to *Roger*, abbot of *Glastenbury*. *An.* 42 *Hen.* III. These *champions*, mentioned in our law books and histories, were usually hired; and any one might hire them, except parricides, and those who were accused of the highest offences: before they came into the field, they shaved their heads, and made oath that they believed the persons who hired them, were in the right, and that they would defend their cause to the utmost of their power; which was always done on foot, and with no other weapon than a stick or club, and a shield; and before they engaged, they always made an offering to the church, that God might assist them in the battle. When the battle was over, the punishment of a *champion* overcome, and likewise of the person for whom he fought was various: if it was the *champion* of a woman for a capital offence, she was burnt, and the *champion* hanged; if it was of a man, and not for a capital crime, he not only made satisfaction, but had his right hand cut off; and the man was to be close confined in prison, till the battle was over. *Bract. lib.* 2. *c.* 35. See tit. *Battel.*

Victory in the trial by battel is obtained, if either champion proves *recreant;* that is, yields and pronounces the horrible word of *craven;* a word of disgrace and obloquy, rather than of any determinate meaning. But a horrible word it indeed is to the vanquished champion: since as a punishment to him for forfeiting the land of his principal, by pronouncing that shameful word, he is condemned as a recreant to become infamous, and not to be accounted *liber et legalis homo;* being supposed by the event to be proved forsworn, and therefore never to be put upon a jury, or admitted as a witness in any cause. 3 *Comm.* 340.

CHAMPION OF THE KING, *campio regis.*] An ancient officer, whose office it is at the coronation of our kings, when the king is at dinner, to ride armed *cap-à-pié* into *Westminster Hall*, and by the proclamation of a herald make a challenge, *That if any man shall deny the king's title to the crown, he is there ready to defend it in single combat, &c.* Which being done, the king drinks to him and sends him a gilt cup with a cover full of wine, which the *champion* drinks, and hath the cup for his fee. This office, ever since the coronation of King *Richard* II. when *Baldwin Freville* exhibited his petition for it, was adjudged from him to Sir *John Dymocke* his competitor, (both claiming from *Marmion*,) and hath continued ever since in the family of the *Dymockes;* who hold the manor of *Scrivelsby* (or *Scrivelsbury*) in *Lincolnshire*, hereditary from the *Marmions*, by grand serjeanty, *viz.* That the lord thereof shall be the king's *champion*, as abovesaid. Accordingly Sir *Edward Dymocke* performed this office at the coronation of King *Charles* II. And a person of the name of *Dymocke* performed it at the coronation of his present Majesty *George the Third.*

CHANCE, where a man commits an unlawful act, by *misfortune*, or *chance*, and not by design, it is a deficiency of the will; as here it observes a total neutrality, and doth not coöperate with the deed; which therefore wants one main ingredient of a crime. Of this as it affects the life of another, See tit. *Murder.* It is to be observed, however, generally, that if any *accidental* mischief happens to follow from

the performance of a *lawful* act, the party stands excused from all guilt; but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee *or intend*, as the death of a man or the like, his want of foresight shall be no excuse; for being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour. 1 *Hale's P. C.* 39. See tit. *Chance-medley*.

CHANCELLOR, *Cancellarius*.] Was at first only a chief notary or scribe under the emperor, and was called *cancellarius*, because he sate *intra cancellos*, to avoid the crowd of the people. This word is by some derived from *cancello*, and by others from *cancellis*, an enclosed or separated place, or chancel, encompassed with bars, to defend the judges and other officers from the press of the public. And *cancellarius* originally, as *Lupanus* thinks, signified only the register in court; *Grapharios, scil. qui conscribendis et excipiendis judicum actis dant operam:* but this name and officer is of late times greatly advanced, not only in this, but in other kingdoms; for he is the chief administrator of justice, next to the Sovereign, who anciently heard equitable causes himself.

All other justices in this kingdom are tied to the strict rules of the law, in their judgments; but the Chancellor hath power to moderate the written law, governing his judgment by the law of nature and conscience, and ordering all things *juxtà æquum et bonum:* and having the king's power in these matters, he hath been called the keeper of the king's conscience. It has been suggested, that the Chancellor originally presided over a political college of secretaries, for the writing of treaties, grants, and other public business; and that the court of equity under the old constitution was held before the king and his council in the palace, where one supreme court for business of every kind was kept: and at first the Chancellor became a judge to hear and determine petitions to the king, which were referred to him, and in the end, as business increased, the people entitled their suits to the chancellor and not to the king, and thus the chancellor's equitable power had by degrees commencement by prescription. *Hist. Chan. p.* 3. 10. 44. &c.

Staunford says, the Chancellor hath two powers; one absolute, the other ordinary; meaning, that although by his ordinary power, in some cases, he must observe the form of proceeding as other inferior judges; in his absolute power he is not limited by the law, but by conscience and equity, according to the circumstances of things. See *post*, tit. *Chancery*.

And though *Polydore Virgil*, in his history of *England*, makes *William* the First, called the *Conqueror*, the founder of our chancellors, yet *Dugdale* has shown that there were many chancellors of *England* long before that time, which are mentioned in his *Origines Juridicales*, and catalogues of chancellors; and Sir *Edward Coke*, in his fourth *Institute*, saith, it is certain, that both the *British* and *Saxon* kings had their chancellors, whose great authority under their kings were in all probability drawn from the reasonable custom of neighbouring nations and the civil law.

He that bears this chief magistracy, is styled the *Lord High Chancellor of Great Britain*, which is the highest honour of the long robe. A chancellor may be made so at will, by patent, but it is said not for life, for being an ancient office, it ought to be granted as hath been accustomed. 2 *Inst.* 87. But Sir *Edward Hide*, afterwards Earl of

Clarendon, had a patent to be lord chancellor for life, though he was dismissed from that office, and the patent declared void. 1 *Sid.* 338.

By the stat. 5 *Eliz. cap.* 18. the Lord Chancellor and Keeper have one and the same power; and therefore since that statute, there cannot be a Lord Chancellor and Lord Keeper at the same time; before, there might, and had been. 4 *Inst.* 78. King *Henry* V. had a great seal of gold, which he delivered to the Bishop of *Durham*, and made him Lord Chancellor, and also another of silver, which he delivered to the Bishop of *London* to keep. But the Lord *Bridgman* was Lord Keeper, and Lord Chief Justice of the Common Pleas at the same time; which offices were held not to be inconsistent. *Ibid.* By stat. 1 *W. & M. cap.* 21. Commissioners appointed to execute the office of Lord Chancellor, may exercise all the authority, jurisdiction, and execution of laws, which the Lord Chancellor, or Lord Keeper, of right ought to use and execute, &c. since which statute this high office hath been several times in commission.

The office of LORD CHANCELLOR or LORD KEEPER, is now created by the mere delivery of the King's great seal into his custody: whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord. And the act of taking away this seal by the king, or of its being resigned or given up by the Chancellor, determines his office. (See 1 *Sid.* 338.) He is a privy counsellor by his office; and according to Lord Chancellor *Ellesmere*, prolocutor of the House of Lords by prescription. To him belongs the appointment of all the Justices of Peace throughout the kingdom. Being formerly usually an Ecclesiastic, (for none else were then capable of an office so conversant with writings,) and presiding over the Royal Chapel, he became keeper of the King's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation, and patron of all the king's livings under the value of *twenty marks* a year in the king's books. (38 *Edw.* III. 3. *F. N. B.* 35. though *Hob.* 214. extends this value to *twenty pounds*.) He is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the Court of Chancery. 3 *Comm.* 47.

The stat. 25 *Edw.* III. *c.* 2. declares it to be *treason* to slay the *Chancellor* (and certain other judges) being in their places doing their offices; and it seems that the Lord Keeper and Commissioners of the great seal are within this *statute* by virtue of stats. 5 *Eliz. c.* 18. and 1 *W. & M. c.* 21. already mentioned. See tit. *Treason*.

The Lord Chancellor, when there is no Lord High Steward, is accounted the first officer in the kingdom; and he not only keeps the king's great seal, but all patents, commissions, warrants, &c. from the king, are perused and examined by him before signed; and Lord *Coke* says the Lord Chancellor is so termed *à cancellando*, from *cancelling the king's letters patent*, when granted contrary to law; which is the highest point of his jurisdiction. 4 *Inst.* 88. He by his oath swears well and truly to serve the king, and to do right to all manner of people, &c. In his judicial capacity, he hath divers assistants and officers, *viz.* the Master of the Rolls, the Masters in Chancery, &c. And in matters of difficulty, he calls one or more of the chief justices and judges to assist him in making his decrees; though in such cases they only give their advice and opinion, and have no share whatever

of the judicial authority. See stat. 1 *Geo.* III. *c.* 1. 9. 6. whereby his majesty is empowered to grant 5,000*l.* a year out of the post-office revenue to the Lord Chancellor.

The Master of the Rolls, however, has judicial power, and is an assistant to the Lord Chancellor when present, and his deputy when absent; but he has certain causes assigned him to hear and decree, which he usually doth on certain days appointed at the chapel of the Rolls, being assisted by one or more masters in chancery: he is, by virtue of his office, chief of the masters of chancery, and chief clerk of the petty-bag office. See 3 *Geo.* II. *c.* 30. tit. *Decree*.

The Twelve Masters in Chancery sit some of them in court, and take notice of such references as are made to them, to be reported to the court, relating to matters of practice, the state of the proceedings, accounts, &c. and they also take affidavits, acknowledge deeds and recognisances, &c. See tit. *Master in Chancery*.

The Six Clerks in chancery transact and file all proceedings by bill and answer; and also issue out some patents that pass the great seal; which business is done by their under clerks, each of whom has a seat there, and whereof every sixth clerk has a certain number in his office, usually about ten; the whole body being called the *sixty clerks*.

The Cursitors of the court, four-and-twenty in number, make out all original writs in chancery, which are returnable in *C. B.* &c. and among these the business of the several counties is severally distributed.

The Register is a place of great importance in this court, and he hath several deputies under him, to take cognisance of all orders and decrees, and enter and draw them up, &c.

The Master of the Subpœna Office issues out all writs of *subpœna*.

The Examiners are officers in this court, who take the depositions of witnesses, and are to examine them, and make out copies of the depositions.

The Clerk of the Affidavits files all affidavits used in court, without which they will not be admitted.

The Clerk of the Rolls sits constantly in the rolls to make searches for deeds, offices, &c. and to make out copies.

The Clerks of the Petty-Bag Office, in number three, have great variety of business that goes through their hands, in making out writs of summons to parliament, *congé d'elires* for bishops, patents for customers, *liberates* upon extent of statute-staple, and recovery of recognisances forfeited, &c. And also relating to suits for and against privileged persons, &c. And the clerks of this office have several clerks under them.

The Usher of the Chancery had formerly the receiving and custody of all money ordered to be deposited in court, and paid it back again by order; but this business was afterwards assumed by the masters in chancery, till, by stat. 12 *Geo.* I. *c.* 32. a new officer was appointed, called *The Accountant General*, to receive the money lodged in court, and convey the same to the Bank, to be there kept for the suitors of the court.

There is also a *Serjeant at Arms*, to whom persons standing in contempt are brought up by his substitute as prisoners.

A Warden of the Fleet, who receives such prisoners as stand committed by the court, &c.

Besides these officers, there is a clerk of the crown in Chancery; clerk and controller of the hanaper; clerk for enrolling letters patent,

&c. not employed in proceedings of equity, but concerned in making out commissions, patents, pardons, &c. under the great seal, and collecting the fees thereof. A clerk of the faculties, for dispensations, licenses, &c. clerk of the presentations, for benefices of the crown in the chancellor's gift; clerk of appeals, on appeals from the courts of the archbishop to the court of chancery; and divers other officers, who are constituted by the chancellor's commission. See for that, tit. *Chancery*, *Judges*.

Chancellor *of a* Diocese, or, *of a* Bishop. A person appointed to hold the Bishop's courts, and to assist him in matters of ecclesiastical law. This officer, as well as all other ecclesiastical ones, if lay or married, must be a Doctor of the civil law, so created in some university. Stat. 37 *Hen.* VIII. *c.* 17.

Chancellor of the Duchy of Lancaster. An officer before whom, or his deputy, the court of the *Duchy Chamber of Lancaster* is held. This is a special jurisdiction concerning all matter of equity relating to lands holden of the king in right of the *Duchy of Lancaster*. *Hob.* 77. 2 *Lev.* 24. This is a thing very distinct from the county palatine, which hath also its separate chancery for sealing of writs and the like. 1 *Vent.* 257. This Duchy comprises much territory which lies at a vast distance from the county, as particularly a very large district surrounded by the city of *Westminster*. The proceedings in this court are the same as on the equity side in the courts of *Exchequer* and *Chancery*. 4 *Inst.* 206. So that it seems not to be a court of record; and it has been holden that those courts have a concurrent jurisdiction with the Duchy Court, and may take cognisance of the same causes. 1 *C. R.* 55. *Toth.* 145. *Hard.* 171. See tit *Equity*.

This court is held in *Westminster-Hall*, and was formerly much used. Under the chancellor of the Duchy are an attorney of the court, one chief clerk or register, and several auditors, &c. See further tit. *Counties Palatine*.

Chancellor *of the* Exchequer, Is likewise a great officer, who, it is thought by many, was originally appointed for the qualifying extremities in the Exchequer. He sometimes sits in court, and in the Exchequer Chamber, and with the judges of the court, orders things to the king's best benefit. He is mentioned in stat. 25 *Hen.* VIII. *c.* 16. and hath, by the stat. 33 *Hen.* VIII. *c.* 39. power, with others, to compound for the forfeitures upon penal statutes, bonds and recognisances entered into to the king. He hath also great authority in the management of the royal revenue, &c. which seems of late to be his chief business, being commonly the first commissioner of the treasury. And though the court of equity in the exchequer chamber, was intended to be holden before the treasurer, chancellor, and barons, it is usually before the barons only. When there is a lord treasurer, the chancellor of the exchequer is under treasurer.

As to the *Chancellor of the Order of the Garter*, see Stow's Annals, *p.* 706. *Chancellor of the Universities*, see tit. *Courts of the Universities*. The office of *Chancellor in Cathedral Churches*, is thus described in the *Monasticon*. *Lectiones legendas in ecclesia per se vel per suum vicarium auscultare, male legentes emendare, scholas conferre, sigilla ad causas conferre literas capituli facere et consignare, libros servare, quotiescung. voluerit prædicare, prædicationes in ecclesia vel extra ecclesiam prædicare, et cui voluerit prædicationis officium assignare.* See *Mon. Angl. tom.* 3. *p.* 24. 339.

CHANCE-MEDLEY, From the Fr. *chance*, lapsus, and *mêler*, miscere.] Such killing of a man as happens either [in self-defence] on a sudden quarrel; or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all. 1 *Hawk. P. C. c.* 30. § 1.

The self-defence here meant, is that whereby a man may protect himself from an assault or the like in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by this word *chance-medley*, or as some rather choose to write it, *chaud-medley*; the former of which, in its etymology signifies a *casual* affray, the latter an affray in the heat of blood or passion; both of them of pretty much the same import; but the former is in common speech too often *erroneously* applied to any manner of homicide, by *misadventure*; whereas it appears by stat. 24 *Hen.* VIII. *c.* 5. and in ancient law books, that it is properly applied to such killing as happens to self-defence, in a sudden rencounter. 4 *Comm.* 183. cites *Stamf. P. C.* 16. 3 *Inst.* 55. 57. *Foster*, 275, 276. This being in fact a species of excusable homicide, comes more properly under the division of *Murder*, and is therefore treated of in that place. See tit. *Homicide*. In *chance-medley* the offender forfeits his goods, but hath a pardon of course. See stat. 6 *Edw.* I. *c.* 9.

CHANCERY.

CANCELLARIA.] The highest court of judicature in this kingdom next to the parliament, and of very ancient institution. The jurisdiction of this court is of two kinds, *ordinary* and *extraordinary* The *ordinary* jurisdiction is that wherein the Lord Chancellor, Lord Keeper, &c. in his proceedings and judgments, is bound to observe the order and method of the common law; and the *extraordinary* jurisdiction is that which this court exercises in cases of *equity*.

The *Ordinary Court* holds plea of recognisances acknowledged in the Chancery, writs of *scire facias* for repeal of letters patent, writs of partition, &c. and also of all personal actions, by or against any officer of the court, and by acts of parliament of several offences and causes. All original writs, commissions of bankrupts, of charitable uses, and other commissions, as idiots, lunacy, &c. issue out of this court, for which it is always open; and sometimes a *supersedeas*, or writ of privilege, hath been here granted to discharge a person out of prison. An *habeas corpus*, prohibition, &c. may be had from this in the vacation; and here a *subpœna* may be had to force witnesses to appear in other courts, when they have no power to call them. 4 *Inst.* 79. 1 *Danv. Abr.* 776.

The *Extraordinary Court*, or Court of Equity, proceeds by the rules of equity and conscience, and moderates the rigour of the common law, considering the *intention* rather than the words of the law. Equity being the correction of that wherein the law, by reason of its universality, is deficient. On this ground, therefore, to maintain a suit in Chancery, it is always alleged that the plaintiff is incapable of obtaining relief at common law; and this must be without any fault of his own, as by having lost his bond, &c. Chancery never acting *against*, but in assistance of the common law, supplying its deficiencies, not contradicting its rules. A judgment at law not being reversible by a decree in chancery. *Cro. Eliz.* 220. But a bill in chancery may be brought to compel the discovery of the contents of a

letter which would discharge the plaintiff of an action at law, before verdict obtained. 3 *Ch. Rep.* 17.

A sensible modern writer remarks, that it is not a very easy task accurately to describe the jurisdiction of our courts of equity. They who have attempted it have generally failed. The following extract from that writer on the subject may perhaps prove more acceptable than any thing which could fall from the Editor's own pen.

Early in the history of our jurisprudence, the administration of justice by the ordinary courts, appears to have been incomplete. To supply the defect, the courts of equity have gained an establishment; assuming the power of enforcing the principles, upon which the ordinary courts also decide, when the powers of those courts or their modes of proceeding are insufficient for the purpose; of preventing those principles, when enforced by the ordinary courts, from becoming, contrary to the purpose of their original establishment, instruments of injustice; and of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent. The courts of equity also administer to the ends of justice, by removing impediments to the fair decision of a question in other courts; by providing for the safety of property in dispute, pending a litigation; by restraining the assertion of doubtful rights, in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; and by putting a bound to vexatious and oppressive litigations, and preventing unnecessary multiplicity of suits; and, without pronouncing any judgment on the subject, by compelling a discovery which may enable other courts to give their judgment; and by preserving testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. This establishment has obtained throughout the whole system of our judicial policy; most of the inferior branches of that system having their peculiar courts of equity; [*e. g.* the court of exchequer, courts of *Wales*, the counties palatine, cinque ports, &c.] and the Court of Chancery assuming a general jurisdiction in cases which are not within the bounds, or which are beyond the powers, of other jurisdictions. *Mitford's Treatise on the Pleadings in Chancery*, 8vo. 1787, 2d edition. See further, as to the origin and jurisdiction of *Courts of Equity* in general, this *Dictionary*, tit. *Equity*.

It is not, therefore, to be expected, that all the cases within the jurisdiction of this court can be enumerated with any degree of accuracy in such a work as this. What confusedly follows may serve to show the leading principles of its decision. They who desire further and more precise information, will consult *Viner's*, and the other *Abridgments* and *Digests*, which enter so much more fully into the subject.

This Court gives relief for and against infants, notwithstanding their minority; and for and against married women, notwithstanding their coverture. In some cases a woman may sue her husband for maintenance; she may sue him when he is beyond sea, &c. and be compelled to answer without her husband. All frauds and deceits, for which there is no remedy at common law, may here be redressed; as also unreasonable and deceitful engagements and agreements entered into, without consideration. 1 *Vern.* 205. See tit. *Fraud*. All breaches of trust and confidence, and accidents; as to relieve obligors, mortgagors, &c. against penalties and forfeitures, where the intent was only to pay the debt. Titles to lands, where the deeds are lost,

or suppress, may by this court be confirmed; conveyances rendered defective by mistake, may be made perfect, &c.

In this court executors may be called upon to give security and pay interest for money that is to lie long in their hands. Here executors may sue one another, or one executor alone may be sued by the legatees or others without the rest. Order may be made for performance of a will. It may be decreed who shall have the tuition of a child, and other matters are regulated as to the disposal of the goods of testators and intestates. See 3 *Comm.* 437. Under this head it may be observed that money articled to be laid out in land, shall be taken as land in equity, and descend to the heir. 1 *Salk.* 154. Personal estate in the hands of executors, shall be applied in discharge of the heir, where there are sufficient assets to pay the debts and legacies. 1 *Danv.* 770. There shall be no bill in equity against an executor, to discover assets before a suit commenced at law. *Hard.* 115. *Sed qu.* Legal assets shall be applied in a course of administration; but equitable assets amongst all the creditors proportionably, on a bill brought, &c. 2 *Vern.* 62. See tit. *Assets, Executor.*

Mortgages are not relievable in equity after twenty years, where no demand has been made, or interest paid, or where other particular circumstances do not interfere, &c. 2 *Vent.* 340. See tit. *Mortgage.*

Copyhold tenants may be relieved against the lords of manors; enclosures of common lands may be decreed; assignments of *choses in action* for a good consideration, though not valid in law, may be carried into effect; accounts are compelled to be rendered; the limitation of actions by statute may be relieved against.

A deed appearing to be cancelled, has been decreed to be a good deed, on special circumstances. 1 *Ch. Cas.* 249. Articles of agreement upon marriage reduced in towriting, though not signed by either party, being proved to be agreed to, were decreed to be performed. 2 *Vern.* 200. Also an agreement in writing made since the statute of frauds, has been decreed to be discharged by parol. 1 *Vern.* 240.

A release shall be avoided for fraud, where there is *suppressio veri*, or *suggestio falsi;* and a release may be set aside in chancery by reason of the misapprehension of the party that gave it. 1 *Vern.* 20. 32. A will concerning lands may be avoided in a court of equity when obtained by fraud, &c. 2 *Ch. Rep.* 97. Heirs may be relieved in equity against unconscionable contracts made during their fathers' lives, to pay large sums of money on their outliving their fathers, and the securities are frequently decreed to be delivered up, on payment of the sum actually advanced. 2 *Ch. Rep.* 397. 1 *Vern.* 467.

A purchaser of land, without notice of an encumbrance, shall not be hurt thereby in equity; and in pleading a purchase, the defendant ought to deny notice of encumbrances, &c. Indentures of apprenticeship have been decreed to be delivered up, and the money given with the apprentice to be paid back by the master, on ill usage of the apprentice, &c. *Finch. Rep.* 125. Charity lands being let at a great undervalue, as was found by inquisition, on a commission of charitable uses, the lease was avoided in equity, and the lessee decreed to pay the arrears in rent according to the first value, and to yield up the possession. 2 *Vern.* 415. Other cases of relief, with respect to public charities and charitable corporations, come also under the immediate direction of the Court of Chancery.

It is common to give relief in chancery notwithstanding there is an agreement between the parties that there shall be no relief in law or equity. 1 *Mod.* 141. 305. In cases which tend to restrain freedom,

or introduce corruption into marriage contracts, the court are always most ready to afford relief. If a portion be given to a woman, provided she marries not without the consent of a certain person, although she marries without such consent, she shall be relieved in Chancery, and have her portion; unless the portion, on such marriage had been limited over to another, in which case it is otherwise. 1 *Danv.* 752. 1 *Mod.* 300. If a father, on the marriage of his son take a bond of the son, that he shall pay him so much, &c. this is void in equity, being adjudged by coercion while he is under the awe of his father. 1 *Salk.* 158. Also where a son, without privity of the father, treating the match, gives bond, to return any part of the portion, in equity it is void. *Ibid.* 156. But a man is not bound to discover the consideration of a bond generally given, which in itself implies a consideration. *Hard.* 200. See tit. *Fraud*, *Marriage*, *&c.*

If a factor to a merchant hath money in his hands, it shall be accounted his own, for equity cannot follow money; but it may goods to make them the merchant's which may be known, though money cannot. 1 *Salk.* 260.

Where trustees convert money raised out of land for payment of debts, to their own use, the heir shall have the land discharged, which hath borne its burden, and the trustees are liable to the debts in equity. 1 *Salk.* 153. If lessee for years, without impeachment of waste about the end of his term cuts down timber-trees, the court of chancery may stop him by injunction. 1 *Roll. Abr.* 380. And tenant after possibility of issue extinct, or for life, dispunishable of waste, may be stopped in equity from pulling down houses, &c. 1 *Danv.* 761.

The following is a general and comprehensive view of the nature and reason of the pleadings in Chancery, extracted and abridged from Mr. *Mitford's Treatise*. See also 3 *Comm.* 446. &c.

Previous to entering on the subject, it should be remembered, that Chancery will not retain a suit for any thing under 10*l.* value, except in cases of charity, nor for lands under 40*s. per annum.*

A suit to the extraordinary jurisdiction of the court of chancery on behalf of a subject merely, is commenced by preferring *a bill* (signed by counsel) in the nature of a petition to the lord chancellor lord keeper, or lords commissioners of the great seal; or to the king himself, in his Court of Chancery, in case the person holding the seal is a party, or the seal is in the king's hand. But if the suit is instituted on behalf of the crown, or of those who partake of its prerogative, or whose rights are under its particular protection, as the objects of a public charity, the matter of complaint is offered by way of *information*, given by the proper officer; [usually the attorney-general.] Except in some few instances, bills and informations have been always in the *English* language; and a suit thus preferred is therefore commonly termed a suit by *English* bill, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court, which till the statute of 4 *Geo.* II. *c.* 26. were entered and enrolled more anciently in the *French* or *Roman* tongue, and afterwards in the *Latin*, in the same manner as the pleadings in the other courts of common law.

Every *bill* must have for its object one or more of the grounds upon which the jurisdiction of the court is founded; and as that jurisdiction sometimes extends to decide on the subject, and in some cases is only ancillary to the decision of another court, or a future suit, the bill may, 1. Either complain of some injury which the person exhibiting it suffers, and pray relief according to the injury; or, 2

Without praying relief, may seek a discovery of matter necessary to support or defend another suit; or, 3. Although no actual injury is suffered, it may complain of a *threatened* wrong; and, stating a probable ground of possible injury, may pray the assistance of the court to enable the plaintiff, or person exhibiting the bill, to defend himself against the injury whenever it shall be attempted to be committed.

As the court of Chancery has general jurisdiction in matters of equity which are not within the bounds, or which are beyond the powers of inferior jurisdictions, it assumes a control over those jurisdictions, by removing from them suits which they are incompetent to determine. To effect this, it requires the party injured to institute a suit in the court of Chancery, the sole object of which is, the removal of the former suit, by means of the writ of *certiorari;* and the prayer of the bill used for this purpose is confined to that object.

The *bill*, except it merely prays the writ of *certiorari*, [in which case it does not require any defence, nor can there be any pleading beyond the bill,] requires the answer of the defendant or party complained of, upon oath; unless the party is entitled to privilege of peerage, or as a lord of parliament, or unless a corporation aggregate is made a party. In the first case the answer is required upon the *honour* of the defendant, and in the latter under the corporation seal.

[In the case of exhibiting a bill against a peer, the Lord Chancellor writes a letter to him, called a *letter missive*, and if he does not put in his answer, a *subpœna* issues, and then an order to show cause why a *sequestration* should not issue, and if he still stands out, then a *sequestration* is granted; for there can be no process of contempt against the *person* of a peer. The process is the same against a member of the house of commons, except the *letter missive*.] See tit. *Privilege* III.

An answer is thus required in the case of a bill, seeking the *decree* of the court on the subject of the complaint, with a view, 1. To obtain an admission of the case made by the bill either in aid of proof; or, 2. To supply the want of it; 3. To obtain a discovery of the points in the plaintiff's case, controverted by the defendant; and, 4. Of the grounds on which they are controverted; 5. To gain a discovery of the case on which the defendant relies; and, 6. Of the manner in which he means to support it.

If the bill seeks only the assistance of the court to protect the plaintiff against a future injury, the answer of the defendant, upon oath, may be required to obtain an *admission* of the plaintiff's title, and a *discovery* of the claims of the defendant, and the grounds on which those claims are intended to be supported.

When the sole object of the bill is a *discovery* of matter necessary to support or defend another suit, the oath of the defendant is required to compel that discovery; which oath, however, the plaintiff may, if he thinks proper, dispense with, by consenting to, or obtaining an order of court for the purpose; and this is frequently done for the convenience of parties.

To the bill thus preferred, (unless it is merely for a *certiorari*,) it is necessary for the person or persons complained of to *make defence*, or to *disclaim* all rights to the matters in question.

As the bill calls upon the defendant to answer the several charges it contains, he must do so, unless he can dispute the right of the plaintiff to compel such answer; either, 1. From some impropriety in requiring the discovery sought; or, 2. From some objection to the proceeding to which the discovery is proposed to be assistant; or, 3. Unless

by disclaiming all right to the matters in question, he shows a further answer from him to be unnecessary.

The *grounds* on which *defence* may be made to a bill either by answer, or by disputing the right of the plaintiff to compel such answer, are various. 1. The subject of the suit may not be within the jurisdiction of a court of equity; 2. Some other court of equity may have the proper jurisdiction; 3. The plaintiff may not be entitled to sue, by reason of some personal disability; 4. The plaintiff may not be the person he pretends to be; 5. He may have no interest in the subject; or, 6. Though he has such interest he may have no right to call upon the defendant concerning it; 7. The defendant may not be the person he is alleged to be by the bill; or, 8. He may not have that interest in the subject to make him liable to the claims of the plaintiff. And notwithstanding all these requisites concur; 9. Still the plaintiff may not be entitled in the whole or in part to the relief or assistance he prays; or, 10. Even if he is so entitled, the defendant may *also* have rights in the subject which may require the attention of the court, and call for its interference to adjust the rights of all parties. The effecting *complete* justice, and *finally* determining, as far as possible, all questions concerning the subject, being the constant aim of courts of equity.

Some of these grounds may extend only to entitle the defendant to dispute the plaintiff's claim to the relief prayed by the bill; and may not be sufficient to protect him from making the discovery sought by it; and where there is no ground for disputing the plaintiff's right to relief, or if no relief is prayed, the *impropriety* or *immateriality* of the discovery may protect the defendant from making it.

The *form* of making *defence* varies according to the foundation on which it is made, and the extent in which it submits to the judgment of the court. If it rests on the bill, and, on the foundation of the matter there apparent, demand the judgment of the court, whether the suit shall proceed at all, it is termed *A Demurrer*. If on the foundation of new matter offered, it demands judgment whether the defendant shall be compelled to answer further, it assumes a different form, and is termed *A Plea*. If it submits to answer generally the charges in the bill, demanding the judgment of the court on the whole case made on both sides, it is offered in a shape still different, and is simply called *An Answer*. If the defendant disclaims all interest in the matters in question, his answer to the complaint made is different from all the others, and is termed *A Disclaimer*. And these several forms, or any of them, may be used together, if applied to separate and distinct parts of the bill.

A Demurrer being founded on the bill itself, necessarily admits the truth of the facts contained in the bill, or in that part of it to which the demurrer extends; and therefore as no *fact* can be in question between the parties, the court may immediately proceed to pronounce its definitive judgment on the demurrer; which if favourable to the defendant, puts an end to so much of the suit as the demurrer extends to. A demurrer thus allowed consequently prevents any further proceeding.

A Plea is also intended to prevent further proceeding at large, by resting on some point founded on matter stated in the plea; and it therefore admits, for the purposes of the plea, the truth of the facts contained in the bill, so far as they are not controverted by facts stated in the plea. Upon the sufficiency of this defence the court will also give immediate judgment, supposing the facts stated in it to be true; but

the judgment, if favourabl eto the defendant, is not definitive ; for the truth of the plea may be denied by *a Replication*, and the parties may then proceed to examine witnesses, the one to prove and the other to disprove the facts stated in the plea. The replication in this case concludes the pleadings, though, if the truth of the plea is not supported, further proceedings may be had, which will be noticed presently.

An Answer generally controverts the facts stated in the bill, or some of them ; and states other facts to show the rights of the defendant, in the subject of the suit ; but sometimes it admits the truth of the case made by the bill, and either with or without stating additional facts, submits the questions arising upon the case, thus made, to the judgment of the court. If an answer admits the facts stated in the bill, or such of them as are material to the plaintiff's case ; and states no new facts, or such only as the plaintiff is willing to admit, no further pleading is necessary ; the court will decide on the answer, considering it as true. So if the sole object of the suit is to obtain *a discovery* there can be no proceeding beyond an answer by which the discovery is obtained. But if necessary to maintain the plaintiff's case, the truth of the answer, or of any part of it, may be denied, and the sufficiency of the bill may be asserted by *a replication*, which in this case also concludes the pleadings, according to the present practice of the court.

If a *Demurrer* or *Plea* is *overruled* upon argument, the defendant must make a new defence. This he cannot do by a second demurrer of the same extent with that overruled ; for although, by a standing order of the court, a cause of demurrer must be set forth in the pleading, yet if that is overruled, any other cause appearing on the bill may be offered on argument of the demurrer, and if valid, will be allowed, the rule of court affecting only the costs. But after a demurrer has been overruled, new defence may be made by a demurrer less extended, or by plea, or answer.—And after a plea has been overruled, defence may be made by demurrer, by a new plea, or by an answer, and the proceedings upon the new defence will be the same as if it had been originally made.

A Disclaimer neither asserting any fact, nor denying any right sought by the bill, admits of no further pleading.

Suits thus instituted are sometimes *imperfect* in their frame, or become so by accident before their end has been obtained ; and the interests in the property in litigation may be changed, pending the suit, in various ways.—To supply the defects arising from any such circumstances, new suits may become necessary, to add to, or continue, or obtain the benefit of, the original suit. A litigation commenced by one party, sometimes renders necessary a litigation by another party, to operate as a defence, or to obtain a full decision on the rights of all parties. [And bills filed for this purpose are termed *cross bills.*]—Where the court has given judgment on a suit, it will in some cases permit that judgment to be controverted, suspended or avoided by a second suit ; and sometimes a second suit becomes necessary to carry into execution a judgment of the court.—Suits instituted for any of these purposes are also commenced by bill ; and hence arises a variety of distinctions of the kinds of bills necessary to answer the several purposes ; [as bills of *review*, (which among other causes may be brought, where new matter is discovered, in time, after the decree made,) bills of *revivor*, &c. See 3 *Comm.* 448. &c. and titles. See *Review*, *Revivor* ;] and on all the different kinds of bills there may

be the same pleadings as on a bill used for instituting an original suit.

It frequently happens, that pending a suit, the parties discover some error or defect in some of the pleadings; and if this can be rectified by amendment of the pleadings, the court will in many cases permit it. This indulgence is most extensive in the case of bills; which being often framed upon an inaccurate state of the case, it was formerly the practice to supply their deficiencies, and avoid the consequences of errors by *special replications*: but this tending to long and intricate pleading, the special replication, requiring a *rejoinder*, in which the defendant might in like manner supply the defects in his answer, and to which the plaintiff might *surrejoin*, the special replication is now disused, for this purpose: and the court will in general permit a plaintiff to rectify any error, or supply any defect in his bill, either by amendment or by *a supplemental bill*, and will also permit, in some cases, a defendant in like manner to complete his answer, either by amendment, or by a further answer.

If the plaintiff conceives a defendant's answer to be insufficient to the charges contained in the bill, he may take exceptions against it, on which it is referred to a master to report whether it be sufficient or not; to which report exceptions may be also made. The *answer*, *replication*, and *rejoinder*, *&c.* being settled, and the parties come to issue, witnesses are examined upon *interrogatories*, either in court, or by commission in the country, wherein the parties usually join; and when the plaintiff and defendant have examined their witnesses, *publication* is made of the *depositions*, and the cause is set down for hearing, after which follows the *decree*.

If, however, in the process of the cause, the parties come to an issue of fact, which by the common law is triable by a jury, the Lord Chancellor, in this case, delivers the record into the King's Bench, to be tried there; and after trial had, the record is remanded into Chancery, and judgment given there. Trials and issues at law are frequently directed by the court, which in that case makes an *interlocutory decree or order*, that after trial the parties shall resort to the court on the equity reserved.

Interlocutory orders and decrees are also made on other occasions; as for *injunctions* till a hearing, where the injury sustained by the plaintiff requires such immediate interference. See tit. *Injunction*.

If the plaintiff dismisses his own bill, or the defendant obtains the dismissal of it for want of prosecution, or if the decree is in behalf of the defendant, the bill is dismissed with the costs to be taxed by a master. Stat. 4 & 5 *Ann. c.* 16. If the defendant does not appear on being served with the process of *subpœna*, in order to answer, upon affidavit of the service of the writ, an *attachment* issues out against him: and if a *non est inventus* is returned, an attachment with proclamation goes forth against him: and if he stands further out in contempt, then a *commission of rebellion* may be issued, for apprehending him, and bringing him to the *Fleet* prison; in the execution whereof the persons to whom directed may justify breaking open doors. If the defendant stands further in contempt, a serjeant at arms is to be sent out to take him; and if he cannot be taken, a *sequestration* of his land may be obtained till he appears. And if a decree, when made, is not obeyed, being served upon the party under the seal of the court, all the aforementioned processes of contempt may issue out against him, for his imprisonment till he yields obedience to it. The court of Chancery, notwithstanding its very extensive

power, binding the person only, and not the estate or effects of the defendant. And in this sense, we presume, it is said that it is no court of record. 1 *Danv. Abr.* 749. and *Chan. Rep.* 193. *Howard* v. *Suffolk.* See *Treatise of Equity*, and tit. *Costs.*

Where there is any *error* in a *decree* in matter of law, there may be a *bill of review*, which is in nature of a writ of error; or an appeal to the House of Lords. Old authorities have been quoted, that a writ of error lies returnable in *B. R.*—And that a judgment of Chancery may be referred to the twelve judges. 4 *Inst.* 80. 3 *Bulst.* 116. But it is now usual to *appeal to the House of Lords*; which appeals are to be signed by two counsel of eminence, and exhibited by way of petition; the petition of appeal is lodged with the clerk of the House of Lords, and read in the house, whereon the appellee is ordered to put in his answer, and a day fixed for hearing the cause; and after counsel heard, and evidence given on both sides, the Lords affirm or reverse the decree of the Chancery, and finally determine the cause by a majority of votes, &c. Though it is to be observed on an *appeal* to the Lords from a decree in Chancery, no proofs will be permitted to be read as evidence, which were not made use of in the Chancery. *Preced. Canc.* 212.

For further matter as to the jurisdiction of the court, its modes of proceeding, and the various cases wherein it relieves, &c. vide *Com. Dig.* (2 V.) tit. *Chancery*, and Mr. *Mitford's Treatise* before quoted.

There are several statutes relating to the court of Chancery. By stat. 28 *Edw.* I. *c.* 5. the court of Chancery is to follow the king. By stat. 18. *Edw.* III. stat. 5. the oaths of the clerks in Chancery are appointed. The chancellor and treasurer may correct errors in the Exchequer. Whosoever shall find himself grieved with any statute, shall have his remedy in Chancery. 36 *Edw.* III. *c.* 9. 31 *Edw.* III. stat. 1. *c.* 12. And see 15 *Rich.* II. *c.* 12. 17 *Rich.* II. *c.* 6. & 4 *Hen.* VIII. *c.* 9.

No *subpœna*, or other process of appearance, shall issue out of Chancery, &c. till after a bill is filed, (except bills for injunctions to stay waste, or to stay suits at law commenced,) and a certificate thereof brought to the *subpœna* office. Stat. 4 & 5 *Ann. c.* 16. Persons in remainder, or reversion of any estate, after the death of another, on making affidavit in the court of Chancery, that they have cause to believe such other person dead, and his death concealed by the guardian, trustees, or others, may move the lord chancellor to order such guardian, trustees, &c. to produce the person suspected to be concealed; and if he be not produced, he shall be taken to be dead, and those in reversion, &c. may enter upon the estate: and if such person be abroad, a commission may be issued for his being viewed by commissioners. Stat. 6 *Ann. c.* 18.

Infants under the age of twenty-one years, seised of estates in trust, or by way of mortgage, are enabled by statute to make conveyances thereof; or they may be compelled thereto, by order of the court of Chancery, &c. upon petition and hearing of the parties concerned. 7 *Ann. c.* 9. And see the statute of 4 *Geo.* II. *c.* 10. whereby idiots and lunatics seised of estates in trust, &c. may make conveyances by order of the Chancery, &c. See tit. *Infant*, *Lunatic.*

By 12 *Geo.* I. *c.* 32 & 33. the power of the masters was abridged, with respect to the suitors' money, which is now to be paid into the *Bank of England*: and an additional stamp-duty, on writs, processes, &c. is granted for relief of the suitors, and as a common stock of the Court of Chancery.

All orders and decrees made and signed by the Master of the Rolls, shall be deemed and taken to be good and valid orders and decrees of the court of Chancery; but not to be enrolled till signed by the lord chancellor, and subject to reversal, &c. by him. Stat. 3 *Geo.* II. *c.* 30.

Where a defendant does not appear after *subpœna* issued, but keeps out of the way to avoid being served with the process; on affidavit that he is not to be found, and suspected to be gone beyond sea, or to abscond, &c. the court of Chancery will make an order for his appearance at a certain day; a copy of which order is to be published in the *London Gazette*, &c. and then, if he do not appear, the plaintiff's bill shall be taken *pro confesso*, and the defendant's estate sequestered, &c. But persons out of the kingdom, returning in seven years, may have a rehearing in six months, and be admitted to answer; otherwise to be barred by final decree. 5 *Geo.* II. *c.* 25. See *Pro Confesso.*

By 12 *Geo.* II. *c.* 24. part of the suitors' cash is to be placed out at interest, for defraying the charges of the *Accountant-General's* office. And see 23 *Geo.* II. *c.* 25. for making good deficiencies to the clerk of the hanaper, and for augmenting the income of the Master of the Rolls.

By 1 *Geo.* III. *c.* 1. § 6. the king is empowered to grant a sum not exceeding 5,000*l.* *per annum* to the chancellor.

By 4 *Geo.* III. *c.* 32. part of the suitors' cash unclaimed to be placed at interest, to be applied to the *Accountant-General's* third clerk, and other purposes.

By 5 *Geo.* III. *c.* 28. 80,000*l.* of the suitors' cash was placed at interest; and 200*l.* *per annum* paid thereout half yearly, to each of the eleven masters of the court, and 400*l.* *per annum* additional, under 46 *Geo.* III. *c.* 128.

