THE

LAW-DICTIONARY:

EXPLAINING THE

RISE, PROGRESS, AND PRESENT STATE,

OF THE

ENGLISH LAW,

IN THEORY AND PRACTICE;

DEFINING AND INTERPRETING

THE TERMS OR WORDS OF ART;

AND COMPRISING COPIOUS INFORMATION,

HISTORICAL, POLITICAL, AND COMMERCIAL,

ON THE SUBJECTS OF OUR

LAW, TRADE, AND GOVERNMENT.

ORIGINALLY COMPILED

By *GILES JACOB*;

AND continued by Him, and other Editors, through TEN EDITIONS:

NOW GREATLY ENLARGED AND IMPROVED,

BY MANY MATERIAL CORRECTIONS AND ADDITIONS,

FROM the lateſt STATUTES, REPORTS, and other ACCURATE PUBLICATIONS;

By T. E. TOMLINS,

OF THE INNER TEMPLE, BARRISTER AT LAW.

IN TWO VOLUMES.

VOL. I.

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LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR T. LONGMAN, B. LAW, C. DILLY, G. G. & J. ROBINSON, T. CADELL, A. STRAHAN, J. JOHNSON, W. RICHARDSON, J. SEWELL, R. BALDWIN, T. EVANS, R. FAULDER, T. PAYNE, F. & C. RIVINGTON, W. LOWNDES, E. & R. BROOKE, G. & T. WILKIE, D. OGILVY & SON, W. BROWN, J. BUTTERWORTH, E. NEWBERY, W. CLARKE & SON, J. DEIGHTON, R. PHENEY, J. WALKER, & R. BANISTER.

1797.

PREFACE.

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 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.

* 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.

§ TENURES, &c. ‖ EAST INDIA COMPANY, NAVIGATION-ACTS, INSURANCE, &c. &c.

PREFACE.

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 particulariſe 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 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

PREFACE.

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 Licence was neceſſarily taken by former Editors of JACOB; and was uſed, to ſome extent, by COWEL 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

PREFACE.

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 awhile, 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.

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.

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: *Spelm. 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 antients 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.* 1. *ſt.* 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.* 6. *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 ſuperintendancy 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.* tit. *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 inferiour 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.* § 197: *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 be 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.* 3; whereas thoſe of *Cheſter* and *Durham* are by preſcription. 12 *E.* 4. 16: *Doct. Plac.* 396.

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

Excommunication is a good plea even to an executor or adminiſtrator, tho' 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.* 3. 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.* 3. 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.* 6. 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.* 3. 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,

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.* 4. 7: *Yelv.* 198: 1 *Bulst.* 154: *Bro.* tit. *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.* 3. *c.* 32. See tit. *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 tit. *Baron* and *Feme*, and *post.* 6, *b*.

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

A defendant may plead in abatement to the person of the plaintiff, that there never was any such person *in rerum naturâ*. See *Com. Dig.* tit. *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 left their clients' causes should suffer if they were drawn to answer to actions in other courts. 2 *Mod.* 297: *Vaugh.* 155: 2 *H.* 7. 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.* tit. *Abatement*. (D. 3.) and this Dict. tit. *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.* 6. 29 *b*: 9 *E.* 4. 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. Superfed.* 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.* 6. 6, 22, 71: 1 *Ro. Rep.* 294: 1 *Sid.* 29: 2 *Ro. Ab.* 273, 9: *Hardr.* 365: 1 *Lutw.* 46: 1 *Salk.* 1. And now the common practice is to use a special imparlance. See further this Dict. tit. *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.* tit. *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.* 5, 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 alledged 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.* 5. *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.* 6. *c.* 7. § 3. But there muſt be an entry on the roll ſtating that after the laſt continuance, *ff.* on ſuch a day and year, the king by his letters patent created, &c. ſetting them forth with a *profert in curiâ*, &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.* 32: 9 *H.* 7. 16: 10 *E.* 3. 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 tho' 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.* 6. 24: 9 *H.* 6. 12: 5 *Co.* 61: *Doct. Pl.* 10.

In general writs, as *treſpaſs*, *aſſize*, *covenant*, where the ſpecial matter is not alledged, and the plaintiff is non-ſuited 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 non-ſuited 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

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. *Tbel. 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, expence and delay which this occaſioned, the ſtat. 1 *E.* 6. *c.* 7, was made.

Proceedings on an information, in nature of a *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 againſt 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.

If an original be filed againſt a feme ſole, and before the return ſhe marries, you may declare againſt her without taking notice of her huſband, for her intermarriage is no abatement of the writ in fact, but only makes it abateable. *Comb.* 449: 1 *Roll. Rep.* 53.

'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.*

c. The general rule is, that whenever the death of any party happens pending the writ, and yet the plaintiff is in the ſame condition as if ſuch party were living, there ſuch death makes no alteration or *abatement* of the writ. 1 *New Abr.* 7.

The death of a plaintiff did generally at common law *abate* the writ before judgment, till the ſtat. 8 & 9 *W.* 3. *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 *Rol. 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 *L. 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 *Hen.* 6. 30: 18 *E.* 4. 1: 2 *H.* 7. 16: 1 *Brownl.* 3, 4: *Clift. Ent.* 6: *Raſt. Ent.* 126.

By ſtat. 17 *Car.* 2. *c.* 8, (made perpetual by 1 *Jac.* 2. *c.* 17. § 5,) it is enacted, that the death of either of the parties between verdict and judgment, ſhall not be alledged for error, ſo as judgment be entered within two terms after ſuch verdict. See 1 *Salk.* 8: 2 *Ld. Raym.* 1415: *Sid.* 385.—See tit. *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 antient demeſne is pleaded; for this may be done after imparlance, becauſe the lord might reverſe the judgment by writ of diſceit, 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.* 34.

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 tit. *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.* 7. 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 *billâ* 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*

actionem habere debet, though 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.* 6. 27: 32 *H.* 6. 17: 36 *H.* 6. 18: 22 *H.* 6. 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.* 6. 24: 36 *H.* 6. 24: 2 *Mod.* 6.

The *nature* of a *plea* in *abatement* is to intitle 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. *Salkild* 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 waves 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.* 4. 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 chusing 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 *Edw. Coke* says, there were twenty-seven parliamentary *abbots* and two priors. 1 *Inst.* 97. In the parliament 20 *R.* 2, there were but twenty-five; but *anno* 4 *Ed.* 3, 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.* 8. *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.* 8, the rest of the *abbots*, *&c.* made voluntary surrenders of their houses to obtain favour of the king; and *anno* 31 *H.* 8, 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.* 8; 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 man-ſlaughter and chance-medley. It is derived from the Saxon *æbere*, 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.* 1. *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 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 antient barony of that name in right of his deceaſed mother, who was eldeſt ſiſter and one of the co-heirs of an earl of *Weſtmorland*, 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. 1. 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

feiture or amercement, and is more properly *miſhering*, *miſherſing*, or *miſkering*, according to *Spelman*. It hath, ſince been termed a liberty or freedom; becauſe whereever this word is uſed in a grant or charter, the perſons to whom made, have the 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.* 8, (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.* 8. *c.* 14,) this privilege was aboliſhed by ſtat. 21 *Jac.* 1. *cap.* 28; and this kind of abjuration ceaſed. 2 *Inſt.* 629.

As to the effect of abjuration, on the marriage tie, ſee tit. *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, tit. *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.* 8. *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.* tit. *Abridgment*, *vide* 21 *H.* 8. *c.* 3.

ABRIDGEMENT. A large work contracted into a narrow compaſs. See tit. *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.* 6. *c.* 3.

ABSENTEES, or *des abſentees.* A parliament ſo called, was held at *Dublin* 10 *May*, 8 *Hen.* 8. And mentioned in letters patent, dated 29 *Hen.* 8. 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 recompence: 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 Acceſſories. 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 before-hand, 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 therefore 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 Acceſſories.*—An Acceſſory 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 acceſſories, and what not: 2. Who may be an acceſſory before the fact: 3. Who may be an acceſſory after it: 4. How acceſſories, conſidered merely as ſuch, and diſtinct from principals are to be treated: 5. Of acceſſories or accomplices accuſing principals.

1. In high treaſon there are no acceſſories, but all are principals: the ſame acts, that make a man acceſſory 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 acceſſories 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 acceſſories: except only in thoſe offences, which by judgment of law are ſudden and unpremeditated, as manſlaughter and the like, which therefore cannot have any acceſſories 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 acceſſories 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 acceſſory 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 acceſſory 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. 7. c. 2*, againſt taking away maidens, &c. makes the offence and the procuring and abetting,

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 tit. *Felonies without Clergy.*

2. Sir *Matthew Hale* (5 *Hale's P. C.* 615, 616) defines *An acceſſory 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 acceſſory: 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 of *A.* now *B.* is principal, and *A.* is acceſſory in the murder. And this holds though the party killed be not *in rerum naturâ* 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 acceſſory to the murder. *Dyer* 186. And it is alſo ſettled, (*Foſter* 125,) that whoever procureth a felony to be committed, though it be by the intervention of a third perſon, is an acceſſory before the fact. It is likewiſe a rule, that he who in anywiſe commands or counſels another to commit an unlawful act is acceſſory to all that enſues upon that unlawful act, but is not acceſſory 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 acceſſory; 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 acceſſory 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 acceſſories before the fact to *burglary*, by commanding, counſelling, &c.

3. *An acceſſory 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 acceſſory *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 acceſſory. 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 acceſſory to the felony. And by ſtat. 11 & 12 *W.* 3. *c.* 7. the receiving a pirate or any veſſel or goods piratically taken renders the receivers acceſſory to the piracy. But to relieve a felon in gaol with cloaths or other neceſſaries, is no offence: for the crime imputable to this ſpecies of acceſſory 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 acceſſory 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.* 1. *c.* 11, all ſuch receivers are made acceſſories (where the principal felony admits of acceſſories) *Foſter* 73; and may be tranſported for fourteen years; and in the caſe of receiving linen goods ſtolen from the bleaching-grounds, are by ſtat. 18 *Geo.* 2. *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 acceſſory 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 acceſſories, *ex poſt facto*. 3 *Inſt.* 108: 2 *Hawk. P. C.* 320. But a feme covert cannot become an acceſſory by the receit 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 acceſſories 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 acceſſories 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 antient 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; acceſſories *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.* 2. *c.* 27) which is denied to the principals, and acceſſories *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 acceſſories, 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 acceſſory 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 acceſſory 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 acceſſory *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 acceſſory *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 acceſſory will appear to be highly neceſſary, though the puniſhment is ſtill much the ſame with regard to principals and ſuch acceſſories as offend before the fact is committed.

By the old common law, the acceſſory 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 acceſſory 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 above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the acceſſory 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 acceſſory 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 acceſſory; and therefore the law ſtill continues that the acceſſory 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 acceſſory 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 acceſſory, 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 acceſſory 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. By the ſtat. 2 & 3 *E.* 6. *c.* 24, the acceſſory is indictable in that county where he was acceſſory, and ſhall be tried there, as if the felony had been committed in the ſame county; and the juſtices before whom the acceſſory 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 acceſſory after the fact ought to be diſcharged without burning in the hand, on being put to his book. *Cro. Car.* 561, *pl.* 3.

Where there are two principals, the attainder of one of them gives ſufficient foundation to arraign the *acceſſory*. *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.* 3. *c.* 17: 10 & 11 *W.* 3. *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.* 2. *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.* 2. *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 is thus diſtinguiſhed from *Incola*, *viz.* Accola *non propriam*, *propriam colit* Incola *terram*. 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

ACCOUNT.

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 defendant need only alledge, 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.* tit. *Accord*. See tit. *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 *accompt*, 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 *accompt* 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 alledging 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 *accompt* againſt him, if he were his receiver. *Co. Lit.* 172. If money be received by a man's wife to his uſe, action of *accompt* 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 diſcovert: 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 *accompt*, 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 *accompt* ſtated, the plaintiff can never after reſort to the original contract, which is thereby merged and diſcharged in the *accompt*: if *A.* ſells his horſe to *B.* for 10*l.* and there being divers other dealings between them, they come to an *accompt* 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 *accompt* for that would not determine the firſt contract. 1 *Mod. Rep.* 206: 2 *Mod.* 44. It has been held, that mutual demands on an *accompt* 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 *accompt* to him; this doth not alter the caſe, but notwithſtanding the covenant, action of *accompt* 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.

Accompt may be brought againſt the following perſons: If a man makes one his *bailiff* of a manor, &c. he ſhall have a writ of *accompt* againſt him as *bailiff*; where a perſon makes one *receiver*, to receive his rents or debts, &c. he ſhall have *accompt* againſt him as *receiver*, and if a man makes one his *bailiff* and alſo his *receiver*, then he ſhall have *accompt* againſt him in *both* ways. Alſo a perſon may have a writ of *accompt* 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 *accompt* againſt him as receiver; or if a perſon deliver money unto another to deliver over unto me, I ſhall likewiſe have *accompt* againſt him as my receiver: ſo if a man enter into my lands to my uſe, and receive the profits thereof I ſhall have *accompt* againſt him as bailiff. 9 *H.* 6: 36 *H.* 6: 10 *R.* 2: *Fitz. Accompt.* 6.

A judgment in *accompt*, as receiver, is no bar to action of *accompt* 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 *accompt* before or after his full age, againſt a guardian in ſocage; and if he ſue the guardian for profits of his lands taken before

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 *accompt* 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 *accompt* lies in this case, for the daughters against the executors. *Jenk. Cent.* 215: 2 *Roll. Abr.* 285. An action of *accompt* 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 expences deducted. *Co. Lit.* 172. In this instance the action of *accompt* may be preferable to that for *money had and received*.—One merchant may have *accompt* against another, where they occupy their trade together; and if one charges me as bailiff of his goods *ad mercandizandum*, 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 *accompt* will not lie against the deputy, but against him. 1 *Leon.* 32.

Statutes.—In the writ of *accompt* the process by the common law was summons, attachment, and distress infinite. The statute of *Marlbridge* (52 *H.* 3. *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. *Westm.* 2. (13 *E.* 1. *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.* 3. *c.* 23, gives an action of *accompt* to the executors of a merchant; the statute 25 *Ed.* 3. *c.* 5, to executors of executors; the statute of 31 *Ed.* 3. *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 jointenant, 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 accompt*; 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 enquire of damages; and these two judgments depend one upon another; for if judgment be to *accompt*, 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 *accompt*, and others in discharge before auditors; and some pleas will be allowed before auditors, that will not be in bar to the *accompt*, *Dyer* 21: 11 *Rep.* 8. In *accompt* 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 plenè computavit*, *&c.* It is no plea by an *accomptant* that he was robbed; unless he alledges 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.* 3. 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 *accompt* is summons, *pone* and distress; and, upon a *nihil* returned, the plaintiff may proceed to outlawry. The statute of Limitations, 21 *J.* 1. *c.* 16, doth not bar a man who is a merchant from bringing action of *accompt* for merchandize at any time; but all other actions of *accompt* are within the statute.

In *Chancery* upon an *accompt* 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 defendant 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 *Comyns's Digest*, tit. *Accompts.*—*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.* 1. *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.* 1. *c.* 32. *sec.* 9.

ACCOUNTS PUBLICK. By statute 25 *Geo.* 3. *c.* 52, the patents formerly granted to Lord *Sondes* and Lord *Mountstuart* as auditors of the imprest are vacated, and the annual sum of 7000*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

of the aggregate fund, not exceeding in the whole 4000 *l.* Theſe are ſtiled *The Commiſſioners for auditing the public 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 6000 *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.* 3. *c.* 8, to that purpoſe. The *French* uſe it for delay; as *accrocher un proces*, 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.* 3. *ſt.* 5. *c.* 4: 28 *Ed.* 3 *c.* 3. None ſhall be compelled to anſwer an *accuſation* to the king, without preſentment, or ſome matter of record. Stat. 42 *Ed.* 3. *c.* 3. See ſtat. 38 *E.* 3. *c.* 9. By ſtatute 5 and 6 *E.* 6. *c.* 11. § 12; and 1 *P.* and *M.* *c.* 10, 11, in treaſon there muſt be two lawful *accuſers*. As to ſelf-accuſation, ſee tit. *Evidence*. See tit. *Malicious Proſecution*.

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

ACEPHALI. The levellers in the reign of king *Hen.* 1; who acknowledged no head or ſuperior. *Leges Hen.* 1; *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.* 2. *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 tit. *Arreſt*, *Bail*.

ACHAT, *Fr. Achet.*] A contract or bargain. Purveyors by ſtat. 34 *Ed.* 3. *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.

ACKNOWLEDGEMENT-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 la 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 feloniâ*; 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 probable cauſe for a criminal proſecution. *Carth. Rep.* 421. See *Leach's Hawkins*, *c.* 23. § 142, &c. By ſtat. 3 *Hen.* 7. *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.

ACQUIT-

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. *Terms 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 a 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.* 8 *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.* 1. *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. *D. 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.

tors. 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, actions are 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.* 1. *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.* 2, 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 nuſance be erected in one county, to the damage of a man in another, the aſſiſe muſt be brought *in conſinio comitatuum*. *Mich.* 8 *Ann. B. R.* By ſtat. 21 *Jac.* 1. *c.* 4. all ſuits on penal ſtatutes ſhall be laid in the county where the offence was committed. See tit. *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.* 1. *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 tit. *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 overs 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.* tit. *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.* tit. *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.* 2. *c.* 44.—vide *Morgan's Vade Mec.* 20.

ACTION II.

I. In all *actions* there muſt be a perſon able to ſue; the party ſued muſt be one ſueable 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 tit. *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 before hand, 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.* 7. *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 plaintiff'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 alledged.

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, traiterous 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 *Rol. 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 ſhewn 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: *Style* 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 inn-keeper, 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

niſhed by the cuſtom of the city. See *Com. Dig.* tit. *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 biſhoprick 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 practice, 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. *Style* 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 beetleheaded 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 ſhew 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 deprived 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, empirick, 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 ſhew 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 pre-contract; 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 juſtication. *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 declarationſet forth *all* the *circumſtantial* words as they are ſpoken; ſo as to ſhew 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 irreconcileable 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* 657. 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 of 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 Inn-keeper is chargeable for goods ſtolen in his houſe. See tit. *Inns* and *Inn-keeper.*

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.* 4. 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.* 6. 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 water-courſe or way;

way; breaking down a party wall; ſtopping of ancient lights, and for any private nuſance 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 vicious 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 merchandize 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, nuſances,* &c. which ſee under the ſeveral titles. And for a general abridgment of the law on this ſubject, ſee *Com. Dig.* tit. *Action.*

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 ſhews 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 action 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.*

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

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

ACTON BURNEL. The ſtatute of 11 *Ed.* 1. *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 forenſick 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

not 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. *Plow.* 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 stile and title of *Adcling*. It was also used among 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 enquiry 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 *E.* 3. *c.* 11. & 25 *E.* 3. *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 licence 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 *Winsor*; 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.

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 *alcier* in *Fr.*] To purge himself of a crime by oath. See the laws of king *Alfred*, in *Brompt. Chron. cap.* 4 & 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. *Termes de Ley.* 23. See tit. *Common* and *Dower.*

ADMINICLE, *adminiculum.*] Aid, help, or support. See stat. 1. *E.* 4. *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 amerel*, 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. E.* 1. and the first *Admiral of England*, by name, was *Richa. d Fitz Alan* Earl of *Arundel* 10 *Ric.* 2.] 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 *W. & 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 antiently 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 *Ed.* 1. 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* 2, to the earl of *Arundel* and *Surry*. In the reign of *Ed.* 3. the court of *admiralty* was eſtabliſhed, and *Ric.* 2. limited its juriſdiction.

By the ſtatute 13 *Rich.* 2 *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 *Ric.* 2. *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 near 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.* 4. *c.* 11, reciting the 13 *R.* 2. *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* 10l. *if he be attainted.*

By ſtat. 27 *H.* 8. *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.* 8. *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 manſlaughter at land the jury is always directed to acquit. *Foſter* 288.

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 & 12 *W.* 3. *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.* 8. *cap.* 15; alſo the ſaid ſtatute 11 & 12. *W.* 3, directs how pirates may be tried beyond ſea, according to the civil law, by commiſſion under the great ſeal of *England*.—See title *Piracy*.

By the ſtatute 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 *H.* 8. *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 *H.* 8. *c.* 15. The ſtatute 10 *Ann.* *cap.* 10. directs how the trial 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.* 1. *cap.* 11, all perſons who ſhall commit any offence for which they ought to be adjudged pirates, felons, or robbers, by 11 & 12 *W* 3, may be tried and judged for every ſuch offence according to the form of 28 *H.* 8. *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 enquire 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 *infrà corpus comitatûs*, 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

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 ſeamens 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* can not hold plea of a matter ariſing from a contract made upon the land, tho' the contract was concerning things belonging to the ſhip: but the *admiralty* may hold plea for the ſeamens 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. Tho' 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 followeth was but acceſſory and conſequential. *Hard.* 183.

If goods delivered on ſhip-board are imbezilled, 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.* 363. By the cuſtom of the *admiralty*, goods may be attached in the hands of a third perſon, *in cauſa meritima & 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 refuſe 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 *Shep. Abr.* 129: See 1 *Salk.* 33: *T. Ray.* 78: 2 *Lord Ray.* 1206: *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.* 607: 1 *Cro.* 685. And where ſailors' cloaths 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 alledged to be detained at land; yet upon alledging offer of a plea, claiming property therein, and refuſal of the plea, on this ſuggeſtion a prohibition ſhall be had. 1 *Show.* 179.

If there be a war with the *Dutch*, and an *Engliſhman*, having letters of mark, takes an *Oſtender* for a *Dutch* ſhip, and brings it into a haven, and libels againſt it to have it condemned as a prize; but ſentence be given that it is no prize; the *Oſtender* may libel in the admiralty againſt the captain, for the damage the ſhip received while it lay in the port; for the original taking being at ſea, the bringing it into the port, in order to have it condemned, is but a conſequence thereof. 1 *Lev.* 243: 1 *Sid.* 367.

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; tho' 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 *R.* 2. ſtat. 1. *c.* 5; & 15 *R.* 2. *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 4 *Inſt.* 339. 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.* 2. *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 proportions to be ſettled by the king's proclamation. This ſtatute alſo enables the admiralty to grant letters of marque. (See tit. *Privateers*). For the mode of proceeding in condemning prizes, ſee the *ſt. & Doug.* 614; 4 *Term Rep.* 382, as to the commiſſioners of Appeal.

By the ſtat. 22 *Geo.* 2. *c.* 3, his majeſty's commiſſion to all the privy councillors 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*.

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. L.* 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, illiteracy, &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 & 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, 4: 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 aſſize. *Reg. Orig.* 206. knights and other gentlemen of the county are uſually aſſociated with judges, in holding their *aſſizes* on the circuits.

ADNICHILED, from the Latin *nihil*, or *nichil.*] Annulled, cancelled, or made void. Stat. 28 *Hen.* 8.

AD QUOD DAMNUM. A writ to enquire whether a grant intended to be made by the king will be to the damage of him or others. *F. N. B.* 221, 2; 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.* 1. *ſtat.* 2. § 1, ordains, *that ſuch as would purchaſe new parks ſhall have writs out of chancery to enquire 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 enquire 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 aſſizes 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 aſſizes 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 licence obtained by this writ, on inquiſition found that ſuch a change will not be detrimental to the public. *Terms de Ley* 26: *Vaugh. Rep.* 341. 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 *Co.* 267. If any one change an highway without this authority, he may ſtop the way at his pleaſure. See tit. *Highway.*

The river *Thames is an 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 enquire 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 antient times, upon every grant, confirmation, &c. or licence made by the king, a writ *ad quod damnum* was to be firſt awarded, to enquire 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 licence, a diſpenſation by *non obſtante* is inſerted.

ADRECTARE, *addreſſare*, i. e. *ad rectum ire, recto ſtare.*] To do right, ſatisfy, or make amends. *Gerv. Dorobern. 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 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.* 2. *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 ſhewed great reverence and devotion to this time, in regard to the approach of the ſolemn feſtival: for *in* adventu *domini nulla aſſiſa debet capi.* But the ſtatute *Weſt.* 1. (3 *E.* 1.) *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 octaves of the *Epiphany*, the ſolemnizing of marriages is forbidden, without ſpecial licence, as we may find from theſe old verſes,

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

AD VENTREM INSPICIENDUM. See *Ventre Inſpiciendo.*

ADVERTISEMENTS. Under ſtat. 9 *Anne, c.* 6. § 5; and 10 *Anne, 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 pretence of improving ſmall ſums. The ſeveral penalties alſo impoſed under the *Lottery* acts, (ſee this Dictionary, tit. *Lottery*,) extend to printers and publiſhers of news-papers inſerting the advertiſements of illegal lottery adventurers; and to diſtributers 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.* 3. *c.* 61.

By ſtat. 25 *Geo.* 2. *c.* 36. *ſ.* 1, any perſon publicly advertiſing a reward *with no queſtions 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 enquiry 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 news-papers, &c.) printing or publiſhing ſuch advertiſement ſhall forfeit 50*l.*

By *ſt.* 21 *Geo.* 3. *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.

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.* 2. *c.* 7, on Scotch Juriſdictions.

ADULTERY, *adulterium, quaſi ad alterius thorum*; *Anno* 1 *Hen.* 7. *cap.* 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 is ſeverely puniſhed by the laws of God, and the antient laws of the land: (See the laws of King *Edmund, c.* 4: Laws of *Canute, par.* 2. *c.* 6, 50: *Leg. H.* 1. *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 antiently 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 heinſuſneſs of the crime, and are frequently very heavy and ſevere.

Before the ſtat. 22 & 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 & Feme.* III.

ADVOCATE. The patron of a cauſe aſſiſting his ent with advice, and who pleads for him: it is the ſame

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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; antiently 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. *cap.* 5. *par.* 4.

ADVOWSON, *Advocatio.*] The right of preſentation to a church or benefice: and he who hath this right to preſent is ſtiled *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—3.

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 dependant 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 becomes 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 advowſon 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 *intire 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, tho' 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, tho' 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 Ed. 2. 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 antient 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 *Rol. 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. cap.* 19, and the reſt by the 13 *Eliz. cap.* 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.

Secondly, A grant of the next avoidance may be aſſigned before the avoidance happens. 2 *Rol. Ab.* 45, &c. But an avoidance cannot be granted by a common perſon after it is fallen: while the church is abſolutely void. *Mo.* 89: *Dy.* 129 *b.*: 26 *a*: 283 *a*: & 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, 1. 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: *Dy.* 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 altho' 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 antient and worthy. *Watſ. c.* 9. *fo.* 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, tho' he die incumbent; for altho' the teſtament hath no effect but by the death of the teſtator, yet it hath an inception in his lifetime. And ſo it is, tho' 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.

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.

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 preſentation, 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 *Lil. Ab.* 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 priviſional 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.

The right of *donation* deſcends to the heir (the anceſtor dying ſeiſed, where the church became void in his lifetime) and not to the executor; which it would had it been a *preſentative* benefice. 2 *Wilſon* 150, 1.

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 an *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 *Rol. Ab.* 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*. *Dr. & 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 *Rol. Ab.* 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 country; 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 benefices, in ſuch caſe the firſt is void by the ſtatute 21 *H.* 8. *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.* 8. *c.* 11, the profits ariſing during the avoidance are given to the next incumbent towards payment of the firſt fruits; tho' 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.* 8. *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.

But if he is *inducted* into a ſecond benefice, the firſt is void *in facto & 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.* 3. 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*. 105.

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 an 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 an uſurpation. *Dy*. 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* 93.

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*. 1.) *c*. 5. § 2, "that if a poſſeſſory action be brought within ſix months after the avoidance, the patron ſhall (notwithſtanding ſuch uſurpation and inſtitution) 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 *Anne*, *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 *E*. 1:) ſtat. 1. *c*. 5,) the eldeſt ſiſter ſhall firſt preſent. And when coparceners, jointenants, &c. are ſeiſed of an *advowſon*, and partition is made, to preſent by turns; by ſtat. 7 *Anne*, *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 *Lil. 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 *Nelſ*. 1290. And by ſtat. 7 *R*. 2. *c*. 12, no alien ſhall purchaſe a benefice in this realm, nor occupy the ſame, without the king's licence, 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*. 1. *c*. 5. § 18, 19: 1 *W*. & *M*. *c*. 26: 12 *Anne*, *c*. 14: & 1 *Jon*. 19. But by ſtat. 11 *Geo*. 2. *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.