By 9 *Geo.* III. *c.* 19. 20,000*l.* more of the suitors' money was placed at interest: out of which 460*l.* *per annum* is paid in salaries, viz. 250*l.* to the accountant-general; 50*l.* to his first clerk; 40*l.* to his second clerk; and 120*l.* to his fourth clerk, in lieu of all fees. The residue being brought to account. By 46 *Geo.* III. *c.* 129. further claims and allowances are given out of the same fund, viz. to the first and second clerk 100*l.*; third clerk 200*l.*; fourth clerk 250*l.*; fifth and sixth clerks 180*l.*; seventh clerk 200*l.*; and also 180*l.* *per annum* each to four additional clerks, and 200*l.* *per annum* to the *Accountant General* for furniture, books, and stationary.

By 14 *Geo.* III. *c.* 43. 50,000*l.* more was in like manner placed out; and out of the interest thereof, and the surplus interest under 12 *Geo.* II. *c.* 24. 5 *Geo.* III. *c.* 28. and 9 *Geo.* III. *c.* 19. the Chancellor is by his order to direct the rebuilding of the six clerks' office, and apply 10,000*l.* (and by 20 *Geo.* III. *c.* 33. 3,000*l.* more) for building the Registrar's and Accountant-General's offices; to be vested in the Accountant-General and his successors.

By 15 *Geo.* III. *c.* 22. part of *Lincoln's-Inn* garden was vested in the Accountant-General, in trust, for the purposes in the last act, as to the Registrar's and Accountant-General's office.

By 15 *Geo.* III. *c.* 56. the Lord Chancellor may apply certain sums to be raised, as mentioned in 14 *Geo.* III. for the purposes of this and that act; the Six Clerks' office to be built on part of *Lincoln's-Inn* garden, and the same vested in the Six Clerks.

The stat. 17 *Geo.* III. *c.* 59. regulates the leases to be made from time to time, by the Master of the Rolls for the time being.

By stat. 32 *Geo.* III. *c.* 42. 300,000*l.* further is to be employed in building offices for the Masters in Chancery, &c.

By 46 *Geo.* III. *c.* 128. § 2. the Lord Chancellor is empowered to order an annuity of 1,500*l.* to be paid (out of the suitors' money unapplied) to Masters in Chancery, on their resigning after twenty years standing: or in case of permanent infirmity.

For other parts of this subject, see tit. *Injunctions*, *Interrogatories*, &c.

CHANGER, An officer belonging to the king's *mint*, whose office consists chiefly in exchanging coin for bullion brought in by merchants or others; it is written after the old way, *chaunger*. Stat. 2 *Hen.* VI. *c.* 12.

CHANTER, *cantator.*] A *Singer* in the choir of a cathedral church; and is usually applied to the chief of the singers. This word is mentioned in 13 *Eliz. c.* 10. At *St. David's* cathedral in *Wales*, the chanter is next to the bishop; for there is no dean. *Camb. Britain.*

CHANTRY, or CHAUNTRY, *cantaria.*] A little church, chapel, or particular altar, in some cathedral church, &c. endowed with lands, or other revenues, for the maintenance of one or more priests, daily to *sing mass*, and officiate divine service for the souls of the donors, and such others as they appointed. See stat. 1 *Edw.* VI. *c.* 14. which in effect put an end to all these chantries, by declaring it not to be lawful for any person to enter for non-performance of the conditions on which they were founded.

Of these chantries, mention is made of forty-seven belonging to *St. Paul's* church in *London*, by *Dugdale*, in his history of that church.

CHAPEL, *capella*, Fr. *chapelle.*] Is either adjoining to a church, for performing divine service; or separate from the mother church, where the parish is wide, which is commonly called a *chapel of ease*. And chapels of ease are built for the ease of those parishioners who dwell far from the parochial church, in *prayer* and *preaching* only; for the *sacraments* [*marriages*] and *burials* ought to be performed in the parochial church. 2 *Roll. Abr.* 340.

These chapels are served by inferior curates, provided at the charge of the rector, &c. And the curates are therefore removeable at the pleasure of the rector or vicar; but chapels of *ease* may be parochial, and have a right to sacraments and burials, and to a distinct minister, by custom; (though subject in some respects to the mother church;) and *parochial chapels* differ only in name from parish churches, but they are small, and the inhabitants within the district are few. In some places chapels of ease are endowed with lands or tithes, and in other places by voluntary contributions; and in some few districts there are chapels which baptize and administer the sacraments, and have chapel-wardens; but these chapels are not exempted from the visitation of the ordinary, nor the parishioners who resort thither from contributing to the repairs of the mother church; especially if they bury there; for the *chapel* generally *belongs to*, and is as it were a *part of* the mother church; and the parishioners are obliged to go to the mother church, but not to the chapel. 2 *Roll. Abr.* 289. And hence it is said, that the offerings made to any chapel, are to be rendered to the mother church; unless there be a custom that the chaplain shall have them.

Public chapels annexed to parish churches, shall be repaired by the parishioners, as the church is, if any other persons be not bound

to do it. 2 *Inst.* 489. Besides the before-mentioned chapels, there are *free* chapels, perpetually maintained and provided with a minister without charge to the rector or parish; or that are free and exempt from all ordinary jurisdiction; and these are where some lands or rents are charitably bestowed on them. Stat. 37 *Hen.* VIII. *cap.* 4. 1 *Edw.* VI. *c.* 14. There are also *private chapels*, built by noblemen and others, for private worship, in or near their own houses, maintained at the charge of those noble persons to whom they belong, and provided with chaplains and stipends by them; which may be erected without leave of the bishop, and need not be consecrated, though they anciently were so, nor are they subject to the jurisdiction of the ordinary.

There are likewise *chapels in the Universities*, belonging to particular colleges, which, though they are consecrated, and sacraments are administered there, yet they are not liable to the visitation of the *bishop*, but of the *founder*. 2 *Inst.* 363. See tit. *Marriage*.

CHAPELRY, *capellania.*] Is the same thing to a chapel as a parish to a church; being the precinct and limits thereof.

CHAPERON, *Fr.*] A hood or bonnet, anciently worn by the knights of the garter, as a part of the habit of that noble order; but in *heraldry* it is a little escutcheon fixed in the forehead of the horses that draw a hearse at a funeral.

CHAPITERS, Lat. *capitula*, Fr. *chapitres*, *i. e.* chapters of a book.] Signify in our common law a summary of such matters as are to be inquired of, or presented before justices in eyre, justices of assise, or of peace, in their sessions. *Britton*, *cap.* 3. useth the word in this signification; and chapiters are now most commonly called *articles*, and delivered by the mouth of the justice in his charge to the inquest; whereas, in ancient times, (as appears by *Bracton* and *Britton*,) they were, after an exhortation given by the justices for the good observation of the laws and the king's peace, first read in open court, and then delivered in writing to the grand inquest, for their better observance; and the grand jury were to answer upon their oaths to all the articles thus delivered them, and not put the judges to long and learned charges to little or no purpose, for want of remembering the same, as they do now, when they think their duty well enough performed, if they only present those few of many misdemeanors which are brought before them by way of indictment.

It is to be wished that this order of delivering written articles to grand juries were still observed, whereby crimes would be more effectually punished: in some inferior courts, as the court leet, &c. in several parts of *England*, it is usual at this day for stewards of those courts to deliver their charges in writing to the juries sworn to inquire of offences. *Horne*, in his *Mirror of Justices*, expresses what those articles were wont to contain. *Lib.* 3. *cap. des Articles in Eyre.* And an example of articles of this kind, may be found in the book of assises. *F.* 138.

CHAPLAIN, *capellanus.*] Is most commonly taken for one that is depending upon the king, or other noble person, to instruct him and his family, and say divine service in his house, where there is usually a private chapel for that purpose. The *King*, *Queen*, *Prince*, *Princess*, &c. may retain as many chaplains as they please; and the king's chaplains may hold any such number of benefices of the king's gift, as the king shall think fit to bestow upon them.

An *Archbishop* may retain *eight* chaplains; a *Duke*, or a *Bishop*, *six*; *Marquis* or *Earl*, *five*; *Viscount*, *four*; *Baron*, *Knight* of the *Garter*,

or *Lord Chancellor, three*; a *Duchess*, *Marchioness*, *Countess*, *Baroness*, (being widows,) the *Treasurer*, and *Controller* of the *king's house*, the *King's Secretary*, *Dean* of the *Chapel*, *Almoner*, and *Master* of the *Rolls*, each of them *two*; the *Chief Justice* of the *King's Bench*, and *Warden* of the *Cinque Ports*, *one*; all which chaplains may purchase a license or dispensation, and take two benefices with cure of souls. Stat. 21 *Hen.* VIII. *cap.* 13.

But both the livings must have cure of souls; and the statute expressly excepts deaneries, archdeaconries, chancellorships, treasurerships, chanterships, prebends, and sinecure rectories. A dispensation in this case can only be granted to hold one benefice more, except to clerks who are of the privy council, who may hold three by dispensation. By the canon law, no person can hold a second incompatible benefice, without a dispensation; and in that case, if the first is under 8*l. per annum* [in the king's book] it is so far void, that the patron may present another clerk, or the bishop may deprive; but till deprivation, no advantage can be taken by lapse. See tit. *Advowson*. But independent of the statute, a clergyman by dispensations may hold any number of benefices, if they are all under 8*l. per annum*, except the last, and then by a dispensation under the statute, he may hold one more. 1 *Comm.* 392 *in n.* See *Plurality*.

By the 41st canon of 1603, the two benefices must not be further distant from each other than thirty miles; and the person obtaining the dispensation, must at least be a master of arts in one of the Universities. But the provisions of this canon are not enforced or regarded in the temporal courts. 2 *Bl. Rep.* 968. See *ante*, tit. *Canon Law*.

Also every *Judge* of the *King's Bench* and *Common Pleas*; and *Chancellor* and *Chief Baron* of the *Exchequer*, and the *King's Attorney* and *Solicitor-General*, may each of them have *one* chaplain attendant on his person, having one benefice with cure, who may be *non-resident* on the same by stat. 25 *Hen.* VIII. *cap.* 16.

And the *Groom* of the *stole*, *Treasurer* of the *king's chamber*, and *Chancellor* of the *duchy* of *Lancaster*, may retain each *one* chaplain. Stat. 33 *Hen.* VIII. *cap.* 28. But the chaplains under these two last statutes, are not entitled to *dispensations* under stat. 21 *Hen.* VIII. If a nobleman hath his full number of chaplains allowed by law, and retains one more, who has dispensation to hold plurality of livings, it is not good. *Cro. Eliz.* 723.

If one person has two or more of the titles or characters mentioned in stat. 21 *Hen.* VIII. *c.* 13. united in himself, he can only retain the number of chaplains limited to his highest degree. 4 *Co.* 90. The king may present his own chaplains, *i. e.* waiting chaplains in ordinary, to any number of livings in the gift of the crown, and even in addition to what they hold upon the presentation of a subject without dispensation; but a king's chaplain being beneficed by the king, cannot *afterwards* take a living from a subject, but by a dispensation according to the stat. § 29. 1 *Salk.* 161.

A person retaining a chaplain, must not only be capable thereof at the time of granting the instrument of retainer, but he must continue capable of qualifying till his chaplain is advanced; and therefore if a duke, earl, &c. retain a chaplain, and die; or if such a noble person be attainted of treason; or if an officer, qualified to retain a chaplain, is removed from his office, the retainer is determined; but where a chaplain hath taken a second benefice before his lord dieth or is attainted, &c. the retainer is in force to qualify him to enjoy the benefices.

And if a *woman* that is *noble* by *marriage*, afterwards marries on under the degree of nobility, her power to retain chaplains will b determined; though it is otherwise where a *woman* is *noble* by *descen* if she marry under degree of nobility, for in such case her retaine before or after marriage is good. A *Baroness*, &c. during the cove ture, may not retain chaplains; if she doth, the lord, her husband, ma discharge them, as likewise her former chaplains, before their ac vancement. 4 *Rep.* 118.

A chaplain must be retained by letters testimonial under hand an seal, or he is not a chaplain within the statute; so that it is not enough fo a spiritual person to be retained by word only to be a chaplain, by suc person as may qualify by the statutes to hold livings, &c. although h abide and serve as chaplain in the family. And where a noblema hath retained and thus qualified his number of chaplains, if he dis misses them from their attendance upon any displeasure, after the are preferred, yet they are his chaplains at large, and may hol their livings during their lives; and such nobleman, though he ma retain other chaplains in his family merely as chaplains, he can not qualify any others to hold pluralities while the first are living for if a nobleman could discharge his chaplain when advanced, t qualify another in his place, and qualify other chaplains, during th lives of chaplains discharged, by these means he might advanc as many chaplains as he would, whereby the statutes would be evaded 4 *Rep.* 90. See further tit. *Advowson*, *Parson*. 3 *Comm.* 392. *n.*

CHAPTER, *capitulum*.] A congregation of clergymen *under* the *Dean* in a cathedral church; *congregatio clericorum in ecclesia cathe drali*, *conventuali*, *regulari*, *vel collegiata*. This collegiate company i metaphorically termed *capitulum*, signifying a little head, it being a kind of head, not only to govern the diocese in the vacation of the bishopric, but also in many things to advise and assis the bishop when the see is full, for which, with the dean, they form a council. *Co. Litt.* 103. The chapter consists of *prebendaries* o *canons*, which are some of the chief men of the church, and therefore are called *capita ecclesiæ*; they are a *spiritual corporation aggregate* which they cannot surrender without leave of the bishop, because he hath an interest in them; they, with the dean, have power to confirm the bishop's grants; during the vacancy of an archbishopric, they are guardians of the spiritualties, and as such have authority by the stat 25 *Hen.* VIII. *cap.* 21. to grant dispensations; likewise as a corporation they have power to make leases, &c.

When the dean and chapter confirm grants of the bishop, the dean joins with the chapter, and there must be the consent of the major part; which consent is to be expressed by their fixing of their seal to the deed, in one place, and at one time, either in the chapter-house or some other place; and this consent is the will of many joined together. *Dyer*, 233. They had also a check on the bishop at common law; for till stat. 32 *Hen.* VIII. *c.* 28. his grant or lease would not have bound his successors, unless confirmed by the *Dean and Chapter*. 1 *Inst.* 103.

A chapter is not capable to take by purchase or gift, without the *dean*, who is the *head* of the *body*; but there may be a chapter without a dean, as the chapter of the collegiate church of *Southwell*; and grants by, or to them, are as effectual as other grants by dean and chapter. Yet where there are chapters without deans, they are not properly chapters; and the chapter in a collegiate church, where there is no episcopal see, as at *Westminster* and *Windsor*, is more properly called a college.

Chapters are said to have their beginning before deans; and formerly the bishop had the rule and ordering of things without a dean and chapter, which were constituted afterwards; and all the ministers within his diocese were as his chapter, to assist him in spiritual matters. 2 *Roll. Rep.* 454. 3 *Comm.* 75. The bishop hath a power of visiting the dean and chapter; but the dean and chapter have nothing to do with what the bishop transacts as ordinary. 3 *Rep.* 75. Though the *bishop* and *chapter* are but one body, yet their *possessions* are for the most part divided; as the *bishop* hath his part in right of his *bishopric*; the *dean* hath a part in right of his *deanery*; and each *prebendary* hath a certain part in right of his *prebend*; and each too is incorporated by himself.

Deans and Chapters have some of them ecclesiastical jurisdiction in several parishes, (besides that authority they have within their own body,) executed by their officials; also temporal jurisdiction in several manors belonging to them, in the same manner as bishops, where their stewards keep courts, &c. 2 *Roll. Abr.* 229. It has been observed, that though the chapter have distinct parcels of the bishop's estate assigned for their maintenance, the bishop hath little more than a power over them in his visitations, and is scarce allowed to nominate half of those to their prebends, who were originally of his family; but of common right it is said he is their patron. *Roll. ibid.* They are now sometimes appointed by the king, sometimes by the bishop, and sometimes they are elected by each other. 1 *Comm.* 383. See further tit. *Dean, Prebend.*

CHARACTER false. See *Servants.*

CHARGE of Justices in Sessions, &c. See tit. *Chapiters.*

CHARGE and DISCHARGE. A charge is said to be a thing done that bindeth him that doth it, or that which is his, to the performance thereof; and discharge is the removal, or taking away of that charge. *Terms de Ley.* Land may be charged divers ways; as by grant of rent out of it, by statutes, judgments, conditions, warrants, &c. Lands in fee-simple may be charged in fee; and where a man may dispose of the land itself, he may charge it by a rent or statute, one way or other. *Lit. sect.* 648. *Moor, Ca.* 129. *Dyer,* 10. If one charge land in tail, and land in fee-simple, and die; the land in fee only shall be chargeable. *Bro. Cha.* 9.

Lands entailed may be charged in fee, if the estate-tail be cut off by recovery; if tenant in tail charge the land, and after levy a fine or suffer a recovery of the lands, to his own use; this confirms the charge and it shall continue. 1 *Rep.* 61. A tenant for life charges the land, and then makes a feoffment to a stranger, or doth waste, &c. whereby it is forfeited, he in reversion shall hold it charged during his (the tenant's) life; and if one have a lease for life or years of land, and grant a rent out of it; if after he surrenders his estate, yet the charge shall continue so long as the estate had endured, in case it had not been surrendered. 1 *Rep.* 67. 145. *Dyer,* 10.

If one *joint-tenant* charge land, and after release to his companion and die, the survivor shall hold it charged: but if it had come to him by survivorship, it would be otherwise. 6 *Rep.* 76. 1 *Shep. Abr.* 325. He that hath a *remainder* or *reversion* of land may charge it; because of the *possibility* that the land will come into *possession*, and then the *possession* shall be charged. But where one leases land for life, and grants the reversion or remainder over to *A. B.* who charges the land, and dies, and the tenant for life is heir to the fee; in this case he

shall hold it discharged, for he had the *possession* by *purchase*, though he had the *fee* by *descent*. *Bro.* 11. 16. 1 *Rep.* 62.

If a rent be issuing out of a house, &c. and it falls down, the charge shall remain upon the soil. 9 *Edw.* IV. 20. But when the estate is gone upon which the charge was grounded, there, generally, the charge is determined. *Co. Litt.* 349. And in all cases where any *executory* thing is created by *deed*, there by *consent* of *all* the parties it may be *by deed* defeated and discharged. 10 *Rep.* 49. See tit. *Estate*, *Limitations*, *Mortgage*, *&c.*

CHARITABLE CORPORATION. A society of persons in the late reign obtained a statute to lend money to *industrious poor*, at 5*l. per cent.* interest on pawns and pledges, to prevent their falling into the hands of the pawn-brokers, and therefore they were called the *Charitable Corporation;* but they likewise took 5*l. per cent.* for the charge of officers, warehouses, &c. And in the fifth year of King *Geo.* II. the chief officers of this corporation, by connivance of the principal directors, absconded and broke, and defrauded the public proprietors of great sums; for relief of the sufferers wherein, as to part of their losses, several statutes were made and enacted. See stats. 5 *Geo.* II. *cc.* 31, 32. 7 *Geo.* II. *c.* 11.

CHARITABLE USES. The laws against devises in *Mortmain* (see that tit.) do not extend to any thing but *superstitious* uses; it is therefore held, that a man may give lands for the maintenance of a school, an hospital, or any other *charitable* uses. But as it was apprehended, from recent experience, that persons on their death beds might make large and improvident dispositions, even for these good purposes, and defeat the political end of the statutes of mortmain, it is therefore enacted by stat. 9 *Geo.* II. *c.* 36. that no lands or tenements, or money to be laid out thereon, shall be given for, or charged with, any *charitable* uses whatsoever, unless *by deed indented*, executed in the presence of two witnesses, *twelve* calendar *months* before the death of the donor; and enrolled in the court of chancery within six months after its execution; (except stock in the public funds, and which must be transferred at least six calendar months previous to the donor's death;) and unless such gift be made to take effect immediately and be without power of revocation; and that all other gifts shall be void. *The two Universities*, their colleges, and the scholars on the foundation of the colleges of *Eaton*, *Winchester* and *Westminster*, are exempted out of this act; but with this proviso, that no college shall be at liberty to purchase more advowsons than are equal in number to one moiety of the fellows or students on their foundations.

Corporations are excepted out of the statutes of Wills, (32 *Hen.* VIII. *c.* 1. 34 *Hen.* VIII. *c.* 5. See tit. *Devise*, *Wills*,) to prevent the extension of gifts in *mortmain;* but now by construction of stat. 43 *Eliz. c.* 4. (see the next paragraph) it is held that a devise to a corporation for a charitable use is valid, as operating in the nature of the *appointment*, rather than of a *bequest*. And indeed the piety of the judges hath formerly carried them great lengths in supporting such charitable uses; (*Pre. Ch.* 272.) it being held that the stat. of *Eliz.* which favours appointments to charities, supersedes and repeals all former statutes; (*Gilb. Rep.* 45. 1 *P. Wms.* 248.) and supplies all defects of assurances. (*Duke*, 84.) And therefore not only a devise to a corporation, but a devise by a copyhold tenant, without surrender, to the use of his will, and a devise, nay, even a settlement by tenant in tail, without either fine or recovery, if made to a charitable use, is good by

way of appointment. *Moor*, 890. 2 *Vern.* 453. *Pre. Ch.* 16. 2 *Comm.* 375.

The king as *parens patriæ* has the general superintendence of all charities, which he exercises by the *Lord Chancellor*. And therefore whenever it is necessary, the Attorney-General, at the relation of some informant, who is usually called the *relator*, files, *ex officio*, an information in the court of chancery, to have the charity properly established. Also by stat. 43 *Eliz. c.* 4. authority is given to the Lord Chancellor or Lord Keeper, and to the Chancellor of the *Duchy of Lancaster*, respectively, to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the Petty-Bag Office in the court of Chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent in his answer to the exceptions may allege what new matter he pleases; upon which they go to proof, and examine witnesses in writing upon all the matters in issue; and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. An appeal lies from the Chancellor's decree to the House of Peers, notwithstanding any loose opinion to the contrary. 3 *Comm.* 427.

Lands given to alms and aliened, may be recovered by the donor. 13 *Edw.* I. *c.* 41.

Lands, &c. may be given for the maintenance of houses of correction, or of the poor. Stat. 35 *Eliz. c.* 7. § 27. Commissioners to inquire of money given to poor prisoners. Stats. 22 & 23 *Car.* II. *c.* 20. § 11. 32 *Geo.* II. *c.* 28. § 9, 10. See tit. *Prisoners.*

Money given to put out apprentices, either by parishes or public charities, to pay no duty. 8 *Ann. c.* 9. § 40. See tit. *Apprentices.*

See this subject treated at length under tit. *Mortmain*; and *Highmore's Law of Charitable Uses.*

CHARKS, Are pit-coal when *charred* or *charked*; so called in *Worcestershire*; as sea-coal thus prepared at *Newcastle* is called *coke.*

CHARRE OF LEAD. A quantity of lead consisting of thirty *pigs*, each pig containing six *stone* wanting two pounds, and every stone being twelve pounds. *Assisa de ponderibus. Rob.* 3. *R. Scot. cap.* 22.

CHARTA, a word made use of not only for a *charter*, for the holding an estate; but also a statute. See *Magna Charta.*

CHARTE, A cart, chart, or plan which mariners use at sea, mentioned in stat. 14 *Car.* II. *cap.* 33.

CHARTEL, Fr. *cartel.*] A letter of defiance, or challenge to a single combat; in use heretofore to decide difficult controversies at law which could not otherwise be determined. *Blount.* A *Cartel* is now used for the instrument or writing for settling the exchange of prisoners of war; and a *cartel-ship*, for the ship used on such occasion, which is privileged from capture.

CHARTER, Lat. *charta*, Fr. *chartres*, i. e. *instrumenta.*] Is taken in our law for written evidence of things done between man and man; whereof *Bracton*, *lib.* 2. *cap.* 26. says thus, *Fiunt aliquando donationes in scriptis, sicut in* chartis *ad perpetuam rei memoriam, propter brevem hominum vitam, &c.* And *Britton*, in his 39th chapter, divides *charters* into those of the king, and those of private persons. *Charters of the king* are those whereby the king passeth any grant to any person

or body politic; as a *charter* of exemption, of privilege, &c. See tit. *King*.

Charter of pardon, whereby a man is forgiven a felony, or other offence committed against the king's crown and dignity; and of these there are several sorts. See tit. *Pardon*.

Charter of the forest, wherein the laws of the forest are comprised, such as the *charter of Canutus*, &c. *Kitch.* 314. *Fleta*, *lib.* 3. *c.* 14.

Charters of private persons are deeds and instruments for the conveyance of lands, &c. And the purchaser of lands shall have all the *charters*, deeds and evidences as incident to the same, and for the maintenance of his title. *Co. Lit.* 6. *Charters* belong to a feoffee, although they be not sold to him, where the feoffor is not bound to a general warranty of the land; for there they shall belong to the feoffor, if they be sealed deeds or wills in writing; but other *charters* go to the tertenant. *Moor*, *Ca.* 687. The *charters*, belonging to the feoffor in case of warranty the heir shall have, though he hath no land by descent, for the possibility of descent after. 1 *Rep.* 1. See tit. *Magna Charta*.

CHARTERER. In *Cheshire*, a freeholder is called by this name. Sir *P. Ley's Antiq. fol.* 356.

CHARTER GOVERNMENTS in AMERICA. See tit. *Plantations*.

CHARTER LAND, *terra per chartam.*] See tit. *Bockland*.

CHARTER-PARTY, Lat. *charta partita*, Fr. *chartre parti*, *i. e.* a deed or writing divided.] Is what among merchants and sea-faring men is commonly called a *pair of indentures*, containing the covenants and agreements made between them, touching their merchandise and maritime affairs. 2 *Inst.* 673. *Charter-parties* of affreightment settle agreements, as to the cargo of ships, and bind the master to deliver the goods in good condition at the place of discharge, according to agreement; and the master sometimes obliges himself, ship, tackle and furniture, for performance.

The common law construes *charter-parties*, as near as may be, according to the intention of them, and not according to the literal sense of traders, or those who merchandise by sea; but they must be regularly pleaded. In covenant by *charter-party*, that the ship should return to the river of *Thames*, by a certain time, *dangers of the sea excepted*, and after, in the voyage, and within the time of the return, the ship was taken upon the sea by pirates, so that the master could not return at the time mentioned in the agreement; it was adjudged that this impediment was within the exception of the *charter-party*, which extends as well to any danger upon the sea by pirates and men of war, as dangers of the sea by shipwreck, tempest, &c. *Stile*, 132. 2 *Roll. Abr.* 248. So where a *charter-party* of affreightment provided that in case of the "inability of the ship to execute or proceed on the service," certain persons should be at liberty to make such *abatement* out of the freight as they should think reasonable; held, that an inability of the ship to proceed to sea for want of men to navigate her, was within the proviso; although the want of such men proceeded from the ravages of the small-pox amongst the original crew, the death of some, and the desertion of others from the fear of the distemper, and an impossibility of procuring others on the spot in their room. *Beatson* v. *Shank*. Stat. 43 *Geo.* III. 3 *East*, 233.

A ship is freighted at so much *per* month that she shall be out, covenanted to be paid after her arrival at the port of *London*; the

ship is cast away coming up from the *Downs*, but the lading is all preserved, the freight shall in this case be paid; for the money becomes due monthly by the contract, and the place mentioned is only to ascertain where the money is to be paid, and the ship is entitled to wages, like a mariner that serves by the month, who if he dies in the voyage, his executors are to be answered *pro rata*. *Molloy de Jur. Maritim.* 260. If a part owner of a ship refuse to join with the other owners in setting out of the ship, he shall not be entitled to his share of the freight; but by the course of the Admiralty, the other owners ought to give security if the ship perish in the voyage, to make good to the owner standing out, his share of the ship. Sir *L. Jenkins*, in a case of this nature, certified that by the Law Marine, and course of the Admiralty, the plaintiff was to have no share of the freight; and that it was so in all places, for otherwise there would be no navigation. *Lex Mercat.* See tit. *Admiralty*, *Freight*, *Insurance*.

CHARTIS REDDENDIS. An ancient writ which lay against one that had charters of feoffment entrusted to his keeping, and refused to deliver them. *Reg. Orig.* 159.

CHASE, Fr. *chasse*.] In its general signification is a great quantity of woody ground lying open, and privileged for wild beasts and wild fowl; and the beasts of *chase* properly extend to the buck, doe, fox, marten and roe; and in common and legal sense to all the beasts of the forest. *Co. Lit.* 233.

A *chase* differs from a park in that it is not enclosed; and also in that a man may have a *chase* in another man's ground, as well as in his own; being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. 2 *Comm.* 38.

But if one have a chase within a forest, and he kill or hunt any stag or red deer, or other beast of the forest, he is finable. 1 *Jones's Rep.* 278.

A *chase* is of a middle nature between a forest and a park, being commonly less than a forest, and not endowed with so many liberties, as the courts of attachment, swainmote, and justice-seat; though of a larger compass, and stored with greater diversity both of keepers, and wild beasts or game, than a park.

A *chase* differs from a *forest* in this, because it may be in the hands of a subject, which a forest in its proper and true nature cannot; and from a *park*, in that it is not enclosed, and hath a greater compass, and more variety of game, and officers likewise. *Crompt.* in his *Jurisd. fol.* 148. says a forest cannot be in the hands of a subject, but it forthwith loseth its name, and becometh a *chase*; but, *fol.* 197. he says, a subject may be lord and owner of a forest, which though it seems a contradiction, yet both sayings are in some sort true; for the king may give or alienate a forest to a subject, so as when it is once in the subject, it loseth the true property of a forest, because the courts called the justice-seat, swainmote, &c. do forthwith vanish, none being able to make a Lord Chief Justice in *Eyre* of the forest but the King; yet it may be granted in so large a manner, as there may be attachment, swainmote, and a court equivalent to a justice-seat. *Manwood, part* 2. *c.* 3, 4.

A forest and a *chase* may have different officers and laws; every forest is a *chase, et quiddam amplius*; but any *chase* is not a forest. A *chase* is *ad communem legem*, and not to be guided by the forest laws; and it is the same of parks. 4 *Inst.* 314. A man may have a free *chase* as belonging to his manor in his own woods, as well as a warren and a

park in his own grounds; for a *chase*, warren and park are collateral inheritances, and not issuing out of the soil; and therefore if a person hath a *chase* in other men's grounds, and after purchaseth the grounds, the *chase* remaineth. *Ibid.* 318. If a man have freehold in a free *chase*, he may cut his timber and wood growing upon it, without view or license of any; though it is not so of a forest; but if he cut so much that there is not sufficient for covert, and to maintain the game, he shall be punished at the suit of the king; and so if a common person hath a *chase* in another's soil, the owner of the soil cannot destroy all the covert, but ought to leave sufficient thereof, and also browse wood, as hath been accustomed. 11 *Rep.* 22. And it has been adjudged, that within such *chase*, the owner of the soil by prescription may have common for his sheep, and warren for his conies, but he cannot surcharge with more than has been usual, nor make cony-burrows in other places than hath been used. *Ibid.* If a free *chase* be enclosed, it is said to be a good cause of seizure into the king's hands.

It is not lawful to make a *chase*, park or warren, without license from the king under the broad seal. See tit. *Forest*, *Game*, *Park*.

CHASOR, A hunting horse. *Dederunt mihi unum* chasorem, &c. *Leg. Will.* I. *cap.* 22. And in another chapter it is written *cacorem*.

CHASTELLAINE, A noble woman: *quasi castelli domina*.

CHASTITY. The *Roman* law (*Ff.* 48. 8. 1.) justifies homicide in defence of the chastity either of one's self or relations; and so also, according to *Selden*, (de Legib. Hebræor. l. 4. c. 3.) stood the law in the *Jewish* republic. The *English* law likewise justifies a woman, killing one who attempts to ravish her. (*Bac. Elem.* 34. 1 *Hawk. P. C.* 71.) So the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. 1 *Hal. P. C.* 485, 486.

And without doubt the forcibly attempting a crime of a *still more detestable nature*, may be equally resisted by the death of the *unnatural aggressor*. For the one uniform principle, that runs through our own and all other laws, seems to be this; that where a crime, in itself capital, is endeavoured to be committed by *force*, it is *lawful* to *repel* that *force* by the *death* of the party attempting. 4 *Comm.* 181. See tit. *Murder*, *Adultery*.

CHATHAM CHEST. See *Greenwich Chest*.

CHATTELS, or CATALS, *catalla*.] All goods moveable and immoveable, except such as are in nature of freehold, or parcel of it. The *Normans* call moveable goods only, *chattels*; but this word by the common law extends to all moveable and immoveable goods; and the *Civilians* denominate not only what we call *chattels*, but also land, *bona*. But no estate of inheritance or freehold, can be termed in our law goods and chattels; though a lease for years may pass as goods.

Chattels are either *personal* or *real*; *personal*, as gold, silver, plate, jewels, household stuff, goods and wares in a shop, corn sown on the ground, carts, ploughs, coaches, saddles, &c. Cattle, &c. as horses, oxen, kine, bullocks, sheep, pigs, and all tame fowls and birds, swans, turkeys, geese, poultry, &c. and these are called personal in two respects, one because they belong immediately to the person of a man; and the other, for that being any way injuriously withheld from us, we have no means to recover them but by personal action.

Chattels real, saith *Coke*, (1 *Inst.* 118.) are such as concern or savour of the realty; as terms for years of land, the next presentation to a church, estates by *a statute merchant*, *statute staple*, *elegit*, or the like. And these are called real chattels, as being interests issuing out of, or annexed to real estates; of which they have one quality, *viz. immobility*, which denominates them *real;* but want the other, *viz.* a sufficient, legal, indeterminate duration; and this want it is that constitutes them *chattels*. The utmost period for which they can last, is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life. 2 *Comm.* 386.

But deeds relating to a freehold, obligations, &c. which are things in action, are not reckoned under goods and *chattels;* though if writings are pawned they may be *chattels;* and money hath been accounted not to be goods or *chattels;* nor are hawks or hounds, such being *feræ naturæ*. 8 *Rep.* 33. *Terms de Ley*, 103. *Kitch.* 32.

A collar of SS. garter of gold, buttons, &c. belonging to the dress of a knight of the garter, are not jewels to pass by that name in personal estate, but ensigns of honour. *Dyer*, 59. As to devises of chattels with remainder over, see tit. *Devise*.

Chattels personal are, immediately upon the death of the testator, in the *actual possession* of the *executor*, as the law will adjudge, though they are at never so great a distance from him; *chattels real*, as leases for years of houses, lands, &c. are *not* in the *possession* of the *executor* till he makes an *entry*, or hath *recovered* the same; except in case of a lease for years of tithes, where no entry can be made. 1 *Vels. Abr.* 437.

Leases for years, though for a thousand years, leases at will, estates of tenants by *elegit*, *&c.* are *chattels*, and shall go to the executor; all obligations, bills, statutes, recognisances and judgments, shall be as a *chattel* in the executors, &c. *Bro. Obl.* 18. *F. N. B.* 120.

But if one be seised of land in fee on which trees and grass grow, the heir shall have these, and not the executor; for they are not *chattels* till they are cut and severed, but parcel of the inheritance. 4 *Rep.* 63. *Dyer*, 273. The game of a park, with the park, fish in the pond, and doves in the house with the house, go to the heir, &c. and are not *chattels;* though if pigeons, or deer, are tame, or kept alive in a room; or if fish be in a trunk, &c. they go to the executors as *chattels*. *Noy*, 124. 11 *Rep.* 50. *Keilw.* 88. See tit. *Heir*, *Executor*.

An owner of *chattels* is said to be possessed of them; as of freehold the term is, that a person is *seised* of the same.

CHAUD-MEDLEY, See tit. *Chance-Medley*.

CHAUMPERT, a kind of tenure mentioned, *Pat.* 35 *Edw.* III. To the hospital of *Bowes*, in the isle of *Guernsey*. *Blount*.

CHAUNTER, a singer in a cathedral. See *Chanter*.

CHAUNTER-RENTS, Are rents paid to the crown by the servants or purchasers of *chauntry-lands*. See stat. 22 *Car.* II. *c.* 6.

CHEATS, Are deceitful practices in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a

judgment; or by suppressing a will; and such like. 1 *Hawk. P. C. c.* 71.

Changing corn by a miller, and returning bad corn in the stead, is punishable by indictment, being an offence against the public. 1 *Sess. Ca.* 217. So to run a foot-race fraudulently, and by a previous understanding with the seeming competitor to win money. 6 *Mod.* 42. So if an indented apprentice enters for a soldier, and having received the bounty is discharged on his master's demanding him, he may be indicted. 1 *Hawk. P. C. c.* 71. § 3. *n.* But selling beer short of the just and true measure, is not indictable as a cheat. 1 *Wils.* 301. *Say.* 146. 1 *Black. Rep.* 274. Nor selling gum of one denomination for that of another. *Sayer*, 205. Nor selling wrought gold, as and for gold of the true standard; the offender not being a goldsmith. *Cowp.* 323.

The distinction laid down as proper to be attended to in all cases of the kind, is this. That in such impositions or deceits, where common prudence may guard persons against their suffering from them, the offence is not indictable; but the party is left to his civil remedy for redress of the injury done him; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable. *Burr.* 1125.

By stat. 33 *Hen.* VIII. *cap.* 1. *sect.* 2. if any person falsely and deceitfully get into his hands or possession any money or other things of any other persons by colour of any *false token*, &c. being convicted he shall have such punishment by imprisonment, setting upon the pillory, or by any corporal pain (except pains of death) as shall be adjudged by the persons before whom he shall be convict.

Lord *Coke* observes hereupon, that for this offence the offender cannot be *fined*, but *corporal pain* only inflicted. 3 *Inst.* 133. But in 1 *Hawk. P. C. c.* 71. § 6. it is said that a person has been fined 500*l.* for this offence.

In indictments on this stat. the false token made use of must be set forth. *Stra.* 1127. A counterfeit pass has been held such. *Dalt.* 91. or a pretended power to discharge soldiers. 1 *Latch.* 202.

By stat. 30 *Geo.* II. *c.* 24. persons convicted of obtaining money or goods by *false pretences*, or of sending threatening letters in order to extort money or goods, may be punished by fine and imprisonment, or by pillory, whipping, or *transportation*. In indictment on this stat. it must appear what the *false pretences* were. 2 *Term Rep.* 581.

As there are frauds which may be relieved civilly, and not punished criminally, (with the complaints whereof the courts of equity do generally abound,) so there are other frauds, which in a special case may not be helped civilly, and yet shall be punished criminally. Thus if a minor goes about the town, and *pretending to be of age*, defrauds many persons, by taking credit for a considerable quantity of goods, and then insisting on his nonage; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. *Barl.* 100. 1 *Hawk. P. C. c.* 71. § 6. *n.*

CHECK-ROLL, A *roll* or book containing the names of such as are attendants on, and in pay to the king or other great personages, as their household servants. Stat. 19 *Car.* II. *cap.* 1. It is otherwise called the *chequer-roll*, and seems to take its etymology from the *Exchequer*. Stat. 14 *Hen.* VIII. *c.* 13.

CHELINDRA, A sort of ship. *Mat. Paris. anno* 1238.

CHELSEA HOSPITAL. See tit. *Soldiers.*

CHELSEA WATER-WORKS. See stat. 7 *Jac.* I. *c.* 9.

CHEST OF CHATHAM. See *Greenwich Chest.*

CHEMISTRY. See *Multiplication of Gold and Silver.*

CHESTER. See general tit. *County Palatine.* Where felony, &c. is committed by any inhabitant of the Palatine of *Chester*, in another county, process shall be made to the *exigent* where the offence was done, and if the offender then fly into the county of *Chester*, the outlawry shall be certified to the officers there. 1 *Hen.* IV. *c.* 18. The sessions for the county palatine of *Chester*, is to be kept twice in the year, at *Michaelmas* and *Easter;* and justices of peace, &c. in *Chester* shall be nominated by the Lord Chancellor. Stats. 32 *Hen.* VIII. *c.* 43. 33 *Hen.* VIII. *c.* 13. Recognisances of statutes-merchant may be acknowledged, and fines levied before the mayor of *Chester*, &c. for lands lying there. 2 & 3 *Edw.* VI. *c.* 31. But no writ of protection shall be granted in the county palatine.

CHEVAGE, *chevagium*, from the Fr. *chef*, *caput.*] A tribute or sum of money formerly paid by such as held lands in villenage to their lords in acknowledgment, and was a kind of head or poll money. Of which *Bracton*, *lib.* 1. *cap.* 10. says thus: Chevagium *dicitur recognitio in signum subjectionis et dominii de capite suo.* *Lambard* writes this word *chivage*, but it is more properly *chiefage;* and anciently the *Jews*, whilst they were admitted to live in *England*, paid *chevage* or poll money to the king, as appears by *Pat.* 8 *Edw.* I. *par.* 1. It seems also to be used for a sum of money, yearly given to a man of power for his protection, as a chief *head* or leader; but Lord *Coke* says, that in this signification, it is a great misprision for a subject to take sums of money, or other gifts yearly of any, in name of *chevage*, because they take upon them to be their chief heads or leaders. *Co. Lit.* 140. *Spelman* in v. *Chevagium* says, it is a duty paid in *Wales*, *pro filiabus maritandis.*

CHEVANTIA, A loan or advance of money upon credit; Fr. *chavarice.* Goods, stock. *Mon. Angl. tom.* 1. *p.* 629.

CHEVERIL, *cheverillus.*] A young cock, or cockling. *Pat.* 15 *Hen.* III.

CHEVISANCE, from the Fr. *chevir*, i. e. *Venir à chef de quelque chose*, to come to the head or end of a business.] An agreement or composition made; an end or order set down between a creditor or debtor; or sometimes an indirect gain in point of usury, &c. In some ancient statutes it is often mentioned, and seems commonly used for an *unlawful bargain* or *contract.* In the stat. 13 *Eliz. c.* 7. (See tit. *Bankrupts.*) it is used simply, in the sense explained by *Dufresne*, for *making contracts.*

CHEVITIÆ, and CHEVISCÆ, Heads of ploughed lands. *Mon. Angl. tom.* 2. *f.* 116.

CHIEF RENTS, The rents of freeholders of manors often so called, i. e. *reditus capitales.* They are also denominated *quit rents*, *quieti reditus;* because thereby the tenant goes quit and free of all other services. 2 *Comm.* 42. See tit. *Rents.*

CHIEF PLEDGE. See tit. *Headborough.*

CHIEF, (TENANTS in.) Tenants in *capite*, holding immediately under the king, in right of his crown and dignity. See tit. *Capite*, *Tenure.*

CHILDREN, As to devises to, see tit. *Devise.* See also tit. *Descent*, *Heir*, *Limitation*, *Poor*, *Posthumous Child*, *&c.*

CHILDWIT, *Sax.*] A fine or penalty of a bond-woman unlawfully begotten with child. *Cowel* says it signifieth a power to take a fine of your bond-woman gotten with child without your consent; and within the manor of *Writtle in Com. Essex*, every reputed father of a base child pays to the lord for a fine 3*s.* 4*d.* where it seems to extend as well to free as bond-women; and the custom is there called *childwit* to this day. See tit. *Bastard.*

CHIMIN, Fr. *chemin*, *via.*] In law phrase is a way; which is of two sorts, the king's highway, and a private way.