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 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 one 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; *jointenants* 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 jointenants of the next avoidance, one may *preſent* the other, and two jointenants 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*.

promoted. If the king *preſent* to a church by *lapſe*, where he ought to *preſent pleno 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 *Rol. Ab.* 354: 3 *Inſt.* 156: *Co. Lit.* 186: 2 *Nelſ. Ab.* 1288, 1290: 2 *Lil.* 351.

The king may repeal 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 *Ro. Ab.* 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 *Rol. Ab.* 364. See *ante*, *Lapſe* II.

If a defendant, or any ſtranger, preſents a 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 ſhew 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 ſeizure, 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 licence from the crown, right of preſentation may be forfeited; tho' 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. Ab.* 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 *Anne*, *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 licence for election, was firſt to be obtained of the patron, and the elect confirmed by him. *Kennet's Paroch. Antiq.* 147, 163.

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. *Stelman* derives it from Sax. *eghe*, an egg, ſoftened into *eye*, uſed to expreſs a brood of pheaſants,) and thence *eyrie*, or as above *aerie*, a place

a place or 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.* 1.

ÆTATE PROBANDA.] A writ that lay to enquire, 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.] 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.* 6. *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 adminiſter 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 impower 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 be 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 ſhewing 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 alledged *Comberb.* 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.* 1. *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 his 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 *Str.* 1157: 1 *Wilſ.* 335.

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

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

AFFINAGE,

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.* 6. *c.* 12. And the verb itſelf by *Weſt. Symbol.* part 2. tit. *Fines*, ſect. 152. 19 *H.* 7. *cap.* 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 ſolem *affirmation* that what they ſay is true. See *Quakers*.

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

AFFORATUS, Appraiſed or valued, as things vendible in a fair or market. *Cartular. Glaſton. M. S. 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. *Bact. 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 *Ed.* 3. *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*, i. *cap.* 63, & ii. *cap.* 10. § 17; *c.* 13. § 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 *Ed.* 3. *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 Dictionary, 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 authorize 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.* i. *cap.* 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.

AFFREIGHTMENT, *affretamentum.*] The freight of a ſhip, from the French *fret*, freight. *Pat.* 11. *Hen.* 4. See *Charter-party*.

AFFRI, vel *Affra*, 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 & 10. *W.* 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 *ſt.* 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.* 3. *c.* 44, (repealing the above act of 4 *Geo.* 3. *c.* 20) had been vested in the King, should be revested in the company; this was accordingly done by stat. 23 *Geo.* 3. *c.* 65. The same freedom of trading there was, notwithstanding, continued to all the king's subjects.

By stat. 27 *Geo.* 3. *c.* 19. § 11, 12. which regards this trade, some regulations were made as to importing from *Gibraltar*, merchandize 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 chuse 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 chuse 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 & 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 shews 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 jure rei esse judicem*. 8 Rep. 118, 138.

AGILD, free from penalties, not subject to the customary fine or imposition. Sax. *a gild*, *fine mulcta*. Leges Aluredi, cap. 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 *H.* 3. *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*.] 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 *agister*, 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 *gistments*; 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

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. *Ideots and Lunatics.*

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 intail in equity and a creature of the court. 1 *Chan. Ca.* 234: 2 *Chan. Ca.* 4: 1 *Vern.* 13 440: 2 *Vern.* 33, 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 compleat, being the mutual conſent of the parties; and ſhould be executed with a recompence, 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. Ab.* 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.* 2. *cap.* 3, commonly called the Statute of Frauds, if an agreement be by parol, and *not ſigned by the parties, or ſomebody lawfully authorized 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. Chan.* 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. Ab.* 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: 19*th April*, 1785, *MSS.* See *Treatiſe of Equity*, i. 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 premiſſes, 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," tho' 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 alledged 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. *Clerk* 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 Pengall* v. *Roſs*, 2 *Eq. Ca. Ab.* 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 premiſſes 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 proviſions 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 alledged, 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 admiſſible, even tho' the agreement be executed. 2 *Atk.* 203: 2 *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 ſhew 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*, *p.* 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. Anneſley*, 2 *Bro. Rep.* 341: *Cudd v. Rutter*, 1 *P. Wms.* 570: *Capper v. Harris*, *Barb.* 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 an 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* 21ſt *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. *Maycall*, 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. *Beazeley* 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 *Vez* 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 over-ruled, 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, *Monteſiori* v. *Monteſiori*. 1 *Bla. Rep.* 363. And a conveyance of land for ſuch purpoſe, notwithſtanding a defeaſance, will be ſuſtained in equity, 13 *Vin. Ab.* 545: 2. *Bro. P. C.* 88.

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

AID, See tit. *Taxes*; *Tenure*, I. 8. 11. 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 alledge 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, tho' 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 *coparcencers*, where one coparcencer 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 hold 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 ſtopp'd 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 *Ed.* I. *c c.* 1, 2: 14 *Ed.* III. *ſt.* 1. *c.* 14: & 1 *H.* 4. *c.* 8: See alſo *Com. Dig.* tit. *Aide.*

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 entreth the ſame day, and diſpoſſeſſes the heir of his inheritance. *F. N. B.* 222. See tit. *Aſſize 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

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 male*. 2 *Inst.* 19: & *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.

ALBERGELLUM, *halsberga*] 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. *Com.* 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.* 1. Du Fresne. Cowel.

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

ALECENARIUM, A sort of hawk called a *lanner*. See *Putura*.

ALEHOUSES, Are to be licensed by justices of peace, who take recognizances 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 & 6 *Ed.* 6. *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.* 1. *c.* 9: and see stat. 4 *Jac.* 1. *c.* 5: 21 *Jac.* 1. *c.* 7: 1 *Car.* 1. *c.* 4: 3 *Car.* 1. *c.* 4: 11 & 12 *W.* 3. *c.* 15. See tit. *Inns*; *Brewers*.

By the stat. 26 *Geo.* 2. *c.* 41, Justices on granting licences are to take recognizances in 10*l.* with sureties in the like sum for the maintaining good order. Licences to be granted to none, not licensed the preceding year, unless they produce certificates of their good character. Licence 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 yearly only; penalty for selling ale, &c. without a licence, by this and subsequent acts, first offence 40*s.* second offence 4*l.* third offence 6*l.*

As to licences see the above statutes and stat. 29 *Geo.* 2. *c.* 12: 5 *Geo.* 3. *c.* 46: 30 *Geo.* 3. *c.* 38: and lastly 32 *Geo.* 3. *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 licence. See tit. *Drunkenness*.

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 assize 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

tled to them. 1 *Inſt.* 2. and the notes there. But under the ſtat. 13 *Geo.* 3. *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 foreclofing 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 moveable 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 *Ric.* 3. *c.* 9: 14 *H.* 8. *c.* 2: 21 *H.* 8. *c.* 16: 22 *H.* 8. *c.* 13: 32 *H.* 8. *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.

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 troubles. 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 *E.* 3. *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.* 2. *c.* 21: and 13 *Geo.* 3. *c.* 21,) theſe reſtrictions are ſtill further taken off; ſo that all children born out of the king's ligeance, whoſe *fathers* (or *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.* 2. *c.* 21. [The iſſue of an *Engliſh woman* by an alien, born abroad is an alien. 1 *Vent.* 422: 4 *Term Rep.* 400, ſolemnly decided.] But *grand-children* 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.

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 cannot 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 cannot inherit to him; but his iſſue born *after* may, to the excluſion of that born before. 1 *Inſt.* 8: *Vaugh.* 285. But by ſtat. 11 & 12 *Wil.* 3. *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.* 2. *c.* 39, by which this ſtatute of *Wil.* 3. is reſtrained to perſons in being at the death of the anceſtor; and diveſts the eſtate from daughters infavour of after-born ſons. Both theſe acts are extended by ſtat. 16 *Geo.* 3. *c.* 52, to *Scotland*.

A Denizen is not excuſed from paying the alien's duty and ſome other mercantile burthens. See ſtat. 22 *H.* 8. *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 *W.* 3. *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 *W.* 3,) 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.* 1. *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.* 3. *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.* 1. *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.* 2. *c.* 3: 9 *Geo.* 2. *c* 24: 4 *Geo* 3. *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 ſay almoſt

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 an *Engliſh* ſhip by virtue of the king's proclamation, is by ſtat. 13. *Geo.* 2. *c.* 3, *ipſo facto* naturalized, under the like reſtrictions as in ſtat. 12 *W.* 3. *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, or being three years employed in the whale fiſhery, without afterwards abſenting themſelves from the king's dominions for more than one year, and none of theſe falling within the incapacities declared by ſtat. 4 *Geo.* 2. *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.* 2. *c.* 7: 20 *Geo.* 2. *c.* 44: 22 *Geo.* 2. *c.* 45: 2 *Geo.* 3. *c.* 25: 13 *Geo.* 3. *c.* 25: 20 *Geo.* 3. *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.* 2. *c.* 26; which enabled all *Jews* to prefer bills of naturalization in parliament without receiving the ſacrament as ordained by ſtat. 7 *Jac.* 1. *c.* 2: but this act continued only a few months, and was then repealed by ſtat. 27 *Geo.* 2. *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 *aliens:* but in caſes of high treaſon, this is not allowed. 2 *Inſt.* 17. See ſtat. 27 *E.* 3. *c.* 8, that where both parties are aliens the inqueſt ſhall be all aliens, and ſtat. 28 *E.* 3. *c.* 13. as to trials between denizens and aliens; See alſo 1 *Com. Dig.* tit. *Alien.* (C. 8.)

Tho' 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 the larceny only. *Forſt* 188.

A very great influx of *Frenchmen* into *England* having been cauſed in the years 1792 and 1793 by the troubles in *France*, and there being cauſe to ſuſpect that ſome of them were ſent here for dangerous and unjuſtifiable purpoſes, an act was paſſed, ſtat. 33 *Geo.* 3. *c.* 4, commonly called the Alien-Bill, 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 directs 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. This act was in the firſt inſtance temporary; and tho' oppoſed in both houſes, was proved by circumſtances of a very ſerious nature, to have been abſolutely neceſſary.

By the various acts of parliament above mentioned, 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. 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.* 2. *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.*

ALLAUNDS, *ab alanis, Scythicæ 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-

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, pag.* 19. & 9 *H.* 5. *ſt.* 1. *c.* 11.

ALLEGIANCE, *allegiantia*, formerly called *ligeance*, from the Latin *alligare & 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 *W. & M. c.* 1, 8. 1 *Ann. ſtat.* 1. *c.* 22. For the other ſtatutes reſpecting allegiance ſee 5 *Eliz. c.* 1. *ſect.* 5: 3 *Jac.* 1. *c.* 4: 7 *Jac.* 1. *c.* 6: 25 *Car.* 2. *c.* 2: 7 & 8 *W.* 3. *c.* 24 & 27: 13 & 14 *W.* 3. *c.* 6: 1 *Ann. c.* 22: 6 *Ann. c.* 14: 8 *Ann. c.* 15: 1 *Geo.* 1. *c.* 13: 2 *Geo.* 2. *c.* 31: 6 *Geo.* 3. *c.* 53. And ſee title OATHS, and *Kyd's Com. Dig.* tit. Allegiance. By the ſtat 3 *Jac.* 1. *c.* 4. 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*.

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.

ALLODIAL. This is where an inheritance is held without any acknowledgement 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 manour*; and *alodarii* Lords Paramount. *Kent*: *Co. Litt.* 1, 5. & 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 *R.* 3. *c.* 9.

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 annex'd to the *Book of Common Prayer*. *Mod. Caſ.* 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. *Bunbury*, and judgment accordingly. 1 *Leo.* 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, tho' the error aſſigned, *viz.* that the 16 *Feb.* on which day judgment was ſaid to be given, was on a *Sunday*, was an error in fact; and the judgment was reverſed.

ALMARIA, for *armaria*: The archives or as they are ſometimes ſtiled *muniments* of a church or library.—*Gervaſ. Dorob.* in *R.* 2.

ALMNER, or ALMONER, *eleemoſynarius*.] 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'as deſe*, allowed him by the king. *Fleta, lib.* 2. *cap.* 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 *Ina* king of the *Weſt Saxons*, and anciently paid in *England* on the firſt of *Auguſt*. It was likewiſe called *romefeoh*, *romefeot*, 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. He had his power by stat. 25 *Ed.* 3. 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 *Ed.* 3. stat. 1. *c.* 4: 3 *R.* 2. *c.* 2. There were afterwards three officers belonging to the regulation of cloathing, who bear the distinct names of *searcher*, *measurer*, and *aulnager*; all which were formerly comprised in one person. 4 *Inst.* 31: *Cowel.*

By 11 & 12 *W.* 3. *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-Hadden* 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 & 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 *Arundell*: *Pretium virginitatis domino solvendum*. LL. *eccl. Gul.* Howeli Dha, *regis* Walliæ. This custom *Henry* earl of *Arundel* released to his tenants, *Anno* 3 & 4 *P.* & *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 *Com. 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

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 ſeiſed 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 *An. c.* 12, is only declaratory. *Barbuit's Caſe, Rep. temp. Ld. Talb.* 281; and ſee 3 *Burr.* 1748.

By our ſtatute law, (ſtat. 7 *An. 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, 9: 3 *Wilſ.* 33: 2 *Stra.* 797: 2 *Ld. Raym.* 1524: 3 *Burr.* 1676: 4 *Burr.* 2016, 7: and *Com. 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 *Ed.* 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 houſekeeping 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*, an 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, *Ed.* 1. 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 *Ed.* 1. 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.

Tho' *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 faillé*); 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 *Com. Dig.* tit. *Amendment*.

By ſtat. 14 *Ed.* 3. *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 *H.* 5. *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. B.* 110.

This ſtatute is confirmed by ſtatute 4 *Hen.* 6. *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.* 6. *c.* 15. ſeem to be annulled by the ſtatute 27 *Hen.* 8. *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.* 6. *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, pannel, or return. *Gilb. H. C. P.* 110.

There are only two ſtatutes of amendments, *viz.* the 14 *Ed.* 3. ſtat. 1. *c.* 6. and 8 *H.* 6. *c.* 12 & 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 *H.* 6, was only to inlarge the ſubject-matter of 14 *Ed.* 3. and that 14 *E.* 3. 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 *Ed.* 3. extends not to the king, becauſe of theſe words, (*challenge of the party*) and that the ſtatute 8 *H.* 6. has always been conſtrued in limitation of the act of *Ed.* 3. and the exception in the ſtatute of *H.* 6. 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.

Farther by ſtat. 8 *Hen.* 6. *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, corouers, 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 extended 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. B.* 111.

By ſtat. 32 *H.* 8. *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.* 1. *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 miſ-awarded; for miſnomer of jurors, if proved to be the perſons returned; want of returns of writs, ſo as a pannel 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.* 2. *c.* 8. (called by *Twiſden* J. an omnipotent act, 1 *Vent.* 100; and made perpetual by ſtat. 22 and 23 *Car.* 2. *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 alledging and bringing into court of any bond, bill or deed, or of alledging or bringing in letters teſtamentary, or of adminiſtration; or for the omiſſion of *vi & 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 alledging *prout patet per recordum*, 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 *An. 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.* 1. *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.

An action for a falſe return of a member of parliament on the ſtat. 7 and 8 *W.* 3, for double damages, is remedial, tho' founded on a law that is penal, ſo within the ſtatutes of *jeofails*. 1 *Wilſ.* 125.

By

By the foregoing ſtatutes (from 14 *E.* 3. *c.* 6; to 8 *H.* 6. *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.* 1. 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.

In an *aſſumpſit*, the defendant pleads *Not Guilty*, thereupon iſſue is joined, and found for the plaintiff, he ſhall have judgment, tho' it is an improper iſſue in this action; for as there is a deceit alledged, 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, tho' 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.* 2, helps a miſ-trial in a proper county, but not where the county is miſtaken. 1 *Mod.* 24.

When the award of a writ of enquiry 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 vicious 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. 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 on y in paper. *Style* 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. 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; tho' 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. T.* 15 *Geo.* 3. 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 *E.* 3. 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

between the original writ and declaration, &c. ſtat. 32 *H.* 8. 18 *Eliz. Vide* 5 *Geo.* 1. *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, 8.

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.

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 *H.* 3. *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 Beaford* 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 *W. & M. c.* 12.

The *amerciament* of the ſheriff, or other officer of the king, for miſconduct, is called *amerciament* royal. *Termes 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 vicious indictment; for if there were a trial and verdict, judgment muſt be arreſted. *Comberb.* 13. A counſel urged, that he might, as *amicus curiæ*, inform the court of an error in proceedings, to prevent giving falſe judgment; but it 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. cap.* 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, as 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 licence of taking in mortmain. In the ſtatute *de libertatibus perquirendis*; *an.* 27 *Ed.* 1. ſt. 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 & 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 therefore 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

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 concerning 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. Br.* 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 frankfee 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 *H.* 4. *c.* 5. & 8 *H.* 6. *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 *diſceit*, 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 *Rol. 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 *Rol. 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 *Rol. 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 *Rol. 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 land 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: *Hetl.* 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 *Co.* 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.* 3.

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*, *Anfealtible*, 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*, *cap.* 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 & Cowel*; the former of whom gives ſome fanciful derivations under this word, and v. *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 ſuccurebant*. 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. *Tuigild* 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.* 1. *c.* 64.

ANIENS, *Fr.*] Void, being of no force. *F. N. B.* 214.

ANNALES, Yearlings, or young cattle from one to two years old.

ANNATS, *Annates.*] This word has the ſame meaning with firſt-fruits, ſtat. 25 *H.* 8. *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 *Ed.* 4. *c.* 4. From the *Saxon*, *Onælan*, *Accendere*, ſignifies the burning or hardening of tile.

ANNIENTED, from the *Fr. Aneantir.*] 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 *Ed.* 6. *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 obſerved in gratitude to their founders and benefactors, was by our 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 *H.* 8. *c.* 5. Vide titles *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 la 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 *Rol. 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. ſect.* 219: 2 *Bulſt.* 148.

The treatiſe called *Doctor and Student*, *dial.* 1. *cap.* 3, ſhews 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

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. Br.* 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 20 days after, and he die after *Eaſter* within 20 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. Br.* 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. Br.* 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 can't 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.* 3. *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 20 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 name 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 any 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 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, 8.

For further matter relative to Annuities in general, as well as thoſe for life, ſee *Com. Dig.* tit. *Annuity*. 17 Geo. 3. c. 14.

ANNUITIES PUBLIC, ſee tit. *National Debt.*

ANSEL, or *Anſul*. See *Aunſel* weight.

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 he 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 in-

tended to be guilty, and not admitted to purge himſelf. *Leg. Hen.* 1. *c.* 65.

ANTISTITIUM, A word uſed for monaſtery in our old hiſtories. *Bleunt.*

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 R.* 2. In another ſenſe, to ſhun or avoid.

APOSTARE, To violate: *apoſtare leges*, and *apoſtatare leges*, wilfully to break or tranſgreſs, to apoſtatiſe 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.* 8. *c.* 40: 1 *M. ſtat.* 2. *c.* 9. And *apothecaries* to the army are to make up their cheſts of medicines at *Apothecaries' Hall*, there to be openly 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.* 8. *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 falſhood 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 *R.* 2. *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.

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 publick. 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.* ii. 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 Apeals 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 publick crimes, probably had its original 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, 4.

It was alſo anciently permitted (as above hinted) for one ſubject to appeal another of *high Treaſon*, either in the courts of common law (*Britt. c.* 22.) or in parliament; or, for treaſons committed beyond the ſeas, in the court of the high conſtable and marſhal. The cognizance 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 cognizance of appeals for treaſon in the common law courts was virtually aboliſhed by ſtat. 5 *E.* 3. *c.* 9: & 25 *E.* 3. [ſtat. 5. *c.* 4.] (1 *Hale P. C.* 349, 359:) and in Parliament expreſsly by ſtat. 1 *H.* 4. *c.* 14. See 4 *Comm.* 314.

On this ſubject Mr. *Kyd* the ingenious editor of *Comyns's Digeſt* makes the following uſeful remark.—It does not appear that the appeal of treaſon is taken away by this ſtatute (1 *H.* 4. *c.* 14,) or any other. The ſtat. 5 *E.* 3. *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 *E.* 3. [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

theſe ſtatutes do manifeſtly not take it away. The ſtat. 1 *H.* 4. *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 *H.* 4. *c.* 14, nor for many years before, the law relating to ſuch appeals ſeems wholly obſolete at this day. *Leach Hawk. P. C.* ii. *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 c.* 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 *E.* 1. *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, 5.

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: *Staund.* 147, 8.] 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 *H.* 7. *c.* 1. in order to be furthering to anſwer an appeal for the ſame felony, though if he has been found guilty of manſlaughter, or on indictment, and has had the benefit of clergy and ſuffered the judgment of the law, he cannot afterwards be appealed. 4 *Comm.* 315.

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 *E.* 1. *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 & 5 *W. & 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 P. C.*

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 P. C.* vol. ii. 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. Ch. 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. Ab.* 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, tho' the defendant takes no exception to it. 2 *Hawk. P. C. cap.* 23. *ſ.* 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 *E.* 3. 15. *per Ingleby.*

The wife is to be a wife *de facto* to be intitled 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. & ſtat. 6 *Ed.* 1. *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 *H.* 7. *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 another, 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 goal 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 notwithin ſtat. 3 *H.* 7. *c.* 1; and therefore *autrefoits 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 *H.* 8. *cap.* 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 *H.* 7. *c.* 1. directing appeals before the ſheriff and coroners, or at king's bench, or gaol delivery; and ſtat 1 *H.* 4. *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 an 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. *cap.* 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 a recovery in aſſault and battery,

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 ſeme covert, without her huſband, may bring *appeal of rape*: and ſtat. 6. *R.* 2. *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 *R.* 2. *cap.* 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 *H.* 6. *Corone* 459.—2 *Hawk. P. C. c.* 23. *ſ.* 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, tho' there be good cauſe of divorce; for he is her huſband till a divorce be had. See *Br. Parliament, pl.* 89. cites 31 *H.* 4. 13, 14: 2 *Hawk. P. C. c.* 23. *ſ.* 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.* 17: *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. Pl. 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 ſhewn 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 *Ed.* 1. 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 defendant 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 *H.* 8. *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. See further 2 *Hawk. P. C. c.* 23. § 44—57; and this Dict. tit. *Robbery*.

APPEAL TO ROME. At the reformation in the reign of *H.* 8. the kingdom entirely renounced the authority of the ſee of *Rome*; and therefore by the ſeveral ſtatutes 24 *H.* 8. *c.* 12. and 25 *H.* 8. *c.* 19 and 21, to appeal to *Rome* from any of the king's courts, (which tho' illegal before, had at times been connived at); to ſue to *Rome* for any licence 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. St. 24 *H.* 8. *c.* 12 — and the ſtat. 25 *H.* 8. *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 court at *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 the

ſon, or by attorney; by perſons of full age: and by guardians, or next friend, 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 a *cepi corpus* upon an *exigent*. *F. N. B.* Or, if he be outlawed. 2 *Co.* 462, 616.

But by ſtat. 4 & 5 *W. & 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 ideot doth ſue or defend, he cannot appear by guardian, *prochein amie*, 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.* 2.

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 ret' of the proceſs. *Impey's Pract. K. B.* 177: 4 *Burr.* 2180.

Attornies 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, tho' 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.* 2. *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 *G.* 1. *c.* 29, and by ſtat. 25 *Geo.* 3. *c.* 80. *ſ.* 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 & 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. *Style* 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, 322, 392: 4 *Rep.* 71: 1 *Lev.* 80: *Ray.* 59.

As to *Appearance* by guardian and next friend, vide *Infants, &c.*

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,

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 *E.* 3. 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 couching *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 Plow. 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.

APPENNAGE, 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 ann.* 1271. *Mat. Pariſ. Chron. Aulæ Regiæ ann.* 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, rendring rent, and afterwards grants away one acre, the rent ſhall be *apportioned. Co. Lit.* 144. Leſſee for years leaſes for years, rendring 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* i. 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 rendring *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.* 2. *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 aforeſaid, 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. C. Rep.* 659.

But though the executor of tenant for life is now intitled 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 C. 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.* 170. 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 publick 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. 2. 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. Litt.* 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 intire 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 & 23 *Car.* 2. *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*. Statute 11 *Ed.* 1: *Stat. Action Burnel.*—See *Auctioneers.*

APPRENDRE, [*Fr.*] A fee or profit *apprendre*, is fee or profit to be taken or received. *Stat.* 2 & 3 *Ed.* 6. *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 intitle 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.* 194. *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 *Rol. 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 inrol 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. *sect.* 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.* 3. *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 & 9 *W.* 3. *c.* 30. § 5. Also justices of peace and churchwardens, &c. may put out poor boys *apprentice* to the sea-service. Stat. 2 & 3 *Ann. c.* 6. and 4 *Ann. c.* 19. And by stat. 7 *Jac.* 1. *c.* 3. apprentices bound out by publick charities are regulated. See title *Chimney-Sweepers.*

As to the manner of their being bound;

By the ſtatute 5 *El. c.* 4. *ſect.* 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.* 2. *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 fac'* ſhall iſſue to the maſter, to ſhew 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 *Rol. 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.

But there are ſeveral ſtatutes allowing further time to pay the duties and ſtamp indentures, thro' neglect omitted, &c. And acts of indemnity of this nature are uſually paſſed every two or three years.

The payment of the duties on apprentice-fees is enforced by ſeveral acts, 18 *Geo.* 2. *c.* 22; & 20 *Geo.* 2. *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 & 5 direct who ſhall take apprentices, and direct that every *cloth-worker, fuller, ſhearman, weaver, taylor, or ſhoe-maker*, taking *three* apprentices, ſhall have *one* journeyman, and for every other apprentice above three, alſo *one* journeyman. *ſ.* 33.—Stat. 1 *Jac.* 1. *c.* 17, allows only *two* apprentices at a time to *batters* and *felt-makers*; (except a ſon apprentice;)—and ſtat. 13 & 14 *Car.* 2. *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 tho' 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, tho' 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.* 2. in *B. R. The King* v. *Amies*; tho' an order of this nature has been quaſhed. *Bott*, (by *Conſt*) i. 513.

By the ſtat. 20 *Geo.* 2. *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 mis-uſage, 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 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 *G.* 2. *c.* 11, This act is extended to ſervants in huſbandry, though hired for leſs than a year.

By ſtat. 6 *Geo.* 3. *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 controul of the chamberlain, whoſe juriſdiction is ſaved in the ſeveral ſtatutes.—The ſtat. 32 *Geo.* 3. *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 *W.* 3. *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 *W.* 3. *B. R. Caſter* 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 tho' 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 tho' 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 cloathing 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.* 3. *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 *toties quoties*. And maſters, *&c.* of apprentices under ſtat. 8 & 9 *W.* 3. *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 inticing 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.* 450. 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. *As to the exerciſing of trades.*

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. *ſect.* 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, uſe 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 ſtatute. 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 & 3 *P. & 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, tho' 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

where by the law of the country more is not required, will not qualify a man to uſe the trade in *England*. *Ca. in Law and Eq.* 70.

By the ſtatute 31 *Eliz. cap.* 5. *ſect.* 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 in 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.

IV. *As to their puniſhment for particular offences, it is to be obſerved, That*

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, tho' 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 *H.* 8. *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 *Anne 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 4th 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 compleat ſuch appropriation effectually, the king's licence 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 patrons 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. Litt.* 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 *fine-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 *fine-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.

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 *H.* 8. *c.* 28, and 31 *H.* 8. *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 *H.* 3. *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 appealed: and the form of this accuſation you may find in *Cromp. Juſt.* 250: See alſo *Bracton, lib.* 3: *Staunf. 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 *H.* 4. *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.

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 licence *de vendre & acheter* beaſts, *&c.* But by the ſtatute 2 *Ed.* 3. *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 *H.* 3. *ſt.* 5. And in the ſtat. 1 *Ed.* 3. *ſt.* 1. *c.* 8, ſheriffs are called the king's approvers.

APPRUARE, To take to his own uſe or profit. ſtat. *W.* 2. *c.* 20.

APPURTENANCES, *pertinentiæ* 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. El.* 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*: *Litt. 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 *Plo. Com.* 103. *b*, 104. *b*, 170: Alſo vide *Com. Dig.* (1 V.) tit. *Appendant* and *Appurtenant.*

AQUAGE, aquagium, *quaſi aquæ agium*, i. e. *aquæductus* & aquægangium.] A water-courſe.——In ſome inſtances uſed for toll paid for water carriage. See *Ewage.*

ARACE, *angl.* To raiſe or eraſe from the French *arracher, evellere, Blount.*

ARATIA, Arable grounds, *Cowel.*

ARAHO, *In arabo conjurare, i. e.* To make oath in the church, or ſome other holy place; for according to the *Ripuarian* laws, all oaths were made in the church upon the relicks of ſaints. *Spelm.*

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 cyrographorum 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 K. *Rich.* I. *Hoveden's Annals, p.* 745.

ARCHERY, A ſervice of keeping a bow, for the uſe of the lord to defend his caſtle.—*Co. Litt. ſect.* 157.

ARCHBISHOP, *archiepiſcopus.*] The chief of the clergy in his province. See title *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,

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.* 8. *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 & 14 *Car.* 2. *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 altho' 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. *L. Raym.* 123.

An archdeacon is a miniſterial officer, and cannot refuſe a churchwarden elected by the pariſh. *Rex* v. *Martin Rice*, *L. Raym.* 138.

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 ſtiled 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 *H.* 8. *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.* 8. *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 ſome-times uſed for repoſitories in libraries.—It is uſed in common ſpeech for the records themſelves.

ARERIESMENT, Surpriſe, affrightment.—To the great *arerieſment* and *eſtenyſement* of the Common law. *Rot. Parl.* 21 *Ed.* 3.

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.

ARENTARE, To rent out, or let at a certain rent. *Conſuetud. Domûs de Farendon*, *MS. fol.* 53.

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.

ARIETUM LEVATIO, An old ſportive exerciſe, ſuppoſed to be the ſame with running at the *quintain*. See *Stevens's Shakſpeare*, Edit. 1793. vol. vi. 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

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 title, *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.* 2. at *York*, *Lanceam & ſellam ſuam ſuper altare Sancti* Petri *ad perpetuam hujus ſubjectionis memoriam offerre.* See *Spelm.* in v.

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.* 1. 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 *R.* 2. *ſt.* 1. *c.* 2, The conſtable (Lord High Conſtable) ſhall have cognizance 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 *E.* 1. *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 *E.* 3. *c.* 3, enforced by ſtats. 7 *R.* 2. *c.* 13, and 20 *R.* 2. *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 ſtat. 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 *W. & M. ſt.* 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 *H.* 8. *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.* 2. *c.* 4. Importing arms or ammunition prohibited; 1 *Jac.* 2. *c.* 8.

ARNALIA, *Arable grounds.* This word is mentioned in *Domeſday*, tit. *Eſſex.*

ARNALDIA, *Arnoldia*; A diſeaſe that makes the hair fall off like the *alopecia*, or like a diſtemper in foxes. *Rog. Hoveden, p.* 693.

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 antient 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. *Ed.* 2. 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. *p.* 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 & 14 *Car.* 2. *cap.* 3.

ARREARAGES, *arreragia*, from the French *arriere*, *retro*, behind.] Money unpaid at the due time, as rent behind; the remainder due on an account; or a ſum of money remaining in the hands of an accountant.

ARRECTATUS, One ſuſpected of any crime. *Offic. Coronat. Spelm: Gloſſ.*

ARRENATUS, *arraigned*, accuſed. *Rot. Parl.* 21 *Ed.* 1.

ARRENTATION, from the Spaniſh *arrendar*, *ad certum redditum dimittere.*] The licenſing the owner of lands in the foreſt, to incloſe 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 licences. *Ordin. Foreſtæ*, 34 *Ed.* 1. *ſt.* 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 officer 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 *Ed.* 1. *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 Ab.* 228;) peers of *Scotland*, (2 *Str.* 990;) a peereſs by marriage, (*Co. Lit.* 16: 6 *Co.* 53: *Dyer* 79;) members of convocation actually attending thereon, (*St.* 8 *H.* 6. *c.* 1:) biſhops, ambaſſadors, or the domeſtic ſervant of an ambaſſador, *really & bonâ fide in that capacity.* (*St.* 7 *Ann. c.* 12: 3 *Wilſ.* 33: 2 *Str.* 797: 2 *Ld. Raym.* 1524: 4 *Burr.* 2016, 17: 3 *Burr.* 1676:) the king's ſervants, (1 *Raym.* 152: 8 *Mod.* 12:) marſhall, warden of the *Fleet*, (1 *Vent.* 65:) clerks, attornies, 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 *E.* 3. *c.* 5: 1 *R.* 2. *c.* 16:) ſuitors, (*Bro. Privil.* 57:) witneſſes ſubpœna'd, 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 (*St.* 5 *Geo.* 2. *c.* 30. § 5: and See *Cowp.* 156:) 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 *T. Rep.* 716:) or in caſes of *devaſtavit* (1 *Salk.* 98:) ſailor or voluntier ſoldier: (unleſs the debt is twenty pounds.) *Stat.* 1 *Geo.* 2. *c.* 14. § 15: 31 *Geo.* 3. *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. *p.* 150: 2 *Sid.* 157: *Latch.* 199: *Godb.* 10: 2 *Rol. Abr.* 274.

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 ſt. 10 *Geo.* 3. *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, 7. 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

or breach of the peace, any man may arreſt without warrant or precept. *Terms de Ley* 54.

The abuſes of gaolers and ſheriff's officers towards their priſoners are well reſtrained and guarded againſt by *Stat.* 32 *Geo.* 2. *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 expences of his priſoner more than ſhall be allowed by an order of ſeſſions. Bailiffs to ſhew 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 *E.* 1. *c.* 26: 20 *E.* 3. *c.* 6: 1 *H.* 4. *c.* 11: *Co. Lit.* 368: 23 *H.* 6. *c.* 9. *Plowd.* 465.

The fees now allowed by the Maſter for arreſts on meſne proceſs in town are 10*s.* 6*d.* in the country 1*l.* 1*s.* and 1*s.* per mile. *Impey's Sheriff* 122.

By *Stat.* 29 *Car.* 2. *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 *T. Rep.* 266, denies 1 *Atk.* 581.

By *Stats.* 12 *Geo.* 1. *c.* 29: and 5 *Geo.* 2. *c.* 27, both made perpetual by *Stat.* 21 *Geo.* 2. *c.* 3, No perſon can be arreſted, or held to bail, on a writ ſued out of the *ſuperiour* courts, unleſs the cauſe of action be 10*l.* or upwards.

And now by *Stat.* 19 *Geo.* 3. *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.* 1. *c.* 29, extended by 19 *Geo.* 3. to debts under 10*l.*

By § 3. of 19 *Geo.* 3. *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 & 12 *W.* 3. *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 & 9 *W.* 3. *c.* 27. § 15: 9 *Geo.* 1. *c.* 28. § 1: and 11 *Geo.* 1. *c.* 22; by which perſons oppoſing the execution of proceſs, or abuſing the officer, if he receives any bodily hurt, are declared guilty of felony.

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,

door, &c. open, he may open the inner door to make an arreſt. *Comb.* 327.

In the caſe of *Lee* v. *General Gaſel*, 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 the 3 & 4 *Jac.* 1. *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 ſhew at whoſe ſuit, out of what 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 ſhew his warrant, though the party demands it; nor is any other ſpecial bailiff bound to ſhew 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 may arreſt the party without the ſheriff's warrant. 1 *Lill. Abr.* 94. And by the cuſtom of *London*, a debtor may be arreſted before the money is due, to make him find ſureties: but not by the common law. 1 *Nelſ. Abr.* 258.

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 *impunè*. *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 ſhall 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.

Every private perſon is bound to aſſiſt an officer, requiring him to apprehend a felon.

As to the arreſting of offenders by *private perſons* of their own authority, *permitted* by law for the *prevention* of *treaſon* or *felony* only intended to be done; any one may lay hold of a perſon, whom he ſees upon the point of committing treaſon, or felony, or doing an act which would manifeſtly endanger the life of another, and detain him, till it may be reaſonably preſumed he has changed his purpoſe. 2 *Hawk. P. C. c.* 12. § 19.

As to arreſts for inferior offences, no private perſon can arreſt another for a bare breach of the peace after it is over; but it is held, that a private man may arreſt a night-walker, or a common cheat going about with falſe dice, and actually caught playing with them, in order to have him before a juſtice of peace; and the arreſt of any other offenders, by private perſons, for offences in like manner ſcandalous, and prejudicial to the public, ſeems juſtifiable. 2 *Hawk. P. C. c.* 12. § 20.

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 proceeding. 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) ſeem exploded as illegal. See *Leach's Hawk. P. C.* ii. *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.* 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, premunire, 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; cognizable 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 ſhew 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 ſhew their warrants, if demanded. *Id.* § 28.

And therefore *Stat.* 27 *Geo.* 2. *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 ſhew 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 ſhew cauſe why judgment ſhould be ſtaid, 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. *Dougl.* 747: *Str.* 845. *Sunday* is no day, 4 *Burr.* 21, 30. nor a *dies non*. It is a rule to ſhew 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 alledge it before. *Str.* 425.

It may be made after motion for a new trial diſcharged, *Dougl.* 716: 1 *Burr.* 334. and if arreſted, each party pays his own coſts, *Cowp.* 407.

After verdict a man may alledge 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, 4.

ARREST OF ENQUEST is to plead in arreſt of taking the enqueſt, upon the former iſſue, and to ſhew 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.

ARRESTO

ARRESTO FACTO SUPER BONIS MERCATORUM ALIENIGENORUM, A writ that lay for a denizen againſt the goods of *aliens* found within this kingdom, in recompence 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 forth-coming, 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 *H.* 4. *c.* 7.

ARRURA,—In the black book of *Hereford*, *De Operationibus* Arruræ, ſignifies days' work of ploughing; for antiently 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 *Aratrum 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.* i. *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. By *Stat.* 5 *Eliz. c.* 13, to burn corn in the four Northern counties, is felony without clergy. And the *Stat.* 22 & 23 *Car.* 2. *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.* 1. *c.* 22, (made perpetual by 31 *Geo.* 2. *c.* 42,) Setting fire to any houſe, barn, or out-houſe, or to any hovel, cock, mow, or ſtack of corn, ſtraw, or wood, or to reſcue any offender is made felony without benefit of clergy.—*Leach's Hawk. P. C.* i. *c.* 58. *App.* 4. § 3.

As to other *malicious burnings*; by *Stat.* 37 *H.* 8. *c.* 6. § 4, to burn any cart loaded with fuel, incurs 10*l.* penalty and treble damages. By *Stat.* 4 & 5 *W.* & *M. c.* 23, to burn the covert for red or black game, one month's impriſonment; and by *Stat.* 28 *Geo.* 2. *c.* 19, to burn the covert for deer or game, a penalty between 40*s.* and 5*l.* By *Stat.* 1 *Geo.* 1. *c.* 48, to burn any wood or coppice is felony. By *Stat.* 10 *Geo.* 2. *c.* 32, to ſet fire to a coal mine, felony without clergy. By *Stat.* 9 *Geo.* 3. *c.* 29, to burn any mill, felony without clergy, if proſecuted within eighteen months.

The offence of *Arſon* was denied the benefit of clergy, by *Stat.* 21 *H.* 8. *c.* 1; but that Stat. was repealed by *Stat.* 1 *E.* 6. *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 & 5 *P.* & *M. c.* 4; which expreſsly denied it to the acceſſory before the fact: though now it it expreſsly denied to the principal in all caſes within the *Stat.* 9 *Geo.* 1. *c.* 22. 4 *Comm.* 223. which See and *Leach's Hawk. P. C.* vol. i. and ii.

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 *H.* 8. *c.* 6.—*Blount.*

ARTICULI CLERI, (*articles of the clergy.*) Are ſtatutes containing certain *articles* relating to the church and clergy, and cauſes eccleſiaſtical. 9 *E.* 2. *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 *H.* 8. *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.* 1. *c.* 27.

By the *Stat.* 23 *Geo.* 2. *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 1000*l.* and be

impriſoned two years. See alſo *Stat.* 14 *Geo.* 3. *c.* 71; 15 *Geo.* 3. *c.* 5; and 21 *Geo.* 3. *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 rights.

ASCESTERIUM, *Archiſterium, arciſterium, aciſterium, alcyſterium, architrium,* from the *Greek.*] A monaſtery. It often occurs in old hiſtories. *Du Cange*

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.* 5, when it was abrogated. 1 *H.* 5. *c.* 6: *Spelm.* and See ſtat. 27 *H.* 8. *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 licence; and a man may, by writ of *ad quod damnum,* ſue out a licence 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.* 2 *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 *H.* 3. *c.* 4; *Manwood, part* 1. *p* 171.

ASSAULT, *Aſſultus,* from the *Fr. Aſſayler.*] An *attempt* or *offer,* with force and violence, to do a corporal 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, 4.—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 *E.* 4: 35 *H.* 6. *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.

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 & 9 *W.* 3. *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 aſſault a privy councillor, in the execution of his office, it is felony. ſtat. 9 *Ann.* *c.* 16.

Stat. 6 *Geo.* 1. *c.* 23. *ſect.* 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.* 2. *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.* 4. *c.* 6, & 11 *Hen.* 6. *c.* 11, render aſſaults on members of parliament more than uſually penal, upon non-ſurrender on proclamation. Stat 9 *E.* 2. 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. By ſtat. 9 *Geo.* 1. *c.* 22, to aſſault another by wilfully ſhooting *at* him is felony without clergy. By ſtat. 12 *Geo.* 1. *c.* 34, aſſaulting a maſter woolcomber or weaver, &c. for not complying with the demands of workmen, is felony and tranſportation for ſeven years.

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, *Aſſajator 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, *Adjecurare.*] To make ſecure by pledges, or any ſolemn interpoſition of faith. In the charter of peace between *Hen* 2. and his ſons, this word is mentioned. *Hoveden, anno* 1174.

ASSEMBLY UNLAWFUL, See tit. *Riot*.

ASSENT, or conſent. To a legacy of goods, the *aſſent* of the executor is neceſſary. See tits. *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 *Bye Laws*. Of *aſſents* to *agreements*. 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 *Aſſeſſors*.

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 heir 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 will 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 diſcharged, and the debt was loſt: but by ſtatute, 3 *W.* & *M.* *c.* 14, made perpetual by 6 *Will.* 3. *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.* 2. *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

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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: *Carthew* 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 en 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 from 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 G. 1.) &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. annō* 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 judgment, waſte, *&c.* And in aſſigning of error, it muſt be ſhewn 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 *H.* 6. *c.* 2.

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 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 *H.* 8. 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.* 2. *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. Litt.* 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 intitled 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.

As to bare rights and poſſibilities ſee *Com. Dig.* tit. *Aſſignment* (C).

Tho' a poſſibility or contingent intereſt, be not *grantable* at law, yet (whether in real or perſonal eſtate) it is *transmiſſible* and *deviſeable*; *Cro. Jac.* 509: 1 *P. Wms.* 566: *Forreſter* 117: 8 *Vin. Abr.* 112. *pl.* 38: 2 *Atk.* 616: 1 *Vez.* 236: *Pollexfen* 44: 3 *Term Rep.* 88: 2 *Burr.* 1131: 1 *Bro. Rep.* 181: *Fearne's Con. Rem.* 444.—The caſes in the books, (1 *C. R.* 18: 1 *Ch. Caſ.* 8: *Pollex.* 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 ſhew 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 *Vez.* 409. ſee *Fonblanque's Treatiſe of Equity* i. 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.

'Tis enacted by the statute 7 *Jac.* 1. *c.* 15, *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 2000*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 tho' 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 premisses without licence of the lessor, *&c.* who after gave licence 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 & 4 *Ann. c.* 9; bail-bonds by the sheriff, by 4 & 5 *Ann. c.* 16; a judge's certificate for taking and prosecuting a felon to conviction, by 10 & 11 *W.* 3. *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 attornies 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*

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 attornies under him to conſtitute; and whatſoever the ſaid* E. F. *or his attorney or attornies, ſhall lawfully do in the premiſſes, 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.* 1. *c.* 8.

ASSISA CADERE, This word ſignifies to be non-ſuited; 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 alledged 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.

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 aſſize 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.

The conſtitution of the juſtices of aſſiſe was begun by *Hen.* 2; 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.* 3. *c.* 12.

There are ſeveral ſtatutes as to holding the aſſiſes at particular places in certain counties.

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.* 6. *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 Cervifiæ. 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

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 alledge *per quod proficuum ſuum ibidem amiſit*, *&c.* 9 *Rep.* 113. One may have an aſſiſe of land and *rents* 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 alledged 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 regiſter 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 *Weſt.* 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 ſhewed 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 jointenants* ſhall have but one aſſiſe in all their names, becauſe they have but one *joint title*; ſo if there are three jointenants, 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.* 8. *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 aſſize will lie for it, as it may be viewed by the recognitors. *Cro. Car.* 534. Aſſiſe will ſometimes lie where treſpaſs *vi & armis* doth not. *Vid.* 8 *Rep.* 47: 1 *Nelſ. Abr.* 276.

By *Magna Charta*, 9 *Hen.* 3. *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 *Rol. 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. ſect.* 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. *Style 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 aſſize; and ſhall pay the plaintiff double damages, and be impriſoned a year. Stat. 13 *Ed.* 1. *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. Aſſ.* 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 *W.* 3.

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 *oyer* 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 & legales homines de vicineto, &c. Videre tenementum illud, & nomina eorum imbreviari, & 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 or 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 them 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 *re-diſſeiſin*; and, if he recover therein, the *re-diſſeiſor* 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 *E.* 1.) *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 *re-diſſeiſor*. 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. *W.* 2: *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 re-ſummons; 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. *Br. 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 ſhewing a diſcent, 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 *anceſtrel*, as in an aſſiſe of *mort d'anceſtor*, they being of the very ſame nature. ſtat.

Weſtm. 2. (13 *E.* 1.) *c.* 20; though they differ in this point of form, that theſe *anceſtrel* 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 anceſtrel 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 co-heireſſes, one enters and holds the others out of poſſeſſion. *F. N. B.* 197: *Finch. L.* 293: *Leg. Orig.* 226: *New Nat. Br.* 437, 8: *Booth on Real Actions.* But a man is not allowed to have any of theſe actions anceſtrel for an abatement, conſequent on the death of any collateral relation, beyond the 4th 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.* 8. *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.* 2. *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 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 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 *Ed.* 2, is alſo called the *aſſiſe of the king*: and the ſtatute of bread and ale, 51 *H.* 3, 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 nuſance, aſſiſa nocumenti*, where a man maketh a nuſance 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 enquire 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 when 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 where 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. *Br. Aſſiſ.* 386: *Mich.* 32 *H.* 6. The king may make an aſſociation unto the ſheriff upon a writ of *rediſſeiſin*, 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 *William* 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 injoined to ſubſcribe the aſſociation, to ſtand by king *William*, on pain of forfeitures and penalties, &c. ſtat. 7 & 8 *W.* 3. *cap.* 27.

ASSOILE, *abſolvere.*] To deliver from excommunication. *Staundf. Pl. Cr.* 72. In ſtat. 1 *H.* 4. *c.* 10, mentioned being made of K. *Ed.* 3, it is added, whom God *aſſoil.*

ASSUMPSIT, from the Lat. *Aſſumo.*] 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 is 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 recompenced 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.* 25. 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 *infimul computaſſent* and *A.* need not bring a writ of account. *Cro. Jac.* 69: *Yelv.* 70. *S. P*: 1 *Rol. Abr.* 7. *S. P*: 1 *Rol. Rep.* 396: *Bulſt.* 208: *Moor* 854.

So if *A.* gives money, or delivers goods to *B.* to merchandize 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 *Rol. Abr.* 9: *Bro. Account* 81: *Raym.* 211: 2 *Keb.* 813: Vide *Style* 131, 283: *Cro. Jac.* 602. So on a balanced account between two partners tho' 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 *Rol. 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 without 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 intitle the plaintiff to the action, on which it ſhall ariſe. 1 *Lev.* 48. Tho' in every *indebitatus aſſumpſit*, 'tis alledged 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

ASSUMPSIT II.

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 compleat 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 is 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*. *Show.* 78.

Indebitatus assumpsit lies for money *paid by mistake*, on an account or *deceit*; but not for money *paid knowingly on illegal consideration*, as an 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.* 236.

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 shew 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.* 2. *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 title *Debt*.

2

II. Some agreements though never so expresly 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.* 2. *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.

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

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 tho' 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 *miſ-feaſance*, 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 whereever a perſon promiſes without a benefit ariſing to the promiſor, 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 *Rol. 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* on 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 ſhews that the plaintiff, *ex æquo et bono*, is *not intitled* 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

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. *ib.*

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 title *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 intitled 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 shewing 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 shewing 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 pede 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 the wood, *non assumpsit*, for the promise being intire, 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, 5.

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 defendant 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 *Rol. 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.*

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 Ed. 1.

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 administring an oath, in some cases of right and property; from the Sax. *ath*, *othe*, *juramentum.* It is mentioned among the privileges granted by king *Hen.* 2, to the monks of *Glastonbury.* Cartular. Abatt. Glaston, MS. fol. 14, 37.

ATIA, See *odio & atia.* A writ of enquiry 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 church-yard.

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. 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

perly 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.* ii. *c.* 22; See 1 *Wilf.* 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 deceipts 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 attornies 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. Caf. in L. & E.* 81.

Against sheriffs making false returns of writs, and against bailiffs for frauds in arrests, 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 proceeding of the court. 1 *Lill.* 121. The court of *B. R.* may award *attachments* 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. *Comp.* 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.* ii. *c.* 22. § 33. in n.—*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 shew 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 recognizance to answer such interrogatories; which if they be not exhibited within four days, the party may move to have the recognizance 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 thinks 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.

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 recognizance to be discharged, 3 *Burr.* 1256; or the

Attorney

Attorney General conſent that the party may continue on the recognizance 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.

Attachment 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 his 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 *E.* 4. 30.

The plaint may be exibited in the *mayor's* or the *ſheriffs'* 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* 200*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 ſhew 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 forth-coming, &c. If the garniſhee fail to appear by his attorney, being warned by the officer to come into court to ſhew 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 ſhew 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 alledged 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 *G. 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 ſhew 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 priviledged 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.

ATTACHMENT OF THE FOREST, Is one of the three courts held there. *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 enroll them, that they may be preſented and puniſhed at the next *juſtice ſeat*, *Manwood* 93. And this *attaching* is by three means; 1. By goods and chattels. 2. By the body, pledges, and mainpriſe. 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 judgement 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, 1.

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 pleadeth 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 publickly called or proclaimed in the county, 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 & 8 *W.* 3. *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

but one only was produced againſt him on his trial. It was alledged 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 tits. *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 antient *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 & 9 *W.* 3. *c.* 26: 15 & 16 *Geo.* 2. *c.* 28; and in many of the new made felonies, created ſince the reign of *Henry* the Eighth 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 *St.* 17 *Geo.* 2. *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, 9.

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 writ of error, or by plea. If by 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* the 7th. See 1 *Comm.* 248.

The *Stat.* 8 *W.* 3. *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 *W.* 3. *c.* 3, the pretended *Prince of Wales* is under *attainder* of treaſon, *&c.* And by 1 *Geo.* 1. *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.* 1. *c.* 17.

ATTAINT, *attincta.*] A writ that lieth to enquire 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 the common law, only upon writs of *aſſiſe*; and ſeems to have been co-eval 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.

In theſe caſes the *aſſiſe* was ſaid to be turned into an *inqueſt* or *jury*, (*aſſiſa vertitur in juratam,*) 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 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 antient 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 B.* 28 *E.* 3. 15: 17 *Aſſ. pl.* 15: *Flet.* 5. 22. 16. At length the *ſt.* of *Weſtm.* 1, (3 *E.* 1.) *c.* 38. allowed an attaint to be ſued upon *inqueſts*, 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. *and* 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 *E.* 3. *ſt.* 1. *c.* 6; 5 *E.* 3. *c.* 7: 28 *Ed.* 3. *c.* 8,) introduced the ſame remedy in all pleas of *treſpaſs*, and the ſtat. 34 *E.* 3. *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* the Second, 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.* 6: 6 *Bro. Abr.* tit. *Atteint* 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.* 6. *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 raſed, 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.* 7. *c.* 24, (revived by 23 *Hen.* 8. *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 fixteenth 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. 5.

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.* 110. *None ſhall have attaint but he that may be reſtored* to the thing loſt by the judgment; *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 *R.* 2. *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 judgment. *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

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*, 'tis 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 non-ſuit, 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 *H.* 8. *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 *Rol. 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 *H.* 7. *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 defendants 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 non-ſuit 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 a nation of conſpiracy, all of them muſt join in an *attaint*, and the non-ſuit 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. *ſtats.* 11 *H.* 6. *c.* 4. and 15 *H.* 6. *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, ann.* 27 *Ed.* 1. And ſee *ſt. Weſt.* 2. *c.* 4.

ATTILE, *Attilium, attilamentum*.] The rigging or furniture of a ſhip. *Fleta. lib.* 1. *c.* 25.

ATTORNARE REM, To *attorn* or turn over money and 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 *H.* 3. *c.* 10.

ATTORNEY, *attornatus*.] Is one that is appointed by another man to do any thing in his abſence. *Weſt. Symb: Crompt. Juriſdict.* 105. An attorney is either publick, 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 attornies: but, ſince that, attornies have been allowed by ſeveral ſtatutes. Attornies may be made in ſuch pleas whereon appeal lieth not: in criminal caſes there will be no attornies admitted. See ſtat. *Glouc.* 6 *Ed.* 1. *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 ideot is not to appear by attorney, but in proper perſon. A corporation cannot

cannot appear otherwiſe than by attorney, who is made by deed under the ſeal of the corporation. *Plowd.* 91.

ATTORNIES AT LAW, Are ſuch perſons as take upon them the buſineſs of other men, by whom they are retained.

Before the ſtatute of *Weſt.* 2. *c.* 10, [13 *Ed.* 1. *A. D.* 1285,] all attornies 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 *Weſt.* 2. *c.* 10, gives to all perſons a liberty of appearing, and 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 fac'* or an action of debt on the judgment. *Gilb. H. C. P.* 33.

The attornies of *B. R.* are of record as well as the attornies 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 & 5 *W. & M. c.* 18, unleſs where the court orders ſpecial bail. By ſtat. 13 *W.* 3. *c.* 6, attornies are to take the oaths to government under penalties and diſability to practiſe. By ſtat. 1 *H.* 5. *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.* 3, a rule of court was made to prevent the admiſſion of perſons under irregular articles of clerkſhip, &c. chiefly to prevent the clerks of attornies 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, ideocy, 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 cognizance, and ſhall take with him a knight or man of good fame. Barons of the exchequer and juſtices ſhall not admit attornies, but in pleas that paſs before them, and where they be aſſigned. Reſerving to the Chancellor his authority in admitting attornies, and to the Chief Juſtices. ſtat. 15 *Ed.* 2. ſtat. 1.

In reſpect of the ſeveral courts, there are attornies at large, and attornies 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 attornies who manage buſineſs out of the courts, &c. *ſtat.* 4 *H.* 4. *c.* 18, was enacted, that the juſtices ſhould examine attornies, and remove the unſkilful; and attornies ſhall ſwear to execute their offices truly, &c. and by ſtat. 33 *H.* 6. *c.* 7, the number of attornies in *Norfolk* and *Suffolk* were limited.

By 3 *Jac.* 1. *c.* 7, attornies, &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 attornies. None ſhall be admitted attornies 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.* 1. *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.* 2. *c.* 23, ordains, That all attornies 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 attornies 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 attornies 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 *ſt.* 6 *Geo.* 2. *cap.* 27, Attornies of the courts at *Weſtminſter* may practiſe in inferior courts.

By 12 *Geo.* 2. *c.* 13. Attornies, &c. that act in any county-court, without being admitted according to the ſtatute 2 *Geo.* 2. *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.

ATTORNEY.

By the ſtat. 22 *Geo.* 2. *c.* 46, Perſons bound clerks to attornies 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 *G.* 2. *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.* 2. *c.* 23. § 20, Attornies may be admitted ſolicitors.

By ſtat. 25 *Geo.* 3. *c.* 80, Every admitted attorney, ſolicitor, notary, proctor, agent or procurator, ſhall annually take out a ſtampt certificate [with a 5 *l.* ſtamp if within the bills of mortality, and 3 *l.* if elſewhere,] from the courts in which they practiſe, on penalty of 50 *l.*

Attornies 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.* 2. 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 deceipt 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 attornies; 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.

Attornies 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 *H.* 4. *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 attornies 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 re-admitted attornies. *Dougl.* 114.

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 expence, 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 entruſted 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. *Dougl.* 623: 1 *Black. R.* 8.