The *King's Highway* (*chiminus regius*) is that in which the King's subjects and all others under his protection, have free liberty to pass, though the property of the soil where the way lies, belongs to some private person.

A *private way* is that in which one man or more have liberty to pass, through the ground of another, by prescription or charter; and this is divided into *chimin in gross* and *chimin appendant.*

Chimin in gross is where a person holds a way principally and solely in itself.

Chimin appendant is that way which a man hath as appurtenant to some other thing; as if he rent a close or pasture, with covenant for ingress and egress through some other ground in which otherwise he might not pass. *Kitch.* 117. *Co. Lit.* 56. See tit. *Highway*, *Trespass*, *Way.*

CHIMINAGE, (*chiminagium.*) Toll due by custom for having a *way* through a forest; and in ancient records it is sometimes called *pedagium. Cromp. Jurisd.* 189. *Co. Lit.* 56. See *Chart. Forest. cap.* 14.

CHIMNEY MONEY, otherwise called *hearth money.* A duty to the crown imposed by stat. 14 *Car.* II. *cap.* 2. of 2*s.* for every hearth in a house. Now long since repealed.

CHIMNEY-SWEEPERS. By stat. 28 *Geo.* III. *c.* 48. churchwardens and overseers with the consent of two justices may bind boys of eight years old or upwards; and who, themselves or their parents, are chargeable to the parish, or who shall beg; or with the consent of their parents, to be apprentices to chimney-sweepers until they are 16 years old. § 1.

The form of the indenture is settled by a schedule annexed to the statute. In that the master covenants to find the boy with decent clothing; to permit him to attend public worship, and to observe the statute in the several particulars mentioned. All other indentures and agreements are declared void; and any chimney sweeper keeping an apprentice under eight years old is to forfeit not more than 10*l.* nor less than 5*l.* for each. § 4.

One justice is authorized to settle all complaints of ill usage by the masters, or ill behaviour in the boys. § 6.

No chimney-sweeper shall keep more than six apprentices at once. The master's name and place of abode are to be inscribed on a brass plate in the front of a leathern cap to be provided by the master for each apprentice, to be worn by the boy when on duty. For every apprentice above six, and for neglecting to provide their caps, the master is to forfeit not exceeding 10*l.* nor less than 5*l.* § 7.

If the master shall misuse or evil-treat his apprentice, or be guilty of the breach of any of the covenants in his indenture, he shall forfeit not more than 10*l.* nor less than 5*l.* § 8.

The statute containing the foregoing and other humane regulations was obtained by the exertions of the benevolent Mr. *Jonas Hanway;*

to whom the public and the poor are indebted for many laudable charities.

CHINA and JAPAN WARES, To what duties liable, &c. see stat. 7 *Geo.* I. *st.* 1. *c.* 21. and tit. *Navigation Acts.*

CHIPP, CHEAP, CHIPPING, Signifies the place to be a market town, as *Chipſtenham*, &c. *Blount.*

CHIPPINGAVEL, or *cheapingavel*, Toll for buying and selling.

CHIRCHGEMOT, CHIRGEMOT, KIRKMOTE.] *Circgemot*, (Sax.) *forum ecclesiasticum. Leg. Hen.* I. *c.* 8. 4 *Inst.* 321. A Synod. It is used for a meeting in a church or vestry. *Blount.*

CHIROGRAPH, *chirographum*, or *scriptum chirographatum.*] Any public instrument or gift of conveyance, attested by the subscription and crosses of witnesses, was in the time of the *Saxons* called *chirographum;* which being somewhat changed in form and manner by the *Normans*, was by them styled *charta.* In following times, to prevent frauds and concealments, they made their deeds of mutual covenant in a *script* and *rescript*, or in a part and counterpart, and in the middle, between the two copies, they drew the capital *letters of the alphabet*, and then tallied or cut asunder, in an indented manner, the sheet or skin of parchment; which being delivered to the two parties concerned, were proved authentic by matching with and answering to one another; and when this prudent custom had for some time prevailed, then the word *chirographum* was appropriated to such bipartite writings or indentures.

Anciently when they made a *chirograph* or deed, which required a counterpart, they engrossed it twice upon one piece of parchment contrariwise, leaving a space between, in which they wrote in great letters the word CHIROGRAPH, and then cut the parchment in two, sometimes even and sometimes with indenture, through the midst of the word. This was afterwards called *dividenda*, because the parchment was so divided or cut; and it is said the first use of these *chirographs* was in *Henry* the Third's time.

Chirograph was of old used for a fine; the manner of engrossing whereof, and cutting the parchment in two pieces, is still observed in the *Chirographer's Office;* but as to deeds, that was formerly called a *Chirograph*, which was subscribed by the proper hand-writing of the vendor or debtor, and delivered to the vendee or creditor, and it differed from *syngraphus*, which was in this manner, viz. Both parties, as well the creditor as debtor, wrote their names and the sum of money borrowed, on paper, &c. and the word SYNGRAPHUS in capital letters in the middle thereof, which letters were cut in the middle, and one part given to each party, that upon comparing them, (if any dispute should arise) they might put an end to the difference. The *chirographs* of deeds have sometimes concluded thus: *Et in hujus rei testimonium huic scripto, in modum* chirographi *confecto, vicissim sigilla nostra apposuimus.* The *chirographs* were called *chartæ divisæ, scripta per* chirographos *divisa, chartæ per alphabetum divisæ;* as the *chirographs* of all fines are at this time. *Kennet's Antiq.* 177. *Mon. Angl. tom.* 2. *p.* 94.

CHIROGRAPHER OF FINES, *chirographus finium et concordiarum*, of the Greek Χειρόγραφον, a compound of Χειρ, *manus*, a hand, and γράφω, *scribo*, I write; a writing of a man's hand.] That officer in the *Common Pleas* who engrosseth fines, acknowledged in that court into a perpetual record, after they are examined and passed in the other offices, and that writes and delivers the indentures of them to the party; and this officer makes out two indentures, one for the

buyer, another for the seller; and also makes one other indented piece, containing the effect of the fine, which he delivers to the *custos brevium*, which is called the *foot of the fine*. The *chirographer* likewise, or his deputy, proclaims all the fines in the court every term, according to the statute, and endorses the proclamations upon the backside of the foot thereof; and always keeps the writ of covenant, and note of the fine. The *chirographer* shall take but 4*s*. fee for a fine, on pain to forfeit his office, &c. Stats. 2 *Hen.* IV. *c.* 8. 23 *Eliz. c.* 3. 2 *Inst.* 468.

CHIRURGEON. See *Surgeon.*

CHIVALRY, *servitium militare*, from the Fr. *chevalier.*] A tenure of lands by knights' service; whereby the tenant was bound to perform service in war unto the king, or the mesne lord of whom he held by that tenure. See tit. *Tenures.*

Chivalry was of two kinds, either *regal*, held only of the King, or *common*, held of a common person. That which might be held only of the King was called *servitium* or *serjeantia*, and was again divided into *grand* and *petit serjeanty.* The *grand serjeanty* was where one held lands of the king by service, which he ought to do in his own person, as to bear the king's banner or spear, to lead his host, or to find a man at arms to fight, &c. *Petit Sergeanty* was when a man held lands of the king, to yield him annually some small thing towards his wars, as a sword, dagger, bow, &c. See tit. *Serjeanty.*

Of the *Court of Chivalry*, its power and jurisdiction, see *post*, tit. *Court of Chivalry.*

CHOCOLATE. See *Coffee.*

CHOP-CHURCH, *ecclesiarum permutatio.*] Is a word mentioned in a statute of King *Hen.* VI. by the sense of which, it was in those days a kind of trade, and by the judges declared to be lawful; but *Brooke*, in his *Abridgment* says, it was only *permissable* by law. It was without a doubt a nickname given to those that used to change benefices; as to *chop* and *change* is a common expression. 9 *Hen.* VI. *cap.* 65. Vide *Litera missa omnibus episcopis, &c. contra* Choppe-Churches, *anno* 1391. *Spelm. de Con. vol.* 2. *p.* 642.

CHORAL, *choralis.*] Signifies any person that by virtue of any of the orders of the clergy, was in ancient time admitted to sit and serve God in the *choire*. *Dugdale*, in his History of St. *Paul's* Church, says, that there were formerly six *Vicars Choral* belonging to that church.

CHOREPISCOPI. See *Suffragan.*

CHOSE, Fr. a thing.] Used in the common law with divers epithets; as *chose local*, *chose transitory*, and *chose in action. Chose local* is such a thing as is annexed to a place, as a mill, and the like; and *chose transitory* is that thing which is moveable, and may be taken away, or carried from place to place. *Chose in action* is a thing incorporeal, and only a *right;* as an annuity, obligation for debt, &c. And generally all causes of suit for any debt, duty, or wrong, are to be accounted *choses in action;* and it seems *chose in action* may be also called *chose in suspense*, because it hath no real existence or being, nor can properly be said to be in our possession. *Bro.* tit. *Chose in Action.* 1 *Lil. Abr.* 264.

A person disseises me of land, or takes away my goods; my right or title of entry into the lands, or action and suit for it, and so for the goods, is a *chose in action;* so a debt on an obligation, and power and right of action to sue for the same. 1 *Brownl.* 33. And a condition and power of re-entry into land upon a feoffment, gift or

grant, before the performance of the condition, is of the nature of a *chose in action*. *Co. Lit.* 214. 6 *Rep.* 50. *Dyer*, 244. If one have an advowson, when the church becomes void, the presentation is but as a *chose in action*, and not grantable, but it is otherwise before the church is void. *Dyer*, 296. Where a man hath a judgment against another for money, or a statute, these are *choses in action*. An annuity in fee to a man and his heirs, is grantable over; but it has been held, that an annuity is a *chose in action*, and not grantable. 5 *Rep.* 89. *Fitz. Grant*, 45. A *chose in action* cannot be transferred over, nor is it devisable; nor can a *chose in action* be a satisfaction, as one bond cannot be pleaded to be given in satisfaction for another; but in equity *choses in action* may be assignable; and the king's grant of a *chose in action* is good. *Cro. Jac.* 170. 371. *Chanc. Rep.* 169.

Charters, where the owner of the land hath them in possession, are grantable. A possibility of an interest, or estate in a term for years, is near to a *chose in action*, and therefore may not be granted; but a possibility, joined with an interest, may be a grantable chattel. *Co. Lit.* 265. 4 *Rep.* 66. *Mod. Ca.* 1128. And this the law doth provide, to avoid multiplicity of suits, and the subversion of justice, which would follow if these things were grantable from one man to another. *Dyer*, 30. *Plowd.* 185.

But by release *choses in action* may be released and discharged for ever; but then it must be to parties and privies in the estate, &c. for no stranger may take advantage of *things in action*, save only in some special cases. *Co. Lit.* 214. *Yelv.* 9. 85. See tit. *Assignment*.

CHRISM, A confection of oil and balsam consecrated by the bishop, and used in the *Popish* ceremonies of baptism, confirmation, and sometimes ordination.

CHRISMALE, *Chrismal*, *chrisom*, The face-cloth, or piece of linen laid over the child's head at baptism, which in ancient times was a perquisite due to the parish priest. *Statut. Ægid. Epis. Salisbur. An.* 1256.

CHRISMATIS DENARII, *Chrisom pence*, money paid to the diocesan, or his suffragan, by the parochial clergy, for the *chrisom* consecrated by them about *Easter*, for the holy uses of the year ensuing. This customary payment being made in *Lent* near *Easter*, was in some places called *Quadragesimals*, and in others *Paschals* and *Easter pence*. The bishop's exaction of it was condemned by Pope *Pius* XI. for simony and extortion; and thereupon the custom was released by some of our *English* bishops. See *Cartular. Mon. de Bernedy*, *MS. Cotton*.

CHRISTIANITATIS CURIA, The court christian, or ecclesiastical judicature. See *Court Christian*.

CHRISTIANITY. Of the punishment of offences against, see tit. *Blasphemy*, *Heresy*, and also tit. *Religion*.

CHURCH.

Ecclesia. A temple or building consecrated to the honour of God and religion, and anciently dedicated to some saint, whose name it assumed; or it is an *assembly of persons united by the profession of the same christian faith, met together for religious worship*. A Church, to be adjudged such in law, must have administration of the sacraments and sepulture, annexed to it. If the king founds a *church*, he may

exempt it from the ordinary's jurisdiction; but it is otherwise in case of a subject.

The manner of founding *churches* in ancient times was, after the founders had made their applications to the bishop of the diocese, and had his license, the bishop or his commissioners set up a cross, and set forth the *church-yard*, where the church was to be built; and then the founders might proceed in the building of the *church*, and when the *church* was finished, the bishop was to consecrate it; and then, and not before, the sacraments were to be administered in it. *Stillingfleet's Ecclesiast. Cases.* But by the common law and custom of this realm, any person who is a good Christian, may build a church without license from the bishop, so as it be not prejudicial to any ancient *churches*, though the law takes no notice of it as a church, till consecrated by the bishop, which is the reason why *church* and no *church*, &c. is to be tried and certified by the bishop. And in some cases, though a *church* has been consecrated, it must be consecrated again; as in case any murder, adultery, or fornication be committed in it, whereby it is defiled; or if the church be destroyed by fire, &c.

The ancient ceremonies in consecrating the ground on which the church was intended to be built, and of the church itself after it was built, were thus: When the materials were provided for building, the bishop came in his robes to the place, &c. and having prayed, he then perfumed the ground with incense, and the people sung a collect in praise of that saint to whom the church was dedicated; then the corner stone was brought to the bishop, which he crossed, and laid for the foundation; and a great feast was made on that day, or on the saint's day to which it was dedicated; but the form of consecration was left to the discretion of the bishop, as it is at this day.

A *church* in general consists of three principal parts; that is, the belfry or steeple, the body of the church with the aisles, and the chancel; and not only the freehold of the whole church, but of the church-yard, are in the parson or rector; and the parson may have an action of trespass against any one that shall commit any trespass in the church or church-yard; as in the breaking of seats annexed to the church, or the windows, taking away the leads, or any of the materials of the church, cutting the trees in the church yard, &c. But *church-wardens* may by custom have a fee for burying in the church. The church-yard is a common place of burial for all the parishioners. *Vent.* 274. *Keb.* 504. 523. But see *Cro. Jac.* 367. *Gibs.* 453. And *post*, *Churchwardens*, III. 2.

And it seems that actions for taking away the *seats* must be brought in the name of the churchwardens, the parishioners being at the expense of them. *Raym.* 246. 12 *Co.* 105. 3 *Com. Dig.* tit. *Esglise*, (F. 3.)

If a man erect a pew in a church, or hang up a bell, &c. therein, they thereby become church goods, though not expressly given to the church; and he may not afterwards remove them. *Shaw. P. L.* 79. The parson only is to give *license* to bury in the church, but for defacing a monument in a church, &c. the builder or heir of the deceased may have an action. *Cro. Jac.* 367. And a man may be indicted for digging up the graves of persons buried, and taking away their burial dresses, &c. the property whereof remains in the party who was the owner when used, and it is said an offender was found guilty of felony in this case, but had his clergy. *Co. Lit.* 113.

Though the parson hath the freehold of the *church* and *church-yard*, he hath not the fee-simple, which is always in abeyance; but in some respects the parson hath a fee-simple qualified. *Lit.* 644, 645. The chancel of the church is to be repaired by the parson, unless there be a custom to the contrary; and for these repairs, the parson may cut down trees in the *church-yard*, but not otherwise. See stat. 35 *Edw.* I. *st.* 2. *Ne Rector prosternat, &c.* The churchwardens are to see that the body of the church and steeple are in repair; but not any aisle, &c. which any person claims by prescription, to him or his house; concerning which repairs the canons require every person who hath authority to hold ecclesiastical visitation to view their churches within their jurisdiction once in three years, either in person, or cause it to be done; and they are to certify the defects to the ordinary, and the names of those who ought to repair them; and these repairs must be done by the churchwardens, at the charge of the parishioners. *Can.* 86. 1 *Mod.* 236. See *post*, tit. *Churchwardens*, III. 2.

By the common law, parishioners of every parish are bound to repair the church; but by the canon law, the parson is obliged to do it; and so it is in foreign countries. 1 *Salk.* 164. In *London* the parishioners repair both the church and the chancel. The Spiritual Court may compel the parishioners to repair the church, and excommunicate every one of them till it be repaired; but those that are willing to contribute shall be absolved till the greater part agree to a tax, when the excommunication is to be taken off; but the Spiritual Court cannot assess them towards it. 1 *Mod.* 194. 1 *Vent.* 367. For though this Court hath power to oblige the parishioners to repair by ecclesiastical censures; yet they cannot appoint in what sum, or set a rate, for that must be settled by the churchwardens, &c. 2 *Mod.* 8.

If a church be down, and the parish is increased, the greater part of the parish may raise a tax for the necessary enlarging it, as well as the repairing thereof, &c. 1 *Mod.* 237. But in some of our books it is said, that if a church falls down, the parishioners are not obliged to rebuild it; though they ought to keep it in due repair. 1 *Vent.* 35. On rebuilding of churches, it is now usual to apply for, and obtain *briefs*, on the petition of the parishioners, to collect the charitable contributions of well-disposed Christians, to assist them in the expense. See *post*, tit. *Churchwardens*, III. 2.

For church ornaments, utensils, &c. the charge is upon the *personal estates* of the *parishioners;* and for this reason persons must be charged for these, where they live. But though generally lands ought not to be taxed for ornaments, yet by special custom, both lands and houses may be liable to it. 2 *Inst.* 489. *Cro. Eliz.* 843. *Hetley*, 131. It has been resolved that no man shall be charged for his land to contribute to the church reckonings, if he doth not reside in the same parish. *Moor*, 554.

By stat. 37 *Hen.* VIII. *c.* 21. churches not above six pounds a year in the king's books, by assent of the ordinary, patron and incumbent, may be united; and by stat. 17 *Car.* II. *c.* 3. in cities and corporations, &c. churches may be united by the bishop, patrons, and chief magistrates, unless the income exceeds 100*l. per annum*, and then the parishioners are to consent, &c. See tit. *Union*.

For completing of *St. Paul's Church*, and repairing *Westminster Abbey*, a duty of 2*s.* per chaldron on coals was granted; and the *church-yard* is to be enclosed, and no persons build thereon, except for the use of the church. 1 *Ann. st.* 2. *c.* 12.

Fifty new churches are to be built in or near *London* and *Westminster*, for the building whereof a like duty is granted upon coals, and commissioners appointed to purchase lands, ascertain bounds, &c. The rectors of which churches were to be appointed by the crown, and the first churchwardens and vestrymen, &c. to be elected by the commissioners. Stat. 9 *Ann. c.* 22. and see stat. 10 *Ann. c.* 11. A duty is also granted on coals imported into *London*, to be appropriated for maintaining of ministers for the fifty new churches. Stat. 1 *Geo.* I. *cap.* 23.

By 43 *Geo.* III. *c.* 108. "to promote the building, repairing and providing of churches and chapels, and of houses for the residence of ministers, and church-yards and glebes," persons possessed of estates in their own right, may by deed enrolled, (in *England*, under stat. 27 *Hen.* VIII. *c.* 16. and in *Ireland* under 10 *Car.* I. stat. 2. *c.* 1. § 17.) or by will executed three months before their decease, give lands not exceeding five acres, or goods and chattels not exceeding 500*l.* for the purposes of the act. This act does not extend to infants, *femes covert*, or incapacitated persons. Only one such gift shall be made by one person, and where the gift exceeds the legal amount, the chancellor may reduce it. § 12. Plots of land not exceeding one acre, held in mortmain may be granted by exchange or benefaction, for being annexed to a church, &c. § 4. See further, tit. *Clergy*.

In all parochial churches and chapels to be hereafter erected, accommodation shall be provided for the poor. § 5.

No man shall cover his head in the church in time of divine service, except he have some infirmity, and then with a cap; and all persons are to kneel and stand, &c. as directed by the Common Prayer during service. *Can.* 18.

No fairs or markets shall be kept in church-yards. Stat. 13 *Edw.* I. *st.* 2. *c.* 6.

Any person may be indicted for indecent or irreverent behaviour in the church; and those that offend against the acts of uniformity, are punishable either by indictment upon the statute, or by the Ordinary, &c. See further, tit. *Churchwardens*, *Parsons*. And as to offences in not coming to church, see tit. *Dissenters*, *Religion*.

If any person shall, by words only, quarrel, chide, or brawl, in any church or church-yard, the ordinary of the place is empowered, on proof by two witnesses, to suspend the offender, if a layman, from the entrance of the church; and if a clerk, from the ministration of his office, so long as the said ordinary shall think meet, according to the fault. Stat. 5 & 6 *Edw.* VI. *c.* 4. § 1.

This offence was cognisable in the ecclesiastical court, before this statute, *ratione loci*; and the statute, though it provides a penalty, doth not alter the jurisdiction. Ld. *Raym.* 850.

If any person shall smite, or lay any violent hands upon another, the offender shall *ipso facto* be deemed excommunicate. 5 & 6 *Edw.* VI. *c.* 4. § 2. But previous to excommunication, there must be either a conviction at law, or a declaratory sentence, in the ecclesiastical court. See 1 *Hawk. P. C. c.* 63. 1 *Burr.* 240. *Burn's Eccl. Law*, tit. *Church* x.

If one be assaulted in the church, or in a church-yard, he may not beat the other, or draw a weapon there, although the other assaulted him, and it be therefore in his own defence; for it is a sanctified place, and he may be punished for that by the foregoing statute. And it is the same in any of the king's courts, or within view of the courts of justice; because a force in that case is not jus-

ufiable, though in a man's own defence. *Cro. Jac.* 367. 1 *Hawk. c.* 63. § 4.

If any person shall maliciously strike any person with any weapon, in any church or church-yard; or shall draw any weapon in any church or church-yard, to the intent to strike another therewith, he shall, on conviction, or verdict, or confession, or by two witnesses, at the assises or sessions, be adjudged to have one of his ears cut off; and *if he have no ears*, he shall be burned in the cheek with a hot iron, having the letter F. whereby he may be known and taken for a *fray-maker* and *fighter*, and besides, he shall be and stand, *ipso facto*, excommunicated as is aforesaid. 5 & 6 *Edw.* VI. *c.* 4. § 3.

By stat. 27 *Geo.* III. *c.* 44. no suit shall be brought in any ecclesiastical court for striking or brawling in any church or churchyard, after the expiration of eight calendar months, from the time when such offence shall have been committed.

CHURCHGEMOT. Vide *Chirchgemot.*

CHURCHWARDENS.

Anciently styled *Church Reeves* or *Ecclesiæ Guardiani.*] Officers instituted to protect the edifice of the church; to superintend the ceremonies of public worship; to promote the observance of religious duties; to form and execute parochial regulations; and to become, as occasion may require, the *legal representatives* of the *body of the parish.*

The office was originally confined to such matters only as concerned *the church*, considered *materially* as an edifice, building, or place of public worship; and the duty of suppressing profaneness and immorality was entrusted to two persons annually chosen by the parishioners, as assistants to the churchwardens, who from their power of *inquiring* into offences, detrimental to the interests of religion, and of *presenting* the offenders to the next provincial council, or *episcopal synod*, were called *quest-men* or *synods-men*, which last appellation has been converted into the name of *sides-men.* But great part of the duty of these *testes synodales*, or ancillary officers, is now devolved upon the churchwardens; the sphere of whose duty has, since the establishment of the *Overseers of the Poor*, been considerably enlarged; and is also diverted into various channels by many modern acts of parliament. See *Paroch. Antiq.* 649. for a more particular account of the origin and progress of these *Sides-men.*

Under this head it will be proper to consider,

I. 1. *Of the Election of Churchwardens.* 2. *Of Exemptions from being elected.*
II. *Of their Interest in the Things belonging to the Church.*
III. 1. *Of their Power; and,* 2. *Duty.*
IV. *Of their Accounts.*

I. 1. They are generally chosen by the joint consent of the parishioners and minister; but by *custom*, (on which the right of choosing these officers entirely depends, 2 *Atk.* 650. 2 *Stra.* 1246.) the minister may choose one, and the parishioners another; or the parishioners alone may elect both. 1 *Vent.* 267. But where the custom of a parish does not take place, the election shall be according to the

directions of the canons of the church. *Can.* 89, 90. which direct that all churchwardens or quest-men in every parish, shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one, and the parishioners another; and without such a joint or several choice, none shall take upon them to be churchwardens. *Gibs. Cod.* 241, 242. 1 *Stra.* 145.

If the parson or vicar, who has, by custom, a right to choose *one* churchwarden, be under sentence of *deprivation*, the right of choosing *both* results to the parishioners. *Carth.* 118.

The parson cannot intermeddle in the choice of that churchwarden which it is the right of the parishioners by custom to elect. 2 *Stra.* 1045. Under the word Parson a *Curate* is included. 2 *Stra.* 1246.

In most of the parishes in *London*, the parishioners choose both churchwardens by custom; but in all parishes erected under stat. 9 *Ann. c.* 22. the canon shall take place; (unless the act, in virtue of which any church was erected, shall have specially provided that the parishioners shall choose both;) inasmuch as no *custom* can be pleaded in such new parishes. *Gibs.* 215. *Co. Lit.* 113. 1 *Roll. Abr.* 339. *Cro. Jac.* 532. 1 *Comm.* 77.

In the election of churchwardens by the parishioners, the majority of those who *meet at the vestry*, upon a written notice given for that purpose, shall bind the rest of the parish. *Lane*, 21.

By custom also, the choice of churchwardens may be in a *select vestry*, or a particular number of the parishioners, and not in the body of the parishioners at large. *Hard.* 378. 1 *Mod.* 181. See this *Dict.* tit. *Vestry.*

In some cases the lord of the manor prescribeth for the appointment of churchwardens; and this shall not be tried in the Ecclesiastical Court, although it be a prescription of what appertains to a spiritual thing. *God.* 153. 2 *Inst.* 653.

The validity of the custom of choosing churchwardens is to be decided, like all other customs of the realm, by the courts of *common law*, and not by the *spiritual court*. *Cro. Car.* 552. 6 *Mod.* 89. 2 Ld. *Raym.* 1008. 3 *Salk.* 88. 1 *Bac. Abr.* 371. So also the legality of the votes given on the election is to be determined by the Common Law. *Burr.* 1420. But the Spiritual Court may become the means of trying the validity of the election by a return of 'not elected,' 'not duly elected,' or any other return that answers the writ, and affords an opportunity of trying the right in an action for a false return. 1 Ld. *Raym.* 138. *Stra.* 610. 2 Ld. *Raym.* 1379. 1405. 2 *Salk.* 433. 5 *Mod.* 325. *Cowp.* 413.

The parishioners are sole judges of what description of persons they think proper to choose as churchwardens; the Spiritual Court, therefore, cannot in any case, control or examine into the propriety of the election. 1 *Salk.* 166. See also the authorities immediately preceding. And the parishioners may, for misbehaviour, remove them. 13 *Co.* 70. *Com. Dig.* 3. tit. *Esglise*, (F. 1.) An indictment also lies against them for corruption and extortion in their office. 1 *Sid.* 307.

The court of King's Bench will not grant a *mandamus* to the churchwardens, to call a vestry to elect their successors. *Stra.* 686. Sed vid. *Stra.* 52. Nor will the Court grant a *quo warranto* to try the validity of an election to the office. 4 *Term Rep.* 382.

They are sworn into their offices by the Archdeacon or Ordinary of the diocese, and if he refuse, a *mandamus* shall issue to compel

him. *Cro. Car.* 551. 5 *Com. Dig.* tit. *Mandamus*, (A.) and the authorities there cited, and without *fee*. 1 *Salk.* 330. But the oath must be general, 'to execute their duty truly and faithfully.' *Hard.* 364. and under stats. 4 *Jac.* I. *c.* 5. 1 *Jac.* I. *c.* 9. and 21 *Jac.* I. *c.* 7. to execute the laws against drunkenness. See *post*, III. 2.

If a churchwarden properly appointed, refuse to take the oath, he may be excommunicated. *Gibs. Cod.* 961. 1 *Mod.* 194. and he must not execute the office till he is sworn. *Gibs.* 243. *Shaw. P. L.* 70.

2. All *peers* of the realm, by reason of their dignity, are exempted from the office. *Gibs.* 215. So are all *clergymen*, by reason of their order. 6 *Mod.* 140. 2 *Stra.* 1107. 1 Ld. *Raym.* 265. *Members of Parliament* by reason of their privilege. *Gibs. Cod.* 215. *Practising Barristers*, and such only, as it seems. *Attorneys. Com. Dig.* tit. *Attorney*, (B. 16.) *Clerks in Court.* 1 *Roll. Rep.* 368. but see *Mar.* 30. *Physicians*, *Surgeons*, *Apothecaries*, *Aldermen*, *Dissenting Teachers*, *Prosecutors of Felons*, *Militia-men.* See tit. *Constable* II. 2.

No person *living out of the parish*, although he occupies lands within the parish, may be chosen churchwarden; because he cannot take notice of absences from church, or disorders in it, for the due presenting of them. *Gibs.* 215.

II. *Churchwardens* are a corporation by custom, to sue and be sued for the goods of the church; and they may purchase *goods*, but not *lands*, except it be in *London*, by custom. *Jones*, 439. *Cro. Car.* 532. 552. 4 *Vin.* 525. *n.* 1 Ld. *Raym.* 337. *Co. Lit.* 3.

In the city of *London*, by special custom, the *churchwardens*, with the minister, make a corporation for *lands* as well as *goods;* and may, as such, hold, purchase and take *lands* for the use of the church, &c. And there is also a custom in *London*, that the minister is there excused from repairing the chancel of the church. 2 *Cro.* 325. *Co. Lit.* 3. 1 *Roll. Abr.* 330. Churchwardens may have appeal of robbery for stealing the goods of the church. 1 *Roll. Abr.* 393. *Cro. Eliz.* 179. And they may also purchase goods for the use of the parish. *Mar.* 22. 67. *Cro. Car.* 552. 3 *Bulst.* 264. *Yelv.* 173. They may also take money or things (by legacy, gift, &c.) for the benefit of the church. 2 *P. Wms.* 125. And they may dispose of the goods of the church, *with the consent of the parishioners.* 1 *Roll. Abr.* 393. 1 *Vent.* 89. *Cro. Jac.* 234. 4 *Vin.* 526.

But the *churchwardens* (except in *London*) have no right to, or interest in, the freehold and inheritance of the church, which alone belongs to the parson or incumbent. *Comp. Incumb.* 381. 1 *Bac. Abr.* 372. 1 *Vent.* 127. 4 *Vin.* 527.

They may bring an appeal of robbery for goods of the church feloniously stolen. *Y. B.* vol. 11. p. 27. and *ejectment* for land leased to them for years. *Runnington's Ejectments*, 59. 3 *Com. Dig. Esglise*, (F. 3.)

If they waste the goods of the church, the new *churchwardens* may have actions against them, or call them to account; though the parishioners cannot have an action against them for wasting the church goods, for they must make new *churchwardens*, who must prosecute the former, &c. 1 *Danv. Abr.* 788. 2 *Cro.* 145. *Bro. Account*, 1.

They have a certain *special* property in the organ, bells, parish books, bible, chalice, surplice, &c. belonging to the church; of which they have the *custody* on behalf of the parish, whose property they really are; for the taking away, or for any damage done any of these,

the churchwardens may bring an action at law, and therefore the parson cannot sue for them in the Spiritual Court. 1 *Bac. Abr.* 372. 1 *Roll. Rep.* 255. See *Cro. Eliz.* 179. 1 *Vent.* 89. 7 *Mod.* 116.

But they have not, *virtute officii*, the custody of the title deeds of the advowson, though they are kept in a chest in the church. 4 *Term Rep.* 351.

III. 1. Churchwardens have power and authority throughout the parish, though it extends into different hundreds and counties; being, though temporal officers, employed in ecclesiastical affairs, and must therefore follow the ecclesiastical division of the kingdom. *Shaw. P. L.* 86.

They have, with the consent of the minister, the placing the parishioners in the seats of the body of the church, appointing gallery-keepers, &c. reserving to the Ordinary a power to correct the same; and in *London*, the *churchwardens* have this authority in themselves.

Particular persons may *prescribe* to have a *seat*, as belonging to them by reason of their estates, as being an ancient messuage, &c. and the seats having been constantly repaired by them. Also one may *prescribe* to any *aisle* in the church, to *sit* and to *bury* there, *always repairing the same.* 3 *Inst.* 202. *Cro. Jac.* 366. If the Ordinary displaces a person claiming a seat in a church by prescription, a prohibition shall be granted, &c. 12 *Rep.* 106. The parson impropriate has a right to the chief seat in the chancel; but by prescription another parishioner may have it. *Noy's Rep.*

Besides their ordinary power, the *churchwardens* have the care of the benefice during its vacancy; and as soon as there is any avoidance, they are to apply to the chancellor of the diocese for a sequestration; which being granted, they are to manage all the profits and expenses of the benefice for him that succeeds, plough and sow his glebes, gather in tithes, thrash out and sell corn, repair houses, &c. and they must see that the church be duly served by a curate approved by the bishop, whom they are to pay out of the profits of the benefice. 2 *Inst.* 489. *Shaw. P. L.* 99. Stat. 13 & 14 *Car.* II. *c.* 12.

The *churchwardens* have not originally power to make any rate themselves, exclusive of the parishioners, their duty being only to summon the parishioners, to a *vestry*, who are to meet for that purpose; and, when they are assembled, a rate made by the majority present shall bind the whole parish, although the *churchwardens* voted against it. *Comp. Incumb.* 389. 1 *Vent.* 367. 1 *Bac. Abr.* 373. 3 *Term Rep.* 592.

But if the *churchwardens* give the parishioners due notice, that they intend to meet for the purpose of making a rate to repair the church, and the parishioners refuse to come, or being assembled, refuse to make any rate, they may make one without their concurrence; for they are liable to be punished in the ecclesiastical courts for not repairing the church. *Degge*, 172. 1 *Vent.* 367. 1 *Mod.* 79. 194. 237. See further on this subject, tit. *Vestry.*

A taxation by a pound-rate is the most equitable way, which if refused to be paid, should be proceeded for in the Ecclesiastical Court; and *Quakers* are subject to such church rate, recoverable as their tithes. *Wood's Inst. b.* 1. *c.* 7. *Gibs.* 219. *Degge*, 171.

2. Their duty is extensive and various; the heads of it are therefore here ranged alphabetically.

Apprentices. See this *Dictionary*, tit. *Apprentices*, *Chimney-Sweepers.*

Bastards. The churchwardens are bound to provide for such for whose sustenance the parish have made no provision; and this without an order of justices. *Hays* v. *Bryant*, *Trin.* 29 *Geo.* III. in *C. P.*

Belfry. Churchwardens ought to keep the keys of, and take care the bells are not rung without proper cause. *Can.* 88.

Briefs. Churchwardens are, by stat. 4 *Ann. c.* 14. to collect the charity-money upon *briefs;* which are letters patent issuing out of Chancery, to rebuild churches, restore loss by fire, &c. which are to be read in churches; and the sums collected, &c. to be endorsed on the briefs in words at length, and signed by the minister and *churchwardens;* after which they shall be delivered, with the money collected, to the persons undertaking them, in a certain time, under the penalty of 20*l.* A register is to be kept of all money collected, &c. Also the undertakers, in two months after the receipts of the money, and notice to sufferers, are to account before a Master in Chancery, appointed by the Lord Chancellor.

Burial. The consent of the churchwardens must be had for burying a person in a different parish from that in which he dies. It is their duty not to suffer suicides, or excommunicated persons, to be buried in the church or church-yard, without license from the bishop. By stat. 30 *Car.* II. *c.* 3. they are to apply to the magistrates to convict offenders for not burying in woollen. See also *post*, *Register.*

Butter and Cheese. The penalties under stat. 13 & 14 *Car.* II. *c.* 26. for reforming abuses in, are payable to the churchwardens of the parish where the offence is committed.

Chimney-Sweepers. See that tit. in this *Dictionary.*

Church. Churchwardens or quest-men are to take care it be well aired, the windows glazed, the floors well paved, &c. If churchwardens erect or add a new gallery, &c. they must have the consent of the parishioners, and a license of the Ordinary, but not for occasional repairs. 2 *Inst.* 489. 1 *Mod.* 273. See *ante*, III. 1. They must also take care to have in the church a large bible, a book of common prayer, a book of homilies, a font of stone, a decent communion table, with bread and wine for the communion, a table-cloth, carpet, and flagon, plate, and bowl of silver, gold or pewter. *Can.* 20. *Y. B.* 8 *Hen.* V. *fo.* 4. *Doct. & Stud.* 118. *Degge*, 151. Churchwardens also are to sign certificates of persons taking the sacrament, to qualify for offices. They are to see that the ten commandments are set up at the east end of the church, and other chosen sentences upon the walls, with a reading desk and a pulpit, and a chest for alms, all at the charge of the parish. It is also the duty of churchwardens to prevent any irreverence or indecency from being committed in the church; and therefore they may pull off a person's hat in the church, or even turn him out if he attempts to disturb the congregation. The church being under the care of the churchwardens, they may refuse to open it at the instance of any person, except *the parson*, or any one acting under him. 1 *Sand.* 13. 1 *Lev.* 196. 1 *Sid.* 301. 3 *Salk.* 37. 12 *Mod.* 433. *Can.* 85. They are not to suffer any stranger to preach, unless he appears qualified, by producing a license, and such preacher is to register his name, and the day when he preached, in a book. *Can.* 50. 52. The pulpit is exclusively the right of the parson of the parish, and the churchwardens are punishable if they shut the door against him; and his consent is necessary to a stran-

ger's preaching. 3 *Salk.* 87. 12 *Mod.* 433. See further this *Dict.* tit. *Church.*

Church-yards. By the canons of the church, it is ordained that the churchwardens, or quest-men shall take care that the church-yards be well and sufficiently repaired, found, and maintained with walls, rails, or pales, as have been in each place accustomed, at their charges, unto whom the same by law appertaineth; they are also to see that the church be well kept and repaired; and by a constitution of *Archbishop Winchelsea*, this charge is to be at the expense of the parishioners. 2 *Inst.* 489. (But one who has land adjoining to the church-yard may by custom be bound to keep the fences in repair.) *Churchwardens* shall suffer no plays, feasts, banquets, suppers, church-ales, drinkings, temporal courts or leets, lay-juries, musters, or any profane usage to be kept in the church or church-yard. Nor shall they suffer any idle persons to abide either in the church-yard or church-porch during the time of divine service or preaching, but shall cause them to come in or to depart. So also, by the common law, churchwardens may justify the removal of tumultuous persons from the church-yard, to prevent them from disturbing the congregation whilst the minister is performing the rites of burial. 1 *Mod.* 168. and by the canon law may prevent an *excommunicated person* from even entering into the church-yard at any time, or on any pretence.

Conventicles. Churchwardens are to levy the penalties by warrant of a justice, under stat. 22 *Car.* II. *c.* 1.

Corn. See stat. 22 *Car.* II. *c.* 8.

County Rate. See stat. 12 *Geo.* II. *c.* 29.

Drunkenness. Churchwardens are to receive the penalties under stat. 4 *Geo.* I. *c.* 5. 21 *Geo.* II. *c.* 7. and 1 *Jac.* I. *c.* 9. See this *Dict.* tit. *Constable.*

Fast Days. See stat. 5 *Eliz. c.* 5.

Fire. See this *Dict.* tit. *Fire.*

Game. Churchwardens are to receive the penalties under stat. 1 *Jac.* I. *c.* 27.

Greenwich Hospital. Churchwardens are to sign certificates of out-pensioners under stat. 3 *Geo.* III. *c.* 16.

Hawkers and Pedlars. Churchwardens are to apprehend, and receive the penalties under stat. 9 & 10 *Wm.* III. *c.* 27. and 9 *Geo.* II. *c.* 23.

Militia. See the *Militia Act*, 26 *Geo.* III. *c.* 107.

Nonconformists. Churchwardens to levy the penalty of 12*d.* on persons not coming to church each *Sunday*, under stat. 1 *Eliz. c.* 2.

Parson. Churchwardens are to observe whether he reads the 39 articles twice a year, and the canons once in the year, preaches every *Sunday* good doctrine, reads the Common Prayer, celebrates the sacraments, preaches in his gown, visits the sick, catechises children, marries according to law, &c.

Parishioners. Churchwardens to see if they come to church, and duly attend the worship of God; if baptism be neglected; women not churched; persons marrying in prohibited degrees, or without banns or license; alms-houses or schools abused; legacies given to pious uses, &c. *Can.* 117. *Cro. Car.* 291. 1 *Vent.* 114.

Poor. Churchwardens are to act in conjunction with the *overseers*; every churchwarden being an overseer, but not *è contrà*. See this *Dict.* tit. *Overseer, Poor.*

Presentments. Churchwardens, by their *oath*, are to present or certify to the bishop or his officers, all things presentable by the

ecclesiastical law, which relate to the *church*, to the *minister*, and to the *parishioners*. The articles which are delivered to churchwardens for their guidance in this respect, are, for the most part, founded on the *book of canons*, and on *rubricks* of the common prayer. They are also bound, by the 4 *Jac.* I. *c.* 5. to present tippling or drunkenness, and by 3 *Jac.* I. *c.* 4. recusants. They need not take a fresh oath upon each presentment they make, nor are they obliged to make presentments oftener than once a year; but they may do it as often as they please, except there is a custom in the parish to the contrary; and, upon default or neglect in the churchwardens, the minister may present; but such presentment ought to be upon oath. *Can.* 117. *Cro. Car.* 285. 291. 1 *Vent.* 86. 114. And see 1 *Vent.* 127. 1 *Saund.* 13. 1 *Sid.* 463.

Rates. See *ante*, III. 1.

Recusants. See *Presentments*, *Nonconformists*.

Registers. Churchwardens shall provide a box wherein to keep *the parish register*, with three locks and three keys; two of the keys to be kept by them, and one by the minister; and every *Sunday* they shall see that the minister enter therein all the christenings, weddings and burials that have happened the week before; and at the bottom of every page, they shall, with the minister, subscribe their names; and they shall, within a month after the 25th day of *March*, yearly, transmit to *the bishop* a copy thereof for the year before, subscribed as above. By stat. 23 *Geo.* III. *c.* 67. upon the entry of any burial, marriage, birth, or christening in *the register* of any parish, precinct, or place, a stamp duty of 3*d.* shall be paid; and therefore the churchwardens and overseers, or one of them, are directed to provide a book for this purpose, with proper stamps for each entry, and to pay for the same, and for the stamps contained therein, out of the rates under their management; and to receive back the moneys which shall be so paid from the persons authorized to demand and receive the said duties.

Sunday. Churchwardens to levy penalties for profaning, under stats. 1 *Car.* I. *c.* 1. and 29 *Car.* II. *c.* 7.

IV. At the end of the year the churchwardens are to yield just accounts to the minister and parishioners, and deliver what remains in their hands to the parishioners or to new churchwardens. In case they refuse, they may be presented at the next visitation, or the new officers may by process call them to account before the Ordinary, or sue them by writ of account at common law. *Shaw. P. L.* 76. 12 *Mod.* 9. 1 *Bac. Abr.* 375. *Bro. Account*, 71. But in laying out their money, they are punishable for fraud only, not indiscretion. *Gibs.* 196. 1 *Burn's Just.* 349. *Shaw. P. L.* 76. If their receipts fall short of their disbursements, the succeeding churchwardens may pay them the balance, and place it to their account. 1 *Roll. Abr.* 121. *Can.* 89. 109. &c. And the Court of Chancery on application will make an order for the purpose. 2 *Eq. Abr.* 203. *Pre. Ch.* 43. but see 4 *Vin.* (8vo.) 529.

By the stat. 3 & 4 *W. & M. cap.* 11. in all actions to be brought in the courts of *Westminster*, or at the assises, for money misspent by churchwardens, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted.

Churchwardens are comprehended within the purview of the stats. 7 *Jac.* I. *cap.* 5. and 21 *Jac.* I. *cap.* 12. as to pleading the general issue

to actions brought against them, and as to double costs when they have judgment.

But in an action on the case against a churchwarden for a false and malicious presentment, though there be judgment for him, yet he shall not have double costs; for the statute does not extend to spiritual affairs. *Cro. Car.* 285. 467. 1 *Sid.* 463. 1 *Vent.* 86. 2 *Hawk. P. C.* 61. *Hardw.* 125.

The Spiritual Court can only order the churchwardens' accounts to be audited, but cannot make a rate to reimburse them, because they are not obliged to lay out money before they receive it. *Hardw.* 381. 2 *Stra.* 974. *Cro. Car.* 285, 286.

But a custom that the churchwardens shall, before the end of their year, give notice to the parishioners to audit their accounts, and that a general rate shall be made, for the purpose of reimbursing them all money advanced, is good. 2 *Andr.* 32.

If there be a select committee or vestry elected by custom, and the churchwardens exhibit their accounts to such committee, who allow the same, this shall discharge them from being proceeded against in the Spiritual Court. 2 *Lutw.* 1027. So of allowance at a vestry in general. *Bunb.* 247. 289. 1 *Vent.* 367. 1 *Sid.* 281. *Raym.* 418. 2 *Barn. K. B.* 421. *Andr.* 11. And if the Spiritual Court take any step whatever after the accounts are delivered in, it is an excess of jurisdiction for which a prohibition will be granted, even after sentence. 3 *Term Rep.* 3.

Justices of peace have no jurisdiction over churchwardens with respect to their accounts as churchwardens. 1 *Keb.* 574. 4 *Vin.* (8vo.) 532.

CHURCHESSET, or *churchset*, *ciricseat*.] A *Saxon* word used in *Domesday*, which is interpreted *quasi semen ecclesiæ*, corn paid to the church. *Fleta* says, it signifies a certain measure of wheat, which in times past every man on *St. Martin's* day gave to holy church, as well in the times of the *Britons* as of the *English;* yet many great persons, after coming of the *Romans*, gave that contribution according to the ancient law of *Moses*, in the name of *first fruits;* as in the writ of King *Canutus*, sent to the Pope, is particularly contained, in which they call it *churchsed*. *Selden's Hist. Tithes*, *p.* 216.

CHURCH-SCOT, Customary oblations paid to the parish priest; from which duties the religious sometimes purchased an exemption for themselves and their tenants.

CHURLE, *ceorl*, *carl*.] Was in the *Saxon* times a tenant at will, of free condition, who held some land of the *Thanes*, on condition of rents and services; which *ceorles* were of two sorts; one that hired the lord's tenementary estate, like our farmers; the other that tilled and manured the *demesnes*, (yielding work and not rent,) and were thereupon called his *sockmen* or *ploughmen*. *Spelm.*

CINQUE PORTS, *quinque portus*.] Those havens that lie towards *France*, and therefore have been thought by our kings to be such as ought to be vigilantly guarded and preserved against invasion; in which respect they have an especial governor, called *Lord Warden of the Cinque Ports*, and divers privileges granted them, as a peculiar jurisdiction; their warden having not only the authority of an admiral amongst them, but sending out writs in his own name, &c. 4 *Inst.* 222.

Cambden says, that *Kent* is accounted the key of *England*, and that *William*, called *The Conqueror*, was the first that made a Constable of *Dover Castle*, and Warden of the *Cinque Ports*, which he did to

bring that country under a stricter submission to his government; but King *John* was the first who granted the privileges to those ports, which they still enjoy; however, it was upon condition that they should provide a certain number of ships at their own charge for forty days, as often as the king should have occasion for them in the wars, he being then under the necessity of having a navy for passing into *Normandy*, to recover that dukedom which he had lost. And this service the *Barons of the Cinque Ports* acknowledged and performed, upon the king's summons, attended with their ships the time limited at their proper costs, and staying as long after as the king pleased at his own charge. *Somner of Roman Ports in Kent.* See this *Dictionary*, tit. *Navy.*

The *Cinque Ports*, as we now account them, are, *Dover*, *Sandwich*, *Romney*, *Winchelsea*, and *Rye*; and to these we may add *Hythe* and *Hastings*, which are reckoned as part or members of the *Cinque Ports*; though by the first institution it is said that *Winchelsea* and *Rye* were added as members, and that the others were the *Cinque Ports*; there are also several other towns adjoining that have the privileges of the ports. These *Cinque Ports* have certain franchises to hold pleas, &c. and the king's writs do not run there; but on a judgment on any of the king's courts, if the defendant hath no goods, &c. except in the ports, the plaintiff may get the records certified into *Chancery*, and from thence sent by *mittimus* to the Lord Warden to make execution. 4 *Inst.* 223. 3 *Leon.* 3.

The constable of *Dover* castle is Lord Warden of the *Cinque Ports*. And there are several courts within the *Cinque Ports*; one before the constable, others within the *ports* themselves, before the mayors and jurats; another, which is called *curia quinque portuum apud Shepway*: there is likewise a court of *Chancery*, in the *Cinque Ports*, to decide matters of equity; but no original writs issue thence. 1 *Danv. Abr.* 793. The jurisdiction of the *Cinque Ports* is general, extending to personal, real, and mixed actions; and if any erroneous judgment is given in the *Cinque Ports* before any of the mayors and jurats, error lies according to the custom, by bill in nature of error, before the Lord Warden of the *Cinque Ports*, in his court of *Shepway*. And in these cases the mayor and jurats may be fined, and the mayor removed, &c. 4 *Inst.* 334. *Cromp. Jurisd.* 138. and error lies from the court of *Shepway* to the court of *K. B. Jenk.* 71. 1 *Sid.* 356.

It has been observed, that the *Cinque Ports* are not *jura regalia*, like counties palatine, but are parcel of the county of *Kent*; so that if a writ be brought against one for land within the *Cinque Ports*, and he appears and pleads to it, and judgment is given against him in the *Common Pleas*, this judgment shall bind him; for the land is not exempted out of the county, and the tenant may waive the benefit of his privilege. *Wood's Inst.* 519.

The *Cinque Ports* cannot award process of outlawry. *Cro. Eliz.* 910. And a *quo minus* lies to the *Cinque Ports*. *Ibid.* 911. If a man is imprisoned at *Dover* by the Lord Warden, a *habeas corpus* may be issued; for the privilege that the king's writ lies not there is intended between *party* and *party*, and there can be no such privilege against the *king*; and a *habeas corpus* is a *prerogative writ*, by which the king demands an account of the *liberty* of the *subject*. *Cro. Jac.* 543. 1 *Nels. Abr.* 447.

Certiorari lies to the *Cinque Ports*, to remove indictments; and the jurisdiction that *brev. dom. regis non currit* is only in *civil causes* between party and party. 2 *Hawk. P. C. c.* 27. § 24.

CIRCA, A watch; from which *circuitor*.

CIRCADA, A tribute anciently paid to the bishop or archdeacon for visiting the churches. *Du Fresne.*

CIRCGEMOT, Vide *Chirchgemot.*

CIRCUITY OF ACTION, *circuitus actionis.*] A longer course of proceeding to recover a thing sued for than is needful; as if a person grant a rent-charge of 10*l.* *per annum* out of his manor of *B.* and after the grantee disseiseth the grantor of the same manor, who brings an assise and recovers the land, and 20*l.* damages, which being paid, the grantee brings his action for 10*l.* of his rent due during the time of the disseisin, which he must have had if no disseisin had been: this is called *circuity of action* because as the grantor was to receive 20*l.* damages, and pay 10*l.* rent, he might have received but 10*l.* only for damages, and the grantee might have kept the other 10*l.* in his hands by way of retainer for his rent, and so saved his action, which appears to be needless. *Terms de Ley.* See tit. *Action.*

CIRCUITS, Certain divisions of the kingdom appointed for the Judges to go twice a year, for administering of justice in the several counties. These circuits are made in the respective vacations, after *Hilary* and *Trinity* terms. See tit. *Assise*, *Nisi Prius.*

The several counties of *England* are divided into six circuits, viz. 1. MIDLAND; containing the counties of *Northampton*, *Rutland*, *Lincoln*, *Nottingham*, *Derby*, *Leicester*, *Warwick.* 2. NORFOLK; *Bucks*, *Bedford*, *Huntingdon*, *Cambridge*, *Norfolk*, *Suffolk.* 3. HOME; *Hertford*, *Essex*, *Kent*, *Sussex*, *Surrey.* 4. OXFORD; *Berks*, *Oxford*, *Hereford*, *Salop*, *Gloucester*, *Monmouth*, *Stafford*, *Worcester.* 5. WESTERN; *Southampton*, *Wilts*, *Dorset*, *Cornwall*, *Devon*, *Somerset.* 6. NORTHERN; *York*, *Durham*, *Northumberland*, *Cumberland*, *Westmorland*, *Lancashire.*

CIRCUMSPECTE AGATIS, Is the title of a statute made *anno* 13 *Edw.* I. *stat.* 4. relating to *prohibitions*, prescribing certain cases to the judges, wherein the king's prohibition lies not. 2 *Inst.* 187. See tit. *Prohibition.*

CIRCUMSTANTIAL EVIDENCE. See tit. *Evidence.*

CIRCUMSTANTIBUS, By-standers; a word of art signifying the supplying or making up the number of *jurors*, if any impanelled appear not, or appearing are challenged by either party, by adding to them so many of those that are present, or *standing-by* (*tales de circumstantibus*) that are qualified as will serve the turn. See stat. 35 *Hen.* VIII. *cap.* 6. and stat. 5 *Eliz. c.* 25. for *Wales.* See also tit. *Jury.*

Circumvention, is any act of fraud whereby a person is reduced to a deed by decreet. *Scotch Dict.*

CITATION, *citatio.*] A summons to appear, applied particularly to process in the spiritual court. The ecclesiastical courts proceed according to the course of the civil and canon laws, by *citation*, *libel*, *&c.* A person is not generally to be cited to appear out of the diocese, or peculiar jurisdiction where he lives; unless it be by the archbishop, in default of the ordinary; where the ordinary is party to the suit, in cases of appeal, &c. and by law a defendant may be sued where he lives, though it is for subtracting tithes in another diocese, &c. 1 *Nels.* 449. By the stat. 23 *Hen.* VIII. *cap.* 9. every archbishop may cite any person dwelling in any bishop's diocese within his province for heresy, &c. if the bishop or other ordinary consents; or if the bishop or ordinary, or judge do not do his duty in punishing the offence. Where persons are cited out of their diocese, and live out of the jurisdiction

of the bishop, a *prohibition* or *consultation* may be granted; but where persons live in the diocese, if when they are cited they do not appear, they are to be excommunicated, &c. The above statute was made to maintain the jurisdiction of inferior dioceses; and if any person is cited out of the diocese, &c. where the civil or canon law doth not allow it, the party grieved shall have double damages. If one defame another within the peculiar of the archbishop, he may be punished there; although he dwell in any remote place out of the archbishop's peculiar. *Godb.* 190. See tit. *Courts Ecclesiastical.*

CITY, *civitas.*] According to *Cowel* is a town corporate, which hath a bishop and cathedral church, which is called *civitas*, *oppidum*, and *urbs; civitas*, in regard it is governed by justice and order of magistracy; *oppidum*, for that it contains a great number of inhabitants; and *urbs*, because it is in due form begirt about with walls. But *Crompton*, in his *Jurisdictions*, where he reckons up the cities, leaveth out *Ely*, although it hath a bishop and cathedral church; and puts in *Westminster*, though it hath not at present a bishop; and Sir *Edward Coke* makes *Cambridge* a city; yet there is no mention that it was ever an episcopal see. Indeed it appears by the stat. 35 *Hen.* VIII. *cap.* 10. that there was a bishop of *Westminster*; see tit. *Bishops*; since which, in stat. 17 *Eliz. cap.* 5. it is termed a *city* or borough; and notwithstanding what *Coke* observes of *Cambridge*, in the stat. 11 *Hen.* VII. *c.* 4. *Cambridge* is called only a town.

Kingdoms have been said to contain as many cities as they have sees of archbishops and bishops; but according to *Blount*, *City* is a word which hath obtained since the conquest; for in the time of the *Saxons* there were no *cities*, but all great towns were called *burghs*, and even *London* was then styled *London-Bourg*; as the capital of *Scotland* is now called *Edinburgh*. And long after the conquest the word *city* is used promiscuously with the word *burgh*, as in the charter of *Leicester* it is called both *civitas* and *burgus*; which shows that those writers were mistaken, that tell us every *city* was or is a bishop's see. And though the word *city* signifies with us such a town corporate as hath usually a bishop and cathedral church; yet it is not always so.

A city, says *Blackstone*, is a town incorporated, which is or hath been the see of a bishop; and though the bishopric be dissolved, as at *Westminster*, yet still it remaineth a city. 1 *Comm.* 114.

It appears, however, that *Westminster* retained the name of city, not because it had been a bishop's see, but because it was expressly created such, in the letters patent by king *Hen.* VIII. erecting it into a bishopric. See *Burnet's Reform. Appx.* There was a similar clause in favour of the other five new created cities, *Chester*, *Peterborough*, *Oxford*, *Gloucester* and *Bristol;* the charter for *Chester* is in *Gib. Cod.* 1449.; and that for *Oxford* in 14 *Rym. Fœd.* 754. Lord *Coke* seems anxious to rank *Cambridge* among the cities. Mr *Wooddeson*, late Vinerian professor, (see his *Lectures*, i. 302.) has produced a decisive authority that cities and bishops' sees had not originally any necessary connection with each other. It is that of *Ingulphus*, who relates, that at the great council assembled in 1072, to settle the claim of precedence between the archbishops, it was decreed that bishops' sees should be transferred from towns to cities.

The accidental coincidence of the same number of bishops and cities would naturally produce the supposition that they were connected together as a necessary cause and effect; it is certainly a strong confirmation of the above authority, that the same distinction is not paid to bishops' sees in *Ireland.*

Mr. *Hargrave* in his notes to 1 *Inst.* 110. proves, that although *Westminster* is a city and has sent citizens to parliament from the time of *Edw.* VI. it *never was incorporated;* and this is a striking instance in contradiction of the learned opinions there referred to, viz. that the king could not grant within time of memory to any place the right of sending members to parliament without first creating that place a corporation. 1 *Comm. edit.* 1793, in *n.* See also tit. *Parliament*, *Bishops*, *Borough*, *&c.*

CITIZENS of *London.* See tit. *London.*

CIVIL LAW, Is defined to be that *law* which every particular nation, commonwealth or city, has established peculiarly for itself; *jus civile est, quod quisque populus sibi constituit. Just. Inst.* Now more properly distinguished by the name of *municipal law;* the term Civil Law being chiefly applied to that which the old *Romans* used, compiled from the laws of nature and of nations. The *Roman* law was founded first, upon the regal constitutions of their ancient kings; next upon the twelve tables of the *Decemviri;* then upon the laws or statutes enacted by the Senate or People; the edicts of the *Prætor* and the *Responsa Prudentum*, or opinions of learned lawyers; and, lastly, upon the imperial decrees or constitutions of successive Emperors. These had by degrees grown to an enormous bulk; but the inconvenience arising therefrom was in part remedied, by the collections of three private lawyers, *Gregorius*, *Hermogenes* and *Papinius;* and afterwards by the Emperor *Theodosius* the younger, by whose orders a *Code* was compiled *A. D.* 438. being a methodical collection of all the imperial constitutions then in force; which *Theodosian Code* was the only book of civil law received as authentic in the western part of *Europe*, till many centuries after. For *Justinian* commanded only in the Eastern remains of the empire; and it was under his auspices that the present body of Civil Laws was compiled and finished by *Trebonian*, about the year 533.

This consists of, 1. The *Institutes;* which contain the elements or first principles of the *Roman* Law in 4 books. 2. The *Digests* or *Pandects* in 50 books; containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A *New code* or collection of imperial constitutions in 12 books; the lapse of a century having rendered the former code of *Theodosius* imperfect. 4. The *Novels* or new constitutions posterior in time to the other books, and amounting to a supplement to the code, containing new decrees of successive emperors, as new questions happened to arise. These form the body of the *Roman* law or *Corpus Juris Civilis*, as published about the time of *Justinian;* which however soon fell into neglect and oblivion, till about the year 1130, when a copy of the *Digests* was found at *Amalfi* in *Italy;* which accident, concurring with the policy of the *Roman* ecclesiastics, suddenly gave a new vogue and authority to the Civil Law, and introduced it into several nations. 1 *Comm.* 80, 81.

The *Digest* or *Pandects*, was collected from the works and commentaries of the ancient lawyers, some whereof lived before the coming of our Saviour: The whole Digest is divided into seven parts; the first part contains the elements of the *law*, as what is justice, right, &c. The second part treats of judges and judgments: The third part of personal action, &c. The fourth part of contracts, pawns and pledges: The fifth part of wills, testaments, &c. The sixth part of the possession of goods: The seventh part of obligations, crimes, punishments, &c. The *Institutes* contain a system of the whole body of

law, and are an epitome of the Digest divided into four books; but sometimes they correct the Digest; they are called Institutes, because they are for instruction, and show an easy way to the obtaining a knowledge of the *Civil Law*; but they are not so distinct and comprehensive as they might be, nor so useful at this time as they were at first. The *Novels* or *Authentics*, were published at several times without any method; they are termed *Novels*, as they are *new laws*, and *Authentics*, being authentically translated from the *Greek* into the *Latin* tongue; and the whole volume is divided into nine Collations, Constitutions or Sections; and they again into 168 Novels, which also are distributed into certain chapters. The first collation relates to heirs, executors, &c. the second, the state of the church: the third is against bawds: the fourth concerns marriages, &c. the fifth forbids the alienation of the possessions of the church: the sixth shows the legitimacy of children, &c. the seventh determines who shall be witnesses: the eighth ordains wills to be good, though imperfect, &c. and the ninth contains matter of succession in goods, &c. *Dict.*

To those tomes of the *Civil Law* we may add the *Book of Feuds*, which contains the customs and services that the subject or vassal oweth to his prince or lord, for such lands or fees as he holdeth of him. *The Constitutions of the Emperor*, were either by a *rescript*, which was the letter of the emperor in answer to particular persons who inquired the law of him; or by *edict*, which the emperor established of his own accord, that it might be generally observed by every subject; or by *decree*, which the emperor pronounced between plaintiff and defendant, upon hearing a particular cause. The power of issuing forth rescripts, edicts and decrees, was given to the prince by the *lex regia*, wherein the people of *Rome* wholly submitted themselves to the government of one person, viz. *Julius Cæsar*, after the defeat of *Pompey*, &c. And by this submission the prince could not only *make laws*, but was esteemed above all coercive power of them. *Dictionary.*

How far the Civil Law is adopted and of force in this kingdom, see tit. *Canon Law.*

Before the reformation, decrees were as frequent in the *Canon Law* as in the *Civil Law*. Many were graduates *in utroque jure* or *utriusque juris*. J. U. D. or *juris utriusque doctor*, is still common in foreign universities. But *Henry* VIII. in the 27th year of his reign, when he had renounced the authority of the Pope, issued a mandate to the university of *Cambridge*, to prohibit *lectures* and the granting *degrees* in canon law in that university. *Stat. Acad. p.* 137. It is probable that at the same time *Oxford* received a similar prohibition, and that degrees in canon law have ever since been discontinued in *England*. 1 *Comm.* 392. in *n.*

CIVIL LIST. See tit. *King.*

TO CLACK WOOL, Is to cut off the sheep's mark, which makes it weigh lighter; as to *force wool*, signifies to clip off the upper and hairy part thereof; and to *bard* it, is to cut the head and neck from the rest of the fleece. *Stat.* 8 *Hen.* VI. *cap.* 22.

CLADES, *Clida*, *cleta*, *cleia*, from the Brit. *clie*, and the Irish *clia*.] A wattle or hurdle; and a hurdle for penning or folding of sheep is still in some counties of *England* called a *cley*. *Paroch. Antiq. p.* 575.

CLARENDON, *Constitutions* of: certain *constitutions*, made in the reign of *Hen.* II. *A. D.* 1164, in a great council held at *Clarendon*, whereby the king checked the power of the *Pope*, and his clergy, and

greatly narrowed the total exemption they claimed from the secular jurisdiction. 4 *Comm.* 422.

CLARETUM, A liquor made of wine and honey, clarified or made clear by decoction, &c. which the *Germans*, *French*, and *English*, called *hipocras*: and it was from this, the red wines of *France* were called *claret*. *Girald. Camb. apud Wharton. Ang. Sax. par.* 2. *p.* 480.

CLAIM, *clameum.*] A challenge of interest in any thing that is in the possession of another, or at least out of a man's own possession; as *claim* by charter, by descent, &c.

In *Plow. Com.* 359. (*a.*) *Dyer*, C. J. is said to have defined *claim* to be, *a challenge of the ownership or property* that one hath not in possession, but which is detained from him by wrong.

CLAIM is either verbal, where one doth by words *claim* and challenge the thing that is so out of his possession; or it is by an action brought, &c. and sometimes it relates to lands, and sometimes to goods and chattels. *Lit. Sec.* 420. Where any thing is wrongfully detained from a person, this *claim* is to be made; and the party making it, may thereby avoid descents of lands, disseisins, &c. and preserve his title, which otherwise would be in danger of being lost. *Co. Lit.* 250. A man who hath present right or title to enter, must make a *claim*; and in case of reversions, &c. one may make a *claim* where he hath right, but cannot enter on the lands: when a person dares not make an entry on land, for fear of being beaten or other injury, he may approach as near as he can to the land, and *claim* the same; and that shall be sufficient to vest the seisin in him. 1 *Inst.* 250. See tit. *Entry*.

If nothing doth hinder a man, having a right to land, from entering or making his *claim*, there he must do so, before he shall be said to be in possession of it, or can grant it over to another; but where the party who hath right, is in possession already, and where an entry or *claim* cannot be made, it is otherwise. 1 *Rep.* 157. A *claim* will devest an estate out of another, when the party must enter into some part of the land; but if it be only to bring him into possession, he may do it in view. By *claim* of lands, in most cases, is intended a *claim* with an entry into part of the lands, or by a near approach to it. *Co. Lit.* 252. 254. *Poph.* 67. One in reversion after an estate for years, or after a statute-merchant, staple, or *elegit*, may enter and make a *claim* to prevent a descent, or avoid a collateral warranty. And *claim* of a remainder by force of a condition must be upon the land, or it will not be sufficient. *Co. Lit.* 202.

If a man seised of lands in right of his wife, make a feoffment in fee on condition, and the husband dieth, and then the condition is broken, and the heir enters; in this case the wife need not *claim* to get possession of her estate, for the law doth vest it in her without any *claim*. *Co. Lit.* 202. 8 *Rep.* 43.

The *claim* of the particular tenant, shall be good for him in reversion or remainder; and of him in reversion, &c. for particular tenant; so *claim* of a copyholder, will be good for the lord, &c. But if tenant for years, in a court of record *claim* the fee of his land, it is a forfeiture of his estate. *Plowd.* 359. *Co. Lit.* 251. A *claim* may be made by the party himself; and sometimes by his servants or deputy; and a guardian in socage, &c. may make a claim, or enter, in the name of the infant that hath right, without any commandment. *Co. Lit.* 245.

Claim or entry should be made as soon as may be; and by the Com-

mon Law it is to be within a year and a day after the disseisin, &c. and if the party who hath unjustly gained the estate, do afterwards occupy the land, in some cases an assise, trespass, or forcible entry may be had against him. *Litt.* § 426. 430.

If a fine is levied of lands, strangers to it are to enter and make a *claim* within five years, or be barred; infants after their age, *feme coverts* after the death of their husbands, &c. have the like time, by stat. 1 *Rich.* III. *cap.* 7. See tit. *Fines.*

Continual Claim, is where a man hath right and title to enter into any lands or tenements, whereof another is seised in fee, or in fee tail; if he who hath title to enter makes *continual claim* to the lands or tenements before the dying seised of him, who holdeth the tenements then, though such tenant die thereof seised, and the lands or tenements descend to his heir, yet may he who hath made such continual claim, or his heir, enter into the lands or tenements so descended by reason of the continual claim made, notwithstanding the descent. So (*si come*) in case a man be disseised, and the disseisee makes continual claim to the tenements in the life of the disseisor, although the disseisor dieth seised in fee, and the land descend to his heir, yet may the disseisee enter upon the possession of the heir, notwithstanding the descent. *Litt.* § 414.

But such claim must always be made within the year and the day before the death of the person holding the land; for if such tenant do not die seised within a year and a day, after such claim made, and yet he that hath right dares not enter, he must make another claim, within the year and the day after the first claim, and so *toties quoties*, that he may be sure his claim shall always have been made within a year and a day before the death of the tenant; and hence it seems it is called *Continual Claim.* See further tit. *Entry;* as also tit. *Descent.*

By stat. 32 *Hen.* VIII. *c.* 43. five years must clapse without entry or continual claim, in order that a descent on the disseisor's death should take away the entry of the disseisee, or his heir; but after the five years, the disseisee must make a continual claim, as before the statute. And by stat. 4 *Ann. c.* 16. § 16. no claim (or entry) shall be of effect to avoid a fine, unless an action shall be commenced thereon within a year, and prosecuted with effect. See tit. *Fine, Entry, Disseisin, &c.* And for further particulars, see 1 *Inst.* 150. and *n.*

Claim of Liberty, A suit or petition to the king in the court of *Exchequer*, to have liberties and franchises confirmed there by the king's Attorney-General. *Co. Ent.* 93.

Clamea admittenda in Itinere per Attornatum. An ancient writ by which the king commanded the justices in eyre to admit a person's claim by attorney who was employed in the king's service and could not come in his own person. *Reg. Orig.* 19.

CLAP-BOARD, is a board cut in order make casks or vessels; which shall contain three feet and two inches at least in length; and for every six ton of beer exported, the same cask, or as good, or 200 of *clap-boards* is to be imported. See tit. *Navigation Acts.*

CLARIGARIUS ARMORUM, A herald at arms. *Blount.*

CLARIO, A trumpet. *Knighton, anno* 1346.

CLASSIARIUS, A seaman, or soldier serving at sea. *Chart. Carol.* 5. *Imperator. Thomæ Comit. Surr. dat. in urbe Londiniensi,* 8 *Junii,* 1522.

CLAUD, *Brit.*] A ditch; *Claudere,* to enclose, or turn open fields into enclosures. *Paroch. Antiq.* 236.

CLAVES INSULÆ, a term used in the *Isle of Man*, where all ambiguous and weighty cases are referred to twelve persons, whom they call *claves insulæ*, i. e. the keys of the island.

CLAVIA, In the inquisition of Serjeanties in the 12th and 13th years of king *John*, within the counties of *Essex* and *Hertford*; Boydin Aylet *tenet quatuor lib. terræ in* Bradwell, *per manum* Willielmi *de dono per serjeantiam* clavie, viz. By the serjeanty of the club or mace. *Brady's Append. Introduct. to Eng. Hist.* 22.

CLAVIGERATUS, A treasurer of a church. *Mon. Angl. tom.* 1. *p.* 184.

Clause irritant, is any provision which makes a penalty be incurred, and the obligation to be null for the future; or upon any other account, makes the right to vacate or resolve. *Scotch Dict.*

Clause Resolutive, is a provision, whereby the contract to which it is affixed, is for not performance declared to have been null from the beginning. *Scotch Dict.*

CLAUSE ROLLS, *rotuli clausi.*] Contain all such matters of record as were committed to close writs; these rolls are preserved in the *Tower*.

CLAUSTURA, Brushwood for hedges and fences. *Paroch. Antiq.* 247.

CLAUSUM FREGIT. See tit. *Capias*, *Common Pleas.*

CLAUSUM PASCHÆ. Stat. *Westm.* 1. *In crastino* clausi paschæ, or *In crastino octabis Paschæ*, which is all one, that is the morrow of the *utas* (or eight days) of *Easter*. 2 *Inst.* 157. Clausum Paschæ, i. e. *Dominica in albis; sic dictum, quod* Pascha claudat. *Blount.* The end of *Easter*; the *Sunday* after *Easter-Day*.

CLAUSURA HEYÆ, The enclosure of a hedge. *Rot. Plac. in itinere apud Cestriam, anno* 14 *Hen.* VII.

CLAWA, A close, or small measure of land. *Mon. Angl. tom.* 2. *p.* 250.

CLEPTOR, A rogue or thief. *Hoveden, anno* 946.

CLERGY.

Clerus.] Signifies the assembly or body of clerks or ecclesiastics, being taken for the whole number of those who are *de clero Domini*, of our Lord's lot or share, as the tribe of *Levi* was in *Judea*; and are separate from the noise and bustle of the world, that they may have leisure to spend their time in the duties of the christian religion.

The *Clergy* in general, were, heretofore divided into *regular* and *secular*; those being *regular* which lived under certain rules, being of some religious order, and were called men of religion, or *The Religious*; such as all Abbots, Priors, Monks, &c. The *secular* were those that lived not under any certain rules of the religious orders; as Bishops, Deans, Parsons, &c. Now, the word *Clergy* comprehends all persons in *holy orders*, and in ecclesiastical offices, viz. *Archbishops*, *Bishops*, *Deans and Chapters*, *Archdeacons*, *Rural Deans*, *Parsons*, (who are either *Rectors*, or *Vicars*,) and *Curates*, to which may be added *Parish Clerks*, who formerly frequently were, and yet sometimes are, in orders. As to the law more peculiarly respecting each of these, see the several titles, particularly tit. *Parson.*

This venerable body of men have several privileges allowed them by our municipal laws, and had formerly much greater, which were abridged at the time of the reformation, on account of the ill use

which the popish clergy had endeavoured to make of them; for the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. The personal exemptions however for the most part continue; a clergyman cannot be compelled to serve on a *jury*, nor to appear at a *Court Leet*, or view of frank pledge, which almost every other person is obliged to do. 2 *Inst.* 4. (See tit. *Court Leet.*) But if a layman is summoned on a jury, and before the trial takes orders, he shall, notwithstanding, appear and be sworn. 4 *Leon.* 190. A clergyman cannot be chosen to any temporal office, as bailiff, reeve, constable, or the like, in regard of his own continual attendance on the sacred function. *Finch. L.* 88. During his attendance on divine service he is privileged from *arrests* in civil suits; for a reasonable time, *eundo, redeundo et morando*, to perform service. Stats. 50 *Edw.* III. *c.* 5. 1 *Rich.* II. *c.* 16. 12 *Co.* 100. In cases of felony he shall have benefit of his clergy, without being branded; and may likewise have it more than once. See *post*, *Clergy, benefit of.* Clergymen also have certain disabilities; they are not capable of sitting as members of the House of Commons. See tit. *Parliament.* By stat. 21. *Hen.* VIII. *c.* 13. the Clergy are not (in general) allowed to take any lands or tenements to farm, on pain of 10*l. per* month, and total avoidance of the lease; unless where they had not sufficient glebe, and the land is taken for the necessary expenses of their household. Stat. § 8. Nor, on like penalty to keep any tan-house, or brew-house. Nor may they engage in any trade, or sell merchandise, on forfeiture of treble value. But see tit. *Bankrupt.*

See now the stat. 43 *Geo.* III. *c.* 84. "for amending the laws relating to spiritual persons holding farms, and for enforcing their residence on benefices." By this act, spiritual persons are allowed in certain cases to take farms, and the penalties of non-residence are allowed. By 44 *Geo.* III. *c.* 2. compensation was made to curates, who suffered by the execution of this act. As to increasing of small livings, see 2 and 3 *Ann. c.* 11. 1 *Geo.* I. *c.* 10. as explained by 43 *Geo.* III. *c.* 107. 45 *Geo.* III. *c.* 84. as to *England*; and as to *Ireland*, *Irish* act, 29 *Geo.* II. *c.* 48. enforced by 46 *Geo.* III. *c.* 60. As to erecting and repairing glebe houses in *Ireland*, see 43 *Geo.* III. *c.* 106. See further, tit. *Parson.*

By the statute called *Articuli Cleri*, 9 *Edw.* II. stat. 1. *c.* 3. if any person lay violent hands on a clerk, the amends for the peace broken (1) shall be before the king, (that is by indictment,) and the assailant may (2) *also* be sued before the bishop, that excommunication or bodily penance may be imposed; which if the offender will redeem by money, it may (3) be sued for by the bishop. See 4 *Comm.* 217.

Although the *Clergy* claimed an exemption from all secular jurisdiction, yet *Mat. Paris* tells us, that soon after *William* the *First* had conquered *Harold*, he subjected the bishopries and abbeys who held *per baroniam*, that they should be no longer free from military service; and for that purpose he in an arbitrary manner registered how many soldiers every bishopric and abbey should provide, and send to him and his successors in time of war; and having placed these registers of ecclesiastical servitude in his treasury, those who were aggrieved, departed out of the realm; but the *clergy* were not till then exempted from all secular service; because, by the laws of king *Edgar*, they were bound to obey the secular magistrate in three cases, viz. upon any *expedition to the wars*, and to contribute to the building and repairing of *bridges*, and of *castles* for the defence of the kingdom. It is probable that by expedition to the wars, it was not at that time

intended they should personally serve, but contribute towards the charge: one they must do; as appears by the petition to the king, *anno* 1267, *viz. ut omnes* clerici *tenentes per baroniam vel feudum laicum, personaliter armati procederent contra regis adversarios, vel tantum servitium in expeditione regis invenirent, quantum pertineret ad tantam terram vel tenementum.* But their answer was, that they ought not to fight with the military, but with the spiritual sword, that is, with prayers and tears; and they were to maintain peace and not war, and that their baronies were founded on charity; for which reason they ought not to perform any military service. *Blount.*

That the *Clergy* had greater privileges and exemptions at common law than the *laity* is certain; for they are confirmed to them by *Magna Charta*, and other ancient statutes; but these privileges are in a great measure lost, the *clergy* being included under general words in later statutes; so that *clergymen* are liable to all public charges imposed by act of parliament, where they are not particularly excepted as above stated. Their bodies are not to be taken upon statutes-merchant, or staple, &c. for the writ to take the body of the conusor is *si laicus sit*; and if the sheriff or any other officer arrest a *clergyman* upon any such process, it is said an action of false imprisonment lies against him that does it, or the *clergyman* arrested may have a *supersedeas* out of *Chancery*. 2 *Inst.* 4.

In action of trespass, account, &c. against a person in holy orders, wherein process of *capias* lies, if the sheriff return that the defendant is *clericus beneficiatus nullum habens laicum feodum ubi summoneri potest*; in this case the plaintiff cannot have a *capias* to arrest his body; but the writ ought to issue to the bishop, to compel him to appear, &c. But on *execution* had against such *clergyman*, a sequestration shall be had of the profits of his benefice. 2 *Inst.* 4. *Degge*, 157.

The foregoing are all the privileges remaining on civil accounts; though by the common law, they were to be free from the payment of tolls, in all fairs, and markets, as well for all the goods gotten upon their church livings, as for all goods and merchandises by them bought to be spent upon their rectories; and they had several other exemptions, &c.

Clergy, Benefit of.

This being, as *Blackstone* observes, a title of no small curiosity as well as use; the learned commentator's chapter on that subject (4 *Comm.* 365.) is here abridged; with such additions thereto as seemed requisite; in which inquiry is made,

I. *Into its Original; and various Changes.*
II. *To whom it is now to be allowed.*
III. *In what Cases.*
IV. *The Consequences of allowing it.*

I. Clergy, the *privilegium clericale*, or, in common speech, *The Benefit of Clergy*, had its original from the pious regard paid by christian princes to the church in its infant state; and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church were principally of two kinds; 1. Exemption of *places* consecrated to religious duties, from criminal

arrests, which was the foundation of sanctuaries; 2. Exemption of the *persons* of clergymen from criminal process before the secular judge, in a few particular cases; which was the true original and meaning of the *privilegium clericale*.

In *England*, however, a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavoured by the clergy: *Keilw.* 180. See stat. *Westm.* 1. 3 *Edw.* I. *c.* 2.; and, therefore, though the ancient *privilegium clericale*, was in *some* capital cases, yet it was not *universally* allowed. And in those particular cases, the use was for the bishop or ordinary to demand his clerks to be remitted out of the king's courts as soon as they were indicted; concerning the allowance of which demand there was for many years a great uncertainty; (2 *Hal. P. C.* 377.) till at length it was finally settled, in the reign of *Henry* VI. that the prisoner should first be arraigned; and might either *then* claim his benefit of clergy, by way of declinatory plea; or, after *conviction*, by way of arresting judgment. This latter way is most usually practised, as it is more to the satisfaction of the court to have the crime previously ascertained by confession, or the verdict of a jury; and also it is more advantageous to the prisoner himself, who may possibly be acquitted, and so need not the benefit of his clergy at all.

Originally the law was held, that no man should be admitted to the privilege of clergy, but such as had the *habitum et tonsuram clericalem*. 2 *Hal. P. C.* 372. *M. Paris*, *A. D.* 1259. But in process of time, a much wider, and more comprehensive criterion was established: every one that could read (a mark of great learning in those days of ignorance and superstition) being accounted a clerk, or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing and other concurrent causes, began to be more generally disseminated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*; and therefore, by stat. 4 *Hen.* VII. *c.* 13. a distinction was once more drawn between mere lay scholars, and clerks that were really in orders. And, though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directs that no person, once admitted to the benefit of clergy, shall be admitted thereto a second time, unless he produces his orders; and in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb. This distinction between learned laymen, and real clerks in orders, was abolished for a time by the stats. 28 *Hen.* VIII. *c.* 1. and 32 *Hen.* VIII. *c.* 3. but it is held (*Hob.* 294. 2 *Hal. P. C.* 375.) to have been virtually restored by stat. 1 *Edw.* VI. *c.* 12. which statute also enacts, that lords of parliament, and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence, (although they cannot read, and without being burnt in the hand,) for all the offences then clergyable to commoners; and also for the crimes of house-breaking, highway robbery, horse-stealing, and robbing of churches.

After this burning, the laity, and before it, the real clergy, were discharged from the sentence of the law in the king's court, and de-

livered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary proceeded to make a purgation of the offender by a new canonical trial, by the oath of the offender and that of twelve compurgators, although he had been previously convicted by his country, or perhaps by his own confession. *Staunf. P. C.* 138. *b.* See also 3 *P. Wms* 447. *Hob.* 289. 291.

But this purgation opening a door to a scandalous prostitution of oaths, and other abuses, it was enacted by *stat.* 18 *Eliz. c.* 7. that for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary as formerly; but upon such allowance, and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso, that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued for above a century, unaltered; except only that the stat. 21 *Jac.* I. *c.* 6. allowed, that *women* convicted of *simple larcenies* under the value of 10*s.* should (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, whipped, put in the stocks, or imprisoned for any time not exceeding a year. And a similar indulgence by stats. 3 & 4 *W. & M. c.* 9. 4 & 5 *W. & M. c.* 24. was extended to women guilty of *any clergyable felony* whatsoever; who were allowed to claim the benefit of the *statute* once, in like manner as men might claim the benefit of clergy, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. The punishment of burning in the hand was changed by stat. 10 & 11 *Wm.* III. *c.* 23. into burning in the left cheek, near the nose; but this provision was repealed by stat. 5 *Ann. c.* 6. and till that period, all women, all peers of parliament, and peeresses, and all male commoners who could read, were discharged in all clergyable felonies; the males absolutely, if clerks in orders; and other commoners, both male and female upon branding; and peers and peeresses without branding, for the first offence; yet all liable, (except peers and peeresses,) at the discretion of the judge, to imprisonment not exceeding a year. And those men who could not read, if under the degree of peerage, were hanged.

But by the said stat. 5 *Ann. c.* 6. it was enacted, that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read. And it was further enacted by the same statute, that when any person is convicted of *any theft or larceny*, and burnt in the hand for the same, according to the ancient law, he shall also, at the discretion of the judge, be committed to the house of correction, or public work-house, to be there kept to hard labour for any time not less than six months, and not exceeding two years; with a power of inflicting a double confinement in case of the party's escape from the first. And by stats. 4 *Geo.* I. *c.* 11. 6 *Geo.* I. *c.* 23. when any persons shall be convicted any *larceny* either *grand* or *petit*, or any felonious stealing or taking of money or goods, either from the person, or the house of another, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to burning in the hand, or whipping, the court may instead thereof direct such offenders to be transported; and by the stat. 19 *Geo.* III. *c.* 74. offenders liable to transportation, may in lieu thereof be employed, if males, (except in the case of petit larceny,) in hard labour, for the benefit of some public navigation, and in all cases might be confined to hard labour in certain penitentiary houses, then in contemplation to be erected; but this latter plan of the penitentiary houses was never car-

ried into execution. See further tit. *Felons*, *Transportation*. 2 *Hawk. P. C. c.* 58. § 10.

By the same stat. 19 *Geo.* III. *c.* 74. instead of burning in the hand, the court in all clergyable felonies may impose a pecuniary fine, or (except in the case of manslaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped; and in the latter case, certain provisions are added to prevent collusion or abuse. The offender so fined or whipped, to be equally liable to subsequent detainer or imprisonment. This part of the act is made perpetual, by 39 *Geo.* III. *c.* 45.

II. 1. ALL *Clerks in orders*, are without any branding, and of course without any transportation, fine, or whipping, (for those are only substituted in lieu of the other,) to be admitted to this privilege, or benefit of clergy, and immediately discharged; and this as often as they offend. 2 *Hal. P. C.* 375.

2. All *Lords of Parliament*, and peers of the realm, having place and voice in parliament, by stat. 1 *Edw.* VI. *c.* 12. (which is likewise held to extend to peeresses; *Duchess of Kingston's* case, 11 *State Tr.* 198.) shall be discharged in all clergyable, and other felonies, provided for by the act, without any burning in the hand, or imprison ment, or other punishment substituted in its stead, in the same manner as real clerks convict; but this only for the first offence.