An action lies againſt an attorney for neglecting to charge a perſon in execution at 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 it's 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. *Dougl.* 238.

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, tho' they came into his hands as ſteward of a court and receiver of rents. 3 *Term R.* 275. See 1 *Salk.* 87: 1 *Lill.* 148: *Mod. Caſ. Law & 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.

Attornies 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

of another court to bail. Attornies 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 French *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 *Ed.* 1. *ſt.* 1,) was paſſed, by which ſubinfeudation was prohibited, it became neceſſary that when the reverſion or remainderman 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 *H.* 8. *c.* 10;) as by that ſtatute the poſſeſſion was immediately executed to the uſe; and by the ſtatute of *Wills*; (34 & 35 *H.* 8. *c.* 5;) by which the legal eſtate is immediately veſted in the deviſee.

Attornments however ſtill continued 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. *ſ.* 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 nonpayment. And by ſtat. 11 *Geo.* 2. *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 near 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, an halfpenny; for every yearly pig, one penny; and for every hog above a year old, two-pence. *Blount*.

AUCTIONARII, *Auxionarii*, Sellers, regrators, or retailers. *Placit. Parl.* 18 *Ed.* 1. But more properly brokers.

AUCTIONS and AUCTIONEERS, Under *ſtats.* 17 *Geo.* 3. *c.* 50: 19 *Geo.* 3. *c.* 25, 56: 21 *Geo.* 3. *c.* 17: 22 *Geo.* 3. *c.* 66: 32 *Geo.* 3. *c.* 11, every Auctioneer muſt take out an annual licence; paying within the bills of mortality 1 *l.* 3 *s.* and without 5 *s.* 9 *d.* and under theſe ſtatutes and ſtat. 27 *Geo.* 3. *c.* 13, (explained by ſtatutes 29 *Geo.* 3. *c.* 63: 30 *Geo.* 3. *c.* 26: 32 *Geo.* 3. *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. 2 Burn. 237

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 ſhewn 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.* 3. *c.* 37. § 20. *Fonblanque's Treatiſe of Equity*, i. 215.

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

AUDITA QUERELA.

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 recognizance,] 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 enjoins 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 *Rol. 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 ſhewn 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 *Comyns'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*. *Style* 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 recognizance, 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 *diſceit* 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 an uſurious contract, by dureſs of impriſonment, or where there is a defeaſance upon it, &c. *Moor, Ca.* 1097: 1 *Brownl.* 39: 2 *Bulſt.* 320. So upon ſhewing an acquittance of the cogniſee, on a ſuggeſtion that he had agreed to deliver up the ſtatute: 1 *Rol.* 309. Where one enters into a ſtatute, and after ſells his lands 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 *Rol. Abr.* 305.

If two executors ſue execution for damages recovered by the teſtator, where one hath releaſed, an *audita querela* lies againſt both. 1 *Rol. 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 *Rol. 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 recognizance 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. *Heb.* 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 ſhewn. *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 *E.* 3. 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 ſhews 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 were 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 expences, &c. But who are now ſuperſeded by the Commiſſioners for auditing the publick accounts. See title *Accounts Publick.*

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.* 2. *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 title *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

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 tenants 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 probably 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 concludes 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 alledged 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 uncontrolable 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 the party, and not ſo much credit in law to be given to it, *Lil. P. R.* 155.

Averment lies not againſt the *proceedings of a court of record*. 2 *Hawk. P. C. c.* 1. *ſect.* 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 ſhews 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.* 3: 2 *Wilſon*, 347.

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 ſhew 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. *Plow. 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 ſtatute 4 & 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.

AUGEA, A ciſtern for water. *Reg. Eccl. Well. MS.*

AUGMENTATION, *augmentatio.*] The name of a court erected 27 *H.* 8; 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 & 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. p. 141.

AULNAGE See ALNAGE.

AUMONE, Fr. *aumoſne*, alms.] Tenure in *aumone* is where lands are given in alms to ſome 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 AUNSEL-WEIGHT, *quaſi hand-ſale-weight*, or from *anſa*, the handle of the balance.] An antient manner of *weighing*, 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 *ſtilliards*, a ſort of hand-weighing among butchers, being a ſmall beam with a *weight* at one end, (which ſhews 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 merchandizes 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 forth a *replevin*, then the taker ſhall juſtify his plea for what cauſe he took it; and if in his own right, he muſt ſhew 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 Leys* 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 alledge ſeiſin within the ſtatute of limitations. Nor ſhall a lord be required to *avow* on any perſon in certain; but he muſt alledge ſeiſin by the hands of ſome tenant within forty years. Stat. 21 *Hen.* 8. *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 *H.* 8. *cap.* 2: 4 *Rep.* 9. A man may diſtrain and *avow* for rent due from a copyholder to a lord of a 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.* 6. 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 an *hoc paratus eſt*, &c. By *Stat.* 21 *Hen.* 8. *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.* 2. *c.* 7, When a plaintiff ſhall be nonſuit before iſſue in any ſuit of replevin, &c. removed or depending in any of the courts

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* and *Replevin*.

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 publickly 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 plea of *auterfoits convict*, 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 *word*, 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 *Rol. 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 *Rol. 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 *Rol. 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 *Viner's Abridgment* 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

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 land*, 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 *Rol. 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 *Rol. Abr.* 8.

But if a letter of attorney be made to three *conjunctim & 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 *Rol. Abr.* 329: *Co. Lit.* 181 *b*: 1 *Rol. 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 *Rol. Rep.* 137.

So if the lord gives licence 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 licence; 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 *Rol. 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 aid 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 title *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 *H.* 3. *M.* 4.

AWAIT, Seems to ſignify what we now call *waylaying*, or lying in *wait* to execute ſome miſchief. By ſtat. 13 *R.* 2. *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*, 8vo. 1791.

The ſubject may be conveniently diſtributed under the following heads;

I. *The*

AWARD I. II.

I. *The Submiſſion.*
II. *The Parties thereto.*
III. *The Subject of the Reference.*
IV. *The Arbitrators and Umpire.*
V. *The Award or 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 co-partnerſhip, 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 ſhew, 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 & 10 *W.* 3. *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, 3: *Barnes* 55, 8: 1 *Salk.* 72: *Comyns* 114: 1 *Ld. Raym.* 664.

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.

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

ariſing before or after her marriage; but the huſband may ſubmit for himſelf and his wife. *Str.* 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. (I. 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 co-pariſhioners, *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 & al.* v. *Thompſon & al. M.* 24 *Car. B. R*: *Rol. 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 *Rol. Rep.* 268, 9.

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: *Com.* 547: *Rol. 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 a 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, 4; 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; *Gouldſb.* 91, 2. for in all theſe caſes the demand is aſcertained. But ſee *Lumley* v. *Hutton*, *Rol. Abr.* tit. *Arbitr.* B. 8. and *Coxat* 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 judgement.

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 expences 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. *Rol. 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 publick 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, 4: *Cro. Jac.* 59 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 the 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

it was almoſt univerſally held, that the party who did not perform the award forfeited the bond. *Keilway* 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: *Truſlove* v. *Aſcwre*, *Cro. El.* 223: *Dy.* 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 *E.* 4. 1: *Br.* 3[illegible].

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 their 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. *Chaje* v. *Dare*, Sir *T. Jones* 168: ſee alſo, *Godb.* 241: 1 *Lev.* 174, 285: 1 *Ld. Raym.* 671: 12 *Mod.* 512: *Lutw.* 541, 4: *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 over-ruled (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 attornies; 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. Ab.* 92. *c.* 3; or the willing party may 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 rea-

ſon 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 opinion 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 to make 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. *Rol. Abr.* tit. *Arbitr. p.* 6.—And on the other hand, an umpirage made by the umpire jointly with the arbitrators is good; their approbation, ſhewn 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 *Blackſt.* 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 *E.* 4. 1: *Br.* 37: *Keilway* 175: ſee *Cro. El.* 97; *Cro. Car.* 132, 3.

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. El.* 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 *Ro. 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.* 75: 6 *Mod.* 195: *Hardw.* 181: *Barnes* 56, 8: 1 *Sid.* 358: *Str.* 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. *Rol. Arb.* 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, 2: *Jenk.* 264: *Rol. Arb.* 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:

309: 1 *Sid.* 154: *Vide Hob.* 190. (See *poſt. Div.* 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 *Ro. Rep.* 362: 2 *Ro. 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. *Rol. Arb.* 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, 5: 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. *Rol. Arb.* N. 9: and ſee *Samon's Ca.* 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: *Rol. Arb.* 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. *Rol. 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: *Rol. Arb.* B. 18.

An award ſhall not affect the *rights* of perſons not parties to the ſubmiſſion. *Finch.* 180, 4. 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: *Rol. Arb.* L. 5.

If a ſubmiſſion be "of all the premiſſes *or of any part of them*," in this caſe the arbitrator may undoubtedly make an award of part only. *Rol. Arb.* 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. El.* 858: ſee *Dy.* 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 premiſſes*," the arbitrator ought to make his award of all, otherwiſe it will be void. 8 *Co.* 98: *Goldſb.* 125: *Rol. 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 *Lord Coke*, in the place of a judge, and his office is to determine according to what is alledged 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 ſhewn 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 ſhewn 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 an hundred matters in difference is ſufficient, provided it concludes to them all. 1 *Keb.* 738: 1 *Lev.* 132, 3.

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. *Rol. Arbitr.* G: 1 *Sid.* 12: 2 *Vent.* 243. 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 controul. 12 *Mod.* 585: and ſee *Rol.* 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, 3. 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. *Rol. 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. *Rol. Arbitr.* E. 2, 3; F. 10: 2 *Bulſt.* 39: 1 *Keb.* 92: 1 *Ro. 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 *Rol. Arb.* 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. *Rol. Arb.* 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: *Lut.* 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 (amongſt 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. *Godb.* 276: *Rol. 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, 4: 1 *Salk.* 74, 5: *Rol. Arb* 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, 7.—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 now 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 ſhewn that there

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 controuled ſo far as it is void, by conſtruction of law. 10 *Mod.* 201: 6 *Mod.* 33, 5: 2 *Ld. Raym.* 964, 5: 1 *Ld. Raym.* 116. ſee 12 *Mod.* 8, 116, 589: *Godb.* 164, 5: 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. *Yel.* 98: *Brown.* 92: *Rol. Arb.* K. 15: *Cro. Jac.* 577, 8.

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 ſubſtantively 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 tollit errorem.* 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, 4. and ſee *Rol. Arb.* Z. 6.—If an award order that the defendant ſhall re-aſſign to the plaintiff, certain mortgaged premiſes, it will be a breach if he do not re-aſſign *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, 6.

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 (21 *Jac.* 1. *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.

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 1.

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 ſhewn, 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 alledging 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 then 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. Vid. *Stra.* 923: *Freem.* 410, 415: 1 *Sid.* 370: 3 *Burr.* 1729, 30: 5 *E.* 4. 108: *Brooke pl.* 33: *Cro. Eliz.* 838.

Every thing neceſſary to ſhew 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 ſhew 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

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 alledged by inducement. 2 *Vent.* 242. The breach muſt alſo be aſſigned, with ſuch preciſion, as to ſhew that the award was made of the thing in which the breach was alledged. 1 *Rol. 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, 9. and vide *Id.* 293. *S. P.*

If the *defendant* ſet forth the award, and alledge the performance generally, and then on a breach being aſſigned in the replication, he rejoin and ſhew 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 *Rol. 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 for non-performance. 3 *Term Rep.* 529. *n.*—And as to ſuch enlargement of time, ſee 2 *Term Rep.* 643, 4: 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, 1.—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 ſpecifick performance. See 1 *Atk.* 74, (62): 1 *Eq. Ab.* 51: 1 *C. R.* 46: 3 *C. R.* 20: 2 *Vern.* 24: 3 *P. Wms.* 187, 9, 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.* See the next Diviſion.

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. Ab.* 63, 4: 3 *C. R.* 49: *Ambl.* 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 ſhew 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 & 10 *W.* 3. 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, 7: See *Bunb.* 265.

By the ſtat. 9 & 10 *W.* 3. *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, 7. 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): *Str.* 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 *Str.* 1178: 3 *P. Wms.* 362.

The

AWARD VIII.

The moſt frequent ſubject of complaint againſt an award, ariſes from ſome imputed *miſconduct* of the arbitrators, and when the complaint 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, 8: 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 re-conſidered, 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 *Term Rep.* 146.

The award thus pleaded, muſt have all the qualities neceſſary to conſtitute a good award; and muſt be ſuch, if it be pleaded without performance, that the plaintiff may have a remedy to compel performance: but if performance be alledged, as it may be (See 1 *Ro. Rep.* 7, 8: *Cro. Jac.* 339: 2 *Bulſt.* 93; *Rol. 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 irreconcileable 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, 7.

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 antiently ſome diſtinctions in the manner of pleading an award, with reſpect to the neceſſity of alledging 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 alledge performance of the thing awarded, unleſs where the award is void, and conſequently the plaintiff could not enforce it. 1 *Ld. Raym.* 122.

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 any wiſe relating to or concerning the ſaid premiſſes.* 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 abovementioned, 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 premiſſes 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 compleat 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,

AWM

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.

AWN

AWNHINDE. See *Third-night-awn-binde.*

AYLE. See *Aile.*

AZALDUS, A poor horſe or jade. *Clauſ.* 4 *Ed.* 3.

B.

BAC

BACA, A hook or link of iron, or ſtaple. *Conſuetudin. domûs de Farendon, MS. f.* 20.

BACINNIUM, or *Bacina*, A baſon 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 *baſon*, or waiting at the *baſon*, 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.

BATCHELOR, *Baccalaureus*, from the Fr. *bachelier*, viz. *tyro*, a learner:] In the univerſities there are *batchelors of arts*, &c. which is the firſt degree taken by ſtudents, before they come to greater dignity. And thoſe that are called *batchelors* 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 *batchelors*, in other companies called the *yeomanry*. The word *batchelor* is alſo uſed and ſignifies the ſame with *knight-batchelor*, a ſimple knight, and not knight banneret, or *knight of the Bath*. The name of batchelor was alſo applied to that ſpecies of eſquire, ten of whom were retained by each knight banneret on his creation. *Anno* 28 *E.* 3, a petition was recorded in the *Tower*, beginning thus: *A noſtre Seigneur le Roy monſtrent votre* ſimple batchelor, *Johan de Bures*, &c. *Batchelor* was anciently attributed to the admiral of *England*, if he were under the degree of a baron. In *Pat.* 8 *R.* 2. we read of a *baccalaureus regis*. Touching the further etymology of this word, See *Spelman.*

The term batchelor 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 batchelors: as in the caſe of the duty on ſervants under ſtat. 25 *Geo.* 3. *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.

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 & 6 *Ed.* 6. *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 licences will be in force for one year, and no longer; and the perſons to whom granted muſt enter into a recognizance 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 licence, 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 *El. c.* 25. *ſect.* 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 K. *Edw.* 1, 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.

BAJ

BAIL,

BAIL, *ballium*, from the Fr. *bailler*, which comes of the *Greek* Βαλλειν, 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 forth-coming, 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 *Hen.* 6. *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 authorized, 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 Dougl. 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.* 2. The keeper of the *Poultry Compter* was rejected. *Dougl.* 466.

I. Of Bail in Civil Cases—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: *Style* 475: 1 *Mod.* 8: 6 *Mod.* 17, 105.

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.* 1. *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 inferor 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 bail will be discharged. 2 *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.

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. fac.* against them, they shall be discharged. 1 *Rol. Abr.* 250: 1 *Lill.* 471. Anciently the bail were to bring in the principal upon the first *scire fac.* 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 *Wilf.* 67: 2 *Cro.* 165: *Jon.* 139: *Str.* 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.* 2. 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 *Wilf.* 270. If an action be brought then eight days in full term after the return. *R. Trin.* 1 *An.*—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 recognizances 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 & 5 *W. & 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 except against them within twenty days, and if he excepts, the bail may *justify by affidavit before the 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. *Style* 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 & 5 *W. & M. cap.* 4. *s.* 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 *capi 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 *An.*

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

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 enquire 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 enquire 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.* 1: and 4 & 5 *W. & 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: 3d. A *third* ground of opposing bail is, that they are not house-keepers; 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.* 3. *Lastly*, after the *expiration* of the rule to bring in the body. *Loft* 438: *M.* 20 *Geo.* 3.

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 a 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 & 5 *Anne. 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. *Str.* 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.——For further matter see the books of practice.

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 sufficient 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,

derers, out-laws, 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 *Ed.* 1. *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 *Ed.* 3. *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 *Ed.* 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 no body proſecutes; but *per Roll* Ch. J. He cannot be bailed. *Sty.* 418. But ſee *Stat.* 4 & 5 *W. & 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 *Ed.* 4. *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 *H.* 7. *c.* 3: 1 & 2 *P. & M. c.* 13. § 3: not to reſtrain juſtices in *London* and *Middleſex*, and towns corporate. 1 & 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. Weſt.* 1, 3 *Ed.* 1. *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 alledged with ſufficient certainty. *Leach's Hawk. P. C.* ii. *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. C. P.* 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.* ii. *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. § 73. from the caſes cited there (*viz.* The Hon. *Alex. Murray's*, 1 *Wilſ.* 299: *John Wilkes's*, 2 *Wilſ.* 158: *Entick* v. *Carrington*, 11 *St. Tr.* 317: *Braſs Croſby's*, 3 *Wilſ.* 188: 2 *Blackſt.* 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 execution; 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

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 title *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 farther, 3 *Edw.* 1. *c.* 15: 27 *Edw.* 1. *St.* 1. *c.* 3: 4 *Edw.* 3. *c.* 2: 1 & 2 *P. & M. c.* 13: & 31 *Car.* 2. *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 for 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 *W. & 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.* 2. *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.* 2, *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.* 2. *c.* 35. § 38: 19 *Geo.* 2. *c.* 34. § 12.

For further particulars relative to bail in criminal caſes, ſee *Leach's Hawk. P. C.* ii. *c.* 15. very much at large.

BAILIFF, *ballivus.*] From the *French* word *bayliff*, 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 *Ed.* 3. *c.* 9, the word *bailiff* ſeems to compriſe as well ſheriffs, as *bailiffs* of hundreds.

As the 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; ſheriffs' *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 *Ed.* 2. *St.* 1. *c.* 5: 14 *Ed.* 3. *St.* 1. *c.* 9: 20 *Ed.* 3. *c.* 6: 1 *Ed.* 3. *St.* 1. *c.* 5: 2 *Ed.* 3. *c.* 4: 5 *Ed.* 3. *c.* 4: 11 *H.* 7. *c.* 15: 27 *H.* 8. *c.* 24: 3 *Geo.* 1. *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

quired 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.* 1. *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 *E.* 3. *c.* 9, Sheriffs ſhall appoint ſuch bailiffs for whom they will anſwer; and by *Stat.* 1 *H.* 5. *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 licence to commit a treſpaſs, as to cut down trees, &c. though he may licence 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 impower and authorize 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.

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 re-delivered 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 *Str.* 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 anſwerable, 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;

perty; 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 alledged 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 *Rol. Ab.* 338: 1 *Inſt.* 89 *b*: *Doct. & St.* 129: 1 *New Ab.* 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 recompence.—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 recompence.

"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.

" 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 inn-keeper is chargeable for the goods of his gueſt within his inn, if the gueſts be robbed by the ſervants or inmates of the keeper.—7. A common carrier by land or by water, muſt indemniſy 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 *Str.* 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, 7: 2 *Bulſt.* 280: 1 *Ro. Ab.* 2, 4, 10: 2 *Ro. Ab.* 567: 12 *Mod.* 480, 2: *Raym.* 220: *Moor.* 462, 543: *Owen* 141: 1 *Leon.* 224: 1 *Cro.* 219: *Bro. Ab.* 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 *Rol. 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 *Rol. 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 *Rol. 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. *Dr. & 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 *H.* 7, 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 *E.* 4. 20 *b*: 12 *E.* 4. 13.

If a man deliver goods to another, the *bailee* ſhall have a general action of treſpaſs againſt a ſtranger, becauſe he

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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.* 4, 28: 25 *H.* 7, 14.

BAIRMAN, A poor inſolvent debtor left *bare* and naked. *Stat. Wil. Reg. Scot. cap.* 17.

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.* 3. *c.* 78. § 48, *&c.*

BALE, (*Fr.*) A pack, or certain quantity of goods or merchandize; as a *bale* of ſilk, cloth, *&c.* This word is uſed in the ſtatute 16 *R.* 2. *c.* 3, and is ſtill in uſe.

BALENGER, By the *Stat.* 28 *H.* 6. *c.* 5, ſeems to have been a kind of *barge*, or water veſſel. But elſewhere it rather ſignifies a man of war. *Walſing. in R.* 2.

BALEUGA, A territory or precinct. *Chart. Hen.* 2. See *Bannum.*

BALISTARIUS, A *baliſter* or croſs-bow man. *Gerard de la War* is recorded to have been baliſtarius *domini regis, &c.* 28 & 29 Hen. 3.

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 tits. *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. *Shep. 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.* 2. *c.* 29.

BALLIUM, A fortreſs or bulwark. *Matt. Weſtm. An.* 1265.

BAN, or *bans*, from the Brit. *ban.* i. e. *clamor.*] 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 & ſponſæ in eccleſiis fieri ſolitæ.* But there may be a faculty or licence 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 *bannerets* 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 *R.* 2. *Stat.* 2. *cap.* 4; and 14 *R.* 2. *c.* 11.—*William de la Pole* was created *baneret* by K. *Edward* the Third by letters patent, *Anno Regni ſui* 13. And thoſe *banerets*, who are created *ſub vexillis regiis, in exercitu regali, in aperto bello, & 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 knights *bannerets* ought not to be made in a civil war: but *Hen.* 7. made divers *bannerets* upon the *Corniſh* commotion, in the year 1495. See *Selden's Titles of Honours, 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 tits. *Abjuration, Tranſportation.*

BANK, Lat. *baucus*, 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 politick, &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 & 6 *W. & M. c.* 20: 8 & 9 *W.* 3. *c.* 20: 11 *Geo.* 1. *c.* 9: 12 *Geo.* 1. *c.* 32: 15 *Geo.* 2. *c.* 13. And officers or servants of the Company, that imbezzle any *Bank-note*, &c. wherewith they are intrusted, being duly convicted, shall suffer death as felons.

By *Stat.* 13 *Geo.* 3. *c.* 79, Persons not authorised 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.* 2. *c.* 4, to regulate the holding general courts and courts of directors.

See the several statutes 21 *Geo.* 3. *cc.* 14, 60: 22 *Geo.* 3. *c.* 8: 23 *Geo.* 3. *c.* 35: 24 *Geo.* 3. *sess.* 2. *cc.* 10, 39: 25 *Geo.* 3. *c.* 32: 29 *Geo.* 3. *c.* 37. and a vast variety of previous statutes as to the continuance of the Bank charter.

By *Stat.* 31 *Geo.* 3. *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.

BANKERS, The monied goldsmiths first got the name of *bankers* in the reign of K. *Charles* the Second; 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.

BANKRUPT, A Trader, who secretes himself or does certain other acts, tending to defraud his creditors. 2 *Comm.* 285, 471. The word itself is derived from *bancus* or *banque*, the table or counter of a tradesman; (*Du-fresne* i 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 *H.* 8. *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.* 8. *c.* 4, mentioned above): 1 *Jac.* 1. *c.* 15: 21 *Jac.* 1. *c.* 19: 10 *An. c.* 15: 7 *Geo.* 1. *c.* 31: 5 *Geo.* 2. *c.* 30, continued at present by 28 *Geo.* 3. *c.* 24. § 2: 19 *Geo.* 3. *c.* 32: 24 *Geo.* 2. *v.* 57: 4 *Geo.* 3. *c.* 33.

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 *Statute*, 13 *Eliz. c.* 7, enacts "That any merchant or other person, being subject or denizen, using or exercising the trade of merchandize, by way of bargaining, exchange, rechange, bartery, 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 *Wilf.* 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

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 becomes 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, brick-makers, butchers, bakers, brewers, clothiers, goldſmiths, dyers, iron-manufacturers who buy iron and work it into wares, lock-ſmiths, milliners, nailors, plumbers, ſales-men, ſhoe-makers, ſmiths and farriers. 2 *Wilſ.* 170, 2: 4 *Burr.* 2148: 3 *Mod.* 330: *Cro. Jac.* 585: 2 *Ld. Raym.* 1480: 2 *Comm.* 476: 3 *Mod.* 330: 1 *Ro. Ab.* 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.* 2. *c.* 30.
Bakers, *may.* See ante *
Brewers, *may.* See ante *
Brokers, *may. Stat.* 5 *Geo.* 2. *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 recognized, *viz.* "If a man exerciſes a manufacture upon the produce of his own land, as a neceſſary or 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, cyder, 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 expence 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."—*Stats.* 3 *Geo.* 1. *c.* 3. § 43; 13 & 14 *Car.* 2. *c.* 24: 4 *Geo.* 3. *c.* 37: 6 *Geo.* 1. *c.* 18: 8 *Geo.* 1. *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, exciſe-men, *&c. not*, all on the ſame principle.
Drovers of cattle, *not. Stat.* 5 *Geo.* 2. *c.* 30.
Dyers, *may.* See ante *.
Factors, *may. Stat.* 5 *Geo.* 3. *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 *.
Graziers, *not. Stat.* 5 *Geo.* 2. *c.* 30.
Inn-keepers, *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.* 3. *c.* 33. and poſt. 2.
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.* 2. *c.* 30.
Sales-men, *may.* See ante *. *Good.* 12.
Scriveners *may. Stat.* 21 *Jac.* 1. *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. *St.* 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.* 1. *c.* 15. *ſect.* 2.

4. Willingly or fraudulently to procure his goods, money or chattels, to be attached or ſequeſtered. *Stat.* 1 *Jac.* 1. *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.* 1. *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 their 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: *St.* 5 *G.* 2. *c.* 30. §24.

11. Neglecting to make ſatisfaction for any juſt debt, to the amount of 100*l.* 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 *G.* 3. *c.* 33.

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, 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; premiſing 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 *G.* 3.

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 publick. 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

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 judgement 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: *Dougl.* 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.* 1. *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 publick, 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 *Burn* 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 ſhews 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 ſhew 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 be becomes a new man. 1 *Burr.* 484: 1 *Salk.* 110.

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.* (*St.* 5 *Geo.* 2. *c.* 30.) Upon which he grants a *commiſſion* to ſuch diſcreet perſons as to him ſhall ſeem good, who are then ſtiled commiſſioners of bankrupt. *St.* 13 *Eliz. c.* 7. of theſe commiſſioners there are ſeveral exiſting liſts, which take the commiſſions 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 recompence for ſuing out the commiſſion, ſo as to receive more than their rateable 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,

iſſued, the commiſſioners are to meet at their own expence, 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. *St.* 1 *Jac.* 1. *c.* 15. nor upon any demiſe of the crown. *St.* 5 *Geo.* 2. *c.* 30. The granting a commiſſion of bankruptcy is not diſcretionary, but a matter of right. 1 *Vern.* 153.

By *Stat.* 5 *Geo.* 2. *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.* 2. 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 it, or if the commiſſion 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 then have proved their debts; and one creditor, if to a ſufficient amount may chuſe himſelf aſſignee; but 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 perſonally 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 eſtate 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 forth-coming to the commiſſioners; who are alſo empowered immediately to grant a warrant for ſeizing his goods and papers. *St.* 5 *Geo.* 2. *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; (*St.* 21 *Jac.* 1. *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. *St.* 5 *Geo.* 2. *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. *St.* 5 *Geo.* 2. *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. *St.* 21 *Jac.* 1. *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 farther 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. *St.* 5 *Geo.* 2. *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 rigor 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,

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 ſhewn by any of the creditors of the bankrupt. *Stat.* 5 *Geo.* 2. *c.* 30.

If no cauſe be ſhewn 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* *St.* 5 *Geo.* 2. *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. *St.* 5 *Geo.* 2. *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.* 2. *c.* 30. *ſect.* 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 ſhew 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. *St.* 24 *Geo.* 2. *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. *St.* 5 *Geo.* 2. *c.* 30. 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

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.* 1. *c.* 19. enacts, that the commiſſioners ſhall be impowered 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 bankrupt 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.* 1. *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, *Billingburſt* 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 a church is not valuable. 1 *Burn's Eccl. Law*, 4 *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 & 6 *Ed.* 6. *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: *Belling.* 118: 1 *P. Wms.* 385, 6.

The commiſſioners, by their warrant, may cauſe any houſe or tenement *of the bankrupt* to be broke 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: 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.

The commiſſioners in *England* may ſell the bankrupt's goods in *Ireland*; and, (notwithſtanding a *dictum* of Lord *Manſfield* to the contrary, See *Dougl.* 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 bankruptcy. 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, independant 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.* 3. *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. 4 *Burr.* 32. Inſomuch that all tranſactions of

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. *Harkey*, 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 it's 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.* 1. *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.

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, 7.

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. *St.* 5 *Geo.* II. *c.* 30. § 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 *St.* 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 rateable 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 recognizances, (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*. *St.* 21 *Jac. c.* 19. Nay, ſo far is this matter carried, that, by the expreſs proviſion of the *St.* 7 *Geo.* 1. *c.* 31, (See *St.* 5 *Geo.* 2. *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. *St.* 19 *Geo.* 2. *c.* 32; alſo annuity-bonds though not forfeited at the time of the bankruptcy. *Cowp.* 540. but ſee 2 *Blac. R.* 110. *b.*—And Policies of Inſurances for Life. *Dougl.* (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. *St.* 5 *Geo.* 2. *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 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. *St.* 13 *El. 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.

The *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 *St.* 5 *Geo.* 2. *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, *Forreſt.* 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 *Str.* 744, 6: 1042: 1 *Atk.* 73.

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: *Dougl.* 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 publick 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 co-extenſive 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 an 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 an 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 *Dougl.* 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.

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 ſufficient 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.* 1. *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.* 1. *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.* 1169. 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 ſpecifick 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 there is nothing 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 *Vez.* 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 *Vez.* 114, 5.

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 premiſſes, 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 premiſſes they remain liable to be diſtrained. 1 *Atk.* 102, 3, 4.

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 highter 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 proviſoe 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 intitled 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 the 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

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 ſpecifick lien upon, and was intitled 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 re-convey 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 reſponſible for 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 ſeparate 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, 98. 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 expence is ſaved, and the joint effects diſpoſed to better advantage; and therefore in a fair caſe and where it can be made 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. *Coxp.* 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 participate 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 enquire into the

ſtate of the different funds, but he is not intitled 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 ſpecifick 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 ſhewn that the partner acted fraudulently, with a view to benefit his ſeparate creditors, at the expence of the joint-creditors. *Cooke's B. L. c.* 13: See tit. *Partners.*

One partner may be a creditor of 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 ſame 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 1*ſt 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 Bumpſtead, 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 chevizance; 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*

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. 1: 21 Jac. 1: and 5 Geo. 2:] 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 premiſſes, or any part thereof, contrary to the true intent and meaning of the ſaid ſtatutes;* And to do and 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, monies, &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 Bumpſtead, &c. *do humbly certify to your Lordſhip, that the major part of the commiſſioners by the ſaid commiſſion authoriſed, 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 authoriſed, purſuant to the directions of the act of parliament made in the 5th year of the reign of his late majeſty king* Geoge II. *intitled '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 authoriſed, 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 authoriſed, and did ſign*

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 authoriſed: 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 authoriſed, 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* 20l. *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 authoriſed 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 authoriſed, 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, *intituled, "An act to prevent the committing of frauds by bankrupts;" and be diſcharged from his debts in purſuance of the ſame act.*

William Bumpſtead,
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 ſhewn to the contrary, within twenty-one days from the date of the ſaid advertiſement.

If no cauſe is ſhewn 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 ſhewn any cauſe to the contrary: I do allow and confirm this certificate.*

THURLOW, C."

CERTIFICATE 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 4 or 3 of them to execute the ſame. And we do further certify, that we, being the major part of the commiſſioners, by the ſaid commiſſion authoriſed, 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.

Your's, &c. John Knight. 14*th* July 1780.

To Meſſrs. Partridge *and* Dennis, *ſaid bankrupt's aſſignees.*"

The

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 merchandize, 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 ſhewing 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.* 3: *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, p.* 75.

BAR, See *Barr.*

BARATRY, See title *Inſurance.*

BARBERS, Were incorporated with the *ſurgeons* of *London*; but not to practiſe ſurgery, except drawing of teeth, *&c.* 32 *H.* 8. *c.* 42: but ſeparated by 18 *Geo.* 2. *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 *Ed.* 3: *Monaſticon, tom.* 1. *p.* 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.* 3: 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 inrolled. 2 *Inſt.* 672.

Since the introduction of uſes and truſts, and the *Stat.* 27 *H.* 8. *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 inrolled in one of the courts at *Weſtminſter*, or in the county where the lands lie; ſuch inrollment to be made within 6 months after the date of the indenture. *Stat.* 27 *H.* 8. *c.* 16: See 2 *Inſt.* 675: *Dy.* 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 enrollment, for the more antient one of livery. But the latter part of this proviſion, which if it had not been evaded, would have introduced almoſt an 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.* 93: 2 *Ro. Ab.* 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

ſufficiency of the ſtatute of Inrollmements are now in ſome meaſure prevented by *Stat.* 29 *Ch.* 2. *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 *Butter*.

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 inrolled. 2 *Co.* 54: *Dyer* 309: 2 *Inſt.* 671.

But if tenant for life *bargains and ſells* his land by deed inrolled, 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 *H.* 8. *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 land, 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, *Kelw.* 85: 1 *Co.* 126: 1 *And.* 327: 1 *Jones* 179: *Sed qu. de hoc.*

If *A.* by indenture inrolled 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 an 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 *Rol. 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. *Keilw.* 84: *Co. Lit.* 265.

If an infant bargains and ſells his land by deed indented and inrolled, yet he may plead non-age; for notwithſtanding the ſtatute the bargainee claims by the deed as at common law, which was, and therefore is ſtill defeazible by non-age. 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 jointenants, 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 jointenant had bargained and ſold *totum ſtatum ſuum* in fee, though he died before inrollment; yet, if the deed were afterwards inrolled, 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 inrolled, will be an effectual *bargain and ſale*. In ſhort, whatever

whatever words upon valuable conſideration would have raiſed an 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 *Ventr.* 108. If lands are *bargained and ſold* for money only, the deed is to be inrolled 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 inrolled 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 inrolment, yet in this caſe if the deed be not inrolled, 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 inrolled, 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 inrolled; if afterwards the firſt deed is alſo inrolled within ſix months, the firſt buyer ſhall have the land; for when the deed is inrolled, the bargainee is ſeiſed of the land from the delivery of the deed, and the inrolment ſhall relate to it. *Hob.* 165: *Wood's Inſt.* 259. Neither the death of the bargainor or bargainee, before the inrolment 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 inrolled; 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 inrolment. *Sid.* 310. Upon the inrolment of the deed, the eſtate ſettles *ab initio*, by the *Stat.* 27 *H.* 8. *c.* 16; which ſays, that it ſhall not veſt, except the deed be inrolled; and when it is inrolled, 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 inrolled; this is a good inrolment within the ſtatute. *Style* 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 Inrolments. 2 *Inſt.* 676. 1 *Nelſ. Abr.* 342.—See further tit. *Inrollment.*

IV. In pleading a bargain and ſale the deed itſelf muſt be ſhewn under ſeal. 1 *Inſt.* 225. For though the inrollment 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 publickly acknowledged and inrolled; 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 *Rol. Rep.* 119.

It muſt likewiſe be ſet forth that the inrolment was within ſix months, or *ſecundum formam ſtatuti*, &c. *vide Allen* 19: *Carter* 221: *Style* 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, inrolled within ſix months, and the ſtatute of uſes, and did not ſhew 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 ſhew in what court the deed is inrolled, becauſe he muſt ſhew 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, corticulus.*] A tan-houſe or place to keep bark in for the uſe of tanners. *New Book Entr.* tit. *Aſſiſe, Corp. 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 ſat 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*. The original of barons by writ, *Camden* refers to king *Hen.* 3; and barons by letters patent, or creation, commenced 11 *R.* 2: *Camb. Brit. pag.* 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 *Ed.* 1, 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, marquiſſes, &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 & 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* 3. *Rex. Sciatis nos conceſſiſſe & 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 *Mat. Paris*, and other writers: and in days of old, all men were ſtiled 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 barronies 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, & 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 or degree of honour, which hath precedency before all knights, as knights of the bath, knights batchelors, &c. except *Bannerets*, made *ſub vexillis regiis in exercitu regali in aperto bello, & 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 an *habendum ſibi & 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 unſcriptural 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. title *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 an huſband and wife and their heirs, they do not take by moieties, as other jointenants, but the intire eſtate is in both. 2 *Lev.* 39. And if an eſtate be granted to an huſband and wife, and another perſon, the huſband and wife have but one moiety, and the other perſon the other moiety. *Litt.* § 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 an 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*

IV. *Of his Intereſt in her Eſtate and Property; and her's 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 Effect of Divorce; and of ſeparate Maintenance, Alimony and Pin-Money.*

I. 1. At common law a man could neither in poſſeſſion, reverſion or remainder, limit an eſtate to his wife; but by *Stat.* 27 *H.* 8. *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 1000*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 C. 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 *Carnl* 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*. *Chan. 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 therefore by *Stat.* 3 *H.* 7. *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, 4.

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.* 1. *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.* 693.

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, *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 ſuppoſititious, the huſband of one of the defendant's was admitted to give evidence of the birth, but refuſed as to the ſubornation. *Stra.* 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: *Leach's Hawk. P. C.* ii. 607, 8.—A huſband and wife may demand ſurety of the peace againſt each

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 an 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 tits. *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 recognizance to her brother, it was decreed to be delivered up. See 2 *Chan. Rep.* 41, 79, 81: 2 *Vern.* 17: 2 *Viz.* 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 8000*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 think 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* shew that it cannot be maintained by the wife against her 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.

In this action the plaintiff must bring proof of the actual solemnization of a marrriage; 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 shew 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, 4.—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

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 & 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 her 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 *H.* 8. *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 alienations of a huſband's eſtate by a woman tenant in dower, &c. ſee *Stat.* 11 *H.* 7. *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, whichever 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 intitled to the benefit of it or not. See 1 *Inſt.* 351: 4 *Inſt.* 87: *Rol. Ab.* 346: *All.* 15: *Cro. Eliz.* 466: 3 *C. R.* 37: *Gilb. Ca. 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.* 2 *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 (*Dy.* 74,) to have been determined by all the judges in a caſe in 6 *Ed.* 6. 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

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 intitled 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. Ca.* 225: 1 *Vern.* 7, 18: 1 *Eq. Ab.* 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 jointenant of a chattel real, and marries and dies, the huſband ſhall not have it, but it ſurvives to the other jointenant. 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 judgement 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, entitles 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 *Pre. 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. Ab.* 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, 2; 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. Voluntiers 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 it's 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 proviſion 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 *Pre. Ch.* 414, it is obſerved, that if the truſtees pay the wife's fortune, it is without remedy.

5. Money

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 tho' 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. Ca.* 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 *Lut.* 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 & 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 *Rol. Rep.* 426: 3 *Bulst.* 264: 1 *Rol. Abr.* 343: 2 *Rol. 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 intitled 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*, signifying 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. *Co. Car.* 343, 7: 1 *Ro. Ab.* 911: 2 *Lron.* 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. Ca.* 240: 1 *C. R.* 27.

In one place *Rolle* says, the wife shall have a necessary *bed* and apparel. 1 *Rol.* 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 *Rol. 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 act on, 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 *Ld. Ray.* 217: *Trin.* 12 *W.* 3. 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.* 6. 22 *b*: *Moor* 468. 1 *Rol. 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 *Rol. 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. Ca.* 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* 17 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. *Br. Releaſes, pl.* 29.

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 *H.* 15; and therefore there he excepted thoſe debts in his releaſe, otherwiſe they had been extinct. *Br. 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 *H.* 5, 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 ſhews his conſent, he may be charged thereupon. 1 *Sid.* 120. The expences 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 take 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.* 1. *Mod. Ca. 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 news-papers, 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.* 3. and *H.* 23 *Geo.* 3, 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. 3. 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 recognized 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 cloaths* 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. Lit.* 133; 1 *Rol. 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, 2.

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 the receiving another offender jointly with her husband. *Leach's Hawk. P. C.* i. *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. *Leach's Hawk. P. C.* i. *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 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 domeſtick œconomy 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* 101: *Savil* 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.* 2. *c.* 23: *Str.* 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: *Ro. Ab.* 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 *miſance, 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 tits. *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 the 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 *Lanv. 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 *Rol.* 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: *Sti.* 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 *Rol. 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.* 8. *c.* 22, all ſuch cuſtomary conveyances ſhall be of force notwithſtanding the *Stat.* 32 *Hen.* 8. *c.* 28. See ante *Div.* 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 *H.* 8. *c.* 26; for it is reaſonable and agreeable to ſome cuſtoms in *England. Dy.* 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 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 *Lil. 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 publickly diſagrees to it. 19 *Jac.* 1. *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 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 conuzor, the feme ſhall be examined; ſo it is where ſhe takes an eſtate by the fine rendering rent. 2 *Inſt.*, 515: 2 *Rol. 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 title *Fines.*

If

If a husband disseise another to the use of his wife, this does not make her a disseiseress, 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 disseiseress, 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 *Rol. 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 disseiseress, 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 *Rol. Abr.* 660: *Bro. Disseisin* 15, 67: See 8 *Hen.* 6. 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, shews 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.* 8. *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 *Rol. Abr.* 475: 1 *Rol. Rep.* 132.

A re-delivery 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 re-delivery, 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 *Rol. 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 indispensibly bound by the contract; therefore if she does not, when under her own management and will, by some act express her agreement 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 authorised 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 *Rol. 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 *R.* 2. *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 *Rol. 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 *Lord 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 *Rol. Rep.* 360, except as above, *&c.* For a perſonal duty to the wife, the baron only may bring the action: and the husband is intitled 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. *Vid.* 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 *Rol.* 347. *l.* 53: *Cro. El.* 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 *Ro. Ab.* 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. Lit.* 133: *Doctr. Placit.* 3: 2 *Hen.* 6. 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. Lit.* 351: 1 *Rol. Abr.* 6. *pl.* 7: *Yelv.* 166: *Noy* 79: 1 *Leon* 312: *Cro. Car.* 254, 494: 1 *Rol. 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 *Rol. Abr.* 348.

If an action be brought againſt an 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 an 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 *Comm.* 414: See 3 *Wilſ.*

124.—See tits. *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 & 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*. Br. 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. *Br. Deraignment* and *Divorce*, *pl.* 1. cites 26 *H.* 8. 7.

If *a man is bound to a feme ſole*, and after *marries her*, and after they are divorced, *the obligation is revived*. Br. 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. *Lord Raym.* 521: *Hil.* 11 *W.* 3.

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. *Br. 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. *Br. Deraignment*, *pl.* 18. cites 32 *Hen.* 8.

If baron *alien* the *wife's land*, and then there is a divorce *cauſa præcontractûs*, or any other divorce which diſſolves the marriage *à vinculo matrimonii*, the wife during the life of the baron may *enter* by ſtatute 32 *Hen.* 8. *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*. Mo. 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 & 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. & S. P. and ſee 1 *Vern.* 261.

A divorce was *à menſâ & 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 diſtribution more properly belongs to this court; but ſince in that court ſhe is ſuch a wife as *is not intitled to adminiſtration*, he diſmiſſed the bill as to diſtribution too, and ſaid, if they could repeal that ſentence, ſhe then would be intitled to diſtribution. *Ch. Prec.* 111.

In caſe of a divorce *à menſâ & 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 ſpecifick 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 reconcileable with principle; for the caſe of a divorce *propter ſævitiam* (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*. *Lit. Rep.* 78: 2 *Atk.* 511.—But if after an agreement between husband and wife to live ſeparate, they appear to have cohabited,

equity

equity will consider the agreement as waived thereby. *Fletcher* v. *Fletcher, Mich.* 1788.—See *Fonblanque's Treat. Eq.* 96, 7.

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. Ca.* 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 expences, 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 monies 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 expences*, 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.

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 circumstance 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 *Lil. Abr.* 211. If one be barred by 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* Chief Justice, 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 shewn that there are goods: but if the plaintiff can shew by way of replication, that more goods have fallen into his hands since that time, then, except the defendant alledge 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 *H.* 7. 29.

See titles *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

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 *H.* 8. *c.* 24.

BARRASTER, BARRISTER, *barrasterius.*] 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 antiently *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 stiled a vacation *barrister*. Also they are called *utter barristers*, *i. e.* pleaders *outer* 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 title *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 licence. 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 *E.* 1. *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 misdemeanours 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. *Str.* 610. See title *Privilege.*—Pleas, before they are filed, must be signed by a barrister or serjeant. See title *Abatement*, *Pleading.*

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 *Rol. 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.* 1. *c.* 29, under title *Attornies at Law*: 4 *Comm.* 134: and see *Stat.* 34 *E.* 3. *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 ſuperiour 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.

BARREL, *barillum*.] 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 *R.* 3. *c.* 13.—Of beer it contains thirty-ſix gallons; and of ale, thirty-two gallons. *Stats.* 23 *H.* 8. *c.* 4: 12 *Car.* 2. *c.* 23.—The aſſiſe of herring-barrels is thirty-two gallons wine meaſure, containing in every barrel uſually a thouſand full herrings. *Stat.* 13 *El. c.* 11.—The eel barrel contains thirty gallons. 2 *H.* 6. *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.

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. *baxatar*, *circumvenire*.] To exchange one commodity for another, or truck wares for wares. *Stat.* 1 *R.* 3. *c.* 9. Becauſe probably they that exchange in this manner do endeavour, for the moſt part, one to over-reach 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 & 3 *Ed.* 6. *c.* 12, *barton* lands, and demeſne lands, are uſed as *ſynonima*. *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 batchelors, *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 villainous 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 copy-holder 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. title *Tenures*.

BASE FEE, Is a 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*.

BAS VILLE, The ſuburbs or inferior town, as uſed in *France*.

BASELS, *baſſelli*, A kind of coin aboliſhed by King *Hen.* 2. *anno* 1158: *Hollingſhed's Chron. p.* 67.

BASELARD, or BASILLARD, In the *Stat.* 12 *Rich.* 2. *c.* 6, Signifies a weapon, which Mr. *Speight*, in his expoſition upon *Chaucer*, calls *pugionem 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 Βασσαρις, *meretrix*; more truely from the Brit. *Baſtaerd*, *notbus*, *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 indiſpenſible condition to make it legitimate, that it ſhall be *born* after lawful wedlock. 1 *Comm.* 454: 2 *Inſt.* 96, 7.

Blackſtone

Blackſtone obſerves, that the reaſon of our *Engliſh* law is ſurely much ſuperiour 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 groſly 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 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 *Rol. 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 note 1 and 2; where the time of geſtation as connected with this queſtion is enquired 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 title *Ventre in piciendo*.

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, 7.—See 1 *Inſt.* 8 *a*. in *note* 7. where it is ſaid, "*Brook* 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. Ab. Baſtardy, p.* 18: *Palm.* 10.—See further, 1 *Inſt.* 123 *b*. in note 1, where additional authorities are cited, to ſhew 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 ſhewn. *Salk.* 123: 3 *P. Wms.* 276: *Stra.* 925; which is ſuch a negative as can only be proved by ſhewing 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*) & *extrà*, *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 & 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 ſhewn; 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 iſſue 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 & 3 *Ed.* 6. *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 *Rol. Abr.* 624.

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 re-

preſents him; and this rule of law was taken from the humanity of the antients, 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: 2 *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. *Preced. 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, 7: *Ld. Raym.* 68: *Comb.* 356. And ſee *poſt.* II.

A baſtard was, in ſtrictneſs of law, incapable of holy orders, and though that were diſpenſed with, 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 tranſcendent 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 R.* 2. 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 *H.* 3, 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 it's 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 *Rol. 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 inconveniencies, as is taken notice of in the preamble of *Stat.* 9 *Hen.* 6. *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 *Rol. 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 *Rol. Abr.* 361.

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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 *Rol. 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 *Rol. 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 non-suit they cannot go on to trial, and so the bishop's certificate never appears of record, and therefore is not binding. 1 *Rol. 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 *Rol. 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 *Rol.* 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 conuzance. *Bro. Bastardy* 97.

II. 1. By *Stat.* 18 *Eliz. c.* 3, (and see *Stat.* 3 *Car.* 1. *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.* 1. *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 & 14 *Car.* 2. *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.* 2. *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 shew 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.* 2. *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.* 3. *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.* 3. *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 intitled 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. Bastards are within the meaning of the marriage act. *Stat.* 26 *Geo.* 2. *c.* 33, which requires the consent of the father, &c. 1 *Term Rep.* 96. And the rule that a bastard is *filius nullius* applies only to the case of inheritances. *Ib.* 101.

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 *Seff. Ca.* 33: *Salk.* 121, 474, 532; or in a state of vagrancy, *Stat.* 17 *Geo.* 2. *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, 8: 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.

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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, 2; 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 recognizance 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 *MSS. temp. E.* 3, 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.* 1. *c.* 27. it is 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."

It hath been adjudged, that in order to convict a woman by force of this laſt ſtatute, there is no need that the indictment be drawn ſpecially, or conclude againſt the form of the ſtatute; for the ſtatute doth not make a new offence, but only makes ſuch concealment an undeniable evidence of murder. 2 *Hawk. P. C. c.* 46. § 43.

Alſo, it hath been agreed, that where a woman appears to have endeavoured to conceal the death of ſuch child within the ſtatute, there is no need of any proof that the child was born alive, or that there were any ſigns of hurt upon the body, but it ſhall be undeniably taken that the child was born alive, and murdered by the mother. 2 *Hawk. P. C. ub. ſup.*

But it hath been 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 hath been agreed, that if a woman confeſs herſelf with child beforehand, and afterwards be ſurprized 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.*

If a woman be with child, and any gives her a potion to deſtroy the child within her, and ſhe takes it, and it works ſo ſtrongly that it kills the woman, this is murder; for it was not given to cure her of a diſeaſe, but unlawfully to deſtroy the child within her; and therefore he that gives her a potion to this end, muſt take the hazard, and if it kills the mother, it is murder. 1 *Hal. H. P. C.* 429, 430.

If a woman be quick or great with child, if ſhe take, or any other give her any potion to cauſe an abortion, or if a man ſtrike her, whereby the child within her is killed; though it be a great crime, yet it is 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: ſo it is, if ſuch child were born alive, and after die of the ſtroke given to the mother, this is not homicide. 1 *Hal. H. P. C.* 433. The offender however may be indicted for a miſdemeanor, at common law.

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 *Baſtard.*

BASTARD EIGNE, See *Baſtard.*

BASTON, *Fr.*] A ſtaff, or club. In the ſtatutes it ſignifies one of the warden of the *Fleet's* ſervants or officers who attend the king's courts with a red ſtaff for taking ſuch into cuſtody who are committed by the court. *Stats.* 1 *R.* 2. *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. Britan.* title *Cumberland.*

BATELLA, A *Boat.*

BATH, Lat. *Bathon*, called by the Britons *Badiza*, has been termed the city of ſickmen, Sax. *Acemannes-Ceaſter*;] 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 ſtatute 7 *Geo.* 1. *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 expence of removing them back to their pariſhes, *&c. Stat.* 12 *Geo.* 2. *c.* 31.

BATIFORIA, A fulling mill. *Monaſticon, tom.* 2. *p.* 32.

BATTEL, Fr. *bataille.*] A trial by combat, anciently allowed of in our laws, (among other caſes,) where the

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 apellee 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 *battle*; 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 *battle*, 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; and 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 alledging 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 *R.* 2. *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: *Bracton, lib.* 3: *Britton, c.* 22: *Smith de Rep. Angl. lib.* 2: *Co. Litt.* 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.* 1, 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 *Dy.* 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. Litt.* 2 *b*.

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.

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.

BATELLUS, See *Batus.*

BATTERY, See title *Aſſault.*

BATUS, *Lat.* from the Sax. *bat.*] A boat, and *batellus* a little boat. *Chart. Ed.* 1: 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 *R.* 1. 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 cognizance of the temporal law, as a common nuſance, 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 puniſhed 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 alledged 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.* 214.

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 publickly allowed here in former times, till the reign of *Hen.* 8, 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.* 2. *c.* 36, made perpetual by *Stat.* 28 *Geo.* 2. *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 recognizance of 20 *l.* each, to give material evidence of the offence,) enter into a recognizance of 30 *l.* to proſecute with effect ſuch perſon for ſuch offence at the next ſeſſions; the conſtable ſhall be paid his reaſonable expences 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 recognizance 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 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.* 4. *c.* 3, as to keeping watch *on the ſea coaſt.*

The erection of beacons, light-houſes and ſea marks, is a branch of the royal prerogative; whereof the firſt was antiently 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 demeſnes of the crown: which power is uſually veſted by letters patent in the office of 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 *An. c.* 20, and 8 *Ann. c.* 17, for building the *Eddyſtone* lighthouſe near *Plymouth*, and raiſing the duties payable by ſhips for its ſupport; and *Stat.* 3 *Geo.* 2. *c.* 36, as to the lighthouſe 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 BALLANCE, for weighing goods and merchandize 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 maintainers.—Juſtices of aſſiſe ſhall inquire of, hear, and determine maintainors, *bearers*, and conſpirators, &c. *Stat.* 4 *Ed.* 3. *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.* 3. *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 vicious *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 foreſt, 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 bedrepium*, &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 tits. *Alehouſes, Brewers, Navigation Acts, Weights and Meaſures*.

BEGGARS. See *Vagrants*.

BEHAVIOUR of Perſons. Vide *Good Behaviour*.

BELGÆ, The inhabitants of *Somerſetſhire, Wiltſhire*, and *Hampſhire*. Blount.

BENEFICE, *beneficium.*] Is generally taken for any eccleſiaſtical living or promotion; and benefices are by *Stat.* 13 *R.* 2. *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 *H.* 8. *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 titles *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*.

BENERTH, An antient 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 *H.* 7. *c.* 10, yielded to that prince in regard of his great expences in wars, and otherwiſe. 12 *Rep.* 19. And by act of parliament, 13 *Car.* 2. *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 *W. & M. ſt.* 2. *c.* 2. In other nations *benevolences* are ſometimes given to lords of the fee by their tenants, &c. *Coſſan 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. Alfredi, c.* 9: *Monaſticon, tom.* 1. *p.* 308. See the next article.

BERCARIA, *berchery*, from the Fr. *bergerie.*] A ſheepfold, or other encloſure 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 *Beverley.* 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.* 1. *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 names 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 *berie* 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 ann.* 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 *berryfields*: 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.* 1. *cap.* 15, *emendari non poſſunt.* Sometimes it is uſed to ſignify any capital offence. *Leges Canuti apud Brompt. c.* 90: *Leg. Hen.* 1. *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. ann. 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 *E.* 4. *c.* 8; and 2 *Jac.* 1. *c.* 28. Though therefore it hath ſome local peculiarities, derived from the ancient laws of *Scotland*; (See *Hale 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.* 2. *c.* 42, that where *England* only is mentioned in any act of parliament, the ſame notwithſtanding hath been and ſhall be deemed to comprehend 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 *Ro. Ab.* 292: *Stat.* 11 *Geo.* 1. *c.* 4: 4 *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 a manor; from the Sax. *beorg*, which ſignifies a hill or caſtle; for heretofore noblemens' 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 tits *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 a 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 *Ed.* 3. *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.

BETACHES, Laymen uſing glebe lands. *Parl.* 14 *E.* 2.

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.* 8. *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 or ſheep of the ſecond year. *Paroch. Antiq. p.* 216.

BIDUANA, A faſting for the ſpace of two days. *Mat. Weſt. 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 *poligamy,* or the having a plurality of wives 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 *E.* 1. *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 cognizance of the plea of bigamy was declared by *Stat.* 18 *E.* 3. *ſt.* 3. *c.* 2, to belong to the Court Chriſtian, like that of baſtardy. But by *Stat.* 1 *E.* 6. *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 œconomy and decency of a well-ordered ſtate. By *Stat.* 1 *Jac.* 1. *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;" but within the benefit of clergy.

The act 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 others 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 & 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,* though quære why not? 1 *Hawk. P. C.* 174, 5: 1 *Hale's P. C.* 692: 1 *Sid.* 171: *Kel.* 80.

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 between an *Engliſhman* and a foreigner, whereof part ought to be *Engliſh*, and part ſtrangers: properly a jury *de medietate linguæ*, under *Stat.* 28 *Ed.* 3. *c.* 13. See title *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. 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. *Term. 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*.

Bill is alſo a common engagement for money given by one man to another; being ſometimes with a penalty, called *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. ſect. 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. *Rol. 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 *Ro. Ab.* 146.