3. All the *Commons* of the realm, not in orders, whether male or female, shall *for the first offence* be discharged of the capital punishment of felonies, within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or suffering the discretionary imprisonment before stated; or in case of larceny, upon being transported for seven years, if the court shall think proper.

It is a privilege peculiar only to the *Clergy*, that sentence of death can never be passed upon them for any number of *manslaughters*, *bigamies*, *simple larcenies*, or other *clergyable* offences; but a layman, even a peer, may be ousted of clergy, and will be subject to the judgment of death, upon a second conviction of a clergyable offence. Thus if a layman has once been convicted of manslaughter, upon production of the conviction, he may afterwards suffer death for bigamy, or *any other* clergyable felony; which would not therefore be a capital crime to another person not so circumstanced. See *post*, as to the *Counter-plea*.

It has been said that *Jews*, and other infidels and heretics, were not capable of the benefit of clergy, till after the stat. 5 *Ann. c.* 6. as being under a legal incapacity for orders. 2 *Hal. P. C.* 373. 2 *Hawk. P. C. c.* 33. § 5. *Fost.* 306. But it does not seem that this was ever ruled for law, since the reintroduction of the *Jews* into *England*, in the time of the usurpation by *Cromwell*. For if that were the case, the *Jews* are still in the same predicament; which every day's experience contradicts; the stat. of *Anne* having made no alteration in this respect, it only dispensing with the necessity of reading. 4 *Comm.* 373.

But a person having once had benefit of clergy, shall not be ousted of his clergy, by the bare mark in his hand, or by a parol averment, without the record testifying it, or a transcript thereof, according to the following statutes. 2 *H. H.* 373.

By stat. 34 & 35 *Hen.* VIII. *cap.* 14. the clerk of the crown, or of the peace, or of assise, shall certify a transcript briefly of the tenor of the indictment, outlawry or conviction, and attainder, into the King's

Bench in forty days: and the clerk of the crown, when the judges of assise, or justices of the peace write to him for the names of such persons, shall certify the same, with the causes of the conviction or attainder.

Another method is given by the stat. 3 *W. & M. c.* 9. *sect.* 7. which enacts, that the clerk of the crown, clerk of the peace, or clerk of assise, where a person admitted to clergy under that act shall be convicted, shall at the request of the prosecutor, or any other on the king's behalf, certify a transcript briefly and in few words, containing the effect and tenor of the indictment and conviction, of his having the benefit of *clergy*, and the addition of the party, and the certainty of the felony and conviction, to the judges where such person shall be indicted for any subsequent offence.

Also it seems, that if the party deny that he is the same person, issue must be joined upon it, and it must be found upon trial that he is the same person, before he can be ousted of *clergy*. 2 *H. H.* 373.

Against the defendant's prayer of clergy, the prosecutor may file a COUNTER-PLEA; alleging some fact, which in law deprives the defendant of the privilege he claims.

It is a good *counter-plea* to the prayer of clergy, that the offender is not entitled to the benefit of the statute, because he was before convicted of an offence, and thereupon prayed the benefit of the statute, which was allowed to him; alleging the truth of the fact, and praying the judgment of the court, that he may die according to law; which fact is to be tried by the record in pursuance of the stat. 34 & 35 *Hen.* VIII. *c.* 14. above stated. *Staunf.* 135. Divers other *counter-pleas* also, by which an offender may be deprived of clergy, may be framed from a consideration of *the persons* to whom it is allowed or denied by the common law; and of the *circumstances* under which that allowance or denial of it has been placed by divers statutes. *Ib.* 138.

The use of this *counter-plea*, however, had long become obsolete, and out of practice; no traces of it appearing in any of the books since *Staundforde's* time, who was chief justice of *K. B. temp. Eliz.* But the daring practices of some money-coiners occasioned its revival; and in the case of *R.* v. *Marston Rothwell*, and *Mary Child*, convicted for coining, at the *Old Bailey*, in *September* sessions, 1783, before *Ashhurst*, J. a *counter-plea* of record was filed on the part of the prosecution, alleging that the convicts had been before allowed the benefit of the statute, &c. And they were thereby ousted of their clergy. *Leach's Hawk. P. C.* ii. *c.* 33. § 19. *n.* and see *Leach's Crown Law*, 312.

III. Privilege of *Clergy* was not indulged at common law, either in high treason, or in petit larceny, nor in any mere misdemeanors; and therefore it may be laid down for a rule, that it was only allowable in petit treasons, and capital felonies; which for the most part became legally entitled to this indulgence by the stat. *de Clero*, 25 *Edw.* III. *st.* 3. *c.* 4. which provides, "that clerks convict for treasons or felonies, touching other persons than the king himself, shall have the privilege of Holy Church." But yet it was not allowable in all felonies whatsoever; for in some it was denied even by the common law, viz. *insidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country; (2 *Hal. P. C.* 333. but in these two cases it was expressly remedied by stat. 4 *Hen.* IV.

c. 2. as to *clerks* only;) and *combustio domorum*, or *arson*, the burning of houses. 1 *Hal. P. C.* 346. all which are a kind of hostile acts, and in some degree border on treason. And further, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament.

All the statutes for excluding clergy, are in fact nothing else but the restoring of the law to the same rigour of capital punishment in the first offence, that was exerted before the *privilegium clericale* was at all indulged; and so tender is the law of inflicting capital punishment, in the first instance, for any inferior felony, that notwithstanding, by the *marine law*, as declared in stat. 28 *Hen.* VIII. *c.* 15. benefit of clergy is not allowed in any case whatever; yet when offences are committed within the Admiralty jurisdiction, which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner. *Moor*, 756. *Fost.* 288.

As there is no necessity that the ordinary should demand the *benefit of the clergy* for a clerk; so neither is there any that the prisoner himself should demand it, where it sufficiently appears to the court that he hath a right to it, in respect to his being in orders, &c. In which case, if the prisoner does not demand it, it is left to the discretion of the judge, either to allow, or not to allow it him. 2 *Hawk. P. C. c.* 33. § 112.

Clergy may be demanded after judgment given against a person, whether of death, &c. and even under the gallows, if there be a proper judge there, who has power to allow it. 2 *Hawk. P. C. c.* 33. § 111.

To conclude this head of inquiry, it may be observed; 1. That in all felonies, whether new created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament. 2 *Hal. P. C.* 330.—2. That where clergy is taken away from the principal, it is not of course taken away from the accessary; unless he be also particularly included in the words of the statute. 2 *Hawk. P. C. c.* 33. § 26. And where *clergy* is taken away expressly by any statute, the offence must be laid in the indictment to be against that very statute, and the words of it, or the offender shall have his *clergy*. *Kel.* 104. *H. P. C.* 231.—3. That when the benefit of clergy is taken away from the *offence*, (as in case of murder, robbery, rape, &c.) a principal in the second degree, being present aiding and abetting the crime, is excluded from his clergy equally with him that is principal in the first degree: but, 4. That where it is only taken away from the *person committing* the offence, (as in the case of stabbing, or larceny in a dwelling-house, or privately stealing from the person,) his aiders and abettors are not excluded; as such statutes are to be taken literally. 1 *Hal. P. C.* 529. *Fost.* 356, 357.

Clergy in cases of outlawry. 4 *Comm.* 320. *n.* 41.

IV. The *consequences* are such as affect the present interest and future credit and capacity of the party, as having been once a felon, but now purged from that guilt by the privilege of clergy, which operates as a kind of statute pardon.

1. By this conviction, the offender forfeits all his goods to the king; which being once vested in the crown, shall not afterwards be restored to the offender. 2 *Hal. P. C.* 388.—2. After conviction, and till he receives the judgment of the law by branding, or some of its substitutes, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of

a felon. 3 *P. Wms.* 487.—3. After burning, or its substitute, or pardon, he is discharged for ever of that, and all other *clergyable* felonies before committed; but not of felonies, from which benefit of clergy is excluded; and this by stats. 8 *Eliz. c.* 4. and 18 *Eliz. c.* 7.—4. By the burning, or its substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted. 2 *Hal. P. C.* 389. 5 *Rep.* 110.—5. What is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in its stead. 2 *Hal. P. C.* 389, 390.

It is holden, that after a man is admitted to his *clergy*, it is actionable to call him a felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. 2 *Hawk. P. C. c.* 33. § 132.

As to what felonies are *within*, and what *without* clergy, see this *Dictionary*, tit. *Felons;* and more particularly the *Index* to 1 *Hawk. P. C.* As to the time of pleading clergy, see tit. *Pleading*, *Judgment*.

Clerico Admittendo, see *Admittendo Clerico.*

Clerico infra sacros Ordines constituto, non Eligendo in Officium, A writ directed to those who have thrust a bailiwick, or other office, upon one in holy orders, charging them to release him. *Reg. Orig.* 143

Clerico capto per Statutum Mercatorum, &c. A writ for the delivery of a *clerk* out of prison, who is taken and imprisoned upon the breach of a statute merchant. *Reg. Orig.* 147. See *ante*, tit. *Clergy.*

Clerico convicto commisso Gaolæ in defectu Ordinarii deliberando, An ancient writ that lay for the *delivery* of a *clerk* to his *ordinary*, that was formerly *convicted* of felony, by reason his *ordinary did* not challenge him according to the privileges of clerks. *Reg. Orig.* 69. See *ante*, tit. *Clergy.*

CLERK, *clericus.*] The law term for a clergyman, and by which all of them who have not taken a degree are designated in deeds, &c. In the most general signification, is one that belongs to the holy ministry of the church; under which, where the canon law hath full power, are not only comprehended *sacerdotes* and *diaconi*, but also *subdiaconi*, *lectores*, *acolyti*, *exorcistæ* and *ostiarii;* but the word has been anciently used for a *secular priest*, in opposition to a *religious* or *regular*. *Paroch. Antiq.* 171. And is said to be properly a minister or priest, one who is more particularly called *in sortem Domini. Blount.*

Clerk, In another sense, denotes a person who practises his pen in any court, or otherwise; of which *clerks* there are various kinds, in several offices, &c. The clergy, in the early ages, as they engrossed almost every other branch of learning, so were they peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them soon after the conquest by *William of Malmsbury.* The judges therefore were usually created out of the sacred order; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day. 1 *Comm.* 17.

Clerk of the Acts. An officer in the navy office, whose business it is to record all orders, contracts, bills, warrants, &c. transacted by the Lord High Admiral, or Lords Commissioners of the Admiralty, and Commissioners of the Navy. See stat. 22 & 23 *Car.* II. *c.* 11.

Clerk of Affidavits, In the court of *Chancery*, is an officer that files all *affidavits* made use of in court.

Clerk of the Assise, Is he that writes all things judicially done by the justices of *assises* in their circuits. *Cromp. Jurisd.* 227. This officer is associated to the judge in commissions of *assise*, to take *assises*, &c. Clerk of the assise shall not be counsel with any person on the circuit. Stat. 33 *Hen.* VIII. *c.* 24. § 5. To certify the names of felons convict, see tit. *Clergy*, *benefit of* II. How punished for concealing, &c. any indictment, recognisance, fine or forfeiture. Stat. 22 & 23 *Car* II. *c.* 22. § 9. 3 *Geo.* I. *c.* 15. § 12. See tit. *Estreat*, *Sheriff*. To take but 2*s.* for drawing an indictment, and nothing if defective. 10 & 11 *W.* III. *c.* 23. §§ 7, 8. Finable for falsely recording appearances of persons returned on a jury. 3 *Geo.* II. *c.* 25. § 3. See tit. *Jury*.

Clerk of the Bails, An officer belonging to the court of *King's Bench*. He files the bail pieces taken in that court, and attends for that purpose.

Clerk of the Cheque, An officer in the king's court, so called because he hath the *check* and controlment of the yeomen of the guard, and all other ordinary yeomen belonging either to the King, Queen, or Prince; giving leave, or allowing their absence in attendance, or diminishing their wages for the same; he also by himself or deputy takes the view of those that are to watch in the court, and hath the setting of the watch. See stat. 33 *Hen.* VIII. *c.* 12. Also there is an officer of the same name in the king's dock yards at *Plymouth*, *Deptford*, *Woolwich*, *Chatham*, &c.

Clerk Controller of the King's House, whereof there are two: An officer in the *King's* court, that hath authority to allow or disallow charges and demands of Pursuivants, Messengers of the Green Cloth, &c. He hath likewise the oversight of all defects and miscarriages of any of the inferior officers; and hath a right to sit in the counting-house, with the superior officers, viz. The Lord Steward, Treasurer, *Controller*, and Cofferer of the Household, for correcting any disorders. See stat. 33 *Hen.* VIII. *c.* 12.

Clerk of the Crown, *clericus coronæ*.] An officer in the *King's Bench*, whose function is to frame, read and record all indictments against offenders there arraigned or indicted of any public crime. And when divers persons are jointly indicted, the *Clerk of the Crown* shall take but one fee, viz 2*s.* for them all. Stat. 2 *Hen.* IV. *c.* 10. He is otherwise termed *Clerk of the Crown office*, and exhibits informations, by order of the court, for divers offences. See tit. *Information*.

Clerk of the Crown in Chancery, An officer in that court who continually attends the Lord Chancellor in person or by deputy: he writes and prepares for the great seal, special matters of state by commission, or the like, either immediately from his majesty's orders, or by order of his council, as well ordinary as extraordinary, viz. commissions of lieutenancy, of justices of assise, *oyer* and *terminer*, gaol delivery, and of the peace, with their writs of association, &c. Also all general pardons, at the King's coronation; or in parliament, where he sits in the Lords' house in parliament time; and into his office the writs of parliament, with the names of knights and burgesses elected thereupon, are to be returned and filed. He hath likewise the making out of all special pardons; and writs of execution upon bonds of statute-staple forfeited; which was annexed to this office in the reign of queen *Mary*, in consideration of his chargeable attendance.

Clerk of the Declarations, An officer of the court of *King's Bench*, that files all declarations in causes there depending, after they are engrossed, &c.

Clerk of the Deliveries, an officer in the *Tower* of *London*, who exercises his office in taking of indentures for all stores, ammunition, &c. issued from thence.

Clerk of the Errors, *clericus errorum.*] In the court of *Common Pleas*, transcribes and certifies into the *King's Bench* the tenor of the records of the cause or action upon which the writ of *error*, made by the cursitor, is brought there to be heard and determined. The *Clerk of the Errors* in the *King's Bench*, likewise transcribes and certifies the records of causes, in that court, into the *Exchequer*, if the cause of action were by bill; if by original, the Lord Chief Justice certifies the record into the House of Peers in Parliament, by taking the transcript from the *Clerk of the Errors*, and delivering it to the Lord Chancellor, there to be determined, according to the stats. 27 *Eliz. c.* 8. and 31 *Eliz. c.* 1. The *Clerk of the Errors in the Exchequer* also transcribes the records, certified thither out of the King's Bench, and prepares them for judgment in the court of Exchequer Chamber, to be given by the justices of *C. B.* and barons there. Stats. 16 *Car.* II. *c.* 2. 20 *Car.* II. *c.* 4. See tit. *Error.*

Clerk of the Essoins, An officer belong to the Court of Common Pleas, who keeps the *essoin rolls*; and the *essoin roll* is a record of that court: he has the providing of parchment, and cutting it out into *rolls*, marking the numbers thereon; and the delivery out of all the rolls to every officer of the court; the receiving of them again when they are written, and the binding and making up the whole bundles of every term; which he doth as servant of the Chief Justice. The Chief Justice of *C. B.* is at the charge of the parchment of all the rolls, for which he is allowed; as is also the Chief Justice of *B. R.* besides the penny for the seal of every writ of privilege and outlawry, the seventh penny taken for the seal of every writ in court under the green wax, or petit seal; the said Lord Chief Justices having annexed to their offices or places, the custody of the said seals belonging to each court.

Clerk of the Estreats, *clericus extractorum.*] A clerk or officer belonging to the Exchequer, who every term receives the *estreats* out of the Lord Treasurer's Remembrancer's Office, and writes them out to be levied for the King: and he makes schedules of such sums *estreated* as are to be discharged. See tit. *Estreat.*

Clerk of the Hanaper, or *Hamper*, An officer in Chancery, whose office is to receive all the money due to the king, for the seals of charters, patents, commissions and writs; as also fees due to the officers for enrolling and examining the same. He is obliged to attendance on the Lord Chancellor daily in the term time, and at all times of sealing, having with him leather bags, wherein are put all charters, &c. After they are sealed, those bags, being sealed up with the Lord Chancellor's private seal, are delivered to the *Controller of the Hanaper*, who, upon receipt of them, enters the effect of them in a book, &c. This *hanaper* represents what the *Romans* termed *fiscum*, which contained the emperor's treasure; and the Exchequer was anciently so called, because *in eo reconderenter* hanapi *et scutræ cæteraque vasa quæ in censum et tributum persolvi solebant*; or it may be for that the yearly tribute which the princes received was in hampers or large vessels full of money. There being an arrear of 10,590*l.* 12*s.* 11*d.* of

several ancient fees and salaries, &c. payable out of this office; and there being a remainder of 13,698*l.* 1*s.* 11*d.* of the six-penny stamp duty on writs granted for relief of the suitors of the court of chancery; it was enacted, by the stat. 23 *Geo.* II. *c.* 25. that thereout the 10,590*l.* 12*s.* 11*d.* should be paid to the creditors of this office. That the said duty should be made perpetual; and thereout 3,000*l.* *per annum* should be paid to the *Clerk of the Hanaper*; that the residue of the 13,698*l.* 1*s.* 11*d.* should be laid out in government securities, and the interest paid to the *Clerk of the Hanaper*, who should pay 1,200*l.* to the *Master of the Rolls*. And that in case the revenue of this office, so augmented, should be more than sufficient to pay all fees, salaries, &c. the clerk should account for the surplus.

Clerk of the Enrolments, An officer of the *Common Pleas*, that enrols and exemplifies all fines and recoveries, and returns writs of entry, summons and seisin, &c.

Clerk of the Juries, *clericus juratorum.*] An officer belonging to the court of *Common Pleas*, who makes out the writs of *habeas corpora* and *distringas*, for the appearance of *juries*; either in that court, or at the assises, after the jury or panel is returned upon the *venire facias*; he also enters into the rolls the awarding of these writs; and makes all the continuances, from the going out of the *habeas corpora* until the verdict is given.

Clerk of the Market, *clericus mercati hospitii regis.*] Is an officer of the King's house, to whom it belongs to take charge of the King's measures, and keep the standards of them, which are examples of all measures throughout the land; as of ells, yards, quarts, gallons, &c. and of weights, bushels, &c. And to see that all weights and measures in every place be answerable to the said standard: as to which office see *Fleta*, *lib.* 2. *cap.* 8, 9, 10. &c. Touching this officer's duty, there are also divers statutes, as 13 *Rich.* II. *cap.* 4. and 16 *Rich.* II. *c.* 3. by which every clerk of the market is to have weights and measures with him when he makes essay of weights, &c. marked according to the standard; and to seal weights and measures, under penalties.

The stat. 16 *Car.* I. *c.* 19. enacts, That clerks of the market of the King's or Prince's household, shall only execute their offices within the verge; and head officers are to act in corporations, &c. The clerks of markets have generally power to hold a court, to which end they may issue out process to sheriffs and bailiffs to bring a jury before them; and give a charge, take presentments of such as keep or use false weights and measures; and may set a fine upon the offenders, &c. 4 *Inst.* 274. But if they take any other fee or reward than what is allowed by statute, &c. or impose any fines without legal trial, or otherwise misdemean themselves, they shall forfeit 5*l.* for the first offence, 10*l.* for the second, and 20*l.* for the third offence, on conviction before a justice of peace, &c. The court of the *Clerk of the Market* is incident to every fair and market in the kingdom, to punish misdemeanors therein; as a court of *Pie powdre* is to determine all disputes relating to private or civil property. It is the most inferior court of criminal jurisdiction in the kingdom. 4 *Comm.* 275. See also stats. 22 *Car.* II. *c.* 8. 23 *Car.* II. *c.* 12. and tit. *Weights and Measures.*

Clerk Marshal of the King's House, An officer that attends the *Marshal* in his court, and records all his proceedings.

Clerk of the Nichils, or *Nihils*, *clericus nihilorum.*] An officer of the court of *Exchequer*, who makes a roll of all such sums as are *ni-*

hiled by the sheriffs upon their estreats of green wax; and delivers the same into the Remembrancer's Office, to have execution done upon it for the king. See stat. 5 *Rich.* II. *c.* 13. *Nihils* are issues by way of fine or amercement.

Clerk of the Ordnance, An officer in the *Tower*, who registers all orders touching the King's *ordnance*.

Clerk of the Outlawries, *clericus utlagariarum.*] An officer belonging to the court of *Common Pleas*, being the servant or deputy to the King's Attorney-General, for making out writs of *capias utlagatum*, after *outlawry*; the King's Attorney's name being to every one of those writs.

Clerk of the Paper Office, An officer in the court of *King's Bench*, that makes up the paper-books of special pleadings and demurrers in that court.

Clerk of the Papers, An officer in the *Common Pleas*; who hath the custody of the *papers* of the warden of the *Fleet*, enters commitments and discharges of prisoners, delivers out day-rules, &c.

Clerk of a Parish, See tit. *Parish Clerk.*

Clerk of the Parliament Rolls, *clericus rotulorum parliamenti.*] An officer who records all things done in the high court of *parliament*, and engrosseth them in parchment *rolls*, for their better preservation to posterity; of these officers there are two, one in the Lords' House, and another in the House of Commons.

Clerk of the Patents, Or of the letters patent under the great seal of *England*; an office erected 18 *Jac.* I.

Clerk of the Peace, *clericus pacis.*] An officer belonging to the sessions of the peace; his duty is to read indictments, enrol the proceedings, and draw the process; he keeps the counterpart of the indenture of armour; records the proclamation of rates for servants' wages; has the custody of the register-book of licenses given to badgers of corn; of persons licensed to kill game, &c. And he registers the estates of papists and others not taking the oaths. Also he certifies into the *King's Bench* transcripts of indictments, outlawries, attainders and convictions, had before the justices of peace, within the time limited. See tit. *Clergy*, *benefit of.* And as to his duty respecting Estreats, see tit. *Estreats.*

The *Custos Rotulorum* of the county hath the appointment of the clerk of the peace, who may execute his office by deputy, to be approved of by the *Custos Rotulorum*, to hold the office during good behaviour. See stats. 37 *Hen.* VIII. *c.* 1. 1 *W. & M. c.* 21.

The following is the form of the oath prescribed by stat. 1 *W. & M. c.* 21. to be taken by the clerk of the peace in open sessions before he enters on his office.

I C. P. *do swear, that I have not* [*paid*] *nor will pay any sum or sums of money, or other reward whatsoever, nor given any bond or other assurance to pay any money, fee or profit, directly or indirectly, to any person or persons whomsoever for* [*my*] *nomination and appointment.*

So help me God.

He is also to take the oaths of allegiance, supremacy and abjuration, and perform such requisites as other persons who qualify for offices.

By stat. 22 *Geo.* II. *c.* 46. § 14. no clerk of the peace, or his depu-

ty, shall act as solicitor, attorney or agent at the sessions where he acts as clerk or deputy, on penalty of 50*l.* with treble costs.

Burn, in his *Justice*, title *Clerk of the Peace*, hints how necessary it is that all his fees should be regulated.

If a Clerk of the peace misdemeans himself, the justices of peace in quarter sessions have power to discharge him; and the *Custos Rotulorum* is to choose another, resident in the county, or on his default the sessions may appoint one: the place is not to be sold, on pain of forfeiting double the value of the sum given by each party, and disability to enjoy their respective offices, &c. Stat. 1 *W. & M. sess.* 1. *c.* 21.

Clerk of the Pells, *clericus pellis.*] A clerk belonging to the *Exchequer*, whose office is to enter every teller's bill into a parchment roll or skin, called *pellis receptorum*, and also to make another roll of payments, which is termed *pellis exituum*; wherein he sets down by what warrant the money was paid; mentioned in the stat. 22 & 33 *Car.* II. *c.* 22.

Clerk of the Petty Bag, *clericus parvæ bagæ.*] An officer of the court of *Chancery*. There are three of these officers, of whom the master of the rolls is the chief. Their office is to record the return of all inquisitions out of every shire; to make out patents of customers, guagers, controllers, &c. all *congé d'elires* for bishops, the summons of the nobility and burgesses to parliament, commissions directed to knights and others of every shire, for assessing subsidies and taxes; all offices found *post mortem* are brought to the clerks of the petty bag to be filed; and by them are entered all *pleadings* of the chancery concerning the validity of patents or other things which pass the great seal: they also make forth *liberates* upon *extents* of statutes staple, and recovery of recognisances forfeited, and all *elegits* upon them; and all suits for or against any privileged person are prosecuted in their office, &c.

Clerk of the Pipe, *clericus pipæ.*] An officer in the *Exchequer* who having the accounts of debts due to the king, delivered and drawn out of the Remembrancer's Offices, charges them down in the great roll, and is called *Clerk of the Pipe* from the shape of that roll, which is put together like a *pipe*; he also writes out warrants to the sheriffs to levy the said debts upon the goods and chattels of the debtors; and if they have no goods, then he draws them down to the Lord Treasurer's Remembrancer, to write estreats against their lands. The ancient revenue of the crown stands in charge to him, and he sees the same answered by the farmers and sheriffs: he makes a charge to all sheriffs of their summons of the *pipe*, and green wax, and takes care it be answered on their accounts. And he hath the drawing and engrossing of all leases of the king's lands; having a *secondary* and several clerks under him. In the reign of King *Henry* VI. this officer was called *Ingrossator magni rotuli*. See stat. 33 *Hen.* VIII. *c.* 22.

Clerk of the Pleas, *clericus placitorum.*] An officer in the court of *Exchequer*, in whose office all the officers of the court, upon special privilege belonging unto them, ought to sue or be sued in any action, &c. The *clerk of the pleas* has under him a great many clerks, who are attorneys in all suits commenced or depending in the court of *Exchequer*.

Clerks of the Privy Seal, *clericus privati sigilli.*] These are four of the officers which attend the Lord *Privy Seal*; or if there be no Lord *Privy Seal*, the principal Secretary of State; writing and ma-

king out all things that are sent by warrant from the Signet to the *Privy Seal*, and which are to be passed to the Great Seal; also they make out *privy seals*, upon a special occasion of his majesty's affairs, as for loan of money, and the like. He that is now called *Lord Privy Seal*, seems to have been in ancient times called *Clerk of the Privy Seal*; but notwithstanding to have been reckoned in the number of the great officers of the realm. Stats. 12 *Rich.* II. *c.* 11. 27 *Hen.* VIII. *c.* 11.

Clerk of the Remembrance, An officer in the Exchequer, who is to sit against the clerk of the pipe, to see the discharges made in the pipe, &c. Stat. 37 *Edw.* III. *c.* 4. The Clerk of the Pipe and Remembrancer, shall be sworn to make a schedule of persons discharged in their offices. Stat. 5 *Rich.* II. *st.* 1. *c.* 15.

Clerk of the Rolls, An officer of the Chancery, that makes search for, and copies deeds, offices, &c.

Clerk of the Rules, In the court of King's Bench, is he who draws up and enters all the *rules* and orders made in court; and gives rules of course on divers writs: this officer is mentioned in stat. 22 & 23 *Car.* II. *c.* 22.

Clerk of the Sewers, An officer belonging to the commissioners of *sewers*, who writes and records their proceedings, which they transact by virtue of their commissions, and the authority given them by stat. 13 *Eliz. c.* 9. See tit. *Sewers.*

Clerk of the Signet, *clericus signeti.*] An officer continually attendant on his Majesty's Principal Secretary, who hath the custody of the *privy signet*, as well for sealing his Majesty's private letters, as such grants as pass the King's hand by bill signed; and of these clerks or officers there are four that attend in their course, and have their diet at the Secretary's table. The fees of the *clerk of the signet*, and privy seal, are limited particularly by statute, with a penalty annexed for taking any thing more. See 27 *Hen.* VIII. *c.* 11.

Clerk of the King's Silver, *clericus argenti regis.*] An officer belonging to the court of *Common Pleas*, to whom every fine is brought after it hath passed the office of the *custos brevium*, and by whom the effect of the writ of covenant is entered into a paper-book; according to which all the fines of that term are recorded in the rolls of the court. After the king's silver is entered, it is accounted a fine in law, and not before. See tit. *Fine.*

Clerk of the Supersedeases, An officer belonging to the court of Common Pleas, who makes out writs of *supersedeas*, upon a defendant's appearing to the *exigent* on an outlawry, whereby the sheriff is forbidden to return the *exigent*. See tit. *Outlawry.*

Clerk of the Treasury, *clericus thesaurarii.*] An officer of the Common Pleas, who hath the charge of keeping the records of the court, and makes out all the records of *Nisi Prius*; also he makes all exemplifications of records being in the *Treasury*; and he hath the fees due for all searches. He is the servant of the chief justice, and removeable at pleasure; whereas all other officers of the court are for life; there is a *Secondary*, or *Under clerk of the Treasury*, for assistance, who hath some fees and allowances; and likewise an *under keeper*, that always keeps one key of the *Treasury* door, and the chief *clerk* of the secondary, another; so that the one cannot come in without the other.

Clerk of the King's Great Wardrobe, An officer of the King's household, that keeps an account or inventory of all things belonging to the royal *wardrobe*. Stat. 1 *Edw.* IV. *c.* 1.

Clerk of the Warrants, clericus warrantorum.] An officer belonging to the Common Pleas' Court, who enters all warrants of attorney for plaintiffs and defendants in suits; and enrols deeds of indentures of bargain and sale, which are acknowledged in the court, or before any judges out of the court. And it is his office to estreat into the Exchequer all issues, fines and amerciaments, which grow due to the king in that court, for which he hath a standing fee or allowance.

CLERONIMUS, An heir. *Mon. Angl. tom. 3. fl.* 129.

CLIPPING *the Coin.* See tit. *Coin, Money, Treason.*

CLITONES, The eldest, and all the sons of Kings. See the charter of King *Æthelred. Mat. Paris, pag.* 158. *Selden's notes upon Eadmerus.*

CLIVE, CLIFF. The names of places beginning or ending with these words, signify a rock, from the old *Saxon.*

CLOCKS AND WATCHES. Dial-plates and cases not to be exported without the movement, stat. 9 & 10. *W.* III. *c.* 28. § 2. Makers shall engrave their names on clocks and watches, stat. 9 & 10 *W.* III. *c.* 28. § 2. Penalties on workmen, &c. embezzling materials of clocks and watches, stat. 27 *Geo.* II. *c.* 7. See tit. *Manufacturers.* By stat. 37 *Geo.* III. *c.* 108. a duty on clocks and watches was imposed, payable by the proprietors; but this was repealed by 38 *Geo.* III. *c.* 40.

By 38 *Geo.* III. *c.* 24. the duty on gold and silver plates, under 24 *Geo.* III. *st.* 2. *c.* 53. & 37 *Geo.* III. *c.* 90. § 16. was repealed so far as related to plate used for watch-cases.

CLOERE, A prison or dungeon; it is conjectured to be of *British* original; the dungeon or inner prison of *Wallingford castle, temp. Hen.* II. was called *cloere brien*, i. e. *carcer brieni, &c.* Hence seems to come the Lat. *cloaca*, which was anciently the closest ward or nastiest part of the prison; the old *cloacerius* is interpreted *carceris custos;* and the present *cloacerius*, or keeper of a *jakes*, is an office in some religious houses abroad, imposed on an offending brother, or by him chosen as an exercise of humility and mortification. *Cowel.*

CLOSE ROLLS AND CLOSE WRITS, Grants of lands, &c. from the Crown, are contained in charters or letters *patent*, that is, open letters, *literas patentes*, so called because they are not sealed up, but exposed to open view, with the great seal pendent at the bottom; and are usually addressed by the king to all his subjects at large. And therein they differ from other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes; which, therefore, not being fit for public inspection, are closed up and sealed on the outside, and are thereupon called *writs close, literæ clausæ;* and are recorded in the *close rolls*, in the same manner as the others are in the *patent-rolls.* 2 *Comm.* 346.

CLOSH, Was an unlawful game forbidden by stat. 17 *Edw.* IV. *c.* 3. and 33 *Hen.* VIII. *c.* 9. It is said to have been the same with our *nine-pins;* and is called *closheayles* by stat. 33 *Hen.* VIII. *c.* 9. At this time it is allowed, and called *hailes*, or *skittles.* See tit. *Gaming.*

CLOTH. No cloth made beyond sea shall be brought into the king's dominions, on pain of forfeiting the same, and the importers to be farther punished. Stat. 12 *Edw.* III. *c.* 3. See tit. *Manufacturers, Wool.*

CLOTHIERS, Are to make broad cloths of certain lengths and breadths within the lists; and shall cause their marks to be woven in the cloths, and set a seal of lead thereunto, shewing the true length thereof. Stat. 4 *Edw.* IV. *c.* 1. 27 *Hen.* VIII. c. 12. Exposing to sale faulty

cloths, are liable to forfeit the same; and clothiers shall not make use of flocks, or other deceitful stuff, in making of broad cloth, under the penalty of 5*l*. Stat. 5 & 6 *Edw.* VI. *c.* 6. Justices of peace are to appoint searchers of cloth yearly, who have power to enter the houses of clothiers; and persons opposing them shall forfeit 10*l*. &c. Stats. 39 *Eliz. c.* 20. 4 *Jac.* I. *c.* 2. 21 *Jac.* I. *c.* 18. All cloth shall be measured at the fulling-mill by the master of the mill; who shall make oath before a justice for true measuring; and the millman is to fix a seal of lead to cloths, containing the length and breadth, which shall be a rule of payment for the buyer, &c. Stats. 10 *Ann. c.* 16. By stat. 1 *Geo.* I. *c.* 15. broad cloths must be put into water for proof, and be measured by two indifferent persons chosen by the buyer and seller, &c. And clothiers selling cloths before sealed, or not containing the quantity mentioned in the seals, incur a forfeiture of the sixth part of the value. Persons taking off, or counterfeiting seals, forfeit 20*l*. By stat. 12 *Geo.* I. *c.* 34. if any weavers of cloth enter into any combination for advancing their wages, or lessening their usual hours of work, or depart before the end of their terms agreed, return any work unfinished, &c. they shall be committed by two justices of the peace to the house of correction for three months; and clothiers are to pay their work-people their full wages agreed, in money, under the penalty of 10*l*. &c. Inspectors of mills and tenter-grounds to examine and seal cloths, are to be appointed by justices of peace in sessions; and millmen sending clothiers any cloths before inspected, forfeit 40*s*. The inspector to be paid by the clothiers 2*d. per* cloth. Stat. 13 *Geo.* I. *c.* 23. If any cloth remaining on the tenters, be stolen in the night, and the same is found upon any person, on a justice's warrant to search, such offender shall forfeit treble value, leviable by distress, &c. or be committed to gaol for three months; but for a second offence he shall suffer six months imprisonment; and for the third offence be transported as a felon, &c. Stat. 15 *Geo.* II. *cap.* 27. See tit. *Drapery*; and more particularly tit. *Manufacturers*, *Servants*, *Wool*.

CLOVE, The two-and-thirtieth part of a weigh of cheese, i. e. eight pounds. Stat. 9 *Hen.* VI. *c.* 8.

CLOUGH, A word made use of for valley, in *Domesday* book. But among merchants, it is an allowance for the turn of the scale, on buying goods wholesale by weight. *Lex Mercat.*

CLUNCH. In *Staffordshire*, upon sinking of a coal-mine, near the surface they meet with earth and stone, then with a substance called *blue clunch*, and after that they come to coal.

CLUTA, Fr. *clous.*] Shoes, clouted shoes; and most commonly horse shoes; it also signifies the streaks of iron or tire with which cart-wheels are bound. *Consuetud. Dom. de Farend. MS. fol.* 16. Hence *clutarium*, or *cluarium*, a forge where the *clous* or iron shoes are made. *Mon. Angl. tom.* 2. *pag.* 598.

CLYPEUS, A shield. Metaphorically, one of a noble family. *Clypei prostrati*, a noble family extinct. *Mat. Paris*, 463.

COACH, *currus.*] A convenience well known. For the regulating of hackney-coaches and chairs in *London*, there are several statutes, viz. 9 *Ann. c.* 23. made perpetual by 3 *Geo.* I. *c.* 7. and enlarged as to the number of coaches, by 11 *Geo.* III. *c.* 24. 42 *Geo.* III. *c.* 78. so as to make the whole number to be licensed 1100, and enlarged also as to chairs, by 10 *Ann. c.* 19. and 12 *Geo.* I. *c.* 12. making the whole number of those 400.

The other statutes now in force are, 12 *Ann. st.* 1. *c.* 14. 1 *Geo.* I. *c.* 57. 30 *Geo.* II. *c.* 22. (See *Carts.*) 4 *Geo.* III. *c.* 36. 7 *Geo.* III. *c.* 44.

10 *Geo.* III. *c.* 44. 11 *Geo.* III. *c.* 24. and 28. 12 *Geo.* III. *c.* 49. 24 *Geo.* III. *st.* 2. *c.* 27. 26 *Geo.* III. *c.* 72. 32 *Geo.* III. *c.* 47. See *Police.*

STAGE COACHES. By stats. 28 *Geo.* III. *c.* 57. 30 *Geo.* III. *c.* 36. 46 *Geo.* III. *c.* 136. drivers of stage coaches are not to admit more than *one* outside passenger on the box, nor more than a certain number on the outside of any part of any stage coach. Several wholesome regulations are made by these acts, but which, like other good laws, are seldom enforced.

As to the liability of masters, &c. of coaches as common carriers, see tit. *Carrier.*

All coaches and carriages kept for pleasure, and all stage-coaches, &c. are subject to certain duties under the management of the tax-office. See, for the assessed duties, 43 *Geo.* III. *c.* 161. &c.

COACHMAKERS. The wares of coachmakers shall be searched, by persons appointed by the saddlers' company. Stat. 1 *Jac.* I. *c.* 22. By stats. 25 *Geo.* III. *c.* 49. 27 *Geo.* III. *c.* 13. every maker of coaches, chariots, chaises, &c. must take out annual licenses from the *Excise Office*, and to pay a duty of 20*s.* for every four-wheeled carriage, and 10*s.* for every two-wheeled carriage, built by them for sale.

COADJUTOR, *Lat.*] A fellow-helper or assistant; particularly applied to one appointed to assist a bishop, being grown old and infirm, so as not to be able to perform his duty.

COAL-MINES. Maliciously setting fire to coal-mines, or to any delph of coal, is felony. 10 *Geo.* II. *c.* 32. § 6. See tit. *Black Act, Felony.*

COALS. By stats. 7 *Edw.* VI. *c.* 7. 16 & 17 *Car.* II. *c.* 2. [made perpetual by 7 & 8 *Wm.* III. *c.* 36. § 2.] and 17 *Geo.* II. *c.* 35. the sack of coals is to contain four bushels of clean coals; and seacoals brought into the river *Thames*, and sold, shall be after the rate of 36 bushels to the chaldron, and 112 pounds to the hundred, &c. The lord mayor and court of aldermen in *London*, and justices of the peace of the several counties, or three of them, are empowered to set the price of all the coals to be sold by retail; and if any person shall refuse to sell for such prices, they may appoint officers to enter any wharves or places where coals are kept, and cause the coals to be sold at the prices appointed. The stat. 12 *Ann. st.* 2. *c.* 17. regulates the contents of the coal-bushel, which is to hold one *Winchester* bushel, and one quart of water. By stats. 9 *Hen.* V. *st.* 1. *c.* 10. 30 *Car.* II. *c.* 8. 6 & 7 *Wm.* III. *c.* 10. 11 *Geo.* II. *c.* 15. 15 *Geo.* III. *c.* 27. and 31 *Geo.* III. *c.* 36. commissioners are ordained for the measuring and marking of keels, and boats, &c. for carrying coals; and vessels carrying coals before measured and marked, shall be forfeited, &c. For the duties and drawbacks on coals and culm, see stat. 9 & 10 *Wm.* III. *c.* 13. 9 *Ann. c.* 6. 22. 28. 8 *Geo.* I. *c.* 14. 14 *Geo.* II. *c.* 41. 22 *Geo.* II. *c.* 37. 31 *Geo.* II. *c.* 15. 33 *Geo.* II. *c.* 15. and 27 *Geo.* III. *c.* 32.

For the duty on coals in *London*, see stats. 9 *Ann. c.* 22. and 5 *Geo.* I. *c.* 9. the duties payable under which, of 3*s.* per chaldron, are made perpetual by stat. 6 *Geo.* I. *c.* 4. § 1. and 1 *Geo.* II. *st.* 2. *c.* 8. See also stat. 27 *Geo.* III. *c.* 13. explained as to coals carried coastwise in *Scotland*, by 33 *Geo.* III. *c.* 69. as to the 1*s.* duty under stat. 19 *Car.* II. *c.* 3. § 36.

By stat. 9 *Ann. c.* 28. contracts between coal-owners and masters of ships, &c. for restraining the buying of coals are void, and the parties to forfeit 100*l.* And selling coals for other sorts than they are, shall forfeit 50*l.* Not above fifty laden colliers are to continue in the port

of *Newcastle*, &c. And work-people in the mines there, shall not be employed who are hired by others, under the penalty of 5*l.*

By stat. 3 *Geo.* II. *c.* 26. containing several regulations as to lightermen and coal buyers, and explained by *st.* 11 *Geo.* II. *c.* 15. coal-sacks shall be sealed and marked at *Guildhall*, &c. on pain of 20*s.* Also sellers of coals are to keep a lawful bushel, and put three bushels to each sack, which bushel and other measures shall be edged with iron, and sealed; and using others, or altering them, incurs a forfeiture of 50*l.* &c. The penalties above 5*l.* recoverable by action of debt, &c. and under that sum before justices of peace.

The offence of selling coals of a different description from those contracted for, upon the stat. 3 *Geo.* II. *c.* 26. § 4. is complete in the county where the coals are *delivered*, and not where they are contracted for, the contract not being for any specific parcel of coals, but for a certain quantity of a certain description. But *though not justly measuring* such coals is a local omission of a local act, required by the 13th section of the act to be performed at the place where the coals are kept for sale, at which place the bushel of Queen *Anne* is required to be kept and used, for the purpose of measuring the coals into sacks of a certain description, in which they are to be carried to the buyer; and therefore the offence is local, and must be laid in the county where the coals were put into the sacks without having been so *justly measured*. *Butterfield, qui tam*, v. *Windle and another*. 4 *East*, 385.

A dealer in coals by the chaldron, who sold to another by *the chaldron*, a certain quantity, *as and for* 10 *chaldron of coals, pool measure*, without justly measuring the same with the lawful bushel of Queen *Anne*, is liable to the penalty of 50*l.* imposed by the 13th section of the stat. 3 *Geo.* II. *c.* 26. upon such defaulters who sell coals *by the chaldron, or lesser quantity*, without measuring them. *Parish, qui tam*, v. *Thompson, E.* 43 *Geo.* III. 3 *East*, 525.

By stat. 4 *Geo.* II. *c.* 30. owners or masters of ships shall not enhance the price of coals in the river of *Thames*, by keeping of turn in delivering of coals there, under the penalty of 100*l.* &c.

Stat. 13 *Geo.* II. *c.* 21. inflicts penalty of treble damages on persons damaging or destroying coal-works.

See the stat. 6 *Geo.* III. *c.* 22. *now in force*, as to the loading coal-ships, at *Newcastle* and *Sunderland*, in turn, according to lists to be made there.

By the stat. 7 *Geo.* III. *c.* 23. explained and amended by 26 *Geo.* III. *c.* 83. and 38 *Geo.* III. *c.* 56 (*loc. & pers.*) (in force till *June* 1, 1812. See *ante.*) *The Land Coal Meter's Office* for *London*, and between the *Tower* and *Limehouse-hole*, is established and regulated. And the duty of that officer and the labouring coal-meters in measuring coals is ascertained. By the same stat. 26 *Geo.* III. *c.* 83. further regulations are made as to the coal-meters' sacks, which, when sealed, are to be four feet four inches long, and twenty-six inches broad. Penalties are imposed on the labouring meters and drivers for misbehaviour, and the mode of remeasurement settled, if required by the consumer.

Stat. 28 *Geo.* III. *c.* 53. was past to indemnify the *London* coal-buyers against certain penalties, which they had *literally* incurred under stats. 9 *Ann. c.* 28. and 3 *Geo.* II. *c.* 26. and also for the purpose of putting an end to the *Society* at the Coal-Exchange, formed to *regulate* (i. e. to monopolize) the trade; subjecting all persons, above five in number, entering into covenant or partnerships, to punishment by indictment or information in *B. R.*

A great number of acts, confined in the extent of the district within which they are to operate, (and therefore classed not in the general body of statutes, but in the list of local and personal acts,) have been from time to time passed to regulate the dealings, and prevent the frauds of dealers in coals.

See 45 *Geo.* III. *c.* 128. (continued by subsequent acts,) for allowing a certain quantity of coals, &c. to be brought to *London* by inland navigation.

COAT-ARMOUR, *Coats of arms* were not introduced into seals, nor indeed into any other use, till about the reign of *Richard* the First, who brought them from the Croisade in the Holy Land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained. 2 *Comm.* 306.

It is the business of the *court military*, or the *court of chivalry*, according to Sir *Matthew Hale*, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c. and also rights of place or precedence, where the king's patent or act of parliament (which cannot be overruled by this court) have not already determined it. 3 *Comm.* 105.

COCHERINGS, An exaction or tribute in *Ireland*, now reduced to chief rents. See *Bonaght.*

COCHINEAL. The importation of cochineal from ports in *Spain* declared lawful. Stat. 6 *Ann. c.* 33. Any persons may import cochineal into this kingdom, in ships belonging to *Great Britain*, or other country in amity, from any place whatsoever, by stat. 7 *Geo.* II. *cap.* 18. See tit. *Navigation Acts.*

COCKET, *cockettum.*] A seal belonging to the king's custom-house; or rather a scroll of parchment sealed, and delivered by the officers of the custom-house to merchants, as a warrant that their merchandises are customed; which parchment is otherwise called *literæ de cocketto*, or *literæ testimoniales de* coketto. Stat. 11 *Hen.* VI. *c.* 15. *Reg. Orig.* 179. 192. See also *Mad. Exch. vol.* 1. *c.* 18. The word *cockettum* or *cocket*, is also taken for the custom-house or office where goods to be transported were first entered, and paid their customs, and had a *cocket* or certificate of discharge; and *cocketta lana* is wool duly entered and *cocketted*, or authorized to be transported. *Mem. in Scac.* 23 *Edw.* I.

Cocket is likewise used for a sort of measure, *Fleta*, *lib.* 2. *cap.* 9. *Panis vero integer quadrantalis frumenti ponderabit unum* cocket *et dimidium;* and it is made use of for a distinction of bread, in the statute of bread and ale, 51 *Hen.* III. stat. 1. *ord. pro pistor;* where mention is made of *wastel bread*, cocket *bread*, *bread of treet*, and *bread of common wheat.* The wastel bread being what we now call the *finest bread*, or *French* bread; the *cocket* bread the second sort of *white bread;* bread of treet, and of common wheat, *brown*, or *household bread*, &c. See *Bread.*

COCKSETUS, A boatman, *cockswain*, or coxon. *Cowel.*

COCULA, A cogue, or little drinking-cup, in form of a small boat, used especially at sea, and still retained in a cogue [cag or kegue] of brandy. These drinking-cups are also used in taverns to drink new sherry, and other white wines which look foul in a glass.

CODICIL, *codicillus*, from *codex*, a book, a writing.] A schedule, or supplement to a will, where any thing is omitted which the testa-

tor would add, or where he would explain, alter or retract what he hath done. See tit. *Will*, *Devise*.

Co-Executors. See *Executors*.

COFFEE, Tea, Chocolate, and Cocoa Nuts.

The duties on these articles form a branch of the public revenue, under the head of *Customs* and *Excise;* and like all other subjects of those jurisdictions, are liable to a variety of penal regulations by acts of parliament, necessary to prevent the numerous frauds and evasions daily endeavoured to be practised, to the impoverishment of government, and the injury of the fair trader. See tit. *Excise*, *Customs*, and also tit. *Navigation Acts*.

COFRA, A coffer, chest, or trunk. *Munimenta Hospit. SS. Trinit. de Pontefracto*, *MS. fol.* 50.

COFFERER of the KING'S HOUSEHOLD, Is a principal officer of the king's house, next under the controller, who, in the counting-house, and elsewhere, hath a special charge and oversight of other officers of the household, to all which he pays their wages. This officer passes his accounts in the Exchequer. See stat. 39 *Eliz. c.* 7.

COGGLE, A small fishing boat upon the coasts of *Yorkshire;* and *cogs*, (*cogones*,) are a kind of little ships or vessels used in the rivers *Ouse* and *Humber*, stat. 23 *Hen.* VIII. *c.* 18. See *Mat. Paris*, *anno* 1066. And hence the *cogmen*, boatmen or seamen, who, after shipwreck or losses by sea, travelled and wandered about to defraud the people by begging and stealing, till they were restrained by divers good laws. *Du Fresne*.

COGNATI, Relations by the mother, as the *agnati* are relations by the father.

COGNATIONE, A writ of Cousenage. See *Cosenage*.

COGNISANCE, or cognizance, Fr. *connusaunce*, Lat. *cognitio*.] Is used diversely in our law; sometimes for an acknowledgment of a *fine*. See tit. *Fine*. In replevin, *cognisance*, or *conusance*, is the answer given by a defendant, who hath acted as *bailiff*, &c. to another, in making a distress. See tit. *Distress*, *Replevin*.

The most usual sense in which this term is now used, is relative to the claim of *Cognisance of Pleas*. This is a privilege granted by the king to a city or town, to hold plea of all contracts, &c. within the liberty of the franchise; and when any man is impleaded for such matters in the courts of *Westminster*, the mayor, &c. of such franchise may ask cognisance of the plea, and demand that it shall be determined before them; but if the courts at *Westminster* are possessed of the plea before *cognisance* be demanded, it is then too late. *Terms de Ley*. See stats. 9 *Hen.* IV. *c.* 5. 8 *Hen.* VI. *c.* 26. 3 *Comm.* 298. 4 *Comm.* 277. See tit. *Pleading*.

Cognisance of Pleas extends not to assises; and when granted, the original shall not be removed. It lies not in a *quare impedit*, for they cannot write to the bishop, nor of a plea out of the county court, which cannot award a resummons, &c. *Jenk. Cent.* 31. 34. This *cognisance* shall be demanded the first day; and if the demandant in a plea of land counterpleads the franchise, and the tenant joins with the claim of the franchise, and it is found against the franchise, the demandant shall recover the land; but if it be found against the demandant, the writ shall abate. *Ibid.* 18.

There are *three sorts of inferior jurisdictions*, one whereof is *tenere placita*, and this is the lowest sort; for it is only a concurrent jurisdiction, and the party may sue there, or in the king's courts, if he

will. The second is *conusance of pleas*, and by this a right is vested in the lord of the franchise to hold the plea, and he is the only person who can take advantage of it. The third sort is an *exempt jurisdiction*, as where the king grants to a great city, that the inhabitants thereof shall be sued within their city, and not elsewhere; this grant may be pleaded to the jurisdiction of the court of *K. B.* if there be a court within that city which can hold plea of the cause, and *nobody can take advantage of this privilege but a defendant;* for if he will bring *certiorari*, that will remove the cause, *but he may waive it if he will*, so that the privilege is only for his benefit. 3 *Salk.* 79, 80. *pl.* 4. *Hil.* 1 *Ann. B. R. Crosse* v. *Smith.*

King *Henry* VIII. by *letters patent* of the 14th of his reign, and confirmed by parliament, *granted to the University of* Oxford *conusance of pleas, in which a scholar or servant of a college should be party, ita quod justiciarii de utroque banco se non intromittant. An attorney of* C. B. *sued a scholar in* C. B. *for battery.* By the court, this general grant does not extend to take away the special privilege of any court without special words. *Lit. Rep.* 304. *Mich.* 5. *C. C. B. Oxford* (University's) Case.

If a scholar of Oxford or Cambridge be sued in chancery for a special performance of a contract to lease lands in Middlesex, the University shall not have consusance, because they cannot sequester the lands. *Gilb. Hist. of C. P.* 194. cites 2 *Vent.* 363.

Conusance must be demanded *before an imparlance*, and *the same term the writ is returnable, after the defendant appears;* because, till he appears, there is no cause in court, otherwise there would be a delay of justice; for if after imparlance, when the defendant has a day already allowed him, he would have two days, since when the conusance is allowed, the franchise prefixes a day to both parties to appear before them; and it is the lord's *laches* if he does not come soon enough not to delay the parties. *Gilb. Hist. of C. P.* 196.

Conusance was granted to the University of *Oxford*, (no cause being shown to the contrary,) in *Easter Term*, 9 *Geo.* II. in the case of *Woodcocke* and *Brooke*. *Hardw.* 241. See further, under tit. *Courts of the University.*

Cognisance also signifies the badge of a waterman or servant, which is usually the giver's *crest*, whereby he is known to belong to this or that nobleman or gentleman. *Dict.*

COGNISOR AND COGNISEE. *Cognisor*, is he that passeth or acknowledgeth a fine of lands or tenements to another; and *cognisee* is he to whom the fine of the said lands, &c. is acknowledged. Stat. 32 *Hen.* VIII. *c.* 5.

Cognition, Is the process, whereby molestation is determined. *Scotch Dict.*

COGNITIONES, Ensigns and arms, or a military coat painted with arms. *Mat. Paris*, 1250.

COGNITIONIBUS MITTENDIS, A writ to one of the king's justices of the *Common Pleas*, or other that hath power to take a fine, who, having taken the fine, defers to certify it, commanding him to certify it. *Reg. Orig.* 68.

COGNOVIT ACTIONEM, Is where a defendant *acknowledges* or confesses the plaintiff's cause against him to be just and true; and before or after issue, suffers judgment to be entered against him without trial. And here the confession generally extends no further than to what is contained in the declaration; but if the defendant will confess more, he may. 1 *Roll.* 929. *Hob.* 178.

COGWARE, Is said to be a sort of coarse cloths, made in divers parts of *England*, of which mention is made in the stat. 13 *Rich.* II. *cap.* 10.

COHUAGIUM, A tribute paid by those who met promiscuously in the market or fair; *choua* signifying a promiscuous multitude of men in a fair or market. *Quieti ab omni thelonio, passagio, pontagio,* cohuagio, *pallagio, &c.* Du Cange.

COIF, *coifa.*] A title given to serjeants at law, who are called *Serjeants of the Coif*, from the lawn *coif* they wear on their heads under their caps, when they are created. The use of it was anciently to cover *tonsuram clericalem*, otherwise called *corona clericalis;* because the crown of the head was close shaved, and a border of hair left round the lower part, which made it look like a crown. *Blount.* See tit. *Clerk.*

COIN, *cuna pecunia.*] Seems to come from the Fr. *coign*, i. e. *angulus*, a corner, whence it has been held, that the ancientest sort of *coin* was square with corners, and not round as it now is. It is any sort of money *coined. Cromp. Jurisd.* 220. *Coin* is a word collective, which contains in it all manner of the several stamps and species of money in any kingdom; and this is one of the royal prerogatives belonging to every sovereign prince, that he alone in his own dominions may order and dispose the quantity, value, and fashion of his *coin.* But the *coin* of one king is not current in the kingdom of another, unless it be at great loss; though our king by his prerogative may make any foreign *coin* lawful money of *England* at his pleasure, by proclamation. *Terms de Ley.* If a man binds himself by bond to pay one hundred pounds of lawful money of *Great Britain*, and the person bound, the obligor, pays the obligee the money in *French*, *Spanish*, or other coin, made current either by act of parliament or the king's proclamation, the obligation will be well performed. *Co. Lit.* 207. But it is said a payment in farthings is not a good payment. 2 *Inst.* 517. See *post.*

When a person has accepted of money in payment from another, and put the same into his purse, it is at his peril after his allowance; and he shall not then take exception to it as bad, notwithstanding he presently reviews it. *Terms de Ley.*

Of Offences relating to the Coin.

Two offences respecting the *coin*, are made *treason* by the stat. 25 *Edw.* III. *c.* 2. These are, the actual *counterfeiting* the gold and silver coin of this kingdom; or the *importing* such counterfeit money with an intent to utter it, knowing it to be false. But these not being found sufficient to restrain the evil practices of coiners and false moneyers, other statutes have been since made for that purpose.

By stat. 1 *M. st.* 2. *c.* 6. if any person shall falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, but shall be current within this realm by consent of the crown; such offence shall be deemed *high treason.* And by stat. 1 & 2 *P. & M. c.* 11. if any person do bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, with intent to utter the same in payment, they shall be deemed offenders in high treason. The money, referred to in these statutes, must be such as is absolutely current here, in all payments, by the king's proclamation; of which there is none at present, *Por-*

tugal money being only taken by consent, as approaching the nearest to our standard, and falling in well enough with our divisions of money into pounds and shillings; therefore to counterfeit that is not high treason, but another inferior offence; but see as to counterfeiting *Spanish* dollars, made current coin, 44 *Geo.* III. *c.* 71. and 45 *Geo.* III. c. 42. by which persons counterfeiting dollars, or tokens issued by Banks of *England* or *Ireland*, are declared guilty of felony, and may be transported for seven years. So bringing the same into the kingdom counterfeited. Persons vending and uttering the same, shall suffer for first offence six months imprisonment, and second offence two years; third offence, transportation.

Clipping or defacing the genuine coin was not hitherto included in these statutes; but by stat. 5 *Eliz. c.* 11. clipping, washing, *rounding*, or filing for wicked gains' sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged high treason; and by stat. 18 *Eliz. c.* 1. the same species of offence is described in other more general words; viz. impairing, diminishing, falsifying, scaling, and lightening, are made liable to the same penalties.

By stat. 8 & 9 *Wm.* III. *c.* 26. (made perpetual by 7 *Ann. c.* 25.) whoever, without proper authority, shall knowingly make or mend, or assist in so doing, or shall buy, sell, conceal, hide, or knowingly have in his possession any implements of coinage specified in the act, or other tools or instruments proper *only* for the coinage of money; or shall convey the same out of the king's mint; he, together with his counsellors, procurers, aiders, and abettors, shall be guilty of high treason, which is much the severest branch of the coinage law. The statute farther enacts, that to mark any coin on the edges with letters, or otherwise, in imitation of those used in the mint; or to colour, gild, or case over any coin resembling the current coin, or even round blanks of base metal, shall be construed high treason. But all prosecutions on this act are to be commenced within *three* months after the commission of the offence; except those for making or mending any coining tool or instrument, or for the making letters on money round the edges; which are directed to be commenced within *six* months after the offence committed. See stat. 7 *Ann. c.* 25.

And, lastly, by stat. 15 & 16 *Geo.* II. *c.* 28. if any person colours or alters any shilling or sixpence, either lawful or counterfeit, to make them respectively resemble a guinea or half guinea; or any halfpenny or farthing, to make them respectively resemble a shilling or sixpence; this is also high treason; but the offender shall be pardoned, in case (being out of prison) he discovers and convicts two other offenders of the same kind.

Offences relating to the coin, *not amounting to treason*, and under which may be ranked some inferior misdemeanors not amounting to felony, are thus declared by a series of statutes, here recited in the order of time. By stat. 27 *Edw.* I. *c.* 3. none shall bring pollards and crockards (which were foreign coins of base metal) into the realm, on pain of forfeiture of life and goods. By stat. 9 *Edw.* III. *st.* 2. no sterling money shall be melted down, upon pain of forfeiture thereof. By stat. 17 *Edw.* III. none shall be so hardy to bring false and ill money into the realm, on pain of forfeiture of life and members of the persons importing, and the searchers permitting such importation. By stat. 3 *Hen.* V. *st.* 1. to make, coin, buy, or bring into the realm any gally-halfpence, suskins, or dotkins, in order to utter them, is felony; and knowingly to receive or pay them, *or blanks*,

(stat. 2 *Hen.* VI. *c.* 9.) incurs a forfeiture of a hundred shillings. By stat. 14 *Eliz. c.* 3. such as forge any foreign coin, although it be not made current here by proclamation, shall (with their aiders and abettors) be guilty of misprision of treason. See tit. *Misprision.* By stat. 13 & 14 *Car.* II. *c.* 31. the offence of melting down any current silver money shall be punished with forfeiture of the same, and also the double value; and the offender, if a freeman of *any* town, shall be disfranchised; if not, shall suffer six months' imprisonment. By stat. 6 & 7 *Wm.* III. *c.* 17. if any person buys or sells, or knowingly has in his custody, any clippings or filings of the coin, he shall forfeit the same and 500*l.* one moiety to the king, and the other to the informer; and be branded in the *cheek* with the letter *R.* [But see tit. *Clergy.*] By stat. 8 & 9 *Wm.* III. *c.* 26. no person shall blanch, or whiten, copper for sale, (which makes it resemble silver,) nor buy or sell, or offer for sale, any malleable composition, which shall be heavier than silver, and look, touch, and wear like gold, but beneath the standard; nor shall any person receive or pay at a less rate than it imports to be of, (which demonstrates a consciousness of its baseness, and a fraudulent design,) any counterfeit or diminished milled money of this kingdom, not being cut in pieces; an operation which is expressly directed to be performed when any such money shall be produced in evidence, and which any person, to whom any gold or silver money is tendered, is empowered (by stats. 9 & 10 *Wm.* III. *c.* 21. 13 *Geo.* III. *c.* 71. and 14 *Geo.* III. *c.* 70.) to perform at his own hazard; and the officers of the Exchequer, and the receivers-general of the taxes, are particularly required to perform; and all such persons so blanching, selling, &c. shall be guilty of felony, and may be prosecuted for the same at any time within three months after the offence committed.

But these precautions not being found sufficient to prevent the uttering of false or diminished money, which was only a misdemeanor at common law, it is enacted by stats. 15 & 16 *Geo.* II. *c.* 28. that if any person shall utter or tender in payment any counterfeit coin, knowing it to be so, he shall for the first offence be imprisoned six months, and find sureties for his good behaviour for six months more; for the second offence shall be imprisoned two years, and find sureties for two years longer; and for the third offence, shall be guilty of felony without benefit of clergy. Also if a person knowingly tenders in payment any counterfeit money, and at the same time has more in his custody; or shall, within ten days after, knowingly tender other false money; he shall be deemed a common utterer of counterfeit money, and shall for the first offence be imprisoned one year, and find sureties for his good behaviour two years longer; and for the second be guilty of felony without benefit of clergy. By the same statute it is also enacted, that if any person counterfeits the *copper coin*, he shall suffer two years' imprisonment, and find sureties for two years more.

By stat. 11 *Geo.* III. *c.* 40. persons counterfeiting *copper halfpence* or *farthings*, with their abettors; or buying, selling, receiving or putting off any counterfeit copper money, (not being cut in pieces or melted down,) at a less value than it imports to be of, shall be guilty of single felony. And by stat. 14 *Geo.* III. *c.* 42. (made perpetual by 39 *Geo.* III. *c.* 75.) if any quantity of money exceeding the sum of five pounds, being or purporting to be the silver coin of this realm, but below the standard of the mint in weight or fineness, shall be imported into *Great Britain* or *Ireland*, the same shall be forfeited, in equal moieties, to the crown and prosecutor.

By 43 *Geo.* III. *c.* 139. counterfeiting foreign copper coin, &c. is punishable by imprisonment; and for second offence, transportation; and houses of suspected persons may be searched, and counterfeited coin seized, &c.

The *coining of money* is in all states the act of the *sovereign power;* that its value may be known on inspection. And with regard to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination. With regard to the *materials*, Sir *Edward Coke* lays it down (2 *Inst.* 577.) that the money of *England* must either be of gold or silver; and none other was ever issued by the royal authority till 1672, when copper farthings and halfpence were coined by *Charles* II. and ordered by proclamation to be current in all payments, under the value of sixpence, and not otherwise. But this copper coin is not upon the same footing with the other in many respects, particularly with regard to the offence of counterfeiting it, as has been already noticed. And as to the silver coin, it was enacted by stat. 14 *Geo.* III. *c.* 42. that no tender of payment in silver money, exceeding twenty-five pounds at one time, shall be a sufficient tender in law for more than its value by weight, at the rate of 5*s.* 2*d.* an ounce. This was a clause in a temporary act, which was continued till 1783, since which time it does not appear to have been revived.

As to the *impression*, the stamping thereof is the unquestionable prerogative of the Crown; for though divers bishops and monasteries had formerly the privilege of coining money, yet, as Sir *Matthew Hale* observes, (1 *Hist. P. C.* 191.) this was usually done by special grant from the king, or by prescription, which supposes one; and therefore was derived from, and not in derogation of, the royal prerogative. Besides that they had only the profit of the coinage, and the power of instituting either the impression or denomination; but had usually the stamp sent them from the Exchequer.

The *denomination*, or the value for which the coin is to pass current, is likewise in the breast of the king; and if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard, and called Esterling or sterling metal; a name for which there are various reasons given, but none of them entirely satisfactory. See *Spelm. Gloss.* 203. *Du Fresne*, 3. 165. The most plausible opinion seems to be that adopted by those two etymologists, that the name was derived from the *Esterlings* or Easterlings, as those Saxons were anciently called who inhabited that district of *Germany* now occupied by the *Hanstowns* and their appendages; the earliest traders in modern *Europe*. Of this sterling or esterling metal, all the coin of the kingdom must be made, by stat. 25 *Edw.* III. *c.* 13. So that the king's prerogative seemeth not to extend to the debasing or enhancing the value of the coin, below or above the sterling value; 2 *Inst.* 577. though Sir *Matthew Hale* (1 *Hale's P. C.* 194.) appears to be of another opinion. The king may also, by his proclamation, legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments. 1 *Hale's P. C.* 197. But this it seems ought to be by comparison with the standard of our own coin, otherwise the consent of parliament will be necessary. The king may also at any time decry, or cry down

any coin of the kingdom, and make it no longer current. 1 *Hale's P. C.* 197.

This *standard* hath been frequently varied in former times; but hath for many years past been thus invariably settled. The pound troy of gold, consisting of twenty-two carats (or 24th parts) fine, and two of alloy, is divided into forty-four guineas and a half of the present value of 21*s.* each. And the pound troy of silver, consisting of eleven ounces and two penny weights fine, and eighteen pennyweights alloy, is divided into sixty-two shillings. See *Folkes on English Coins.*

In the 7th year of King *William* III. an act was made for calling in all the old *coin* of the kingdom, and to melt it down and recoin it; the deficiencies whereof were to be made good at the public charge; and in every hundred pound *coined*, 40*l.* was to be shillings, and 10*l.* sixpences, under certain penalties.

Persons bringing plate to the *Mint* to be *coined*, were to have the same weight of money delivered out as an encouragement; and receivers-general of taxes, &c. were to receive money at a large rate per ounce. Our guineas have been raised and fallen, as money has been scarce or plenty, several times by statute; and anno 3 *Geo.* I. guineas were valued at 21*s.* at which they now pass.

A duty of 10*s.* per ton was imposed on wine, beer, and brandy imported, called the *coinage duty*, granted for the expense of the king's *coinage*, but not to exceed 3,000*l.* per annum. Stat. 18 *Car.* II. *cap.* 5. This duty for coinage hath been continued and advanced, from time to time by divers statutes; and by stat. 27 *Geo.* II. *c.* 11. (explained by stat. 27 *Geo.* III. *c.* 13. § 64.) the treasury is to apply 15,000*l.* a year to the expenses of the mints in *England* and *Scotland*. Stat. 14 *Geo.* III. *c.* 92. regulates the stamping of *money-weights*, the fees for which are settled by stat. 15 *Geo.* III. *c.* 30. at 1*d.* for every 12 weights.

COLIBERTS, *coliberti.*] Were tenants in socage; and particularly such villeins as were manumitted or made freemen. *Domesday.* But they had not an absolute freedom; for though they were better than servants, yet they had superior lords, to whom they paid certain duties, and in that respect they might be called servants, though they were of middle condition, between freemen and servants. *Libertate carens* colibertus *dicitur esse.* Du Cange.

COLLATERAL, *collateralis.*] From the Lat. *literalè*, sideways, or that which hangeth by the side, not direct: as *collateral assurance* is that which is made over and above the deed itself; *collateral security* is where a deed is made of other land, besides those granted by the deed of mortgage; and if a man covenants with another, and enters into bond for performance of his covenant, the bond is a *collateral* assurance, because it is external, and without the nature and essence of the covenant. If a man hath liberty to pitch booths or standings for a fair or market, in another person's ground, it is *collateral* to the ground. The private woods of a common person, within a forest, may not be cut down without the king's license; it being a prerogative *collateral* to the soil. And to be subject to the feeding of the king's deer, is *collateral* to the soil of a forest. *Cromp. Jurisd.* 185. *Manw. f.* 66.

Collateral Consanguinity *or* Kindred. *Collateral* relations agree with the lineal in this, that they descend from the same stock or ancestor; but differ in this, that they do not descend from each other. *Collateral kinsmen*, therefore, are such as lineally spring from one and the same ancestor, who is the *stirps* or root, the *stipes*, trunk, or com-

mon stock, from whence these relations are branched out. 2 *Comm.* 204. See tit. *Descent.*

COLLATERAL DESCENT, *and* COLLATERAL WARRANTY. See *Descent* and *Warranty.*

COLLATERAL ISSUE, Is where a criminal convict pleads any matter, allowed by law, in bar of execution, as *pregnancy*, the king's *pardon*, an *act of grace*, or *diversity of person*, viz. that he or she is not the same that was attainted, &c. whereon issue is taken, which issue is to be tried, by a jury, *instantèr.*

COLLATIO BONORUM, Is in law where a portion or money advanced by the father to a son or daughter, is brought into *hotchpot*, in order to have an equal distributory share of his personal estate, at his death, according to the intent of the stat. 22 & 23 *Car.* II. *c.* 10. *Abr. Cas. Eq. p.* 254. See tit. *Hotchpot*, *Executor.*

COLLATION TO A BENEFICE, *collatio beneficii.*] Signifies the bestowing of a *benefice* by the bishop, or other ordinary, when he hath right of patronage. See tit. *Advowson.*

COLLATIONE FACTA UNI POST MORTEM ALTERIUS, A writ directed to the Justices of the *Common Pleas*, commanding them to issue their writ to the bishop, for the admission of a clerk in the place of another presented by the king; who died during the suit between the king and the bishop's clerk; for judgment once passed for the king's clerk, and he dying before admittance, the king may bestow his presentation on another. *Reg. Orig.* 31.

COLLATIONE HEREMITAGII, A writ whereby the king conferred the keeping of a *hermitage* upon a clerk. *Reg. Orig.* 303. 308.

COLLATION OF SEALS. This was when upon the same label, one seal was set on the back or reverse of the other.

COLLATIVE ADVOWSONS. See tit. *Advowson.*

COLLECTORS, Of money due to the king. Stat. 20 *Car.* II. See *Receivers.*

COLLEGE, *collegium.*] A particular corporation, company or society of men, having certain privileges founded by the king's license; and for *colleges* in reputation, see 4 *Rep.* 106. 108.

The establishment of Colleges or Universities, is a remarkable æra in literary history. The schools in Cathedrals and Monasteries confined themselves chiefly to the teaching of grammar. There were only one or two masters employed in that office. But in colleges, professors were appointed to teach all the different parts of science. The first obscure mention of academical degrees in the University of *Paris*, (from which the other Universities in *Europe* have borrowed most of their customs and institutions,) occurs *A. D.* 1215. Vide *Roberts. Hist. Emp. C.* V. 1 *v.* 323.

See the power of visitors of Colleges well explained in Dr. *Walker's* case. *Hardw.* 212. See further, tit. *Corporations*, *Leases*, *Universitie*.

COLLEGIATE CHURCH, Is that which consists of a Dean and secular canons; or more largely, it is a church built and endowed for a society, or body corporate, of a dean or other president, and secular priests, as canons or prebendaries in the said church. There were many of these societies distinguished from the religious or regulars, before the reformation; and some are established at this time; as *Westminster*, *Windsor*, *Winchester*, *Southwell*, *Manchester*, &c. See tit. *Chapter*, *Dean.*

COLLIGENDUM BONA DEFUNCTI, (Letters *ad.*) In defect of representatives and creditors to administer to an intestate, &c. the

ordinary may commit administration to such discreet person as he approves of, or grant him these letters, *to collect the goods of the deceased*, which neither make him executor nor administrator; his only business being to keep the goods in his safe custody, and to do other acts for the benefit of such as are entitled to the property of the deceased. 2 *Comm.* 505. See tit. *Executor*.

COLLOQUIUM, *à colloquendo.*] A talking together, or affirming of a thing laid in declarations for words in actions of slander, &c. *Mod. Cas.* 203. *Carthew*, 90.

COLLUSION, *collusio.*] Is a deceitful agreement or contract between two or more persons, for the one to bring an action against the other, to some evil purpose, as to defraud a third person of his right, &c. This *collusion* is either apparent, when it shows itself on the face of the act; or, which is more common, it is secret, where done in the dark, or covered over with a show of honesty. And it is a thing the law abhors; wherefore, when found, it makes void all things dependent upon the same, though otherwise in themselves good. *Co. Lit.* 109. 360. *Plowd.* 54. Collusion may sometimes be tried in the same action wherein the covin is, and sometimes in another action, as for lands aliened in mortmain by a *quale jus;* and where it is apparent there needs no proof of it, but when it is secret it must be proved by witnesses, and found by a jury like other matters of fact. 9 *Rep.* 33. The statute of *Westm.* 2. 13 *Edw.* I. *c.* 33. gives the writ *quale jus*, and inquiry in these cases; and there are several other statutes relating to deeds, made by collusion and fraud. The cases particularly mentioned by the statute of *Westm.* 2. are of *quare impedit*, *assise*, &c. which one corporation brings against another, with intent to recover the land or advowson, for which the writ is brought, held in mortmain, &c. See tit. *Fraud*.

COLONIES. See tit. *Plantation*.

COLONUS, A husbandman or villager, who was bound to pay yearly a certain tribute; or at certain times in the year to plough some part of the lord's lands. And from hence comes the word *Clown*.

COLOUR, *color.*] Signifies a probable plea, but which is in fact false; and hath this end, to draw the trial of the cause from the jury to the judges; and therefore *colour* ought to be matter in law, or doubtful to the jury.

It is a rule in pleading, that no man be allowed to plead, specially, such a plea as amounts only to the general issue; but in such case he shall be driven to plead the general issue in terms, whereby the whole question is referred to a jury. But if a defendant, in an assise or action of trespass, be desirous to refer the validity of his title to the court rather than the jury, he may state his title specially, and at the same time *give colour* to the plaintiff, or suppose him to have an appearance or colour of title, bad indeed in point of law, but of which the jury are not competent judges. As if his own true title be that he claims by feoffment with livery from *A.* by force of which he entered on the lands in question, he cannot plead this by itself, as this plea amounts to no more than the general issue. But he may allege this specially, provided he goes farther, and says, that the plaintiff claiming *by colour* of a prior deed of feoffment, without livery, entered, upon whom he entered; and may then refer himself to the judgment of the court, which of the two titles is the best in point of law. *Doctor & Stud.* 2. *c.* 53.

Every colour ought to have these qualities following: 1. It is to be doubtful to the *lay gens*, as in case of a deed of feoffment pleaded, and it is a doubt whether the land passeth by the feoffment, without livery, or not. 2. Colour ought to have continuance, though it wants effect. 3. It should be such colour, that, if it were effectual, would maintain the nature of the action; as in assise, to give colour of freehold, &c. 10 *Rep.* 88. 90. *a.* 91. Colour must be such a thing, which is a good colour of title, and yet is not any title. *Cro. Jac.* 122. If a man justifies his entry for such a cause as binds the plaintiff or his heirs for ever, he shall not give any colour; but if he pleads a descent in bar, he must give colour, because this binds the possession, and not the right; so that when the matter of the plea bars the plaintiff of his right, no colour must be given. When the defendant entitles himself by the plaintiff; where a person pleads to the writ, or to the action of the writ; he who justifies for tithes, or where the defendant justifies as servant; in all these cases no colour ought to be given. 10 *Rep.* 91. *Lutw.* 1343. Where the defendant doth not make a special title to himself, or any other, he ought to give colour to the plaintiff. *Cro. Eliz.* 76. In trespass for taking and carrying away twenty loads of wood, &c. the defendant says, that *A. B.* was possessed of them, *ut de bonis propriis*, and that the plaintiff claiming them by *colour* of a deed after made, took them, and the defendant retook them; and adjudged that the colour given to the plaintiff, makes a good title to him, and confesseth the interest in him. 1 *Lil. Abr.* 275. See tit. *Pleading.*

COLOUR OF OFFICE, *color officii.*] Is when an act is evilly done by the countenance of an office; and always taken in the worst sense, being grounded upon corruption, to which the *office* is a shadow and colour. *Plowd. Comment.* 64. See *Bribery*, *Extortion.*

COLPICES, *colpicium*, *colpiciis.*] Young poles, which being cut down, make levers or lifters; and in *Warwickshire*, they are called *colpices* to this day. *Blount.*

COLPO, A small wax candle, *à colpo de cere.* *Hoveden* says, that when the King of *Scots* came to the *English* court, as long as he staid there, he had every day, *De liberatione triginta sol. et duodecim vassellos dominicos, et quadraginta grossos longos* colpones *de dominica candela regis, &c. anno* 1194.

COMBARONES, The fellow barons, or commonalty of the Cinque Ports. *Placit. temp. Edw.* I. & *Edw.* II. But the title of Barons of the Cinque Ports is now given to their representatives in parliament; and the word *combaron* is used for a fellow member, the *baron* and his *combaron.* See tit. *Parliament.*

COMBATERRÆ, from Sax. *cumbe*, Brit. *kum*, Eng. *comb.*] A valley or low piece of ground or place between two hills; which is still so called in *Devonshire* and *Cornwall.* Hence many villages in other parts of *England* have their names of *comb*, as *Wickcomb*, *&c.* from their situation. *Kennet's Gloss.*

COMBAT, *Trial by.* See *Battel.*

COMBINATIONS, To do unlawful acts, are punishable before the unlawful act is executed. This is to prevent the consequence of *combinations* and conspiracies, &c. 9 *Rep.* 57. See tit. *Confederacy*, *Conspiracy.*

COMBUSTIO PECUNIÆ, The ancient way of trying mixed and corrupt money, by melting it down upon payments into the *Exchequer.* In the time of King *Henry* II. a constitution was made, called the *trial by combustion;* the practice of which differed little or nothing from the present method of *assaying* silver. But whether this exa-

mination of money by *combustion*, was to reduce an equation of money only of *sterling*, viz. a due proportion of alloy with copper; or to reduce it to a fine, pure silver without alloy, doth not appear. On making the constitution for trial, it was considered, that though the money did answer *numero et pondere*, it might be deficient in value; because mixed with copper or brass, &c. Vide *Lownde's Essay upon Coin, p.* 5. See tit. *Coin*.

COMITATUS, A county. *Ingulphus* tells us, that *England* was first divided into counties by King *Alfred;* and counties into hundreds, and these again into tithings; and *Fortescue* writes, that *regnum* Angliæ *per* comitatus *ut regnum* Franciæ *per ballivatus distinguitur*. It is also taken for a territory or jurisdiction of a particular place, as in *Mat. Paris, anno* 1234. and divers old charters. See tit. *County, Sheriff*.

According to Lord *Littleton*, in his *History of Henry* II. *lib.* 2. *fol.* 217. each county was anciently an earldom, so that, previous to the reign of King *Stephen*, there were not any titular earls, nor more earls than counties, though there might be fewer. As to the divisions of counties into hundreds and tithings, see Ld. *Lit. lib.* 2. *fol.* 259. Also see *Bract. lib.* 3. *c.* 10.

COMITATU COMMISSO, Is a writ or commission whereby a sheriff is authorized to take upon him the charge of the county. *Reg. Orig.* 295.

COMITATU ET CASTRO COMMISSO, A writ by which the charge of a county, together with the keeping of a castle, is committed to the sheriff. *Reg. Orig.* 295.

COMITIVA, A companion or fellow traveller. It is mentioned in *Bromp. Regn. Hen.* II. And sometimes it signifies a troop or company of robbers, as in *Wals. anno* 1366.

COMMANDERY, *præceptoria.*] Was any manor or chief messuage, with lands and tenements thereto appertaining, which belonged to the priory of *St. John of Jerusalem in England;* and he who had the government of such a manor or house, was styled the *commander;* who could not dispose of it but to the use of the priory, only taking thence his own sustenance, according to his degree. *New Eagle* in *Lincolnshire*, was, and still is, called the *Commandery of Eagle*, and did anciently belong to the said priory of *St. John*. So *Selbach* in *Pembrokeshire*, and *Shingay* in *Cambridgeshire*, were *commanderies* in the time of the knights templars, says *Camden;* and these in many places of *England* are termed *Temples*, because they formerly belonged to the said templars. See stat. 26 *Hen.* VIII. *c.* 2. The manors and lands belonging to the priory of *St. John of Jerusalem*, were given to King *Henry* VIII. by stat. 32 *Hen.* VIII. *c.* 20. about the time of the dissolution of abbeys and monasteries; so that the name only of *commanderies* remains, the power being long since extinct.

COMMANDMENT, *præceptum.*] Is diversely taken; as the *commandment of the king*, when upon his own motion he had cast any man into prison. *Commandment of the justices*, absolute or ordinary; absolute, where upon their own authority they commit a person for contempt, &c. to prison, as a punishment; ordinary is when they commit one rather for safe custody, than for any punishment; and a man committed upon such an ordinary *commandment* is replevisable. *Staundf. P. C.* 72, 73. Persons committed to prison by the special *command* of the king, were not formerly bailable by the court of *King's Bench;* but at this day the law is otherwise. 2 *Hawk. P. C. c.* 15. § 36. See tit. *Bail*.

In another sense of this word, magistrates may *command* others to assist them in the execution of their offices, for the doing of justice; and so may a justice of peace to suppress riots, apprehend felons; an officer to keep the king's peace, &c. *Bro.* 3. A master may *command* his servant to drive another man's cattle out of his ground, to enter into lands, seize goods, distrain for rent, or do other things; if the thing be not a trespass to others. *Fitz. Abr.* The *commandment* of a thing is good, where he that commands hath power to do it; and a verbal command in most cases is sufficient; unless it be where it is given by a corporation, or when a sheriff's warrant is to a bailiff to arrest, &c. *Bro.* 288. *Dyer*, 202.

Commandment is also used for the offence of him that willeth another man to transgress the law, or do any thing contrary to it; and in the most common signification, it is taken where one willeth another to do an unlawful act, as murder, theft, or the like; which the civilians called *mandatum*. *Bract. lib.* 3. *c.* 19. See tit. *Accessory*.

In forcible entries, &c. an infant or *feme covert* may be guilty in respect of actual violence done by them in person; though not in regard to what shall be done by others at their *command*, because all such commands of theirs are void. *Co. Lit.* 357. 1 *Hawk. P. C. c.* 64. § 35. See tit. *Infant*. In trespass, &c. the master shall be charged criminally for the act of the servant, done by his *command;* but servants shall not be excused for committing any crime, when they act by command of *their masters*, who have no authority over them to give such *command*. *Doct. & Stud. c.* 42. *Hale's P. C.* 66. *Kel.* 13. And if a master commands his servant to distrain, and he abuseth the distress, the servant shall answer it to the party injured, &c. *Kitch.* 372. See tit. *Servant*.

COMMARCHIO, The confines of the land; from whence probably comes the word *marches*. *Imprimis de nostris landimeris*, commarchionibus. *Du Cange*.

COMMENDAM, *ecclesia* commendata, *vel custodia ecclesiæ alicui commissa*.] Is the holding of a benefice or church-living, which being void, is *commended* to the charge and care of some sufficient clerk, to be supplied until it may be conveniently provided with a pastor. And he to whom the church is *commended*, hath the profits thereof only for a certain time, and the nature of the church is not changed thereby, but is as a thing deposited in his hands in trust, who hath nothing but the custody of it, which may be revoked. When a parson is made bishop, there is a cession or voidance of his benefice, by the promotion; but if the king, by special dispensation, gives him power to retain his benefice notwithstanding his promotion, he shall continue parson, and is said to hold it *in commendam*. *Hob.* 144. *Latch.* 236. As the king is the means of avoidances on promotions to dignities, and the presentations thereon belong to him, he often on the creation of bishops grants them licenses to hold their benefices *in commendam;* but this is usually where the bishopricks are small, for the better support of the dignity of the bishop promoted; and it must be always before consecration; for afterwards it comes too late, because the benefice is absolutely void. A *commendam*, founded on the stat. 25 *Hen.* VIII. *c.* 21. is a dispensation from the supreme power, to hold or take an ecclesiastical living *contra jus positivum;* and there are several sorts of *commendams;* as a *commendam semestris*, which is for the benefit of the church without any regard to the *commendatary*, being only a provisional act of the ordinary, for supplying the vacation of *six months*, in which time the patron is to present his clerk, and is but a

sequestration of the cure and fruits until such time as the clerk is presented; a *commendam retinere*, which is for a bishop to retain benefices, on his preferment; and these *commendams* are granted on the king's mandate to the archbishop, expressing his consent, which continues the incumbency, so that there is no occasion for institution. A *commendam recipere* is to take a benefice *de novo* in the bishop's own gift, or in the gift of some other patron, whose consent must be obtained. *Dyer*, 228. 3 *Lev.* 381. *Hob.* 143. *Danv.* 79.