Theſe kinds of bills are now ſuperſeded in uſe, the ſingle bills by the more modern traffick of *Bills of Exchange*, and the penal bills by *Bonds* or *Oligations*. —See thoſe titles.

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, alledged any thing *ore tenus*, which was over-ruled 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 *E.* 1. *c.* 31, "When one impleaded before any of the juſtices, alledges an exception, praying they will allow it, and if they will not, if he that alledges 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 ſhew 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 over-ruled. 2 *Inſt.* 427: *Dyer* 231. *pl.* 3: *Raym.* 486.

The *exceptions* ought to be put in writing *ſedente curiâ*, 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 alledged 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,

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 Tranſfer 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 addreſt 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 *indorſer*; 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 ſhewn 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 a third. Thus on a bill dated the 28, 29, 30 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 to be 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 1ſt 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 addreſt, 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*, but theſe days of grace are not allowed 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 & 10 *W.* 3. *c.* 17: and 3 & 4 *An. 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 moſt 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 *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

To Mr. *C. D.* *T. T.*
[Place of abode and buſineſs]

Acc. *C. D.*

London, Jan. 1, 1793. Exchange for £50 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

To Mr. *C. D. &c.* *V. S.*

London, Jan. 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.* and Co. or order, Ten thouſand livres Tournoiſes, value received of them, and place the ſame to account, as *per* advice from

To Mr. *E. F.* *C. D.*
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 indorſible 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, 9. But at length they were recognized by the Legiſlature and put on the ſame footing with *inland* bills of exchange; by *Stat.* 3 & 4 *An. c.* 9; (made perpetual by *Stat.* 7 *An. 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 *London, Jan.* 1, 1793.
I promiſe to pay *A. B.* or bearer on demand Twenty pounds for value received.
T. T.

£20 *London, Jan.* 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.* 3. *c.* 51: and 17 *Geo.* 3. *c.* 30, made perpetual by *Stat.* 27 *Geo.* 3. *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 21 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.

Bills of exchange and promiſſory notes muſt now be drawn on ſtampt paper. The ſtamp is proportioned, under *Stat.* 31 *Geo.* 3. *c.* 25, to the amount of the bill, from 3*d.* to 2*s.*—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 & 4 *An. 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 title *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 authoriſed 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 indorſer to the maker of the note, who by his promiſe is his debtor, to pay the money to the indorſee. —The indorſer 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 fixt, 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 to the firſt indorſer of a note; the ſubſequent indorſers 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 & 4 *An. c.* 9. § 5: 1 *Burr.* 452, 9. 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

ney 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 *W. & 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 bankers' 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, 6, 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.

Bills of exchange and promiſſory notes, though according to the general principles of law, they are to be conſidered only as evidences of a ſimple contract, are yet in one reſpect regarded as ſpecialties; and on the ſame footing with bonds; for unleſs the contrary be ſhewn by the defendant, they are always preſumed to have been made on a good conſideration; nor is it incumbent on the plaintiff either to ſhew a conſideration in his declaration, or to prove it at the trial. 1 *Black. Rep.* 445: *Peckham* v. *Wood*, *K. B. Eaſt.* 18 *Geo.* 3.—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 acknowledgement 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 & 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 publick nature and morally certain. See 1 *Stra.* 24: 1 *Wilſ.* 262, 3.—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

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. *Liſſet*, 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 *Lord 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.* 3.

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 exeception 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 tenor 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, 9: 1 *Ld. Raym.* 364, 574: 12 *Mod.* 214, 410: *Carth.* 4, 9.

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, 4: 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 ſhew 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. *Dougl.* 286, (299).

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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 1ſt 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.* 2.—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 negociated 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 ſhew 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. *ſect.* 15.

If the party under-writes the bill, *preſented* ſuch a day, or only the day of the month; this is ſuch an acknowledgement 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 compleat acceptance; for the mention of his books and accounts ſhews 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 Chief Juſtice *Hale*, at *Guildhall*. *Molloy*, *book* 2. *cap.* 10. *ſect.* 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.* 1. *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.

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 a 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.* 2. *c.* 22.

III. According to the difference in the ſtile 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 ſhews 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 indorſer's name, with an order to pay the money to himſelf, which ſhews his election to take as indorſee; or to write a receipt which ſhews he is only the agent of the indorſer. 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, 3, 6, 7—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 & 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 enquire 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.

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 intitle 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.* 7[illegible]

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, 3. 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 ſhewn, 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 a 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 anv 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 a 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, 9; *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 ſuſtained 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

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 intitled 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 expences; which latter conſiſt uſually of the exchange, re-exchange, proviſion and poſtage, together with the expences 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, 7: 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 & 10 *W.* 3. *c.* 17, and afterwards the *Stat.* 3 & 4 *Anne, 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, intereſt and coſts, (*i. e.* expences) 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 intitled 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 & 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, [expences] are to be recovered, there is more indulgence in the time allowed for notice 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 & 4 *Anne, 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

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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 shewn 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 *Wilf.* 48: *Bull. N. P.* 271.—So the receipt of part from an indorsor, is no discharge of the drawer or preceding indorsor.

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 *Wilf.* 46.

Though in order to intitle 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 intitle himself to recover against an indorsor, it is not necessary for the indorsee to shew an attempt to recover against the drawer of a bill of exchange, or the payee-indorsor of a promissory note. See 1 *Salk.* 131, 3: 1 *Str.* 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 intitle 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 & 4 *Anne*, *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 recognized 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, 7: 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: *Str.* 680: 8 *Mod.* 373: 1 *Mod. Ent.* 312. *pl.* 13: *Morg. Prec.* 548: *Kesseboower* v. *Tims*, *B. R. E.* 22 *Geo.* 3: *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 past 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 recognized 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 *Wilf.* 189; 1 *Ld. Raym.* 21, 175: 3 *Mod.* 86: 4 *Mod.* 242.

But when the custom of merchants was recognized 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 recognized by the court, the case as stated, intitled 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 shews 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*, *Tr.* 14 *Geo.* 3. 1 *H. Black. Rep.* 89, in the notes.

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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. *Vid. Simonds* v. *Parminter*, 1 *Wilſ.* 185: *Vid. Morg. Prec.* 43, 44, 50: 4 *Term Rep.* 82, 5.

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. *Vid. 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. *Vid. Golding* v. *Grace*, 2 *Bl. 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 title *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 & 4 *Anne*, *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 intitle the plaintiff to recover.

In ſtating the bill or the note, regard muſt be had to the legal operation of each reſpectively. 1 *Burr.* 324, 5. 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 alledge 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 & al.* v. *Gibſon & al. Id.* 485: *Confirmed in Dom. Proc.* See *H. Black. Rep.* 569: *Collis* v. *Emett*, *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 intitled 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. *Burchell* 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 chuſes 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 alledged that he accepted the bill, for the acceptance is the foundation of the action, but the manner of acceptance needs not to be alledged. 2 *Ld. Raym.* 1542: 1 *Ld. Raym.* 364, 5: 374, 5: 1 *Salk.* 127, 9: *Carth.* 459.

If the bill or note was payable to order, and the action by an indorſee, ſuch indorſements muſt be ſtated as to ſhew 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 intitle 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.

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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 intitle 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: *Str.* 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 declaration, 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: *Dougl.* 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 proof of the hand-writing of the indorſors as in an action againſt the acceptors. See *Collis* v. *Emett*, 1 *H. Black. Rep.* 313.—That of the drawer himſelf muſt of courſe be proved.—It muſt alſo be 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, 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.—But in the years 1786, 7 and 8, 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 & al.* v. *Gibſon & al.* 3 *Term Rep.* 483: *Collis* v. *Emett*, 1 *H. Black. Rep.* 313. From the deciſions on theſe caſes, the principal 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 & al.* v. *Gibſon & 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.* 569. 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 & al.* v. *Gibſon & al.* and *Hunter* v. *Gibſon & 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

competent to the defendants to demur: and that on the record, as ſtated, no judgment could be given.—The whole diſcloſed a ſyſtem of bill-negociation 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 ſhewing 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: *Str.* 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.

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, 7: 1 *Wilſ.* 185. See ante 1, of this *Div.* 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 enquiry, it is ſufficient for the latter to *produce* the note or bill without any proof of the defendant's hand. See 2 *Str.* 1149: *Barnes* 233, 4: 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 ſhewn 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.* 3. *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. title *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 *Anne c.* 14. § 1, which *abſolutely invalidates* notes, bills, *&c.* given for money won at play. 2 *Stra.* 1155.—So on *Stat.* 12 *Anne ſt.* 2. *c.* 16. § 1, as to ſecurities on uſurious contracts; *Lowe* v. *Waller*, *Doug.* 736. And reaſoning by analogy, on *Stat.* 5 *Geo.* 2. *c.* 30. § 11, againſt notes given by a bankrupt to procure his certificate. See this Dict. title *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 & 10 *W.* 3. *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.

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.* 2. *c.* 25: 9 *Geo.* 2. *c.* 18. And *vide Stat.* 31 *Geo.* 2. *c.* 22. *ſ.* 78.

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 shewing 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 titles *Factor*, *Merchant*.

BILL OF RIGHTS, The statute 1 *Wm. and Mary, stat.* 2. *cap.* 2, is so called; as declaring the true *rights* of *British* subjects. See title *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 the 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 title *Fraud.*—See also title *Bankrupt* II.

BILL OF STORE, A kind of licence 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 licence granted to a merchant, to suffer him to trade from one *English* port to another, without paying custom. See title *Navigation Acts.*

BILLETS OF GOLD, Fr. *billot.*] Are wedges or ingots of gold, mentioned in the statute 27 *E.* 3. *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 *An. c.* 15: 10 *An. c.* 6. See *Fuel.*

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 *Billinsgate* 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 & 11 *W.* 3. *c.* 24: 1 *Geo.* 1. *Stat.* 2. *c.* 18. *f.* 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,

BIOTHANETUS, One who deſerves to come to an untimely end. *Ordericus 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 & 7 *W.* 3. *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 antient 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 *Ed.* 3, it was decreed, That if any ſhould not repair his proportion of the banks, ditches and cauſeys by a day aſſigned, xii*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 *H.* 8. *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 compleat 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 & Wells, Worceſter, Coventry* and *Litchfield, Hereford, Llandaff, St. David's, Bangor*, and *St. Aſaph*; and four founded by King *Henry* 8. 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* 8. 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 *Hen.* 8; 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 *Hen.* 8, 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 *Ed.* 6. *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 ſtiled *metropolitanus & primus totius Angliæ*; and the *archbiſhop* of *York* ſtiled *primus & 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 title *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 priviiege 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 excommuni-

cate, 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 *H.* 8. *c.* 21: 28 *H.* 8. *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 *H.* 8. *c.* 13: 25 *H.* 8. *c.* 21: 28 *H.* 8. *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. *God.* 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. *God.* 14.

A BISHOP is elected by the king's *congé d'eſlire*, or licence 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 *H.* 8. *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 of 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, 4, 5.

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 title *Temporalties*. Biſhops are allowed four years for payment of their firſt fruits, by *ſt.* 6 *An. c.* 27. Every biſhop may retain four chaplains. Vide *Stat.* 21 *Hen.* 8. *c.* 13. *ſ.* 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 licences for marriage, makes probate of wills, &c. *Co. Lit.* 96: 2 *Rol. 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 *H.* 8. *c.* 28: 1 *El. c.* 19. *ſ.* 5. See this Dict. title *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. *St.* 37 *H.* 8. *c.* 17.

By *Stat.* 24 *Geo.* 3. *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.* 3. *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, 1: ſee 1 *Comm.* 401: 4 *Comm.* 264: and this Dict. title *Parliament*.

Archbiſhopricks and *Biſhopricks* 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 ſtile 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.

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 *H.* 3, that the day increaſing in the leap-year, and the day next before, ſhall be accounted but one day. *Brit.* 209: *Dyer* 17. See title *Year.*

BISUS, *biſus, mica* biſa, *panis* biſius, Fr. *pain bis.*] Brown bread, a brown loaf. *Cowel.*

BLACK ACT, or WALTHAM BLACK ACT. The *Stat.* 9 *Geo.* 1. *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 name, demanding money, &c. or reſcuing ſuch offenders, are guilty of felony without benefit of clergy. This act is made perpetual by 31 *Geo.* 2. *c.* 42. And ſee further, *Stat.* 6 *Geo.* 2. *c.* 37: 27 *Geo.* 2. *c.* 15.

See alſo *Stat.* 16 *Geo.* 3. *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.* i. *c.* 49. § 7, and this Dict. titles *Foreſt, Game, Deer-ſtealing.*

BLACK-BOOK, Is a book lying in the *Exchequer.* See *State Annals* 154.

BLACK LEAD. By *Stat.* 25 *Geo.* 2. *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.

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 tits. *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*, & *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.*

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 & 9 *W.* 3. *cap.* 9.—See alſo *Stat.* 4 & 5 *P. & M. c.* 5. § 26: 39 *Eliz. c.* 20. § 12: 1 *Geo.* 1. *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 *Ed.* 3. *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* & 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.* 2. *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.

BLANKS, Were a kind of white money coined by *Hen.* 5, in thoſe parts of *France* which were 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.* 6. *c.* 9. See tit. *Alba Firma.*

BLANKS,

BLANKS, In judicial proceedings, certain void ſpaces ſometimes left by miſtake. A blank (ſuppoſing ſome-thing material wanting) in a declaration, abates the ſame. 4 *Ed.* 4, 14: 20 *H.* 6, 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 ſtatute 9 & 10 *W.* 3. *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.* 1. *c.* 21, perſons jeſtingly or prophanely 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.*

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 *Ed.* 1.

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* wites 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 *bloudveit* 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, *bloudwite* 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*, & 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 *Stat.* 12 *Car.* 2. *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. Alfredi*, *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 & immune à ſervitiis vulgaribus & 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 Teſtamentales. 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 chuſe 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 deceipt.

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 title *Executor.* V. 3.

BOND I.

BONA PATRIA, An aſſiſe of country-men 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 *E.* 1. *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 recompence. 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 expences, 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, 7: 6 *Mod.* 11, 60, 101:) the *Stat.* 4 & 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 tho' in ſtrictneſs it may be accounted his own fault why he did not take out execution, and therefore not intitled to intereſt; yet, as by the judgment he is intitled 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 exceeded the penalty, this was affirmed. 1 *Vern.* 350: 1 *Eq. Ab.* 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, are 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 twenty-first year of the reign of our sovereign Lord* George *the Third, by the grace of God, of* Great Britain, France *and* Ireland, *king defender of the Faith and so forth, and in the year of our Lord one thousand seven 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 } *David Edwards* (L.S.)

A. B.

For irregular forms of bonds or 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 *Rol. 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, enters 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. *vid.* tit. *Dureſs.*

So in respect of 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, cloaths, 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 *Rol. 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, ideots, as also feme coverts 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 politick 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 *Rol. 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 general issue, defendant may give in evidence that they made him sign the bond when he was so drunk 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 *Ch. Ca.* 157. An heir is not bound, unless he be named expressly in the *bond*; though the executors and administrators are. *Dy.* 13.

It

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 *Rol. 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 & utrumque noſtrum per ſe pro toto & 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* in 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: *Stile* 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, *Godard's* caſe: *Noy* 21, 85, 86: *Hob.* 249: *Stile* 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 *Rol. 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.* 7. 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 non-suited. 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 *Rol. 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 *E.* 4.

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 *E.* 4, 3: 1 *Rol. 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 reinfeoff, 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 *future* 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 *Rol. 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 *Rol. Abr.* 444: *Owen* 52: 1 *Leon.* 74: *Gouldy.* 71.

See further this Dict. tits. *Condition*, *Consideration*, *Gaming*, *Marriage*; as to *Resignation Bonds*, 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 *Wilson* 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 alledging, 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 aceptance of one bond cannot be pleaded in satisfaction of another bond. *Cro. Car.* 85: *Moore* 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;

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.

V. 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. *Heb.* 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 ſhew 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 the one 100 *l.* to the one, and the other to the other, is a void condition. *Dyer* 350 *a. pl.* 20: *Heb.* 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 bound 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, *Rebert* 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 *Rol. 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 ſhew 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 no-body 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 ſhewed 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 defendants plead a ſpecial matter, that admits and excuſes a non-performance, the plaintiff need only anſwer, and falſify the *ſpecial matter alledged*; for he that excuſes a non-performance admits it, and the plaintiff need not ſhew 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 ſhew a breach; for then he has no cauſe of action, unleſs he ſhew 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 *An. 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 & 9 *Wm.* 3. *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.* 2. *c.* 25. See title *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, *copy-holders*, and *cuſtomary-tenants*, are ſometimes ſo called. *Calthorpe on Copyholds* 51, 54. See title *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.* 8. *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.

By *Stat.* 7 *An. c.* 14. *ſect.* 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.

By *Stat.* 12 *Geo.* 2. *c.* 36, No perſon ſhall import or ſell books firſt written and printed in this kingdom, and reprinted abroad, under the penalty of 5*l.* and double the value of every book ſo imported or ſold. 54 Geo. c. 20. See tit. Rel. prop.

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.* 3. *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

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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*, 1 *Vol.* 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, title *Literary Property*.

BOOK OF RATES, See title *Cuſtoms*.

BOOKSELLERS, And authors of books, *&c.* See title *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 *Fulham 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 ſurety-ſhip, 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*.

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 incloſure 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. *Lit. ſect.* 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.* 2, *burghs* had ſo great privileges, that if a bond-man 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 title *Burgage-Tenure*, *Parliament*.

BOROUGH COURTS, Vide *Courts*.

BOROUGH-HOLDERS, BORSHOLDERS, or BURSHOLDERS, *quaſi borh-ealders*, See title *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 brethren 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*, though it certainly did in *Scotland*. (under the name of *Mercheta*, or *Marcheta*) till aboliſhed by *Malcolm* III.—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 dies 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

engliſh land; though the youngeſt ſon ſhall be intitled 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 intruſted. *Co. Lit.* 33, 111: *F. N. B.* 150: *Mo. pl.* 565.

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 titles *Will. Executor.*

BORROWING, See title *Bailment.*

BORSHOLDERS, See title *Headborough.*

BORTMAGAD. Sax. *Bord, domus & Magad. ancilla.*] A houſe-maid. *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 wind-fall 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* Italian, *bois* French. *Boſcus* is divided into high wood or timber, *hautboys*, and coppice or underwoods, *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 *H.* 6.

BOSINNUS, A certain ruſtical pipe, mentioned in ancient tenures.

BOSTAR, An ox ſtall. *Mat. Pariſ. anno* 1234.

BOTE, Sax.] A recompence, ſatisfaction or amends. The Saxon *bote* is ſynonimous to the word *eſtovers.* See title *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.* 25. 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 *H.* 1, 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 *Ed.* 2. *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 *buts* 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 incloſed 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 *Ed.* 3. *ſt.* 5. *cap.* 21. See title *Cuſtoms.*

BOTTOMRY, or *bottomree, fœnus nauticum.*] Is generally where a perſon lends money to a merchant, who wants it to traffick, 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 title *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, An 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, *incapite, Mad. Exch.* i. 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 title *Abuttals.*

BOUND-BAILIFFS, See title *Bailiffs.*

BOUNTIES ON EXPORTATION, See title *Navigation Act.*

BOUNTY

BOUNTY OF Q. 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. *Crompt. 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 *E.* 4. *c.* 2, parents 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 *H.* 8. *c.* 6; and title *Game*.

BRACELETS, Hounds, or rather beagles of the ſmaller and ſlower kind. *Pat.* 1 *Rich.* 2. *p.* 2. *m.* 1.

BRACENARIUS, Fr. *braconnier*.] A huntſman, or maſter of the hounds. *Anno* 26 *Ed.* 1. *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. *pag.* 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 title *Clergy*, benefit of.

BRANDY, A liquor made chiefly in *France*, and extracted from the lees of wine. In the *Stat.* 20 *Car.* 2. *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.* 2. *cap.* 4.

The duty on brandy is regulated by *Stat.* 27 *Geo.* 3. *c.* 13.—By *Stat.* 4 *W. c.* 5. § 8, no brandy ſhall be imported in any caſk or veſſel, not containing ſixty gallons at leaſt, on pain of forfeiture. See further titles *Cuſtoms*, *Exciſe*, and *Burn's Juſtice* title *Exciſe* XVI. See alſo title *Navigation Acts*.

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 *H.* 7. *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.* 8. *c.* 7: 2 & 3 *Ed.* 6. *c.* 37.

BREACH OF CLOSE, See title *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 title *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 title *Peace*.

BREACH OF POUND, The breaking any pound or place where cattle or goods diſtrained are depoſited, to reſcue ſuch diſtreſs. See title *Diſtreſs*; *Pound-breach*.

BREACH OF PRISON, See title *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 alledged, or the plaintiff will have no cauſe of action. 1 *Saund.* 102. See titles *Bond*, *Condition*, *Covenant*.

BREAD AND BEER, The aſſize 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 *H.* 3. *St.* 1. *Ord. Piſtor.* & 51 *H.* 3. *St.* 6: *Vide* 2 & 3 *Ed.* 6. *c.* 15.

By *Stat.* 31 *Geo.* 2. *c.* 29, containing regulations concerning the aſſiſe of bread, and to prevent adulteration, ſo much of *Stat.* 51 *H.* 3, intitled, *aſſiſa panis & cervisiæ*, as relates to the aſſiſe of bread, and the *Stat.* 8 *An. 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 *lb.* 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.* 2. *c.* 18. how penalties not appropriated by *Stat.* 31 *Geo.* 2. *c.* 29, ſhall be diſtributed. See alſo *Stat.* 3 *Geo.* 3. *c.* 6. (for *Scotland*) &c. wherein there are farther regulations concerning the aſſiſe of bread, and for preventing the adulteration thereof.

See alſo *Stat.* 13 *Geo.* 3. *c.* 62. as to *ſtandard wheaten bread*. And ſee title *Corn*.

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 TTRITE, *panis tritici*.] Is bread mentioned in the ſtatute 51 *Hen.* 3, of aſſiſe of bread and ale; wherein are particulariſed *waſtel bread*, *cocket bread*, and *bread of treet*, which anſwer to the three ſorts of bread now in uſe, called white, wheaten, and houſe-hold bread. In religious houſes they heretofore diſtinguiſhed bread by theſe ſeveral names, *panis armigerorum*, *panis conventualis*, *panis puerorum*, & *panis famulorum. Antiq. Not.*

BRECCA, from the Fr. *breche*.] A breach or decay. In ſome ancient deeds there have been covenants for repairing

pairing *muros* & breccas, *portas & foſſata*, &c.—*De* brecca *aquæ inter* Woolwich & Greenwich *ſupervidend. Pat.* 16. *Ric.* 2. 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, Weather-ſheep, *Mon. Angl.* 1. *c.* 406.

BRENAGIUM, A payment in bran, which tenants anciently made to feed their lords' hounds. *Blount.*

BRETOYSE, or BRETOISE, The law of the marches of *Wales*, in practiſe 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 licence of trial, in the King's courts, by the plaintiff, *qui* breve *perquiſivit:* 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 licence 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 & 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.* 3. *ſt.* 2. *c.* 41, Brewers of ſtrong and ſmall beer, are to take out annual licences from the officers of exciſe—Brewers are by this and other acts ſubject to various regulations under the exciſe laws.—The duty on beer and ale is ſettled by *Stat.* 27 *Geo.* 3. *c.* 13.—Notice to the Exciſe Office muſt be given, and entry made of places for brewing beer and ale. See *Stats.* 12 *C.* 2. *c.* 24: 15 *C.* 2. *c.* 11; and 5 *Geo.* 3. *c.* 43.—See alſo *Stats.* 1 *W. & M. ſt.* 1. *c.* 24: 7 & 8 *W.* 3. *c.* 30: 8 & 9 *W.* 3. *c.* 19, 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 brewhouſe for other purpoſes, on penalty of 50*l.* *Stat* 22 & 23 *Car.* 2. *c.* 5. § 10.—By *Stat.* 32 *Geo.* 3. *c.* 8. § 1, Common brewers muſt not ſell beer in leſs quantities than caſks of 4½ gallons. See *Burn's Juſtice* tit. *Exciſe* I.—By a By-law of the common council, brewers' drays ſhall not be in the ſtreets of *London* after 11 in the forenoon in Summer, and 1, 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.* i. *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 a *Stat.* 11 *H.* 4, 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 *C.* 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 diveſted 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 *R.* 2. *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 & 6 *Ed.* 6. *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 & 6 *E.* 6. *c.* 16, is ſo diſabled to hold the ſame, that he cannot be reſtored to a capacity of holding it by any grant or diſpenſation what-

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 of members of corporations, which are erected for the sake of publick government, is an offence for which an information will lie. 12 *Mod.* 314: 2 *Ld. Raym.* 1377: 1 *Blackst.* 383.—But the Court will grant such information very cautiously, since the additional penalties by Statute. 1 *Black.* 380. See title *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 the Customs, &c. taking *bribes*, See tit. *Customs.*

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.* 2. *c.* 25. *sect.* 6.

As to bribery in elections to parliament. See title *Parliament.*

BRIBOUR, Fr. *bribeur.*] Seems to signify in some of our old statutes, one that pilfers other men's goods. 28 *Ed.* 2. *cap.* 1.

BRICOLLS, An engine mentioned in *Blount* by which walls were beat down,

BRICKS AND TILES.—By *Statute* 17 *E.* 4. *c.* 4, The earth for tiles is to be digged and cast up before the 1st of *November* yearly, stoned and turned before the 1st of *February*, and wrought before the 1st of *March* following.—Every common tile must be 10 ½ inches long 6 ¼ broad and ½ 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.* 3. *c.* 42, Bricks when burnt are to be 8 ½ inches long 2 ½ thick and 4 wide.—Contracts for ingrossing and inhancing the price of bricks made void, and a penalty of 20 *l.* imposed on the parties.

The last excise duty imposed on bricks and tiles, made in *Great Britain*, by 27 *Geo.* 3. *c.* 13.—And the regulations to enforce the excise on bricks or tiles, are settled by *Stats.* 24 *Geo.* 3. *sess.* 2. *c.* 24. and 25 *Geo.* 3. *c.* 66.

BRIDGE, *pons.*] A building of stone or wood erected a-cross 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 re-built a foot-bridge over a more convenient part of the stream, and converted 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 publick utility to the county, the *County*, and not the district, are bound to repair it. *Burr.* 2594: *Blackst.* 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 heighth 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 a 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 *H.* 8. *c.* 5, All housholders 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 publick 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.* 2. *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.* 2. *c.* 29, for better aſſeſſing, collecting and levying of county rates, &c. See tit. *County-Rates*.

By the ſaid *Stat.* 12 *Geo.* 2. *c.* 29. § 14, When any publick bridges, &c. are to be repaired at the expence 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 7 years, at a certain annual ſum.—They are to give publick 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.

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 *bridgemaſters* 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.

BRIEFS, or licences 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 *haubergeon*; and others with *brigantine*, a long but low-built veſſel, ſwift in ſailing.

BRIGANTES. The antient 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. *Brigbote* and *Burgbote*.

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.* 3. *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.* 2. *c.* 31.—By the *Stat.* 22 *G.* 2. *c.* 20, the *Stat.* 11 & 12 *W.* 3, 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 *R.* 2. *c.* 2.

BROCELLA, This word, as interpreted by Dr. *Thoroton*, 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 & 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 *faccus* to carry dry, and *brochia* liquid things.

BRODEHALFPENY, or BROADHALFPENY. See *Bordhalfpeny.*

BROKERS, *broccatores*, *broccarii* & *auxionarii.*] Are thoſe that contrive, make and conclude bargains and contracts between merchants and tradeſmen, in matters of money and merchandize, for which they have a fee or reward. Theſe are *Exchange brokers*; and by the *Stat.* 10 *R.* 2. *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 perſons 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 title *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. *brær*, *briar. Paroch. Antiq.* 620.

BRUILLUS, a wood or grove; Fr. *breil*, *breuil*, a thicket or clump of trees in a park or foreſt. Hence the abby 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.* 1. *pag.* 773.

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.* 1. *c.* 18, makes all unwarrantable undertakings by unlawful ſubſcriptions ſubject to the penalties of a *præmunire.*—See title *Funds.*

BUCKLARIUM, A buckler. *Clauſ.* 26 *Ed.* 1. *m.* 8. *intus.*

BUCKSTALL, A toil to take deer, which by the *Stat.* 19 *Hen.* 7. *c.* 11, is not to be kept by any perſon that hath not a park of his own, under *penalties.* See alſo 3 *Jac.* 1. *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.* 2. *c.* 5.

BUCINUS, A military weapon for a footman. *Tenures, pag.* 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.* 3. *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 *H.* 8. *cap.* 6, inforced by 5 *Eliz.* 17.

By the articles of the navy, (*Art.* 29. *ſtat.* 22 *Geo.* 2. *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 & 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, felonioufly, and againſt the order

of nature, commited 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 licence from the mayor and aldermen, *&c.* for a *board* in the streets, which are not to be incumbered. *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.* 2. *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.* 3. *c.* 78. The regulations of this law being very minute and technical, we must refer the reader to the statute itself.—See title *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*, *&* Petri *a sinistris*. These decrees of the pope are often mentioned in our statutes, as 25 *Ed.* 3: 28 *H.* 8. *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 statute 28 *Hen.* 8. *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 and pigs, *&c.* 1 *Rol. 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 *Ed.* 3. *st.* 2. *c.* 2. See titles *Coin*, *Money*.

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 & cervisiæ*, *anno* 51 *Hen.* 3. 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 causâ*; *certiorari's*; attachments; *&c. scire facias's*; certificates of statute-staple; extents and liberates; *supersedeas's*; 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.* 8.

BURDARE, To jest or trifle. *Mat. Paris, Addit. p.* 149.

BURGAGE TENURE. See title *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, 3.

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 title *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 scite 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. H.* 8,) 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*.

BURG-BOTE, 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. *Burgh-bote*.

BURGESSES, *burgarii & 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

the *Stat.* 5 *R.* 2. *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 title *Parliament.* Burgeſſes of our towns are called, in *Domeſday,* the *homines* of the king, or of ſome other great man; but this only ſhews whoſe protection they were under, and is not any infringement of their *civil liberty. Squire Ang. Sax. Gov.* 260 *n. Burgenſes & homines burgorum & villarum, Madox Excheq.* 1 *V.* 333. The aid of burghs, *ib.* 1 *V.* 600, 601. See title *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, (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 compleat 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 *Hal. 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 *An. 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 *centerbit,* 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 burglary in a houſe. But it ſeems not neceſſary or proper in an indictment for burglary in a church, which by all the antient 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 *contra,* 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,

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 *H. H. P. C.* 557, 558.—But ſee *Stat.* 13 *Geo.* 3. *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 alledged 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 ſtatute 3 *W. & M. c.* 9; and if one break open a counter or cupboard, fixed to a houſe, it is burglary. 1 *Hale's Hiſt. P. C.* 554.

All out-buildings, as barns, ſtables, ware-houſes, *&c.* adjoining to a houſe, are looked upon as part thereof, and conſequently burglary may be committed in them. And if the ware-houſe, *&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, incloſing 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 incloſed, or booth, or tent, *&c.* but by *Stat.* 5 & 6 *E.* 6. *c.* 9, clergy is taken from this offence.

3. In the day-time there is no burglary.—As to what is reckoned night, and what day for this purpoſe, antiently 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. *Stran.* 481: *Kel.* 67.

A ſervant embezzled money intruſted 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 *H.* 8. *c.* 5, expreſsly permitted to repel the violence by the death of the aſſailants, without incurring the penalties even of excuſeable 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.* 3. *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 *An. c.* 31, and 6 *Geo.* 1. *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 title *Acceſſary*.

See likewiſe *Stats.* 25 *Geo.* 2. *c.* 36: 27 *Geo.* 2. *c.* 3, and 18 *Geo.* 3. *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.* 3. *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.* 3. *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 vagabond, within *Stat.* 17 *Geo.* 2. *c.* 5.

For further matter, See titles *Clergy, Felony, Larceny.*

BURI, Huſbandmen. *Mon. Angl. tom.* 3. *p.* 183.

BURIALS,

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.* 2. *c.* 3.

BURNETA, Cloth made of dyed wool. A *burnet* colour muſt be dyed; but *brunus color* 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 title *Arſon.*—To the malicious burnings mentioned under title *Arſon*, may be added, that by *Stat.* 6 *Geo.* 1. *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.* 2. *c.* 11; and 1 *An. ſt.* 2. *c.* 9, to burn any *ſhip* to the prejudice of the owners or freighters; and by *Stat.* 4 *Geo.* 1. *c.* 12, to the prejudice of the underwriters, is made felony without clergy.—By *Stat.* 12 *Geo.* 3. *c.* 24, to burn the king's ſhips of war, or any of the arſenals or ſtores, &c. therein, is alſo made felony without clergy.—By *Stat.* 27 *Geo.* 2. *c.* 15, *threatning* 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 title *Fire.* See further titles *Felons*, *Navy*, *Ships*, *Inſurance.*

BURNING TO DEATH, See titles *Felony*, *Treaſon.*

BURROCHIUM, A burrock, or ſmall wear over a river, where wheels are laid for the taking of fiſh. *Cowel.*

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 *burſers. Paroch. 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 title *Headborough.*

BUSONES COMITATUS: *Bract. lib.* 3. *tract.* 2. *cap.* 1. *Blount* ſays *buſones* is uſed for *barones.*

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.* 8. *c.* 11. See title *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 *Ed.* 3. *c.* 6.—By *Stat.* 2 & 3 *E.* 6. *c.* 15. (revived, continued and confirmed by *Stat.* 22 & 23 *Car.* 2. *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 title *Conſpiracy.*—By *Stat.* 4 *H.* 7. *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 *C.* 1. *c.* 1, butchers are not to ſell or kill meat on *Sunday.*—By *Stats.* 1 *Jac.* 1. *c.* 22: and 9 *An. c.* 11, regulations are made as to the watering and gaſhing hides; and the ſelling putrified and rotten hides by butchers; and by the ſaid *Stat.* 1 *Jac.* no butcher ſhall be a tanner, or currier.

See further titles *Cattle*; *Foreſtalling*; *Victuals.*

BUTLER, See *Botiler.*

BUTT, *butticum.*] A meaſure of wine, &c. well known among merchants, and containing 126 gallons of *Malmſey* wine, by *Stat.* 1 *R.* 3. *c.* 13.

BUTTER AND CHEESE.—By *Stat.* 9 *H.* 6. *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.* 2. *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.* 1. *c.* 27: and 17 *Geo.* 2. *c.* 8, regulate the ſale of butter; the former in the city of *York*, the latter at *New Malton.*—See titles *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 *C.* 2. *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.* 3. *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.* 3. 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 *An. 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.* 1. *c.* 7, is ſaid in *Burn's Juſtice*, (title *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

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.* 1. *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 title *Taylors.*

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 title *Abbuttals.*

BUTLERAGE OF WINES, See title *Customs.*

BUTHSCARLE, *butsecarl, bujcarles, (buscarli & buthsecarli.)* Mariners or seamen. *Selden's Mare Clausum, fol.* 184.

BUZONIS, The shaft of an arrow, before it is fledged or feathered. St. *Ed.* 1.

BYE, 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 of 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 stiled *birlaw-men.* And *birlaws*, according to *Skene*, are *leges rusticorum*, laws made by husbandmen, or townships, concerning neighbourhood amongst them. *Skene, pag.* 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 title *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 alledged 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 *Ro. Ab.* 366. *l.* 35: *Mo.* 75: *Hob.* 212.—So may the homage. 1 *Ro. Ab*: *Dy.* 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 *H.* 7. *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.* title *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 impower 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 *Ro. Ab.* 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.* title *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.*

CABLISH, *cablicium.*] Signifies bruſhwood, 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.* 3. *c.* 56.

CACHEPOLUS or CACHERELLUS, An inferior bailiff, a catchpole. See *Conſuetud. domûs de Farendon MS. fol.* 23: and *Thorn.*

CADE, Of herrings is 500, of ſprats 1000. 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 voluntier in the army, waiting for ſome poſt.

CAEP GILDUM, See *Ceapgilde.*

CAGIA, A cage or coop for birds. *Rot. Clauſ.* 38 *H.* 3.

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 chalk-ſtones, 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.* 2. *c.* 23, for the eſtabliſhment of the new ſtile, and *Stat.* 25 *Geo.* 2. *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 titles *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.* 2. *c.* 7. See title *Time.*

CALENDAR OF PRISONERS, A liſt of all the priſoners' names, in the cuſtody of each reſpective ſheriff. Where priſoners are capitally convicted at the aſſizes, 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, with 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, 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 it 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.*

CALLICO, No perſon ſhall wear in apparel any printed or dyed callico, on pain of forfeiting 5 *l.* And drapers ſelling any ſuch callico, ſhall forfeit 20 *l.* But this doth not extend to callicoes dyed all blue; *Stat.* 7 *Geo.* 1. *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.* 2. *c.* 4.—By *Stat.* 14 *Geo.* 3. *c.* 72, ſtuffs wholly made of raw cotton wool within this kingdom, are not to be conſidered as callicoes, and every perſon may uſe the ſame. Theſe are diſtinguiſhed by three blue ſtripes in the ſelvedge. See title *Linen*, and *Burn J.* title *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 *non-ſuited*, or withdraw himſelf: whereupon the crier is ordered to *call the plaintiff*; when neither he nor any for him appears. See titles *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.* 2. *c.* 36: 21 *Geo.* 2. *c.* 26;) but now by *Stats.* 27 *Geo.* 3. *c.* 13. § 23: 27 *Geo.* 3. *c.* 32. § 19, Cambricks, or *French* lawns, legally imported, may be worn, or ſold, and no perſon ſhall be proſecuted for having the ſame in his poſſeſſion.—By *Stats.* 4 *Geo.* 3. *c.* 37; and 7 *Geo.* 3. *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 titles *Linen*, *Navigation Acts.*

CAMERA, From the old Germ. *Cam. Cammer*, crooked; whence comes our Engliſh *kembo*, arms in kembo. 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. *p.* 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. *p.* 637.

CAMPARTUM, Any part or portion of a larger field or ground; which would otherwiſe be in groſs or common. *Prinne Hiſtor. Collect. vol.* 3. *p.* 89.

CAMPERTUM, A corn-field. *Pet. in Parl.* 30 *Ed.* 1.

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.* 3. *ſt.* 2. *c.* 41, to take out annual licenſes. And by *Stat.* 25 *Geo.* 3. *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.* 3. *c.* 13. (½*d. per lb.* of which was repealed by *Stat.* 32 *Geo.* 3. *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 *An. 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 *An. c.* 9: 11 *Geo.* 1. *cap.* 30: *Vide Stat.* 23 *Geo.* 2. *c.* 21.

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 muſick, 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 knight's 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.*

CANNA, 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 Pope 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 alledged 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* the 22d, 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 catholick faith, which is followed with conſtitutions and cuſtoms, judgments and determinations in ſuch matters and cauſes as are liable to eccleſiaſtical cognizance, 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.*

Trial 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.* 8. *c.* 19,

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.* 1. *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 *H.* 8. See 2 *Black. Rep.* 968.

There are four ſpecies of courts in which the canon laws, (and the *civil laws* alſo, See title *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 degrees 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. title *Courts*.—The following particulars relate to them all, and to this ſubject, in general.

1. The courts of common law, have the *ſuperintendancy* 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 titles *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 controul them. See title *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 *H.* 8. *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, *& leges ſub graviore 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 inſtitution 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 *tret*, a town or village.] In *Wales* an hundred villages: for the *Welſh* divide their counties into *cantreds*, as the *Engliſh* do into hundreds. This word is uſed *Stat.* 28 *H.* 8. *c.* 3.—See *Mon. Angl. part.* 1. *fol.* 319, where it is written *Kantrep.*

CAPACITY, *capacitas.*] An ability, or fitneſs to receive: and in law it is where a man, or body politick, 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 politick: 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 title *Alien*. Perſons attainted of treaſon or felony, ideots, lunaticks, 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. Lit.* 171, 172.—See titles *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 for 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 after 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 title *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*, an helmet or iron head-piece. *Hoveden, p.* 61. *Capellus militis* is likewiſe an helmet or military head-piece. *Conſuetud. Domûs 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 titles *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 *Stats. Marlb.* 52 *H.* 3. *c.* 23; *Weſtm.* 2. 13 *E.* 1. *c.* 11.—In actions of *debt* and *detinue* by *Stat.* 25 *E.* 3. *c.* 17.—And in all actions *on the caſe* by *Stat.* 19 *H.* 7. *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 arreſted 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 expence, 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 titles *Common Pleas, Actions, 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 under-ſheriff, 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 expence, 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 *aliàs* 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*, [*or often*] commanded you, *ſicut aliàs*, or *pluries præcipimus*. See further title *Outlawry.*—On the ſubject alſo of proceſs in *C. P.* See this Dict. title *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

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 *E.* 3. *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 *H. 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 title *Outlawry*.

Capias ad Satisfaciendum, (Shortly termed a Ca. Sa.) A judicial writ 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.* 1. *c.* 24. See *Rol. 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 hath 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 fac.* againſt him, and on that what execution he will. *Rol.* 904. And if the defendant reſcue himſelf, the plaintiff ſhall haye 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 title *Capias*.

For further matter, ſee titles *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. Br.* 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 title *Judgment*. See alſo title *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 titles *Diſtreſs*; *Withernam*.

CAPIATUR. See title *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 title *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 title *Deſcent*.

CAPITALE, A thing which is ſtolen, or the value of it. *Leg. H.* 1. *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

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 ſtiled *capitalis dominus*, &c. But tenure in *capite* is now aboliſhed; and by *Stat.* 12 *Car.* 2. *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 title *Tenures.*

CAPITILITIUM, Poll-money. *Dict.*

CAPITITIUM, A covering for the head. It is mentioned in the *Stat.* 1 *Hen.* 4, 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 end 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 ſhews 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 kind 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 title *Indictment.*

CAPTIVES. An act was made for relief of *captives*, taken by *Turkiſh, Mooriſh*, and other pirates, and to prevent taking of others in time to come. *Stat.* 16 & 17 *Car.* 2. *c.* 24. See title *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 title *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 title *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 *Hal. P. C.* 497: Vide *Bracton. fo.* 125.—See title *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 *R.* 2.

CARDS AND DICE. A duty of *two ſhillings* (four ſix-pences) is impoſed on all playing cards; and a duty of fifteen ſhillings (two 5 *s.* and two 2 *s.* 6 *d.*) by *Stat.* 9 *Anne c.* 23: 29 *Geo.* 2. *c.* 13: 16 *Geo.* 3. *c.* 34: and 29 *Geo.* 3. *c.* 30.—Theſe duties are under the control of the Stamp Commiſſioners.

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.* 2. *c.* 13. § 10; and of 5 *l. per* pack by *Stat.* 16 *Geo.* 3. *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 publick gaming houſe, a penalty of 5 *l.* attaches on the *ſeller.* 10 *Ann. c.* 19. § 162.—See alſo *Stat.* 5 *Geo.* 3. *c.* 46. § 9—17.

CARECTA AND CARECTATA. A cart and cart-load. *Mon. Angl. tom.* 2. *f.* 340.

CARETARIUS, OR CARECTARIUS, A carter. *Blount.* See *Carreta.*

CARISTIA, Dearth, ſcarcity, dearneſs. *Pat.* 8 *Ed.* 1.

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. f.* 29: See *Cowell.*—It is ſometimes written *Karite.*

CARK, A quantity of wool, whereof thirty make a ſarpler. *Stat.* 27 *H.* 6. *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. Juriſd. fol.* 191.

CARPEMEALS, Cloth made in the Northern parts of *England*, of a coarſe kind; mentioned in 7 *Jac.* 1. *cap.* 16.

CARR,

CARR, Is a kind of cart with wheels. Vide *Carruca.*

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. *Davies 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 *R.* 2. *c.* 4. They were not only uſed in trade, but alſo in war. See *Walſingh. in Hen.* 5. *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 *London*,) 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 title *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 intruſted 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 *Rol. 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.* 526.

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 title *Bailment.*

Where a carrier entruſted with goods, opens the pack, and takes away and diſpoſes of part of the goods, this, ſhewing an intent of ſtealing them, will make him guilty of felony. *H. 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, refuſes to carry goods, he is liable to an action in the ſame manner as an inn-keeper 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.* 1. *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.* 2. *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.* 2. *c.* 8. *ſect.* 9, Commiſſioners for regulating the navigation of the river *Thames* are to rate the price of water carriage.

By *Stat.* 30 *Geo.* 2. *c.* 22. *ſect.* 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 titles *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

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 hoy-man 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 over-board any trunks or packages of value, he is not liable for the loſs. 1 *Rol. 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.

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 *Ro. Ab.* 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 pretence of preſſing, and plundered her of the goods, it was adjudged the maſter (the ſhip being *infra corpus comitatûs*) 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.* 3; 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. *Lovett* 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.* 2. *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, *&c.* ſee now poſt *Stat.* 26 *Geo.* 3. or other] *goods* ſhiped 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.* 3. *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. *ſt.* 26 *Geo.* 3. *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. *ſt.* 26 *Geo.* 3. *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.* 2. *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.

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 riſque: 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

ceived 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: 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 hand-bills, 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 *Wilf.* 429: 2 *Bl. Rep.* 916.

As to the *proof* necessary in an action against a carrier, See title *Bailment* 5.—That a carrier may retain goods for his hire, See 1 *Ld. Raym.* 166, 752.

CART-BOTE. See title *Bote*.

CARTS, By the *Stat.* 2 *W. & M. Stat.* 2. *c.* 8. *sect.* 19, 20; & 18 *Geo.* 2. *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 felly, not to be shod with iron, nor be drawn with above two horses, under the penalty of 40*s.*—By the *Stat.* 18 *Geo.* 2. *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 *G.* 1. *st.* 2. *c.* 57: 24 *G.* 2. *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.* 2. *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.* 2. *c.* 22. *sect.* 2, and to be entered with the commissioners of hackney-coaches. And see *Stat.* 24 *Geo.* 3. *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 *charl* and *car*, a plowman or rustick. Vide *Karle*.

CARUCAGE, *carucagium*.] A tribute imposed on every plough, for the public [illegible] was a taxation [illegible] [illegible]es, so *carucage* was by carucates of land. *Mon. Angl. tom.* 1. *f.* 294.

CARUCATE, or CARVE OF LAND, *carucata terræ*.] A plough-land; which in a deed of *Thomas de Arden*, 19 *Edw.* 2, 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 statute 7 & 8 *W.* 3. *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*, *page* 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 *Ed.* 1, 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 plow. *Spelm.* v. *Carua*. *Kennet's Gloss*: 1 *Inst.* 69. and *n*.

CARUCATARIUS, He that held lands in *carvage*, or plough-tenure. *Paroch. Antiq. p.* 354.

CASE Action on; See title *Action*, and also *Com. Dig.* 1 *V.* tit. *Action*.

CASSATUM AND CASSATA, By the *Saxons* called *hide*; by *Bede*, *familia*, is a house with land sufficient to maintain one family; *Rex Ang. Ethelred*, *de* 310 Cassatis, *unum trierem*, &c. Hoveden anno 1008. And *Hen. Huntingdon*, mentioning the same thing, instead of *cassata* writes *hilda*.

CASHLITE, *Saxon*. 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 *H.* 2. 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 *Ed.* 1. *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. *f.* 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 burden was ſometimes granted. As king *Hen.* II. granted to the tenants within the honour of *Wallingford.*—*Ut ſint quieti de* operationibus caſtellorum. *Paroch. Antiq. page* 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 *cucking-ſtool*, 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 *ſcealſing ſtole.* It was anciently alſo a puniſhment inflicted on *brewers* and *bakers* tranſgreſſing the laws, who were ducked *in ſtercore*, in ſtinking water.

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.* 8. *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.* 2. *c.* 24. *ſect.* 2, theſe and other rents in the Dutchy 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 title *Maihem.*

CASUAL EJECTOR, In ejectment, a nominal defendant, and who continues ſuch until appearance by or for the tenant in poſſeſſion. See title *Ejectment.*

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 *E.* 1.) *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, authoriſes them to frame a new form anſwerable to the new caſe, and as *like* the former as they may. 7 *Rep.* 4: See *Fitz. Nat. Br. fo.* 206: *Termes de la ley.* See 3 *Comm.* 51.

CASU PROVISO, A *writ* of *entry*, given by the ſtatute 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. Fitz. N. B.* 205. This writ, and the writ of *caſu conſimili*, ſuppoſes the tenant to have aliened 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. Br.* 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. Br.* 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 pre-occupation 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.* Sheriff's 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 title *Church.*

CATHEDRATICK,

CATHEDRATICK, *cathedraticum.*] A ſum of 2 *s.* paid to the biſhop by the inferior clergy, *in argumentum ſubjectionis & ob honorem* cathedræ. *Hiſt. procurat. & Synodals, p.* 82.

CATZURUS, A hunting horſe. *Tenures, page* 68. Vide *Chacurus.*

CATTLE. Several ancient laws were made to regulate the number of ſheep to be kept by any farmer. See title *Sheep.*

As to the *importation of cattle.*—By *Stat.* 5 *Geo.* 3. *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.* 3. *c.* 10, which was of temporary continuance, but made perpetual by *Stat.* 16 *G.* 3. *c.* 8, all ſorts of cattle may be imported from *Ireland* duty free.—And this notwithſtanding *Stat.* 18 *C.* 2. *c.* 2: 20 *C.* 2. *c.* 7: and 32 *C.* 2. *c.* 2.

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 *E.* 6. *c.* 19: 3 *C.* 1. *c.* 49. 7, 8.—And the ſaid act 3 & 4 *Ed.* 6. *c.* 19, is not repealed by *Stat.* 12 *Geo.* 3. *c.* 71, which repeals the general foreſtalling act of 5 & 6 *E.* 6. *c.* 14, and other ſubſequent acts enforcing the ſame, but hath no reference to any preceding act.—By *Stat.* 31 *Geo.* 2. *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.* 3. *c.* 39, he may prohibit the importation of hides, ſkins, horns, *&c.*

By *Stat.* 3 *Car.* 1. *cap.* 1, No *drovers* are to travel with cattle on *Sundays*, on penalty of 20 *s.*

By *Stat.* 21 *Geo.* 3. *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 *H.* 8. *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.* 2. *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.* 2. *c.* 6, and 15 *Geo.* 2. *c.* 34, felonioufly 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 title) 9 *Geo.* 3. *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.

To prevent the ſtealing of horſes and other cattle for the purpoſe of ſelling them, merely for their ſkin, the *Stat.* 26 *Geo.* 3. *c.* 71, provides that every perſon keeping a ſlaughter-houſe for cattle, not killed for butchers' meat, ſhall take out licences and be ſubject to an inſpector—and ſhall not ſlaughter, but at certain times, *&c. &c.*

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 court* 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. 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 ſorts of caveats. 1 *Rol. Rep.* 191: 1 *Nelſ. Abr.* 416, 417.

CAVERS, Offenders relating to the mines in *Derbyſhire*, who are puniſhable in the *berghmote*, or miners' court.

CAULCEIS, See *Stat.* 6 *H.* 6. *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 *Hen.* 3, 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 infeoff 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. Br.* 456. A woman infeoffed 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 *Ed.* 3. 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. Br.* 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 to do it, requiring him to *shew 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 pignorat. 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. Br.* 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.* 3. *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. C. V.* 1 *V.* 271, 2: *Potgiesserus de Statu Servorum, lib.* 1. *cap.* 1. *sect.* 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 11 *d. per* poll, and 1 *d. per ann.* ever after: and these thus sworn are called *censers. Survey of the Dutchy of Cornwall.*

CENTENARII, Petty judges, under-sheriffs of counties, that had rule of an *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: 'tis otherwise if a deed become void by incertainty, 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 title *Pleading*—and particularly titles *Deed*; *Fine*; *Will.*

CERTIFICANDO DE RECOGNITIONE STAPULÆ. 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, assize and peace, are to make certificates into *B. R.* of the tenor of indictments, convictions, &c. under penalties, by the *Stat.* 34 & 35 *Hen.* 8. *c.* 14: 3 *W. & M. c.* 9. See tit. *Clergy, benefit of.*

If

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 alledged 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 *Ro. Ab.* 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 alledging 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. Ab.* 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 cognizance* 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 *Ro. Ab.* 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 titles *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 *Ro. Ab.* 563, *&c.* But *induction* ſhall be tried by a jury; being the corporal inveſtiture of the temporal profits. *Dy.* 229. Reſignation of a benefice may be tried either way, but ſeems moſt properly to fall within the biſhop's cognizance. 2 *Ro. Ab* 583: 3 *Comm.* 336.

6. The trial of all cuſtoms and practice 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 Dict.

CERTIFICATE OR CERTIFICATION OF ASSISE, *certificatio aſſiſæ novæ diſſeiſinæ*, *&c.*] A writ anciently granted for the re-examining or re-trial 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 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 cur 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 *H. 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

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 recognizance 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.

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 alledged: 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.* 1. *cap.* 23: See *Stat.* 12 *Geo.* 1. *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. *Certiorari*'s to remove indictments, *&c.* are to be ſigned by a judge: and to remove orders, the *fiat* for making out the writm uſt 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 compleat liſt of theſe, if needed, the ſtudent ſhould conſult the index to the ſtatutes.—The following ſeem to have deſerved a ſhort mention in this place.

By *Stats.* 12 *Car.* 2. *cc.* 23, 24. no certiorari ſhall be allowed in certain caſes of tranſgreſſion of the *Exciſe-Laws.*

By *Stat.* 13 *Geo.* 3. *c.* 78, (which ſee at large title *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.* 3. *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 *An. ſeſſ.* 2. *c.* 14, concerning game. 2 *Hawk. P. C. c.* 27. § 60, 61.

Alſo by *Stat.* 1 *An. c.* 18. concerning the repair of *bridges, no certiorari* ſhall be allowed.—Nor by *Stat.* 8 *Geo.* 2. *c.* 20. for puniſhing deſtroyers of *turnpikes.*—Nor by *ſt.* 12 *Geo.* 2. *c.* 29, for aſſeſſing *county rates.*—Nor on *ſt.* 19 *Geo.* 2. *c.* 21, againſt curſing and *ſwearing.*—Nor on *ſt.* 23 *Geo.* 2. *c.* 13, againſt *ſeducing artificers.*—Nor on *ſt.* 25 *Geo.* 2. *c.* 36, againſt *bawdy-houſes.*—Nor on 29 *Geo.* 2. *c.* 40, againſt *ſtealing lead, iron, &c.*—Nor on 30 *Geo.* 2. *c.* 21, for preſerving *fiſh* in the *Thames.*—Nor on 30 *Geo.* 2. *c.* 24, for reſtraining *gaming* in public houſes.—Nor on 31 *Geo.* 2. *c.* 29, for regulating *bread.*—Nor on

2 *Geo.* 3. *c.* 30, for preventing thefts in bumb-boats.—Nor on 10 *Geo.* 3. *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 *recognizance*, 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 *W.* 3. *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 indorſed on the writ. See title *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.* 2. *c.* 19.

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.* 2. *c.* 18. See *Stra.* 991.

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 *Lil.* 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 ſtile of their court, and power to hold plea, and before whom, ought to be ſhewn 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 *H. H. 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 a certiorari may be thus.—Firſt, on the back of the writ indorſe 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 potûs*, 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 incloſure. *Cart. priorat. de Thelesford 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 *Ed.* 4. 11. See title *Execution*, &c.

CESSAVIT, A writ which lies (by the *Stats.* of *Glouceſter*, 6 *E.* 1. *c.* 4: and *Weſtm.* 2. 13 *E.* 1. *cc.* 21, 41.) when a man who holds lands 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 premiſſes, 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 preſers 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.* 2. *c.* 28, and 11 *Geo.* 2. *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 premiſſes. See title *Ejectment*. And the ſame remedy is in ſubſtance adopted by the *Stat.* 11 *Geo.* 2. *c.* 16, which enacts, that where any tenant at rack-rent ſhall be one year's rent in arrear, and ſhall deſert the demiſed premiſſes, leaving the ſame uncultivated or unoccupied, ſo that no ſufficient diſtreſs can be had, two juſtices of the peace, (after notice affixed on the premiſſes for fourteen days) may give the landlord poſſeſſion thereof; and the leaſe ſhall be void. See title *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. Br.* 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.* 8. *cap.* 3. *Ceſſe* or *ceaſſe*, 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 title *Commendam*, *Advowſon* II.