A *commendam* may be temporary for six or twelve months, two or three years, &c. or it may be perpetual, i. e. for life; when it is equal to a presentation, without institution or induction. But all dispensations beyond six months were only permissive at first, and granted to persons of merit. The *commendam retinere* is for one or two years, &c. and sometimes for three or six years, and doth not alter the estate which the incumbent had before. A *commendam retinere* as long as the *commendatary* should live and continue bishop, hath been held good. *Vaugh.* 18.

The *commendam recipere* must be for life, as other parsons and vicars enjoy their benefices; and as a patron cannot present to a full church, so neither can a *commendam recipere* be made to a church that is then full. *Show.* 414. A benefice cannot be *commended* by parts, any more than it may be presented unto by parts; as that one shall have the glebe, another the tithes, &c. Nor can a *commendatary* have a *juris utrum*, or take to him and his successors, sue or be sued, in a writ of annuity, &c. But a *commendatary in perpetuum* may be admitted to do it. 11 *Hen.* IV.

These *commendams* are now, in fact, seldom or never granted to any but bishops; and in that case the bishop is made *commendatary* of the benefice while he continues bishop of such diocese; as the object is to make an addition to a small bishoprick; and it would be unreasonable to grant it to a bishop for life, who might afterwards be translated to one of the richest sees. See the case of *Commendams*, *Hob.* 140. and *Collier's Eccl. Hist.* 2. 710.

COMMENDATARY, *commendatarius.*] He that holdeth a church living or preferment *in commendam.*

COMMENDATORS, Are secular persons, upon whom ecclesiastic benefices are bestowed, called so, because the benefices were commended and intrusted to their oversight; they are not proprietors, but only trustees or tutors. *Scotch Dict.*

COMMENDATORY LETTERS, Are such as are written by one bishop to another in behalf of any of the clergy, or others of his diocese, travelling thither, that they may be received among the faithful; or that the clerk may be promoted; or necessaries administered to others, &c. Several forms of these letters may be seen in our historians, as in *Bede*, *lib.* 2. *c.* 18.

COMMENDATUS, One that lives under the protection of a great man. *Spelm. Commendati homines* were persons who by voluntary homage, put themselves under the protection of any superior lord; for ancient homage was either *predial*, due for some tenure; or personal, which was by compulsion, as a sign of necessary subjection; or voluntary, with a desire of protection; and those, who, by voluntary homage, put themselves under the protection of any men of power, were sometimes called *homines ejus commendati*; and sometimes only *commendati*, as often occurs in *Domesday*. *Commendati dimidii* were those who depended on two several lords, and paid one half of their homage to each: and *subcommendati* were like under-tenants, under

the command of persons that were dependants themselves on a superior lord; also there were *dimidii sub-commendati*, who bore a double relation to such depending lords. *Domesday*. This phrase seems to be still in use, in the usual compliment, *commend me to such a friend*, &c. which is to let him know, *I am his humble servant*. *Spelm. of Feuds, cap.* 20.

COMMERCE, *commercium.*] Traffic, trade or merchandise in buying and selling of goods.

There is a distinction between *commerce* and *trade*; the former relates to our dealings with foreign nations, or our colonies, &c. abroad; the other to our mutual traffic and dealings among ourselves at home.

No municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandise; neither can they have a proper authority for this purpose; for, as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For this reason, the affairs of commerce are regulated by a law of their own, called the Law-merchant, or *Lex Mercatoria*, which all nations agree in and take notice of. And in particular it is held to be part of the law of *England*, which decides the causes of merchants by the general rules which obtain in all commercial countries. See further tit. *Merchant*. See also tit. *Bill of Exchange*.

COMMISSARY, *commissarius.*] A title in the ecclesiastical law, belonging to one that exerciseth spiritual jurisdiction, in places of a diocese which are so far from the episcopal city that the chancellor cannot call the people to the bishop's principal consistory court, without their too great inconvenience. This commissary was ordained to supply the bishop's jurisdiction and office in the out-places of the diocese; or in such places as are peculiar to the bishop, and exempted from the jurisdiction of the archdeacon; for where, either by prescription or composition, archdeacons have jurisdiction within their archdeaconries, as in most places they have, this *commissary* is superfluous, and oftentimes vexatious, and ought not to be; yet in such cases, a *commissary* is sometimes appointed by the bishop, he taking prestation money of the archdeacon yearly *pro exteriori jurisdictione*, as it is ordinarily called. But this is held to be a wrong to archdeacons and the poorer sort of people. *Cowel's Interp.* 4 *Inst.* 338.

There are also *commissaries* in time of war. Persons sent abroad to take care of the supply and distribution of provisions for the army.

COMMISSION, *commissio.*] The warrant or letters patent, which all persons exercising jurisdiction either ordinary or extraordinary, have to authorize them to hear or determine any cause or action; as the *commission* of the judges, &c. *Commission* is with us as much as *delegatio* with the civilians; and this word is sometimes extended farther than to matters of judgment; as the *commission of purveyance*, &c. *Commissions* of inquiry shall be made to the justices of one bench or the other, &c. and to do lawful things, are grantable in many cases: also most of the great officers, judicial and ministerial, of the realm, are made by *commission*. And by such *commissions*, treasons, felonies, and other offences, may be heard and determined; by this means, likewise, oaths, cognisances of fines, and answers are taken, witnesses examined, offices found, &c. *Bro. Abr.* 12. *Rep.* 39. See stat. 42 *Edw.* III. *c.* 4. And most of these *commissions* are appointed by the king under the great seal of *England*; but a *commission* granted under the great seal may be determined by a privy seal; and by granting

another new *commission* to do the same thing, the former *commission* determines; and on the death or *demise* of the king, the *commissions* of judges and officers generally cease. *Bro. Commis.* 2 *Dyer*, 289. There was formerly a *High-Commission* Court founded on 1 *Eliz. c.* 1. but it was abolished by stats. 16 *Car.* I. *c.* 11. and 13 *Car.* II. *c.* 2. Of *commissions* divers may be seen in the table of the *Register of Writs*. See also stats. 4 *Hen.* IV. *c.* 9. 7 *Hen.* IV. *c.* 11. 6 *Ann. c.* 7. By which last act, § 27. it is provided that no greater number of commissioners shall be made for the execution of any office than had been previously usual.

Commission of Anticipation, Was a *commission* under the great seal to collect a tax or subsidy before the day. 15 *Hen.* VIII.

Commission of Array. See tit. *Militia.*

Commission of Association, A *commission* to *associate* two or more learned persons with the justices in the several circuits and counties of *Wales*, &c. See tit. *Assise*, *Circuit.*

Commission of Bankrupt, See tit. *Bankrupt.*

Commission of Charitable Uses, Goes out of the *Chancery* to the bishop and others, where lands given to charitable uses are misemployed, or there is any fraud or disputes concerning them, to inquire of and redress the abuse, &c. Stat. 43 *Eliz. c.* 4. See tit. *Charitable Uses*, *Mortmain.*

Commission of Delegates, Is a commission under the great seal to certain persons, usually two or three temporal lords, as many bishops, and two judges of the law, to sit upon an appeal to the king in the court of *Chancery*, where any sentence is given in any ecclesiastical cause by the archbishop. Stat. 25 *Hen.* VIII. *c.* 19. Now generally three of the common law judges, and two civilians, sit as delegates.

Commission to inquire of Faults against the Law, Was an ancient commission set forth on extraordinary occasions and corruptions.

Commissions of the Peace, See tit. *Justices of Peace.*

Commission of Lunacy, A commission out of *Chancery* to inquire whether a person represented to be a lunatic be so or not; that if lunatic, the king may have the care of his estate, &c. See tit. *Lunatic.*

Commission of Oyer and Terminer, An *English* term, is a commission especially granted to some eminent persons of the hearing and determining one or more causes; and it is the first and largest of the five commissions, by which the *English* judges of assise do sit in their several circuits. *Scotch Dict.* See tit. *Oyer and Terminer.*

Commission of Rebellion, Otherwise called a writ of rebellion, issues when a man after proclamation made by the sheriff, upon a process out of the *Chancery*, on pain of his allegiance, to present himself to the court by a day assigned, makes default in his appearance; and this commission is directed to certain persons, to the end they, three, two, or one of them, apprehend the party, or cause him to be apprehended as a *rebel* and contemner of the king's laws, wheresoever found within the kingdom, and bring or cause him to be brought to the court on a day therein assigned: this writ or commission goes forth after an attachment returned, *non est inventus*, &c. *Terms de Ley.* See tit. *Attachment*, *Chancery.*

Commission of Sewers, Is directed to certain persons to see drains and ditches well kept and maintained in the marshy and fenny parts of *England*, for the better conveyance of the water into the sea, and

preserving the grass upon the land. Stat. 23 *Hen.* VIII. *c.* 5. 13 *Eliz. c.* 9. See tit. *Sewers.*

COMMISSION OF TREATY WITH FOREIGN PRINCES, Is where leagues and treaties are made and transacted between states and kingdoms, by their ambassadors and ministers, for the mutual advantage of the kingdoms in alliance.

COMMISSION TO TAKE UP MEN FOR WAR, Was a commission to press or force men into the king's service. This power of *impressing* has been heretofore doubted, but the legality of it is now fully established. Vide *Fost. Rep.* 154. 1 *Comm.* 419. *Broadfoot's* case, *Comb.* 245. *Tubbs's* case, *Cowp.* 517. See tit. *Mariner*, *Navy.*

COMMISSIONER, *commissionarius.*] He that hath a commission, letters patent, or other lawful warrant to examine any matters, or to execute any public office, &c. And some *commissioners* are to hear and determine offences, without any return made of their proceedings; and others to inquire and examine, and certify what is found. Stat. 4 *Hen.* IV. *c.* 9. *Commissioners*, by the common law, must pursue the authority of the *commission*, and perform the effect thereof; and they are to observe the ancient rules of the courts whence they come; and if they do any thing for which they have not authority, it will be void. 2 *Co. Rep.* 25. *Co. Lit.* 157. The office of commissioners is to do what they are commanded; and it is necessarily implied, that they may do that also, without which what is commanded cannot be done; their authority, when appointed by any statute law, must be used as the statutes prescribe. 12 *Rep.* 32. If a commission is given to *commissioners* to execute a thing against law, they are not bound to accept or obey it: *commissioners* not receiving a commission may be discharged, upon oath before the Barons of the Exchequer, &c. and the king by *supersedeas* out of Chancery, may discharge *commissioners.* Besides *commissioners* relating to judicial proceedings, there are *Commissioners* of the *Treasury*, of the *Customs*, *Wine-licenses*, *Alienations*, *&c.* of which there are an infinite number.

COMMISSIONERS FOR VALUATION OF TEINDS, Are those appointed by the parliament to value Teinds. *Scotch Dict.*

COMMITTEE, Are those to whom the consideration or ordering of any matter is referred, by some court, or by consent of parties to whom it belongs; as in parliament, a bill either consented to and passed, or denied, or neither, but being referred to the consideration of certain persons appointed by the house farther to examine it, they are thereupon called a *committee.* And when a parliament is called, and the speaker and members have taken the oaths, and the standing orders of the house are read, *committees* are appointed to sit on certain days, viz. the *committee of privileges*, of *religion*, of *grievances*, of *courts of justice*, and of *trade*; which are the standing *committees.* But though they are appointed by every new parliament, they do not all of them act, only the *committee* of privileges; and this being not of the whole house, is first called in the speaker's chamber, from whence it is adjourned into the house, every one of the house having a vote therein, though not named, which makes the same usually very numerous; and any member may be present at any select *committee*; but is not to vote unless he be named. The chairman of the *grand committee*, who is always some leading member, sits in the clerk's place at the table, and writes the votes for and against the matter referred to them; and if the number be equal he has a casting voice, otherwise he hath no vote in the *committee*; and after the chairman hath put the question for reporting to the house, if that be carried, he leaves the chair,

and the speaker being called to his chair, (who quits it in the beginning, and the mace is laid under the table,) he is to go down to the bar, and so bring up his report to the table. After a bill is read a second time in the house of commons, the question is put, whether it shall be committed to a *committee of the whole house*, or a *private committee*; and the *committees* meet in the speaker's chamber, and report their opinion of the bill, with the amendments, &c. And if there be any exceptions against the amendments reported, the bill may be *recommitted*; eight persons make a *committee*, which may be adjourned by five, &c. *Lex Constitutionis*, 147. 150. See tit. *Parliament*.

There is a *Committee of the King*, mentioned in *West's Symb.* tit. *Chancery*, *sect.* 144. And this hath been used, though improperly, for the widow of the king's tenant being dead, who is called the *committee of the king*, that is, one committed by the ancient law of the land to the king's care and protection. *Kitch. fol.* 160.

The *Committee* of a lunatic, idiot, &c. is the person to whom the care and custody of such lunatic is *committed* by the court of *Chancery*. See tit. *Lunatic*.

Most corporations have their *committees* of select members to perform the general routine of business. See tit. *Corporation*.

COMMITMENT.

The sending of a person to prison, by warrant or order, who hath been guilty of any crime.

Anciently more felons were committed to gaol without a *mittimus* in writing, than were with it; such were commitments by watchmen, constables, &c. See 1 *H. H.* 610. But now since the *habeas corpus* act, a commitment *in writing* seems more necessary than formerly, otherwise a prisoner may be admitted to bail under that act, whatsoever his offence may have been. *Burn's Justice*, tit. *Commitment*.

I. *What kind of Offenders may be committed; and by whom; and in what manner.*
II. *To what Prison they may be committed, and at whose Charge.*
III. *How they may be removed and discharged.*

I. There is no doubt but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed. 2 *Hawk. P. C. c.* 16. § 1. It is said, that wheresoever a justice of peace is empowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the gaol to remain there till he shall comply. *Id. ib.* § 2.

It seems agreed by all the old books, that wheresoever a constable, or private person may justify the arresting another for a felony or treason, he may also justify the sending or bringing him to the common gaol; and that every private person hath as much authority in cases of this kind, as the sheriff, or any other officer; and may justify such imprisonment by his own authority, but not by the command of another. 2 *Hawk. P. C. c.* 16. § 3.

But inasmuch as it is certain, that a person lawfully making such an arrest may justify bringing the party to the constable, in order to

be carried by him before a justice of peace; and inasmuch as the statutes of 1 & 2 *P. & M. cap.* 13. and 2 & 3 *P. & M. cap.* 10. which direct in what manner persons brought before a justice of the peace for felony, shall be examined by him, in order to their being committed or bailed, seem clearly to suppose, that all such persons are to be brought before such justice for such purpose; and inasmuch as the statute of 31 *Car.* II. *c.* 2. commonly called the *Habeas-corpus* act, seems to suppose that all persons, who are committed to prison, are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate, and the constant tenor of the late books, practice and opinions, are agreeable hereto; it is certainly most advisable at this day, for any private person who arrests another for felony, to cause him to be brought, as soon as conveniently he may, before some justice of peace, that he may be committed or bailed by him. 2 *Hawk. P. C. c.* 16. § 3.

It is certain, that the *Privy Council*, or any one or two of them, or *Secretary of State*, may lawfully commit persons for *treason*, and for *other offences* against the state, as in all ages they have done. 2 *Hawk. P. C.* 117.

As to commitments by the *Privy Council*, two cases in *Leonard* (1 *Leon.* 71. 2 *Leon.* 175.) presuppose some power for this purpose, without saying what; and the case in 1 *Anders.* 297. plainly recognises such a power in *high treason*. But as to the jurisdiction of Privy Councillors in *other* offences, it does not appear to have been either claimed or exercised. But see *post*, as to commitments by the Secretary of State for *libel*; the cases of *Derby* and *Earbury*; which *Lord Camden* said are established, and the court has no right to overturn them. 11 *S. T.* 328.

As to commitments by the *Secretary of State*; in the case of *Entick* v. *Carrington*, *C. B. Mich. Geo.* III. upon a special verdict, respecting the validity of a Secretary of State's warrant to seize persons *and papers* in the case of *libels*, a very critical inquiry was made into the source of this power in that officer, in cases of libels and *other State crimes*. 2 *Wils.* 275. 11 *S. T.* 317. 319. It appears that the king being the principal conservator of the realm, the Secretary of State has so much of the royal authority transferred to him, as justifies *commitment* for these crimes, but not the *seizure of papers*.

The following instances of commitments by the Privy Council and Secretary of State, will further explain the nature of this power. 1. *Howell* was committed in the 28 *Eliz.* and *Hollyard* in the 30th *Eliz.* by *Secretary Walsingham*, Privy Councillor; and it was determined that where the commitment is not by the whole council, the cause must be expressed in the warrant. 1 *Leon.* 71. 2 *Leon.* 175. *Sed vide* stat. 31 *Car.* II. *c.* 2. Lord *Raym.* 65.—2. *Anno* 34 *Eliz.* the judges remonstrated against the exercise of this power; and declared that all prisoners may be discharged, unless committed by the queen's command, or by her whole council, or by one or two of them for *high treason*. 1 *And.* 297.—3. *Melvin* was committed *an.* 4 *Car.* I. by *Secretary Conway*, on suspicion of high treason; but the court thought the cause of the suspicion should have been expressed. *Palm.* 558.—4. *Crofton* was committed by the *council*, *an.* 14 *Car.* II. for high treason generally. *Vaugh.* 142. 1 *Sid.* 78. 1 *Keb.* 305.—5. *Fitzpatrick* by the *Privy Council*, *an.* 7 *W.* III. for high treason, in aiding an escape; and bailed for neglect of prosecution. 1 *Salk.* 103.—6. *Yaxley* was committed, *an.* 5 *W. & M.* by the *Secretary of State*, *Lord Nottingham*, for refusing to declare if he was a *Jesuit*. *Carth.* 291. *Skin.* 369.—

7. *Kendal* and *Roe* were committed, *an.* 7 *W.* III. by *Secretary Trumbal* for high treason, in assisting the escape of *Montgomery*; and by *Holt*, C. J. held good, but the prisoners were bailed. 4 *S. T.* 559. 5 *Mod.* 78. *Skin.* 596. *Holt*, 144. Lord *Raym.* 61. 65. *Comb.* 343. 12 *Mod.* 82. 1 *Salk.* 347.—8. *Derby* was committed, 10 *Ann.* for publishing a libel, (*quære* for *felony*, 11 *S. T.* 311.) called the *Observator*; and the court held the warrant good and legal. *Fortesc.* 140. 11 *S. T.* 309.—9. Sir *W. Wyndham* was committed, *an.* 4 *Geo.* I. by *Secretary Stanhope* for high treason; and by *Parker*, C. J. held good. *Stra.* 3. 3 *Vin.* 516.—10. Lord *Scarsdale*, and *Duplin*, and *Harvey* were committed, *an.* 2 *Geo.* I. by Lord *Townsend*, Secretary of State, for treasonable practices, and admitted to bail. 3 *Vin.* 534.—11. *Earbury* was arrested and committed by warrant from the Secretary of State, for being the author of a seditious libel, and his papers seized, and he continued on his recognisance, *an.* 7 *Geo.* II. 8 *Mod.* 177. 11 *S. T.* 309.—12. *Hensey* was committed, *an.* 31 *Geo.* II. by the Earl of *Holdernesse*, *Secretary of State*, for high treason, in adhering to the king's enemies. 1 *Burr.* 642.—13. *Shebbear* was committed, 31 *Geo.* II. on two warrants from the *Secretary of State*, for a libel. 1 *Burr.* 460.—14. *Wilkes* was committed, *an.* 3 *Geo.* III. by warrant from the Earl of *Halifax*, Secretary of State, for a libel; but discharged by his privilege of parliament. 2 *Wils.* 150. 11 *S. T.* 302.—15. *Sayer* was apprehended, 18 *Geo.* III. by warrant from the Earl of *Rochford*, *Secretary of State*, for high treason, and bailed by Lord *Mansfield*. *Black. Rep.* 1165. See further, tit. *Bail* II. and also tit. *Arrest*.

As to the manner of commitment, it is enacted by 2 & 3 *P. & M. c.* 10. that justices of peace shall examine persons brought before them for felony, &c. or suspicion thereof, before they commit them to prison, and shall bind their accusers to give evidence against them. See 2 *Hawk. P. C. c.* 16. § 11.

A justice of the peace may detain a prisoner a reasonable time, in order to examine him; and it is said, that three days is a reasonable time for this purpose. 2 *Hawk. P. C. c.* 16. § 12. *Dalt. c.* 125. 2 *Inst.* 52. 591.

Every commitment must be in writing, and under the hand and seal, and show the authority of him that made it, and the time and place, and must be directed to the keeper of the prison. It may be either in the king's name, and only tested by the justice, or in the justice's name. It may command the gaoler to keep the party in safe and close custody; for this being what he is obliged to do by law, it can be no fault to command him so to do. 2 *Hawk. P. C. c.* 16. § 13, 14, 15.

It ought to set forth the crime with convenient certainty, whether the commitment be by the Privy Council, or any other authority; otherwise the officer is not punishable by reason of such *mittimus*, for suffering the party to escape; and the court, before whom he is removed by *habeas corpus*, ought to discharge or bail him; and this doth not only hold where no cause at all is expressed in the commitment, but also where it is so loosely set forth, that the court cannot judge whether it were a reasonable ground for imprisonment or not. 2 *Hawk. P. C. c.* 16. § 17. See tit. *Arrest*, *Bail*.

A commitment for high treason or felony in general, without expressing the particular species, has been held good. 2 *Hawk. P. C. c.* 16. § 16. But now, since the *habeas corpus* act, it seems that such a general commitment is not good; and, therefore, where *A.* and *B.* were committed for aiding and abetting Sir *James Montgomery* to make his escape, who was committed by a warrant of a Secretary of State for high

treason; on a *habeas corpus*, they were admitted to bail, because it did not appear of what species of treason Sir *James* was guilty. *Skin.* 596. 1 *Salk.* 347. S. C.

It is safe to set forth that the party is charged upon oath; but this is not necessary, for it hath been resolved, that a commitment for treason, or for suspicion of it, without setting forth any particular accusation or ground of the suspicion, is good. 2 *Hawk. P. C. c.* 16. § 17. This resolution was in the case of Sir *W. Wyndham*, 2 *Geo.* I. who was committed by the Secretary of State for high treason generally. *Stra.* 2. 3 *Vin.* 515. at large. It was confirmed by *Pratt*, C. J. in *Wilkes's* case, committed by a similar warrant for a libel. 2 *Wils.* 158. 11 *S. T.* 304. And Mr. J. *Foster* says, in cases wherein the justice of the peace *hath jurisdiction*, the legality of his warrant will never depend on the truth of the information whereon it is grounded. *Curtis's Ca.* 136. See also *Dalt. c.* 125. *Cromp.* 233. 2 *Inst.* 52. *Palm.* 558. 1 *Salk.* 347. 5 *Mod.* 78. 10 *Mod.* 334. 1 *H. P. C.* 582.

Every such *mittimus* ought to have a lawful conclusion, viz. that the party be safely kept till he be delivered by law, or by order of law, or by due course of law; or that he be kept till further order, (which shall be intended of the order of law,) or to the like effect; and if the party be committed only for want of bail, it seems to be a good conclusion of the commitment, that he be kept till he find bail; but a commitment till the person who makes it shall take further order, seems not to be good; and it seems that the party committed by such or any other irregular *mittimus* may be bailed. 2 *Hawk. P. C. c.* 16. § 18.

Also a commitment grounded on an act of parliament ought to be conformable to the method prescribed by such statute; as where the churchwardens of *Northampton* were committed on the 43 *Eliz. cap.* 2. and the warrant concluded in the common form, viz. *Until they be duly discharged according to law;* but the statute appointing, *that the party should there remain until he should account*, for want of such conclusion they were discharged. *Carth.* 152, 153. And where a man is committed as a criminal, the conclusion must be, *until he be delivered by due course of law;* if he be committed for contumacy, it should be *until he comply.*

II. All commitments must be to some prison within the realm of *England*. For,

By the stat. 31 *Car.* II. *cap.* 2. the *habeas corpus* act, it is enacted, "That no subject of this realm, being an inhabitant or resiant of this kingdom of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*, shall or may be sent prisoner into *Scotland*, *Ireland*, *Jersey*, *Guernsey*, *Tangier*, or into any parts, garrisons, islands or places beyond the seas, which then were, or at any time after should be, within or without the dominions of his majesty."

By Stat. 14 *Edw.* III. *c.* 10. sheriffs shall have the custody of the gaols as before that time they were wont to have, and they shall put in such under-keepers for whom they will answer. And this is confirmed by stat. 19 *Hen.* VII. *cap.* 10. Also by stat. 5 *Hen.* IV. *cap.* 10. it is enacted, "That none be imprisoned by any justice of the peace, but only in the common gaol, saving to lords, and others who have gaols, their franchise in this case." It seems that the king's grant since the statute, 5 *Hen.* IV. *c.* 10. to private persons to have the custody of prisoners committed by justices of peace, is void. And it is said, that none can claim a prison as a franchise, unless he have also a gaol delivery. 2 *Hawk. P. C. c.* 16. § 7. See stat. 11 & 12 *W.*

III. *c.* 19. § 3. made perpetual by stat. 6 *Geo.* I. *c.* 19. to enable justices of peace to build and repair gaols in their respective counties where a clause like that in stat 5 *Hen.* IV. *c.* 10. is inserted.

Also it hath been held, that regularly no one can justify the detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously sick, that it would apparently hazard his life to send him to the gaol; or there be evident danger of a *rescous* from rebels, &c. yet constant practice seems to authorize a commitment to a messenger; and it is said that it shall be intended to have been made in order for the carrying of the party to gaol. 2 *Hawk. P. C. c.* 16. § 8, 9.

And it is said, that if a constable bring a felon to gaol, and the gaoler refuse to receive him, the town where he is constable ought to keep him till the next gaol delivery. *H. P. C.* 114. 2 *Hawk. P. C. c.* 16. § 9.

A prisoner in the custody of the king's messenger, on a warrant from the Secretary of State, who is brought into *K. B.* by *habeas corpus* to be bailed, but has not his bail ready, cannot be committed to the same custody he came in; but must be committed to the custody of the marshal, which will prevent the necessity of suing out a new *habeas corpus;* as he may be brought up from the prison of the court, by a rule of court, whenever he shall be prepared to give bail. 1 *Burr.* 460.

If a person arrested in one county for a crime done in it, fly into another county, and be retaken there, he may be committed by a justice of the first county to the gaol of such county. *H. P. C.* 93. But by the better opinion, if he had before any arrest fled into such county, he must be committed to the gaol thereof by a justice of such county. 2 *Hawk. P. C. c.* 16. § 8. *Dalt. c.* 118. Also it seems to be laid down as a rule by some books, that any offender may be committed to the gaol next to the place where he was taken, whether it lie in the same county or not. 2 *Hawk. P. C. c.* 16. § 8. See *post.* Stat. 24 *Geo.* II. *c.* 55.

By stat. 6 *Geo.* I. *c.* 19. vagrants and other criminals, offenders, and persons charged with small offences, may, for such offences, or for want of sureties, be committed either to the common gaol, or house of correction, as the justices in their judgment shall think proper.

By stat. 24 *Geo.* II. *c.* 55. if a person is apprehended upon a warrant endorsed in another county, for an offence not bailable, or if he shall not there find bail, he shall be carried back into the first county, and be committed, or, if bailable, bailed by the justices in such first county.

As to the *charges* of commitment, it is enacted by stat. 3 *Jac.* I. *c.* 10. that offenders committed are to bear their own charges, and the charges of those who are appointed to guard them; and if they refuse to pay, the charges may be levied by sale of their goods. And by stat. 27 *Geo.* II. *c.* 3. if they have no goods, &c. within the county where they are apprehended, the justices are to grant a warrant on the treasurer of the county for payment of the charges. But in *Middlesex* the same shall be paid by the overseers of the poor of the parish where the person was apprehended.

By the stat. 3 *Hen.* VII. *c.* 3. the sheriff shall certify the names of all prisoners in his custody to the justices of gaol delivery.

III. As prisoners ought to be committed at first to the proper prison, so ought they not to be removed thence, except in some special

cases; and to this purpose it is enacted by 31 *Car.* II. *cap.* 2. "That if any subject of this realm shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal, or supposed criminal matter, that the said person shall not be removed from the said prison and custody, into the custody of any other officer or officers, unless it be by *habeas corpus*, or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer, to carry such prisoner to some gaol; or where any person is sent by order of any judge of assise, or justice of the peace, to any common workhouse, or house of correction; or where the prisoner is removed from one prison or place to another within the same county, in order to a trial or discharge by due course of law; or in case of sudden fire or infection, or other necessity; upon pain that he who makes out, signs, or countersigns, or obeys, or executes such warrant, shall forfeit to the party grieved 100*l.* for the first offence, 200*l.* for the second, &c. 2 *Hawk. P. C. c.* 16. § 10.

A person legally committed for a crime, certainly appearing to have been done by some one or other, cannot be lawfully discharged by any other but by the king, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to prosecute him on a proclamation for that purpose, by the justices of gaol delivery. But if a person be committed on a bare suspicion, without any appeal or indictment, for a supposed crime, where afterwards it appears that there was none; as for the murder of a person thought to be dead, who afterwards is found to be alive; it hath been holden that he may be safely dismissed without any farther proceeding; for that he who suffers him to escape, is properly punishable only as an accessory to his supposed offence; and it is impossible there should be an accessory where there can be no principal; and it would be hard to punish one for a contempt founded on a suspicion appearing in so uncontested a manner to be groundless. 2 *Hawk. P. C. c.* 16. § 22. But the safest way for the gaoler, is to have the authority of some court, or magistrate, for discharging the prisoner.

If the words of a statute are not pursued in a commitment, the party shall be discharged by *habeas corpus*. See tit. *Arrest*, *Bail*, *Imprisonment*, *Prisoner*, *&c.*

COMMOIGNE, *Fr.*] A fellow monk; one that lives in the same convent. 3 *Inst.* 15.

COMMONALTY, *populus*, *plebs*, *communitas.*] In *Art. super chartas*, 28 *Edw.* I. *c.* 1. the words *Tout le Commune d'Engleterre*, signify all the people of *England*. 2 *Inst.* 539. But this word is generally used for the middle sort of the king's subjects, such of the commons as are raised beyond the ordinary sort, and coming to have the managing of offices, by that means are one degree under burgesses, which are superior to them in order and authority; and companies incorporated are said to consist of masters, wardens, and *commonalty*, the first two being the chief, and the others such as are usually called of the livery. The ordinary people and freeholders, or at best knights and gentlemen, under the degree of baron, have been of late years called *communitas regni*, or *tota terræ communitas*; yet anciently, if we credit *Brady*, the barons and tenants *in capite*, or military men, were the community of the kingdom; and those only were reputed as such in our most ancient histories and records. *Brady's Gloss. to his Intr. to Eng. Hist.*

COMMON.

Communia.] A right or privilege, which one or more persons claim to take or use, in some part or portion of that which another man's lands, waters, woods, &c. do naturally produce; without having an absolute property in such land, waters, wood, &c. It is called an *incorporeal right*, which lies in *grant*, as if originally commencing on some agreement between lords and tenants, for some valuable purposes; which by age being formed into a prescription, continues, although there be no deed or instrument in writing which proves the original contract or agreement. 4 *Co.* 37. 2 *Inst.* 65. 1 *Vent.* 387.

I. *Of the several Kinds of Commons.*
II. *The Interest of the Owner of the Soil; wherein, of* Approvement *and* Enclosure.
III. *The Commoner's Interest in the Soil; and herein, of* Apportionment *and* Extinguishment.

I. There is not only common of *pasture*, but also common of *piscary* or *fishing;* common of *estovers;* common of *turbary;* which see under their several heads. The word *common*, however, in its most usual acceptation, signifies *common of pasture*. This is a right of feeding one's beasts on another's land: for in those waste grounds, usually called commons, the property of the soil is generally in the lord of the manor; as in *common fields*, it is in the particular tenants. This kind of common is divided into *common in gross*, *common appendant*, *common appurtenant*, and *common pur cause de vicinage*.

Common in gross, is a liberty to have common alone, without any lands or tenements, in another person's land, granted by deed to a man and his heirs, or for life, &c. *Fitz. N. B.* 31. 37. 4 *Rep.* 30.

Common appendant, is a right belonging to a man's arable land, of putting beasts *commonable* into another's ground. And *common appurtenant* is belonging to an estate for all manner of beasts *commonable* or not *commonable*. 4 *Rep.* 37. *Plowd.* 161.

Common appendant and *appurtenant*, are in a manner confounded, as appears by *Fitzherbert;* and are by him defined to be a liberty of common appertaining to, or depending on, a freehold; which common must be taken with beasts *commonable*, as horses, oxen, kine, and sheep; and not with goats, hogs, and geese. But some make this difference, that *common appurtenant* may be severed from the land whereto it pertains; but not *common appendant:* which, according to Sir *Edward Coke*, had this beginning: When a lord enfeoffed another of arable land, to hold of him in *socage*, the feoffee, to maintain the service of his plough, had at first, by the curtesy or permission of the lord, *common* in his wastes for necessary beasts to eat and compost his land, and that for two causes; one, for that it was tacitly implied in the feoffment, by reason the feoffee could not till or compost his land without cattle, and cattle could not be sustained without pasture; so by consequence the feoffee had, as a thing necessary and incident, common in the waste and lands of the lord; and this may be collected from the ancient books and statutes; and the second reason of this *common* was, for the maintenance and advantage of tillage, which is much regarded and favoured by the law. *Fitz. N. B.* 180. 4 *Rep.* 37.

Common jur cause de vicinage; common by reason of neighbourhood; is a liberty that the tenants of one lord in one town have to common with the tenants of another lord in another town. It is where the tenants of two lords have used, time out of mind, to have common promiscuously in both lordships lying together, and open to one another. 8 *Rep.* 78. And those that challenge this kind of common, which is usually called *intercommoning*, may not put their cattle in the common of the other lord, for then they are distrainable; but they may turn them into their own fields, and if they stray into the *neighbouring common*, they must be suffered. *Terms de Ley.* The inhabitants of one town or lordship may not put in as many beasts as they will, but with regard to the freehold of the inhabitants of the other; for otherwise it were no good neighbourhood, upon which all this depends. *Ibid.*

If one lord encloses the common, the other town cannot then common; but though the *common of vicinage* is gone, *common appendant* remains. 4 *Rep.* 38. 7 *Rep.* 5. Every common *jur cause de vicinage* is a common *appendant.* 1 *Danv. Abr.* 799.

This is indeed only a permissive right intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits. And therefore either township may enclose and bar out the other, though they have intercommoned time out of mind. 2 *Comm.* 34.

Common appendant is only to ancient *arable* land; not to a house, meadow, pasture, &c. It is against the nature of *common appendant* to be appendant to meadow or pasture. But if in the beginning land be arable, and of late a house hath been built on some part of the land, and some acres are employed to meadow and pasture, in such case it is appendant; though it must be pleaded as appendant to the land, and not to the house, pasture, &c. 1 *Nels. Abr.* 457. This may be common appendant, though it belongs to a manor, farm, or plough-land; and common appendant is of common right; but it is not common appendant, unless it has been appendant time out of mind. 1 *Danv.* 746. It may be upon condition; be for all the year, or for a certain time, or for a certain number of beasts, &c. by usage; though it ought to be for such cattle as plough and compost the land, to which it is appendant. *Ibid.* 797. Common appendant may be to common in a field after the corn is severed, till the ground is resown; so it may be to have common in a meadow after the hay is carried off the same, till *Candlemas, &c. Yelv.* 185.

This common, which is in its nature without number, by custom may be limited as to the beasts. Common appurtenant ought always to be for those *levant and couchant*, and may be *sans number. Plowd.* 161. A man may prescribe to have common appurtenant for all manner of cattle, at every season in the year. 25 *Ass.* 8. Common by prescription for all manner of *commonable* cattle as belonging to a tenement, &c. must be for cattle *levant and couchant* upon the land, (which is so many as the land will maintain,) or it will not be good; and if a person grants *common sans number*, the grantee cannot put in so many cattle, but that the grantor may have sufficient common in the same land. 1 *Danv. Abr.* 798, 799. He who hath common appendant or appurtenant, can keep but a number of cattle proportionable to his land; for he can common with no more than the lands to which his common belongs is able to maintain. 3 *Salk.* 93. *Common appurtenant* may be to a house, pasture, &c. though common appendant cannot; but it ought to be prescribed for as against common right; and uncommonable cattle, as hogs, goats, &c.

are appurtenant. This common may be created by grant at this day; so may not common appendant. 1 *Inst.* 122. 1 *Roll. Abr.* 398.

Common appurtenant for a certain number of beasts may be granted over. 1 *Danv.* 802.

In *Scotland*, in those districts where there is no coal, the inhabitants are chiefly supplied with fuel from the mosses with which the country abounds. Where one estate has only a small quantity of this moss, it is not unusual for the proprietor of a neighbouring estate, where there is a superfluity, to sell to the proprietor of the defective estate a perpetual liberty to his tenants to cut moss for fuel, on a certain annual rent, per *fine* or *finnilty*, (which terms are synonymous,) and this is called "a heritable moss tolerance." See *Dingwall* v. *Farquharson. Dom. Proc. Journals*, sub. an. 1797.

II. The property of the soil in the common is entirely in the lord; and the use of it jointly in him and the commoners.

Lords of manors may depasture in commons where their tenants put in cattle; and a prescription to exclude the lord is against law. 1 *Inst.* 122.

The lord may agist the cattle of a stranger in the common by prescription; and he may license a stranger to put in his cattle, if he leaves sufficient room for the commoners. 1 *Danv.* 795. 2 *Mod.* 6. Also the lord may surcharge, &c. an overplus of the common; and if, where there is not an overplus, the lord surcharges the common, the commoners are not to distrain his beasts; but must commence an action against the lord. *Fitz. N. B.* 125. But it is said, if the lord of the soil put cattle into a *close*, contrary to custom, when it ought to lie fresh, a commoner may take the cattle damage-feasant; otherwise it is a general rule that he cannot distrain the cattle of the lord. 1 *Danv.* 807.

The lord may distrain where the common is surcharged; and bring action of trespass for any trespass done in the common. 9 *Rep.* 113.

A lord may make a pond on the common; though the lord cannot dig pits for gravel or coal; the statutes of *approvement* extending only to enclosure. 3 *Inst.* 204. 9 *Rep.* 112. 1 *Sid.* 106. If the lord makes a warren on the common, the commoners may not kill the conies; but are to bring their action, for they may not be their own judges. 1 *Roll.* 90. 405.

By stat. 20 *Hen.* III. *c.* 4. (*stat. of Merton*,) lords may *approve* against their tenants, viz. enclose part of the waste, &c. and thereby discharge it from being common, leaving common sufficient; and neighbours as well as tenants claiming common of pasture, shall be bound by it. If the lord encloses on the common, and leaves not common sufficient, the commoners may not only break down the enclosures; but may put in their cattle, although the lord ploughs and sows the land. 2 *Inst.* 88. 1 *Roll. Abr.* 406.

Where the tenants of the manor have a right to dig gravel on the wastes, or to take estovers, there the lord has no right, under the statute of *Merton*, to enclose and approve the wastes of the manor. Yet a custom in a manor that any person, being desirous of enclosing, may apply to the court, &c. first obtaining the consent of the lord, does not abridge the lord's common law right of enclosing without any such application, provided he leave common sufficient for the tenants. 2 *Term Rep.* 391, 392.

By stat. 29 *Geo.* II. *c.* 36. owners of common, with the consent of the majority, in number and value, of the commoners; the majority of the commoners, with consent of the owners; or any persons with the consent of both, may enclose any part of a common for the growth of wood. If the wood is destroyed, the offender may be punished according to stat. 1 *Geo.* I. *c.* 48. If not convicted in six months, the owner shall have satisfaction from the adjoining parishes, &c. as for fences overthrown, by *stat. Westm.* 2.—Persons cutting wood on commons should incur the same penalty. And by *Stat.* 31 *Geo.* II. *c.* 41. the recompense is to be paid to persons interested, in proportion to their interest. Tenants for life, or for years determinable on lives, may consent for their term; but that binds not, after determination of their estate.

By stat. 13 *Geo.* III. *c.* 81. § 21. *rams* are not to remain on commons from the 25th of *August* to the 25th of *November*.

III. A commoner hath only a special and limited interest in the soil, but yet he shall have such remedies as are commensurate to his right, and therefore may distrain beasts damage-feasant, bring an *action on the case*, *&c.* but not being absolute owner of the soil, he cannot bring a general action of *trespass* for a trespass done upon the common. See *Bridg.* 10, 11. *Godb.* 123, 124. 12 *Leon.* 201, 202.

A commoner cannot regularly do any thing on the soil which tends to the melioration or improvement of the common, as cutting down of bushes, fern, &c. 1 *Sid.* 251. 12 *Hen.* VIII. 2. 13 *Hen.* VIII. 15. Therefore if a common every year in a flood is surrounded with water, the commoner cannot make a trench in the soil to avoid the water, because he has nothing to do with the soil, but only to take the grass with the mouth of the cattle. 1 *Roll. Abr.* 405. 2 *Bulst.* 116. But see *ante*, II. and *post*.

Every commoner may break the common if it be enclosed; and although he does not put his cattle in at the time, yet his right of commonage shall excuse him from being a trespasser. *Lit. Rep.* 38. See 1 *Roll. Abr.* 406. That is, supposing the enclosure made by the lord, and that there is not sufficient common; or that the enclosure is made by any other person than the lord.

If a tenant of the freehold ploughs it, and sows it with corn, the commoner may put in his cattle, and therewith eat the corn growing upon the land: so if he lets his corn lie in the field beyond the usual time, the other commoners may, notwithstanding, put in their beasts. 2 *Leon.* 202, 203.

The commoner cannot use common but with his own proper cattle. But if he hath not any cattle to manure the land, he may borrow other cattle to manure it, and use the common with them; for by the loan, they are in a manner made his own cattle. 1 *Danv.* 798. Grantee of common appurtenant, for a certain number of cattle, cannot common with the cattle of a stranger. He that hath *common in gross*, may put in a stranger's cattle, and use the common with such cattle. *Ibid.* 803. Common appendant or appurtenant, cannot be made *common in gross*, and approvement extends not to *common in gross*. 2 *Inst.* 86.

A commoner may distrain beasts put into the common by a stranger, or every commoner may bring action of the case, where damage is received. 9 *Rep.* 11. But one commoner cannot distrain the cattle of another commoner, though he may those of a stranger, who hath no right to the common. 2 *Lutw.* 1238.

Wherever there is colour of right for putting in cattle, a commoner cannot distrain; where there is no colour he may. So he may distrain a stranger's cattle, but not those of a commoner, *though he exceeds* his number. Where writ of admeasurement lies, he cannot distrain. *Quære*, whether he may distrain cattle surcharged, where the right of common is for a number certain. 4 *Burr.* 2426. 1 *Black. Reft.* 673.

The usual remedies for surcharging the common, are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass; both which may be had by the lord; or lastly, by a special action on the case for damages, in which any commoner may be plaintiff. *Freem.* 273. But the ancient and most effectual method of proceeding, is by writ of *admeasurement of pasture*. This lies, either where a common appurtenant, or in gross, is certain as to number; or where a man has common appendant, or appurtenant to his land, the quantity of which common has never yet been ascertained. In either of these cases, as well the lord as any of the commoners, is entitled to this writ of admeasurement; which is one of those writs that are called *vicontiel*, (2 *Inst.* 369. *Finch. L.* 314.) being directed to the sheriff, (*vicecomiti*,) and not to be returned to any superior court, till finally executed by him.

It recites a complaint, that the defendant hath surcharged (*superoneravit*) the common: and therefore commands the sheriff to admeasure and apportion it; that the defendant may not have more than belongs to him, and that the plaintiff may have his rightful share. And upon this suit all the commoners shall be admeasured, as well those who have not, as those who have, surcharged the common; as well the plaintiff as defendant. *Fitz. N. B.* 125. The execution of this writ must be by a jury of twelve men, who are upon their oaths to ascertain, under the superintendence of the sheriff, what and how many cattle each commoner is entitled to feed. And the rule for this admeasurement is generally understood to be, that the commoner shall not turn more cattle upon the common, than are sufficient to manure and stock the land to which his right of common is annexed; or, as our ancient law expressed it, such cattle as only are *levant and couchant* upon his tenement; (*Bro. Abr.* 1. *Prescription*, 28.) which being a thing uncertain before admeasurement, has frequently, though erroneously, occasioned this unmeasured right of common to be called a common *without stint*, or *sans nombre*; (*Hardr.* 117.) a thing, which though possible in law, does in fact very rarely exist. Ld. *Raym.* 407.

If, after the admeasurement has thus ascertained the right, the same defendant surcharges the common again, the plaintiff may have a writ of *second surcharge*, (*de secundâ superoneratione*,) which is given by the stat. *Westm.* 2. 13 *Edw.* I. *c.* 8. and thereby the sheriff is directed to inquire by a jury, whether the defendant has in fact again surcharged the common, contrary to the tenor of the last admeasurement; and if he has, he shall then forfeit to the king the supernumerary cattle put in, and also shall pay damages to the plaintiff. *Fitz. N. B.* 126. 2 *Inst.* 370. This process seems highly equitable, for the first offence is held to be committed through mere inadvertence, and therefore there are no damages or forfeiture on the first writ, which was only to ascertain the right which was disputed; but the second offence is a wilful contempt and injustice; and therefore punished, very properly, with not only damages, but also forfeiture. And herein, the right, being once settled, is never again disputed; but only

the fact is tried, whether there be any second surcharge or no; which gives this neglected proceeding a great advantage over the modern by action on the case, wherein the *quantum* of common belonging to the defendant must be proved upon every fresh trial, for every repeated offence.

This injury, by surcharging, can, properly speaking, only happen where the common is *appendant* or *appurtenant*, and of course limited by law; or where, when in gross, it is expressly limited and certain; for where a man hath *common in gross*, *sans nombre*, or without *stint*, he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts. 1 *Roll. Abr.* 399. For the law will not suppose that, at the original grant of the common, the lord meant to exclude himself.

There is yet another disturbance of common, when the owner of the land, or other person, so encloses or otherwise obstructs it, that the commoner is precluded from enjoying the benefit, to which he is by law entitled. This may be done either by erecting fences, or by driving the cattle off the land, or by ploughing up the soil of the common. *Cro. Eliz.* 198. Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities, that they devour the whole herbage, and thereby destroy the common. For in such case, though the commoner may not destroy the rabbits, yet the law looks upon this as an injurious disturbance of his right, and has given him his remedy by action against the owner. *Cro. Jac.* 195. This kind of disturbance does indeed amount to a disseisin, and if the commoner chooses to consider it in that light, the law has given him an assise of *novel disseisin*, against the lord, to recover the possession of his common. *Fitz. N. B.* 179. Or it has given a writ of *quod permittat*, against any stranger as well as the owner of the land, in case of such a disturbance to the plaintiff as amounts to a total deprivation of his common; whereby the defendant shall be compelled to *permit* the plaintiff to enjoy his common as he ought. *Finch. L.* 275. *Fitz. N. B.* 123. But if the commoner does not choose to bring a *real* action to recover seisin, or to try the right, he may (which is the easier and more usual way) bring an action on the case for his damages, instead of an assise, or a *quod permittat*. *Cro. Jac.* 195. See 3 *Comm.* 238—240.

If any commoner encloses, or builds on the common, every commoner may have an action for the damage. Where turf is taken away from the common, the lord only is to bring the action; but it is said the commoners may have an action for the injury, by entering on the common, &c. 1 *Roll. Abr.* 89. 398. 2 *Leon.* 201.

If a commoner who hath a *freehold* in his common be ousted of, or hindered therein, that he cannot have it so beneficially as he used to do; whether the interruption be by the lord or any stranger, he may have an *assise* against him; but if the commoner hath only an *estate for years*, then his remedy is by *action on the case*. And if it be only a small trespass, that is little or no loss to the commoner, but he hath common enough besides, the commoner may not bring any action. 4 *Rep.* 37. 8 *Rep.* 79. *Dyer*, 316.

A commoner cannot dig clay on the common, which destroys the grass, and carrying it away doth damage to the ground; so that the other commoners cannot enjoy the common, *in tam amplo modo*, as they ought. *Godb.* 344. Also a commoner may not cut bushes, dig trenches, &c. in the common, without a custom to do it. 1 *Vels.* 462.

If he makes any thing *de novo*, he is a trespasser. He can do nothing to impair the common, but may reform a thing abused, fill up holes, &c. 1 *Brownl.* 208.

A commoner may abate hedges erected on a common; for though the lord hath an interest in the soil, by abating the hedges, the commoner doth not meddle with it. 2 *Mod.* 65. Any man may by prescription have common and feeding for his cattle in the king's highway, though the soil doth belong to another. But the occupation of common by usurpation, will not give title to him that doth occupy it, unless he hath had it time beyond memory.

Upon agreement between two commoners to enclose a common, a party having interest not privy to the agreement, will not be bound; but one or two wilful persons shall not hinder the public good. *Chan. Rep.* 48. Commons must be driven yearly at *Michaelmas*, or within fifteen days after. Infected horses, and stone horses under size, &c. are not to be put into commons, under forfeiture, by stat. 32 *Hen.* VIII. *c.* 13. New erected cottages, though they have four acres of ground laid to them, ought not to have common on the waste. 2 *Inst.* 740. In law proceedings, where there are two distinct commons, the two titles must be shown. Cattle are to be alleged *commonable*, and common ought to be in lands commonable; and the place is to be set forth where the messuage and lands lie, &c. to which the common belongs. 1 *Nels.* 462, 463.

Common appendant, because it is of common right, shall be *apportioned* by the commoner's purchase of part of the land in which he hath such common; but common appurtenant shall be extinct by the commoner's purchase of part of the land, in which, &c. Both common appendant and appurtenant shall be *apportioned* by alienation of part of the land to which the common is appendant or appurtenant. *Co. Lit.* 122. *Hob.* 235. 8 *Co.* 78. *Owen*, 122. 4 *Co.* 37. *Cro. Eliz.* 594.

A release of common in one acre, is an extinguishment of the whole common. See 4 *Co.* 37.

If *A.* hath common in the lands of *B.* as appurtenant to a messuage, and after *B.* enfeoffs *A.* of the said lands, whereby the common is extinguished; and then *A.* leases to *B.* the said messuage and lands, with all commons, &c. used or occupied with the said messuage; this is a good grant of a new common for the time. *Cro. Eliz.* 570. If several persons are seised of several parts of a common, and a commoner purchases the inheritance of one part, his entire common is extinct. 1 *And.* 159. When a man hath common appendant, for a certain number of cattle, and to a certain parcel of land, if he sell part of it, the common is not extinguished; for the purchaser shall have common *pro rata;* but it is otherwise in common appurtenant. 8 *Rep.* 78. 1 *Nels.* 460. See *Fitz. Abr.* tit. *Comm. per tot.*

By stat. 13 *Geo.* III. *c.* 81. in every parish where there are *common field lands*, all the arable lands lying in such fields, shall be cultivated by the occupiers, under such rules as 3-4ths of them in number and value (with the consent of the land and tithe owners, [the latter not to receive any fines, only rents, § 23.]) shall appoint by writing under their hands; the expense to be borne proportionably, § 1, 2. 4. 7. Under the management of a *field-master*, or *field-reeve*, to be appointed annually in *May*, § 3. 5. 6.

Persons having right of common, but not having land in such fields, and persons having sheep-walks, may compound for such right, by

written agreement, or may, with their consent, have parts allotted them to common upon, § 8—10. And the balks, slades and meres may be ploughed up, § 11—14.

Lords of manors with the consent of 3-4ths of the commoners, on the wastes and commons within their manors, may demise (for not more than four years) any part of such wastes, &c. not exceeding 1-12th part; and the clear rents reserved for the same, shall be applied in improving the residue of such wastes, § 14.

In every manor where there are *stinted commons*, in lieu of demising part thereof, assessments on the lords of such manors, and the owners and occupiers of such commons may be made, and the money employed in the improvement of the commons, under the direction of the majority; which (or in some instances 2-3ds) may regulate the depasturing, opening, shutting up, breaking and unstocking the commons, and the kind of cattle to be allowed the commoners, § 16—21.

All rights relative to commons, previous to this act, are saved: except as against persons who become subject to regulations made under the statute, § 27.

As to *Common* in general, see further, *Com. Dig.* tit. *Common.*

Common of Estovers, or *estouviers*, that is *necessaries*, from *estoffer* to furnish.] A liberty of taking necessary wood for the use or furniture of a house, or farm, from off another's estate. 2 *Comm.* 35. Or in the language of the law, for *house-bote*, *plough-bote*, and *hay-bote*. See tit. *Bote.* What botes are necessary, tenants may take, notwithstanding no mention be made thereof in their leases; but if a tenant take more house-bote than is needful, he may be punished for waste. *Terms de Ley.* Tenant for life may take upon the land demised reasonable estovers, unless restrained by special covenant; and every tenant for years hath three kinds of estovers incident to his estate. 1 *Inst.* 41. When a house, having estovers appendant or appurtenant, is blown down by wind, if the owner rebuilds it in the same place and manner as before, his estovers shall continue; so if he alters the rooms and chambers, without making new chimneys; but if he erect any new chimneys, he will not be allowed to spend any estovers in such new chimneys. 4 *Rep.* 87. 4 *Leon.* 383. If one have a dwelling-house whereunto *common of estovers* doth belong, and the house by fire is burnt down, and a new one built near to the place, or in the place in another form, the estovers are gone; but if the old house be only some of it down, it is otherwise; and in all cases where the alterations to a house do no prejudice to the tertenant or owner of the land or wood, the estovers will remain. *Fitz. N. B.* 180. Where a man hath estovers for life, if the owner cut down all the wood, that there is none left for him, he may bring an *assise of estovers*; and if the tenant have but an estate for years, or at will, he may have an action on the case. *Moor Ca.* 65. 9 *Rep.* 112. If the tenant who hath *common of estovers*, shall use them to any other purpose than he ought, he that owns the wood may bring trespass against him; as where one grants twenty loads of wood to be taken yearly in such a wood, ten loads to burn, and ten to repair pales; here he may cut and take the wood for the pales, though they need no amending, but then he must keep it for that use. 9 *Rep.* 113. *Fitz. N. B.* 58. 159.

Common of Pasturage, Is the right of pasturing the goods and cattle of the dominant tenement, upon the ground of the servient. *Scotch Dict*

Common of Piscary, Is a liberty of fishing in another man's water. *Common of piscary* to exclude the owner of the soil, is contrary to

law: though a person by prescription may have a separate right of fishing in such water, and the owner of the soil be excluded; for a man may grant the water, without passing the soil; and if one grant *separaliam piscariam*, neither the soil nor the water pass, but only a right of fishing. 1 *Inst.* 4. 122. 164. 5 *Rep.* 34. See *Fish* and *Fishery*.

COMMON OF TURBARY, Is a license to dig turf upon the ground of another, or in the lord's waste. This common is appendant or appurtenant to a house, and not to lands; for turfs are to be burnt in the house; and may be *in gross*; but it does not give any right to the land, trees, or mines. It cannot exclude the owner of the soil. 1 *Inst.* 4. 122. 4 *Rep.* 37.

There is also a *common* of digging for *coals*, *minerals*, *stones* and the like. All these bear a resemblance to the common of pasture in many respects; though in one point they go much farther; common of pasture being only a right of feeding on the herbage or vesture of the soil which renews annually; but common of turbary and those just mentioned, are a right of carrying away the very soil itself. These several species of common do, however, all originally result from the same necessity as common of pasture; viz. for the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary and fire-bote for his fuel; and house-bote, plough-bote, cart-bote and hedge-bote for repairing his house, his instruments of tillage, and the necessary fences of his grounds. 2 *Comm.* 34, 35.

COMMON BENCH, *bancus communis*, from the Sax. *banc*, bank, and thence metaphorically a *bench*, high seat or tribunal.] The court of *Common Pleas* was anciently called *Common Bench*, because the pleas of controversies between *common persons* were there tried and determined. *Camd. Britan.* 113. In law books and references the court of *Common Pleas* is written *C. B.* from *Communi Banco*, (or *C. P.*) and the justices of that court are styled *Justiciarii de Banco*. See tit. *Common Pleas*.

COMMON DAY OF PLEA IN LAND, Signifies an ordinary day in court, as *Octabis Hilarii*, *Quindena Paschæ*, *&c.* It is mentioned in the stat. 51 *Hen.* III. stat. 2. and 3. Concerning general *days in bank*, see tit. *Days in Bank*.

COMMON FIELD LAND, See tit. *Common*.

COMMON FINE, *finis communis*.] A small sum of money, which the resiants within the liberty of some leets pay to the lords, called in divers places *head silver* or *head pence*, in others *cert money*; and was first granted to the lord, towards the charge of his purchase of the *court-leet*, whereby the resiants have the ease to do their suit within their own manors, and are not compellable to go to the *sheriff's turn*: in the manor of *Sheepshead* in the county of *Leicester*, every resiant pays 1*d. per* poll to the lord at the court held after *Michaelmas*, which is there called *common fine*. For this *common fine* the lord may distrain; but he cannot do it without a prescription. 11 *Rep.* 44. There is also *common fine of the county*. See *Fleta*, *lib.* 7. *c.* 48. and stat. 3 *Edw.* I. *c.* 18.

COMMONS HOUSE OF PARLIAMENT, Is the Lower House of Parliament, so called, because the *Commons* of the realm, that is the knights, citizens, and burgesses returned to parliament, representing the whole body of the Commons do sit there. *Cromp. Jurisd.* See tit. *Parliament*.

COMMON INTENDMENT, Is common meaning or understand-

ing, according to the subject matter, not strained to any extraordinary or foreign sense; *bar to common intendment* is an ordinary or general bar, which is commonly an answer to the plaintiff's declaration. There are several cases in the law where *common intendment*, and intendment take place; and of *common intendment* a will shall not be supposed to be made by collusion. *Co. Litt.* 78. See *Co. Litt.* 303. a, b. &c.

COMMON LAW, *lex communis.*] Is taken for the law of this kingdom simply, without any other laws; as it was generally holden before any statute was enacted in parliament to alter the same; and the king's courts of justice are called the *Common Law Courts*. The *Common Law* is grounded upon the *general customs* of the *realm;* and includes in it the *law of nature*, the *law of God*, and the *principles* and *maxims* of the *law:* it is founded upon *reason;* and is said to be the perfection of *reason*, acquired by long study, observation and experience, and refined by learned men in all ages. And it is the common birth-right, that the subject hath for the safeguard and defence, not only of his goods, lands and revenues; but of his wife and children, body, fame, and life also. *Co. Lit.* 97. 142. *Treatise of Laws, p.* 2.

According to *Hale*, the *Common Law of England*, is the common rule for administering justice, within this kingdom, and asserts the king's royal prerogatives, and likewise the rights and liberties of the subject; it is generally that law, by which the determinations in the king's *ordinary courts* are guided; and this directs the course of descents of lands; the nature, extent, and qualification of estates; and therein the manner and ceremonies of conveying them from one to another; with the forms, solemnities and obligation of contracts; the rules and directions for the exposition of deeds, and acts of parliament; the process, proceedings, judgments, and executions of our courts of justice; also the limits and bounds of courts, and jurisdictions; the several kinds of temporal offences and punishments, and their application, &c. *Hale's Hist. of the Common Law, p.* 24. 44, 45.

As to the *rise of the Common Law*, this account is given by some ancient writers: After the decay of the *Roman* empire, three sorts of the *German* people invaded the *Britons*, viz. the *Saxons*, the *Angles*, and the *Jutes;* from the last sprung the *Kentish* men, and the inhabitants of the *Isle of Wight;* from the *Saxons* came the people called *East*, *South*, and *West Saxons;* and from the *Angles*, the *East Angles*, *Mercians*, and *Northumbrians*. These people having different customs, they inclined to the different laws by which their ancestors were governed; but the customs of the *West Saxons* and *Mercians*, who dwelt in the midland counties being preferred before the rest, were for that reason called *jus Anglorum;* and by these laws those people were governed for many ages; but the *East Saxons* having afterwards been subdued by the *Danes*, their customs were introduced, and a third law was substituted, which was called *Dane lage;* as the other was then styled *West Saxon lage*, &c. At length the *Danes* being overcome by the *Normans*, *William* called the *Conqueror*, upon consideration of all those laws and customs, abrogated some and established others; to which he added some of his own country laws, which he judged most to conduce to the preservation of the peace; and this is what we now call the *Common Law*.

But though we usually date our *Common Law* from hence, this was not the original of the *Common Law;* for *Ethelbert*, the first christian king of this nation, made the first *Saxon* laws, which were published

by the advice of some wise men of his council; and king *Alfred*, who lived 300 years afterwards, collected all the *Saxon Laws* into one book, and commanded them to be observed through the whole kingdom, which before only affected certain parts thereof; and it was therefore properly called the *Common Law*, because it was common to the whole nation; and soon after it was called, the *folc-right*, i. e. the *people's right*.

Alfred was styled *Anglicarum legum conditor*; and when the *Danes*, on the conquest of the kingdom, had introduced their laws, they were afterwards destroyed; and *Edward the Confessor* out of the former laws composed a body of the *Common Law*; wherefore he is called by our historians, *Anglicarum legum restitutor*. *Blount*. In the reign of *Edw.* I. *Britton* wrote his learned book of the *Common Law* of this realm; which was done by the king's command, and runs in his name, answerable to the *Institutions* of the *Civil Law*, which *Justinian* assumes to himself though composed by others. *Staundf. Prerog.* 6. 21. But *Justinian* ought to be entitled to the honour, as the *Institutes* were composed by his direction. This *Britton* is mentioned by *Gwin* to have been bishop of *Hereford*.

Bracton, a great lawyer, in the time of *Hen.* III. wrote a very learned treatise of the *Common Law of England*, held in great estimation; and he was said to be Lord Chief Justice of the kingdom. Also the famous and learned *Glanvil*, Lord Chief Justice in the reign of *Hen.* II. wrote a book of the *Common Law*, which is said to be the most ancient composition extant on that subject. Besides these, in the time of *Edw.* IV. the renowned lawyer *Littleton* wrote his excellent book of *English Tenures*. In the reign of King *James* the First, the great oracle of the law, Sir *Edward Coke*, published his learned and laborious *Institutes* of our law, and commentary on *Littleton*. About the same time likewise Dr. *Cowel*, a civilian, wrote a short Institute of our laws. In the reign of King *George* the First, Dr. *Tho. Wood*, a civilian and common lawyer, and at last a divine, wrote an Institute of the laws of *England*, which is something after the manner of the Institutes of the Civil Law.

To conclude the whole of this head, the late learned Judge *Blackstone* in the reign of *George* the Third, published his *Commentaries* on the Laws of *England*, the best *analytic* and most *methodic* system of our laws which ever was published. It is equally adapted for the use of students, and of those gentlemen who choose to acquire that knowledge of our laws, which is, in fact, essentially necessary for every one. See particularly those *Commentaries*, *vol.* 1. *p.* 637. and *vol.* 4. *p.* 411. on this subject.

COMMON PLEAS, *communia placita.*] Is one of the king's courts now constantly held in *Westminster-Hall*; but in ancient time was moveable, as appears by *Magna Charta*, *cap.* 11. Before this charter of king *John* & *Hen.* III. there were but two courts called the king's courts, viz. the *King's Bench* and the *Exchequer*, which were then styled *Curia Domini Regis*, and *Aula Regis*, because they followed the court of the king; and upon the grant of the great charter, the court of *Common Pleas* was erected and settled in one certain place, i. e. *Westminster-Hall*; and after that, all the writs ran *Quod sit coram justiciariis meis apud Westm.* whereas before, the party was required by them to appear *Coram me vel justiciariis meis*, without any addition of place, &c. But Sir *Edward Coke* is of opinion in his preface to the eighth report, and 1 *Inst.* 71. b. that the court of *Common Pleas* existed as a distinct court before the conquest; and was not created by *Magna*

Charta, at which time there were *Justiciarii de Banco*, &c. Though before this act, *Common Pleas* might have been held *in Banco Regis*; and all original writs were returnable there.

According to *Madox* the origin of the court of *Common Pleas* is of a much later date than that assigned by Lord *Coke*. He so far agrees with Lord *Coke* as to admit that the *Magna Charta* of *Hen.* III. rather confirmed than erected the *Bank* or *Common Pleas*; and that such a court was in being several years before the *Magna Charta* of 17 of King *John*, though it was *then* first made stationary; but in other respects Lord *Coke* and Mr. *Madox* differ widely; for the latter thinks that some time after the conquest there was one great and supreme judicature, called the *Curia Regis*, which he supposes to have been of *Norman*, and not *Anglo Saxon* original, and to have exercised jurisdiction over common as well as other pleas; that the *Common Pleas* and *Exchequer* were gradually separated from the *Curia Regis*, and became jurisdictions wholly distinct from it; and that the separation of the *Common Pleas* began in the reign of *Richard* I. or early in the reign of king *John*, and was completed by *Hen.* III. See *Mad. Hist. Exc.* 63. 549. fo. ed. 3 *Comm.* 37. 4 *Inst.* 99. 1 *Inst.* 71. b. and the note there.

Writs returnable in this court, are now *coram justiciariis nostris apud Westm.* But original writs, &c. returnable in *B. R.* are *Coram nobis ubicunque fuerimus in Angliâ.* The jurisdiction of the court of *C. P.* is general, and extends itself throughout *England*; it holds plea of all civil causes at common law, between subject and subject, in actions real, personal and mixed; and it seems to have been the only court for real causes. In personal and mixed actions it hath a concurrent jurisdiction with the *King's Bench*; but it hath no cognisance of pleas of the crown; and *Common Pleas* are all pleas that are not such.

The court of *Common Pleas* does not possess any *original* jurisdiction; nor has it, like the court of *King's Bench*, any mode of proceeding in *common* cases peculiar to itself. Its authority is founded on original writs issuing out of the court of *Chancery*; which original writs are the king's mandates for the court to proceed in the determination of the causes mentioned therein. The reason of original writs issuing out of *Chancery* is, because when the courts were united, which was formerly the case, the chancellor held the seal; therefore, when they were divided, he still keeping the seal, sealed all original writs. *Gilb. H. C. P.* 3. In all personal actions therefore brought by and against common persons, the only way of proceeding in this court, is by original.

There is indeed one other way of proceeding in this court, in *common* cases, which is sometimes used; and which is called proceeding by *original quare clausum fregit*. This method of proceeding is grounded, in point of law, upon the same kind of original writ as the usual proceeding by *capias* is, the only difference between them being in the *mesne process* after the original is sued out; or at least *supposed* so to be. Instead of the process to compel the appearance of the defendant being by *capias* against his person, it is in this case by summons and distress against his goods. In a word, it is the same as the ancient mode of proceeding in this court was before the general introduction of the *capias*. (See this *Dict.* tit. *Capias*.) The advantage and use of this mode of proceeding by *original q. c. f.* is where a defendant has effects which can be distrained, but he himself cannot be met with to be *personally* served; the process by *capias* re-

quiring personal service, which is not required in the process by summons.

All actions belonging to this court, come hither either by original, as arrests and outlawries; or by privilege or attachment, for or against privileged persons; or out of inferior courts not of record, by *pone, recordare, accedas ad curiam, writ of false judgment, &c.* Actions popular, and actions penal, of debt, &c. upon any statute, are cognisable by this court; and besides having jurisdiction for punishment of its officers and ministers, the court of *Common Pleas* may grant prohibitions, to keep temporal and ecclesiastical courts within due bounds. 4 *Inst.* 99, 100. 118. In this court are four judges, created by letters patent; the seal of the court is committed to the custody of the Chief Justice.

The other officers of the *Common Pleas* are the *Custos Brevium*, three *Prothonotaries* and their *Secondaries*, the Clerk of the *Warrants*, Clerk of the *Essoins*, fourteen *Filazers*, four *Exigenters*, a Clerk of the *Juries*, the *Chirographer*, Clerk of the *King's Silver*, the Clerk of the *Treasury*, Clerk of the *Seal*, of *Outlawries*, and the Clerk of the *Enrolment of Fines and Recoveries*, Clerk of the *Errors*, *&c.* The *Custos Brevium* is the chief clerk in this court, who receives and keeps all writs returnable therein; and all records of *Nisi Prius*, which are delivered to him by the clerks of the assise of every circuit, &c. and he files the rolls together, and carries them into the treasury of records; he also makes out exemplifications, and copies of all writs and records, &c. The *Prothonotaries* enter and enrol all declarations, pleadings, judgments, &c. and they make out all judicial writs, writs of execution, writs of privilege, *procedendos*, *&c.* The *Secondaries* are assistants to the *Prothonotaries* in the execution of their offices; and they take minutes, and draw up all orders and rules of court. The *Filazers*, who have the several counties of *England* divided among them, make out all *mesne process*, as *capias*, *alias*, *pluries*, *&c.* between the original writ and the declaration; and they make all writs of *view*, *&c.* The *Exigenters*, appointed for several counties, make out all exigents and proclamations in order to outlawry. The *Clerk of the Warrants* enters all warrants of attorney; enrols deeds of bargain and sale, and estreats all issues. The *Clerk of the Essoins* keeps the roll of the essoins, wherein he enters them, and nonsuits, &c. The *Clerk of the Juries* makes out all writs of *habeas corpora jurator'*, for juries to appear; and he enters the continuances till the verdict given. The *Clerk of the Treasury* keeps the records of the court, and makes exemplifications of records, copies of issues, judgments, &c. The *Clerk of the Seals* seals all writs and mesne process; also writs of outlawry and supersedeas, and all patents. The *Clerk of the Outlawries* makes out the writs of *capias utlagatum*. The *Clerk of the Errors* is for the allowance of writs of error, &c. The *Clerk of the Enrolments* of fines and recoveries, returns all writs of covenant, writs of entry and seisin, and enrols and exemplifies fines, &c. The *Clerk of the king's Silver* enters the substance of the writ of covenant; and the *Chirographer* engrosseth all fines, and delivers the indentures to the parties, &c.

To these officers may be added a *Proclamator*; a *Keeper* of the court; *Cryer*; and *Tipstaffs*; besides the *Warden of the Fleet*. There are also *Attorneys* of this court, whose number is unlimited; and none may plead at the bar of the court, in term-time, or sign any special pleadings but *Serjeants* at law.

COMMON PRAYER, *preces publicæ.*] The liturgy or prayers used in our church. It is the particular duty of clergymen every *Sunday*, &c. to use the public form of prayer, prescribed by the *Book of Common Prayer;* and if any incumbent be resident upon his living, as he ought to be, and keep a curate, he is obliged by the *act of uniformity*, once every month, at least, to read the *common prayers* of the church, according as they are directed by the book of *common prayer*, in his parish church, in his own person; or he shall forfeit 5*l.* for every time he fails therein. Stat. 13 & 14 *Car.* II. *cap.* 4. Also by that statute the book of *common prayer* is to be provided in every parish, under the penalty of 3*l.* a month; and the *common prayer* must be read before every *lecture;* the whole appointed for the day, with all the circumstances, and ceremonies, &c. Ministers, before all sermons, are to move the people to join in a short *prayer* for the catholic church; and the whole congregation of christian people, &c. for the king and royal family; the ministers of God's word, nobility, magistrates, the whole commons of the realm, &c. and conclude with the *Lord's Prayer*, *Can.* 55. Refusing to use the *Common Prayer*, or using any other open *prayers*, &c. is punishable by stat. 1 *Eliz. c.* 2. See tit. *Church*, *Churchwarden*, *Parson*, *Service*, and *Sacrament*.

COMMON WEAL, Is understood in our law to be *bonum publicum*, and is a thing much favoured; and therefore the law doth tolerate many things to be done for common good, which otherwise might not be done; and hence it is, that *monopolies* are *void* in law; and that *bonds* and *covenants* to *restrain free trade*, *tillage*, or the like, are adjudged *void*. 11 *Co. Rep.* 50. *Plowd.* 25. *Shep. Epit.* 270.

COMMORANCY, *commorantia* from *commoro.*] An abiding, dwelling or continuing in any place; as an inhabitant of a house in a vill, &c. And *commorancy* for a certain time, may make a settlement in a parish. *Dalt.* See tit. *Poor*. Commorancy consists in usually lying in a certain place. 4 *Comm.* 273.

COMMORTH, or COMORTH, *comortha.*] From the Brit. *cymmorth*, i. e. *subsidium;* a contribution which was gathered at marriages, and when young priests said or sung the first masses, &c. See stat. 4 *Hen.* IV. *c.* 27. But stat. 26 *Hen.* VIII. *c.* 6. prohibits the levying any such in *Wales*, or the *Marches*, &c. *Cowel.*

COMMOTE, In *Wales*, is half a *cantred* or hundred, containing fifty villages. Stat. *Walliæ*, 12 *Edw.* I. *Wales* was anciently divided into three provinces; and each of these were again subdivided into *cantreds*, and every *cantred* into *commotes*. *Doderige's Hist. Wal. fol.* 2. *Commote* also signifies a great seignory or lordship, and may include one, or divers manors. *Co. Lit.* 5.

COMMUNANCE. The commoners, or tenants and inhabitants, who had the right of common, or commoning in open field, &c. were formerly called *communance*. *Cowel.*

COMMUNE CONCILIUM REGNI ANGLIÆ. The common council of the king and people assembled in parliament.

COMMUNIA PLACITA NON TENENDA IN SCACCARIO. An ancient writ directed to the treasurer and barons of the *Exchequer*, forbidding them to hold plea between *common persons* (i. e. not debtors to the king, who alone originally sued and were sued there) in that court, where neither of the parties belong to the same. *Reg. Orig.* 187. But little obedience would perhaps be now paid to such a writ, was any officer to dare to issue it; for the court of Exchequer, seems by prescription, to have attained a concurrent jurisdiction in civil suits, with the other courts in *Westminster-Hall*. See tit. *Courts*, *Exchequer*.

COMMUNI CUSTODIA, A writ which anciently lay for the lord, whose tenant holding by knight's service died, and left his eldest son under age, against a stranger that entered the land, and obtained the ward of the body. *Fitz. N. B.* 89. *Reg. Orig.* 161. Since the statute 12 *Car.* II. *c.* 24. hath taken away wardships, this writ is become of no use.

COMMUNITY of the kingdom. Vide *Commonalty.*

COMPANAGE, *Fr.*] All kind of food, except bread and drink; and *Spelman* interprets it to be *quicquid cibi* cum pane *sumitur.* In the manor of *Feskerton* in the county of *Nottingham*, some tenants, when they performed their boons or work-days to the lords, had three boon loaves with *companage* allowed them. *Reg. de Thurgarton*, cited in *Antiq. Nottingham.*

COMPANION OF THE GARTER, Is one of the knights of that most noble order, at the head of which is the king, as sovereign. See stat. 24 *Hen.* VIII. *c.* 3. and tit. *Garter.*

COMPASS, An instrument used in navigation, by the direction and assistance whereof vessels are steered to the most distant parts of the world. It was invented soon after the close of the holy war, and thereby navigation was rendered more secure as well as more adventurous, the communication between remote nations was facilitated, and they were brought nearer to each other. See *Roberts. Hist. Emp. C.* V. 1. *v.* 78. See tit. *Longitude.*

COMPELLATIVUM, An adversary or accuser. *Leg. Athelstan.*

COMPERTORIUM, A judicial inquest in the Civil Law, made by delegates, or commissioners, to find out and relate the truth of a cause. *Paroch. Antiq.* 575.

COMPOSITION, *compositio.*] An agreement or contract between a parson, patron and ordinary, &c. for money or other thing in lieu of tithes. Land may be exempted from the payment of tithes, where *compositions* have been made; and real *compositions* for tithes are to be made by the concurrent consent of the parson, patron and ordinary. Real *compositions* are distinguished from personal contracts; for a *composition* called a personal contract is only an agreement between the parson and the parishioners, to pay so much instead of tithes; and though such agreement is confirmed by the ordinary, yet, if the parson is not a party, that doth not make it a real *composition*, because he ought to be a party to the deed of *composition. March's Rep.* 87. The *compositions* for tithes made by the consent of the parson, patron and ordinary, by virtue of stat. 13 *Eliz. c.* 10. shall not bind the successor, unless made for twenty-one years or three lives, as in case of leases of ecclesiastical corporations, &c. *Compositions* were at first for a valuable consideration, so that though, in process of time, upon the increase of the value of the lands such compositions do not amount to the value of the tithes, yet custom prevails, and from hence arises what we call a *modus decimandi. Hob.* 29. See further, tit. *Tithes.*

The word *composition* hath likewise another meaning, i. e. *decisio litis. Compositions* were in ancient times allowed for crimes and offences, even for murder. An expedient employed by the civil magistrate, in order to set some bounds to the violence of private revenge. This custom may be traced back to the ancient *Germans. Tacit. de Morib. Ger. c.* 21. Lord *Kaim's Hist. Law Tr.* 1. *p.* 41, 42. &c.

COMPOSITIO MENSURARUM, Is the title of an ancient ordinance for measures, not printed.

COMPOSTUM. Dung, soil or compost laid on lands. *Register. Eccl. Cantuar. MS.*

COMPOUNDING FELONY, or *theft-bote*, Is where the party robbed not only knows the felon, but also takes his goods again, or other amends upon agreement not to prosecute. It was formerly held to make a man an accessary; but is now punished only with fine and imprisonment. 1 *Hawk. P. C. c.* 59. § 6. To take any reward for helping a person to stolen goods, is made felony by stat. 4 *Geo.* I. *c.* 11. And to advertise a reward for the return of things stolen, incurs a forfeiture of 50*l.* by stat. 25 *Geo.* III. *c.* 36. See tit. *Advertisement*; and also *Felony*, *Misprision*.

COMPRINT. A surreptitious printing of another bookseller's copy to make gain thereby, which was contrary to common law, and is now restrained by statute. See tit. *Literary Property*.

COMPROMISE, *compromissum.*] A mutual promise of two or more parties at difference, to refer the ending of their controversy to arbitrators; and *West* says, it is the faculty or power of pronouncing sentence between persons at variance, given to arbitrators by the parties' private consent. *West's Symb.* § 1. Matters compromised are also matters of law referred, or made an end of. See tit. *Award.*

Comptroller, Is one who observes and examines the accompts of collectors of public money. *Scotch Dict.*

Comptroller of the Pipe, Is an officer of the Exchequer, that writeth out summons twice every year to the sheriffs, to levy the farms and debts of the Pipe, and also keepeth a contra-rollment of the Pipe. *Scotch Dict.*

COMPURGATOR, One that by oath justifies another's innocence. *Compurgators* were introduced as evidence in the jurisprudence of the middle ages. Their number varied according to the importance of the subject in dispute, or the nature of the crime with which a person was charged. *Du Cange*, *voc. Juramentum*, *vol.* 3. *p.* 1599. See *Oath*, and 3 *Comm.* 342. 4 *Comm.* 361. 407. See also tit. *Clergy.*

COMPUTATION, *computatio.*] The true account and construction of time; and to the end neither party to an agreement, &c. may do wrong to the other, nor the determination of time be left at large, it is to be taken according to the just judgment of the law. A deed dated the 20th day of *August*, to hold from the day of the date, shall be construed to begin on the 21st day of *August;* but if in the *habendum* it be to hold from the making, or from thenceforth, it shall begin on the day delivered. 1 *Inst.* 46. 5 *Rep.* 1. If an indenture of lease dated the 4th day of *July*, made for three years from thenceforth, be delivered at four of the clock in the afternoon of the said 4th day of *July*, the lease shall end the 3d day of *July* in the third year; and the law in this *computation* rejects all fractions or divisions of the day. See *Day*, *Month*, *Year*, *Time*, *Age*, &c. &c.

Computation of miles after the *English* manner, is allowing 5,280 feet, or 1,760 yards to each mile; and the same shall be reckoned not by straight lines, as a bird or arrow may fly, but according to the nearest and most usual way. *Cro. Eliz.* 212. See *Mile.*

COMPUTO, *Lat.*] A writ to compel a bailiff, receiver or accountant, to yield up his accounts. It is founded on the statute of *Westm.* 2. *cap.* 12. And also lies against guardians, &c. *Reg. Orig.* 135.

CONCEALERS, *concelatores*, so called *à concelando*, as *mons à movendo*, by an *antiphrasis.*] Such as were used to find out *concealed* lands, i. e. such lands as are privily kept from the king by common per-

sons, having nothing to show for their title or estate therein. See stat. 39 *Eliz. cap.* 22. There are also *concealers of crimes;* and as to *concealing treason*, &c. see tit. *Misprision.*

CONCESSI, *I have granted.*] A word of frequent use in conveyances, creating a covenant in law; as *dedi* (I have given) makes a warranty. *Co. Lit.* 384. This word is of a general extent, and said to amount to a grant, feoffment, lease and release, &c. 2 *Saund.* 96.

CONCESSIT SOLVERE. This is an action of debt *upon simple contract*, and lies by custom in the courts of the cities of *London* and *Bristol*, and the great sessions in *Wales*. *Sti.* 198. *Paschall* v. *Sharing*. The present form of declaring in this action in *London* is, that the defendant in consideration of divers sums of money before that time due, and owing from the said defendant to the said plaintiff, and then in arrear and unpaid, *granted and agreed to pay* (*concessit solvere*) to the said plaintiff, 100*l.* where and when the same should afterwards be demanded, yet, &c. And this general form has been held good upon a writ of error. 1 *Roll. Abr.* 564. *pl.* 21. 2 Ld. *Raym.* 1. 32. *Story* v. *Atkins*. In the court of great sessions in *Wales*, the form of declaring in this action is still more general, for there it is sufficient merely to state that the defendant, on, &c. at, &c. *granted to pay* to the plaintiff such a sum of money, without adding any thing more. But to prevent a surprise upon the defendant from this very general way of declaring, it is necessary for the plaintiff to give notice in writing of the particular cause of action. It is observable, however, that in a case, 39 *Hen.* VI. 29. abridged *Bro. London*, 15. it is said that it was agreed for law, that in debt in *London* upon a *concessit solvere* by the custom, the declaration shall be, that for *merchandises to him before sold*, he granted to pay 10*l.* so that the merchandise must be mentioned in this action of *debt*, the defendant may wage his law. *Bro. Ley Gager*, 69. It does not lie against executors or administrators, because, as they are presumed to be ignorant of the contract made by their testator or intestate, they cannot wage their law. 9 *Rep.* 87. *b. Pinchon's* case. *Sti.* 199. *Hodges* v. *Jane*. *Ibid.* 228. *Oreswich* v. *Amery*. However, if the action be brought against an executor or administrator, he must *demur;* for it cannot be taken advantage of in arrest of judgment, or upon error. *Plowd.* 182. *Norwood* v. *Read*, *Vaugh.* 97. 100. and the authorities there cited. By the custom of *London*, indeed, a defendant cannot wage his law in this action. 1 *Wils.* 277. *Gunn* v. *Mackherry*, and therefore it lies there against an executor or administrator, upon a contract made with the deceased. 8 *Rep.* 126. *a.* The *City of London's* case, 5 *Rep.* 82. *b. Snelling's* case, *Cro. Eliz.* 409. *S. C.* See *Williams* v. *Saunders*, 1 *Co. n.* 2.

CONCIONATORES, Common-council men, freemen, called to the hall or assembly, as *most worthy*. *Quodam tempore cum convenissent* concionatores *apud* London, &c. *Histor. Elien.* edit. *Gale*, *c.* 46.

CONCLUSION, *conclusio.*] Is when a man by his own act upon record hath charged himself with a duty or other thing, or confessed any matter whereby he shall be concluded; as if a sheriff returns that he hath taken the body upon *capias*, and hath not the body in court at the day of the return of the writ; by this return, the sheriff is *concluded* from plea of escape, &c. *Terms de Ley*. In another sense, this word *conclusion* signifies the end of any plea, replication, &c. and a plea to the writ is to conclude to the writ; a plea in bar, to conclude to the action, &c. See tit. *Pleading*. And as to the conclusion of deeds, see tit. *Deeds*.

CONCORD, *concordia.*] Is an agreement made between two or more, upon a trespass committed; and is divided into *Concord executory*, and *Concord executed*. *Plowd.* 5, 6. 8. These concords and agreements are by way of satisfaction for the trespass, &c. See tit. *Accord, Satisfaction.*

Concord is also an agreement between parties, who intend the levying of a fine of lands one to the other, how and in what manner the lands shall pass. It is the foundation and substance of the fine, taken and acknowledged by the party before one of the judges of *C. B.* or by commissioners in the country. See tit. *Fine.*

CONCUBARIA, A fold, pen, or place where cattle lie. *Cowel.*

CONCUBEANT, Lying together. Stat. 1 *Hen.* VII. *cap.* 6.

CONCUBINAGE, *concubinatus.*] In common acceptation, the keeping of a harlot or concubine; but in a legal sense, it is used as an exception against her that sueth for dower, alleging thereby that she was not a wife lawfully married to the party, in whose land she seeks to be endowed, but his *concubine*. *Brit. c.* 107. *Bract. lib.* 4. *tract.* 6. *cap.* 8. There was a *concubinage* allowed in scripture to the Patriarchs, *secundum legem matrimonii*, &c. *Blount.*

CONDERS, from the Fr. *conduire*, to conduct.] Such as stand upon high places near the sea-coast, at the time of herring-fishing, to make signs with boughs, &c. to the fishermen at sea, which way the shoals of herrings pass; for this may be better discovered by such as stand upon some high cliff on the shore, by reason of a kind of blue colour which the herrings cause in the water, than by those that are in the ships or boats for fishing. These are otherwise called *huers* and *balkers*, *directors* and *guiders*. See stat. 1 *Jac.* I. *c.* 23.

END OF THE FIRST VOLUME.

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