No perſon is entitled to diſpenſation, but *chaplains* of the king and others mentioned in the *Stat.* 21 *H.* 8. *c.* 13; the

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 title *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 title *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. Br.* 136.—See title *Ceſſavit.*

CESSURE, or *ceſſer*; *ceaſing*, giving over; or departing from. *Stat. Weſtm.* 2. *c.* 1. See title *Ceſſavit.*

CESTUI 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.* 2. *c.* 3, lands of *ceſtui que truſt* may be delivered in execution. See title *Truſts, Uſes.*

CESTUI 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.* 8. *c.* 10: *Cro. Eliz.* 46. See tit. *Uſe.*

CESTUI QUE VIE, He for whoſe life any lands or tenements are granted. *Perk.* 97. See title *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 *Ed.* 4. *c.* 4.

CHAINS, *Hanging* in. See title *Murder.*

CHAIRS, See *Coaches.*

CHALDRON or CHALDER of coals. See title *Coals.*

CHALKING, The merchants of the ſtaple require to be eaſed of divers new impoſitions, as *chalking*, ironage, wharfage, &c. *Rot. Parl.* 50 *Ed.* 3.

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 titles *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, 8.

Challenge to jurors is alſo divided into *challenge principal* or *peremptory*; and *challenge pur cauſe*, *i. e.* upon cauſe or reaſon alledged: *challenge* principal or peremptory, is that which the law allows without cauſe alledged, or further examination; as a priſoner at the bar, arraigned for felony, may *challenge* peremptorily the number allowed him by law, one after another, alledging 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 alledged; 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 ſheweth 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 *Rol. 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 *An. c.* 14. § 8; (See title *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 title *Murder.*

CHAMBERDEKINS, or *Chamber-deacons*, were certain poor *Iriſh* ſcholars, cloathed in mean habit, and living under no rule; or rather beggars baniſhed *England* by *Stat.* 1 *Hen.* 5. *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 parliament, 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, *8vo. 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, muſick, *&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 councillors.

There were formerly chamberlains of the king's courts. 7 *Ed.* 6. *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 *H.* 8. *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 title *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 title *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 DEPINCT, Anciently *St. Edward's chamber*, now called the *painted chamber.*

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 expence. 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 *Ed.* 1. *cap.* 25: *Weſtm.* 2. 13 *Ed.* 1. *c.* 49: 28 *Ed.* 1. *St.* 3. *c.* 11. and 33 *Ed.* 1. *Stat.* 3, *&c.* and a form of a writ framed to them; yet *Stat.* 4 *Ed.* 3. *c.* 11. and 32 *Hen.* 8. *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 *Ed.* 1. *Stat.* 3, makes the offenders liable to three years' impriſonment, and a fine at the king's pleaſure. By the *Stat.* 28 *Ed.* 1. *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 *Rol. 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 alledged 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 *Rol. 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 *E.* 1. *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,

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 *H.* 8. *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 title *Maintenance*.

CHAMPERTORS, By ſtatute, are 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 *Ed.* 1. *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 Ferneberg*, for thirty marks fee, did by charter covenant to be *champion* to *Roger* abbot of *Glaſtenbury*. *An.* 42 *Hen.* 3. 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 title *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 & 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* 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 co-operate with the deed; which therefore wants one main ingredient of a crime. Of this as it affects the life of another, See title *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 *Hal. P. C.* 39. See title *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 incloſed 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 & 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 & 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 intitled their ſuits to the chancellor, and not the king: and thus the chancellor's equitable power had by degrees commencement by preſcription. *Hiſt. Chan. p.* 3. 10, 44, *&c.*

Staundford 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 title *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 ſhewn 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 ſtiled 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 *Hen.* 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 councillor by his office; and, according to Lord Chancellor *Elleſmere*, prolocutor of the Houſe of Lords by preſcription.—To him belongs the appointment of all Juſtices of peace throughout the kingdom. Being formerly uſually an Eccleſiaſtic (for none elſe were then capable of an office ſo converſant in 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 *Ed.* 3. 3: *F. N. B.* 35. though *Hob.* 214. extends this value to *twenty pounds*)—He is the general guardian of all infants, ideots and lunatics; and has the general ſuperintendance 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 *E.* 3. *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 title *Treaſon*.

The Lord Chancellor, now there is no Lord High Steward, is accounted the firſt officer of 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.

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.

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.*

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 ſix 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

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.* 1. *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 offices, there is a clerk of the crown in Chancery; clerk and controller of the hanaper; clerk for inrolling 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, licences, &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 others officers, who are conſtituted by the chancellor's commiſſion.—See poſt title *Chancery*.

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 *H.* 8. *c.* 17.

CHANCELLOR OF THE DUTCHY OF LANCASTER.—An officer before whom, or his deputy the court of the *Dutchy 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 *Dutchy 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 *Ventr.* 257.—This Dutchy comprizes 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 Dutchy Court, and may take cognizance of the ſame cauſes. 1 *C. R.* 55: *Toth.* 145: *Hard.* 171.

This court is held in *Weſtminſter-Hall*, and was formerly much uſed. Under the chancellor of the Dutchy are an attorney of the court, one chief clerk or regiſter, and ſeveral auditors, &c.—See further title *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 hath by the *Stat.* 33 *H.* 8. *c.* 39, power, with others, to compound for the forfeitures upon penal ſtatutes, bonds and recognizances 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, pag. 706.—*Chancellor of the Univerſities*. See title *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 & conſignare, libros ſervare, quotieſcunq; voluerit prædicare, prædicationes in eccleſia vel extra eccleſiam prædicare, & 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 *H.* 8. *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, 7: *Foſter* 275, 6.—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 title *Murder*.—In *chance-medley* the offender forfeits his goods, but hath a pardon of courſe. See *Stat.* 6 *Ed.* 1. *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 leters 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,

cauſes. All original writs, commiſſions of bankrupt, of charitable uſes, and other commiſſions, as ideots, 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 alledged 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 reverſable 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 *C. 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.

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 ſhew the leading principles of its deciſions—They who deſire further and more preciſe information, will conſult VINER'S and the other Abridgment 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 title *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 ſuppreſt, 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 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 title *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 title *Mortgage.*

Copyhold tenants may be relieved againſt the lords of manors—incloſures 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 into writing, though not ſigned by either party, being proved to be agreed to, were decreed to be performed. 2 *Vern.* 200.

Alſo

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 out-living their fathers, and the ſecurities are frequently decreed to be delivered up, on payment of the ſum actually advanced. 2 *Chan. Rep.* 397: 1 *Vern.* 467.

A purchaſer of land, without notice of an incumbrance, ſhall not be hurt thereby in equity; and in pleading a purchaſe the defendant ought to deny notice of incumbrances, &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 under-value, 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 titles *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 *Rol. 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. *Miſford's Treatiſe.*

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 it's prerogative, or whoſe rights are under its particular protection, as the objects of a publick 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 ſtat. 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 controul 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*.

miſſive, and if he does not put in his anſwer, a *ſubpœna* iſſues, and then an order to ſhew 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*.]

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 ſhews 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 alledged 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 favourable to 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 ſhew 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

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 *over-ruled* upon argument, the defendant muſt make a new defence. This he cannot do by a ſecond demurrer of the ſame extent with that over-ruled; for although, by a ſtanding order of the court, a cauſe of demurrer muſt be ſet forth in the pleading, yet if that is over-ruled, 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 over-ruled, new defence may be made by a demurrer leſs extended, or by plea or anſwer.—And after a plea has been over-ruled, 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 *Com.* 448, &c.] 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 defects in his anſwer, and to which the plaintiff might *ſur-rejoin*, 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 title *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 coſts to be taxed by a Maſter. *Stat.* 4 & 5 *An.* *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. Ab.* 749, and *Chan. Rep.* 193, *Howard* v. *Suffolk*.

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 or 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 *Ed.* 1. *c.* 5, the court of Chancery is to follow the king. By *Stat.* 18 *Ed.* 3. *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 *Ed.* 3. *c.* 9: 31 *Ed.* 3. *ſtat.* 1. *c.* 12. And ſee 15 *R.* 2. *c.* 12: 17 *R.* 2. *c.* 6: & 4 *H.* 8. *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 *An. 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 *An. 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 *An. c.* 9. And ſee the ſtatute of 4 *Geo.* 2. *c.* 10. whereby ideots and lunaticks ſeiſed of eſtates in truſt, &c. may make conveyances by order of the Chancery, &c. See titles *Infant*, *Lunatic*.

By 12 *Geo.* 1. *c.* 32 *and* 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 inrolled till ſigned by the lord chancellor, and ſubject to reverſal, &c. by him. *Stat.* 3 *Geo.* 2. *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.* 2. *c.* 25.

By 12 *Geo.* 2. *c.* 24, Part of the ſuitors' caſh is to be placed out at intereſt, for defraying the charge of the *Accountant General's* office. And ſee 23 *Geo.* 2. *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.* 3. *c.* 1, The king is empowered to grant a ſum not exceeding 5000*l. per annum* to the chancellor.

By 4 *Geo.* 3. *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.* 3. *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.

By 9 *Geo.* 3. *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 4th clerk, in lieu of all fees. The reſidue being brought to account.

By 14 *Geo.* 3. *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.* 2. *c.* 24; 5 *Geo.* 3. *c.* 28; and 9 *Geo.* 3. *c.* 19, the Chancellor is by his order to direct the re-building of the Six Clerks' office, and apply 10,000*l.* (and by 20 *Geo.* 3. *c.* 33, 3000*l.* more) for building the Regiſter's and Accountant-General's offices; to be veſted in the Accountant-General and his ſucceſſors.

By 15 *Geo.* 3. *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 Regiſter's and Accountant-General's office.

By 15 *Geo.* 3. *c.* 56, the Lord Chancellor may apply certain ſums to be raiſed, as mentioned in 14 *Geo.* 3, 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.* 3. *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.* 3. *c.* 42, 300,000*l.* further is to be employed in building offices for the Maſters in Chancery, &c.

For other parts of this ſubject. See titles *Injunction*, *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.* 6. *cap.* 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. Britan.*

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,

nors, and such others as they appointed. See *Stat.* 1 *E.* 6. *c.* 14, which in effect put an end to 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 *Rol. Abr.* 340.

These chapels are served by inferior curates, provided at the charge of the rector, &c. And the curates are therefore removable 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 *Rol. 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 'fore-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.* 8. *cap.* 4: 1 *Ed.* 6. *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 title *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 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 enquired 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 enquire 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 *Dutchess*, *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 licence or dispensation, and take two benefices with cure of souls. *Stat.* 21 *Hen.* 8. *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 title *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.*

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* title *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.* 8. *cap.* 16.

And the *Groom* of the *ſtole*, *Treaſurer* of the *king's chamber*, and *Chancellor* of the *dutchy* of *Lancaſter*, may retain each *one* chaplain. *Stat.* 33 *Hen.* 8. *cap.* 28. But the chaplains under theſe two laſt ſtatutes, are not entitled to *diſpenſations* under *Stat.* 21 *Hen.* 8. 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 *H.* 8. *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 one under the degree of nobility, her power to retain chaplains will be determined; though it is otherwiſe where a *woman* is *noble* by *deſcent*, if ſhe marry under degree of nobility, for in ſuch caſe her retainer before or after marriage is good. A *Baroneſs*, &c. during the coverture, may not retain chaplains; if ſhe doth, the lord, her huſband, may diſcharge them, as likewiſe her former chaplains, before their advancement. 4 *Rep.* 118.

A Chaplain muſt be retained by letters teſtimonial under hand and ſeal, or he is not a chaplain within the ſtatute; ſo that it is not enough for a ſpiritual perſon to be retained by word only to be a chaplain, by ſuch perſon as may qualify by the ſtatutes to hold livings, &c. al, though he abide and ſerve as chaplain in the family. And where a nobleman hath retained and thus qualified his number of chaplains, if he diſmiſſes them from their attendance upon any diſpleaſure, after they are preferred, yet they are his chaplains at large, and may hold their livings during their lives; and ſuch nobleman, though he may retain other chaplains in his family, merely as chaplains, he cannot qualify any others to hold pluralities while the firſt are living: for if a nobleman could diſcharge his chaplain when advanced, to qualify another in his place, and qualify other chaplains, during the lives of chaplains diſcharged, by theſe means he might advance as many chaplains as he would, whereby the ſtatutes would be evaded. 4 *Rep.* 90.—See further tit. *Advowſon*, *Parſon*.

CHAPTER, *capitulum*.] A congregation of clergymen *under* the *Dean* in a cathedral church: *congregatio clericorum in eccleſia cathedrali, conventuali, regulari, vel collegiata*. This collegiate company is metaphorically termed *capitulum*, ſignifying a little head, it being a kind of head, not only to govern the dioceſe in the vacation of the biſhoprick, but alſo in many things to adviſe and aſſiſt the biſhop when the ſee is full, for which, with the Dean, they form a council. *Co. Lit.* 103. The chapter conſiſts of *prebendaries* or *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 archbiſhoprick, they are guardians of the ſpiritualties, and as ſuch have authority by the *Stat.* 25 *Hen.* 8. *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 *H.* 8. *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 *Rol. Rep.* 454: 3 *Co.* 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;

vided; as the *biſhop* hath his part in right of his *biſhoprick*; 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 *Rol. 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. *Rol. ibid.*—They are now ſometimes appointed by the king, ſometimes by the biſhop, and ſometimes elected by each other. 1 *Comm.* 383. See further title *Dean*.

CHARGE of Juſtices in Seſſions, &c. See title *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 intailed 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 *jointenant* 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 *diſcent*. *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 *E.* 4. 20. But when the eſtate is gone upon which the charge was grounded, there, generally, the charge is determined. *Co. Lit.* 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 titles *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.* 2 the chief officers of this corporation, by connivance of the principal director, 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.* 2. *cc.* 31, 32: 7 *Geo.* 2 *c.* 11.

CHARITABLE USES. The laws againſt deviſes in *Mortmain* (ſee that title) 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.* 2. *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 *H.* 8. *c.* 1: 34 *H.* 8. *c.* 5: See titles *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 an *appointment*, rather than of a *bequeſt*. And indeed the piety of 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 ſuperintendance 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 *Dutchy of Lancaster*, respectively, to grant commissions under their several seals, to enquire 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 alienied, may be recovered by the donor. 13 *Ed.* 1. *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.* 2. *c.* 20. § 11: 32 *Geo.* 2. *c.* 28. § 9, 10. See tit. *Prisoners.*

Money given to put out apprentices, either by parishes or publick charities, to pay no duty, 8 *Ann. c.* 9. § 40. See title *Apprentices.*

See this subject treated at length under title *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.* 2. *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 politick; 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 title *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 discent, for the possibility of discent 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 title *Plantations.*

CHARTER LAND, *terra per chartam.*] See title *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 merchandize 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 that 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 ship-wreck, tempest, *&c. Style* 132: 2 *Rol. Abr.* 248.

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 intitled 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,

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 titles *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, martin 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 incloſed; 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 beaſts of the foreſt, he is fineable. 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 becomes 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, ſwain-mote, 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*, & *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 licence 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 browſewood, 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 coney-burrows in other places than hath been uſed. *Ibid.* If a free *chaſe* be incloſed, 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 licence from the king under the broad ſeal. See titles *Foreſt, Game, Park.*

CHASOR, An hunting horſe.—*Dederunt mihi unum* chaſorem, &c. *Leg. Will.* 1. *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* republick. The *Engliſh* law likewiſe juſtifies a woman, killing one who atempts 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, 6.

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 title *Murder, Adultery.*

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, houſhold-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 with-held 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 favour of the realty; as terms for years of land, the next preſentation to a church, eſtates by *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

terminate 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 title *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 *Nelſ. 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 titles *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 title *Chance-Medley*.

CHAUMPERT, A kind of tenure mentioned *Pat.* 35 *Ed.* 3. To the hoſpital of *Bowes*, in the iſle of *Guernſey*. *Blount*.

CHAUNTER, A ſinger in a cathedral. See *Chanter*.

CHAUNTRY RENTS, Are rents paid to the crown by the ſervants or purchaſers of *chauntry-lands*. See *Stat.* 22 *Car.* 2. *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 publick. 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 due 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. *Comp.* 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 *H.* 8 *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.* 2. *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 houſhold ſervants. *Stat.* 19 *Car.* 2. *cap.* 1. It is otherwiſe called the *checquer roll*, and ſeems to take its etymology from the *Exchequer*. *Stat.* 14 *Hen.* 8. *c.* 13.

CHELINDRA, A ſort of ſhip. *Mat. Paris, anno* 1238.

CHELSEA

CHELSEA HOSPITAL, See title *Soldiers.*

CHELSEA WATER-WORKS, See *Stat.* 7 *Jac.* 1. *c.* 9.

CHESTER. See generally title *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 *H.* 4. *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 *H.* 8. *c.* 43: 33 *H.* 8. *c.* 13. Recogniſances of ſtatutes-merchant may be acknowledged, and fines levied before the mayor of *Cheſter*, &c. for lands lying there. 2 & 3 *Ed.* 6. *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 & 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 *Ed.* 1. *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. Ang. tom.* 1. *pag.* 629.

CHEVERIL, *cheverillus.*] A young cock, or cockling. *Pat.* 15 *H.* 3.

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 title *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 title *Headborough.*

CHIEF (TENANTS in). Tenants in *capite*, holding immediately under the king, in right of his crown and dignity. See titles *Capite*, *Tenure.*

CHILDREN, As to deviſes to, See title *Deviſe*: See alſo titles *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 title *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 titles *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.* 2. *cap.* 2, of 2 *s.* for every hearth in a houſe. Now long ſince repealed.

CHIMNEY-SWEEPERS. By *ſtat.* 28 *Geo.* 3. *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 ſixteen 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 authoriſed 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 miſ-uſe 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 Publick and the Poor are indebted for many laudable charities.

CHINA and JAPAN WARES, To what duties liable, &c. ſee *ſtat.* 7 *Geo.* 1. *ſt.* 1. *c.* 21. and title *Navigation-Acts.*

CHIPP, CHEAP, CHIPPING, Signifies the place to be a market-town, as *Chippenham*, &c. *Blount.*

CHIPPINGAVEL, or *chepingavel*, toll for buying and ſelling.

CHIRCHGEMOT, CHIRGEMOT, KIRK-MOTE.] *Circgemot* (Sax.) *forum eccleſiaſticum.*—Leg Hen. 1. 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 ſtiled *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 counter-part, 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 authentick 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 counter part, they ingroſſed 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 ingroſſing 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 & concordiarum*, of the Greek Χειρόγραφον, a compound of Χεὶρ, *manus* a hand, and γράφω *ſcribo*, I write; A writing of a man's hand.] That Officer in the *Common Pleas* who ingroſſeth 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 *H.* 4. *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 title *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 ſerjeanty* 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 title *Serjeanty.*

Of the *Court of Chivalry* its power and juriſdiction, See poſt title *Court of Chivalry.*

CHOCOLATE, See *Coffee.*

CHOP-CHURCH, *eccleſiarum permutatio.*] Is a word mentioned in a ſtatute of King *Hen.* 6. 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 nick-name given to thoſe that uſed to change benefices; as to a *chop* and *change* is a common expreſſion. 9 *Hen.* 6. *cap.* 65. Vide *Litera miſſa omnibus epiſcopis*, &c. *contra* Choppe-Churches, *anno* 1391. Speim. 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 ſuſpence*, becauſe it hath no real exiſtence or being, nor can properly be ſaid to be in our poſſeſſion. *Bro.* title *Choſe in Action*: 1 *Lil. Abr.* 264.

A perſon

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: *Moor 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 title *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 limony 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 titles *Blaſphemy*, *Hereſy*, and alſo title *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 licence, 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 licence 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 belfrey or ſteeple, the body of the *church* with the iſles, 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: *Gilb.* 453: and poſt *Churchwardens*, III. 2.

And it ſeems that actions for taking away the *ſeats* muſt be brought in the name of the church-wardens, the pariſhioners being at the expence of them. *Raym.* 246: 12 *Co.* 105: 3 *Com Dig.* title *Epiſcopal* (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. *Show. P. L.* 79. The patron only is to give *licence* 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 ſuch 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 *Ed.* 1. *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 iſle, &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 juriſdictions 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 church-wardens, at the charge of the pariſhioners. *Can.* 86: 1 *Mod.* 236. See poſt title *Church-wardens*, 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 church-wardens, &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 inlarging 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 *Ventr.* 35.— On re-building 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 expence. See poſt title *Church-wardens*, 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 *H.* 8. *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.* 2. *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 ann.* and then the pariſhioners are to conſent, &c. See tit. *Union*.

For compleating 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 incloſed, 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 church-wardens and veſtrymen, &c. to be elected by the commiſſioners. *Stat.* 9 *Ann. cap.* 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.* 1. *cap.* 23.

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 ill language is to be uſed, or noiſe made in *churches* or *church-yards*; and perſons ſtriking, or laying violent hands on others there, are to be excommunicated; and ſtriking with a weapon, or drawing a weapon with intent to ſtrike, ſhall loſe one of their ears: and a man may not lawfully return blows in his own defence in theſe caſes. *Stat.* 5 & 6 *Ed.* 6. *cap.* 4: 1 *Hawk. P. C. c.* 63. § 24, &c.

No fairs or markets ſhall be kept in *church-yards*. *Stat.* 13 *E.* 1. *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 titles *Churchwardens*; *Parſons*. And as to offences in not coming to church, See titles *Diſſenters*, *Religion*.

CHURCHGEMOT. Vide *Chirchgemot*.

CHURCH-WARDENS.

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 intruſted to two perſons annually choſen by the pariſhioners, as aſſiſtants to the church-wardens, 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 church-wardens; the ſphere of whole 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

CHURCH-WARDENS I. II.

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. 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 church-wardens or queſtmen 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 church-wardens. *Gibſ. Cod.* 241, 2: 1 *Stra.* 145.

If the Parſon or Vicar, who has, by cuſtom, a right to chuſe *one* church-warden, 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 church-wardens by cuſtom; but in all pariſhes erected under *St.* 9 *An. 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 *Ro. Abr.* 339: *Cro. Jac.* 532: 1 *Comm.* 77.

In the election of church-wardens 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 church-wardens 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. title *Veſtry*.

In ſome caſes the lord of the manor preſcribeth for the appointment of church-wardens: 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 church-wardens 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. Ab.* 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 alſo ſole judges of what deſcription of perſons they think proper to chooſe as church-wardens; the Spiritual Court therefore cannot in any caſe controul 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 church-wardens, 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.* 1. *c.* 5: 1 *Jac.* 1. *c.* 9; & 21 *Jac.* 1. *c.* 7, to execute the laws againſt drunkenneſs. See *poſt* III. 2.

If a church-warden 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.—*Attornies. Com. Dig.* tit. *Attorney* (B. 16.) *Clerks in Court.* 1 *Ro. Rep.* 368, but ſee *Mar.* 30.—*Phyſicians, Surgeons, Apothecaries, Aldermen, Diſſenters, 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 church-warden; becauſe he cannot take notice of abſences from church, nor diſorders in it, for the due preſenting of them. *Gibſ.* 215.

II. *Church-Wardens* 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 *church-wardens*, 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 *Rol. Abr.* 330. Churchwardens may have appeal of robbery for ſtealing the goods of the church. 1 *Rol. Abr.* 393: *Cro. Eliz.* 179.—And they may alſo purchaſe goods for the uſe of the pariſh. *Mar.* 22, 67: *Cro. Car.* 552: 3 *Buſſ.* 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 *Ro. Ab.* 393: 1 *Vent.* 89: *Cro. Jac.* 234: 4 *Vin.* 526.

But

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. Ab.* 372: 1 *Vent.* 127: 4 *Vin.* 527.

They may bring an appeal of robbery for goods of the church felonioufly ſtolen—*T. B.* vol. 11. p. 27.—and *ejectment* for land leaſed to them for years. *Runnington's Ejectments* 59: 3 *Com. Dig. Egliſe* (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 *Ro. 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. Church-wardens 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 *iſle* 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 *church-wardens* 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 diocefe for a ſequeſtration; which being granted, they are to manage all the profits and expences 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.* 2. *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 *church-wardens* voted againſt it. *Comp. Incumb* 389: 1 *Vent.* 367: 1 *Bac. Abr.* 373: 3 *Term Rep.* 592.

But if the *church-wardens* 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, title *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 Dict. tit. *Apprentices, Chimney-Sweepers.*

Baſtards.—The church-wardens, 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.* 3. in *C. P.*

Belfry.—Church-wardens ought to keep the keys of, and take care the bells are not rung without proper cauſe. *Can.* 88.

Briefs.—Church-wardens are by *Stat.* 4 *An. c.* 14, to collect the charity-money upon *briefs*; which are letters-patent iſſuing out of Chancery, to re-build churches, reſtore loſs by fire, *&c.* which are to be read in churches; and the ſums collected, *&c.* to be indorſed on the briefs in words at length, and ſigned by the miniſter and *church-wardens*; 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 church-wardens 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 licence from the biſhop.—By *Stat.* 30 *Car.* 2. *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.* 2. *c.* 20, for reforming abuſes in, are payable to the church-wardens of the pariſh where the offence committed.

Chimney-Sweepers. See that title in this Dict.

Church.—Church-wardens or queſt-men are to take care it be well aired, the windows glazed, the floors well paved, *&c.* If church wardens erect or add a new gallery, *&c.* they muſt have the conſent of the pariſhioners, and a licence 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,

plate, and bowl of silver, gold or pewter. *Can.* 20: *Y. B.* 8 *H.* 5. *p.* 4.: *Doct. & Stud.* 118: *Deg.* 151 —Church-wardens 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 church-wardens 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 church-wardens, 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 licence—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 church-wardens are punishable if they shut the door against him; and his consent is necessary to a stranger's preaching. 3 *Salk.* 87: 12 *Mod.* 433. See further this Dictionary title *Church*.

Church-yards.—By the canons of the church it is ordained that the church-wardens, 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 expence 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.)—*Church-wardens* 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 the 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, church-wardens 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.—*Church-wardens* are to levy the penalties by warrant of a justice, under *Stat.* 22 *Car.* 2. *c.* 1.

Corn.—See *Stat.* 22 *Car.* 2. *c.* 8.

County Rate.—See *Stat.* 12 *Geo.* 2. *c.* 29.

Drunkenness.—*Church-wardens* are to receive the penalties under *Stat.* 4 *Geo.* 1. *c* 5: 21 *Geo.* 2. *c.* 7. and 1 *Jac.* 1. *c.* 9. See this Dict. title *Constable*.

Fast-days.—See *Stat.* 5 *Eliz. c.* 5.

Fire.—See this Dict. title *Fire*.

Game.—Church-wardens are to receive the penalties under *Stat.* 1 *Jac.* 1. *c.* 27.

Greenwich Hospital.—Church-wardens are to sign certificates of out-pensioners under *Stat.* 3 *Geo.* 3. *c.* 16.

Hawkers and Pedlars;—*Church-wardens* are to apprehend; and receive the penalties under *Stat.* 9 & 10 *W.* 3. *c.* 27: and 9 *Geo.* 2. *c.* 23.

Militia.—See the *Militia-Act* 26 *Geo.* 3. *c.* 107.

Non-conformists.—Churchwardens to levy the penalty of 12 *d.* on persons not coming to church each *Sunday*, under *Stat.* 1 *Eliz. c.* 2.

Parson.;—Church wardens are to observe whether he reads the thirty-nine 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; Church-wardens 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 licence; alms-houses or schools abused; legacies given to pious uses; *&c.* *Can.* 117: *Cro. Car.* 291: 1 *Vent.* 114.

Poor.—Church-wardens are to act in conjunction with the *overseers*; every church-warden being an overseer, but not *è contrà*.—See this Dict. title *Overseer, Poor*.

Presentments.—Church-wardens, 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 church-wardens 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.* 1. *c.* 5. to present tippling or drunkenness, and by 3 *Jac.* 1. *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 church-wardens, 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, Non-conformists*.

Registers.—Church-wardens 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 twenty-fifth day of *March*, yearly, transmit to *the bishop* a copy thereof for the year before, subscribed as above. By *Stat.* 23 *Geo.* 3. *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 church-wardens 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 monies which shall be so paid from the persons authorised to demand and receive the said duties.

Sunday.—Church-wardens to levy penalties for profaning; under *Stats.* 1 *Car.* 1. *c.* 1. and 29 *Car.* 2. *c.* 7.

IV. At the end of the year the *Church-wardens* are to yield just accounts to the minister and parishioners, and deliver

deliver what remains in their hands to the parishioners, or to new *church-wardens*: 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 *church-wardens* may pay them the balance, and place it to their account. 1 *Rol. Abr.* 121: *Can.* 89, 109, &c. And the Court of Chancery on application will make an order for the purpose. 2 *Eq. Ab.* 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 mis-spent by *church-wardens*, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted.

Church wardens are comprehended within the purview of the *Stats.* 7 *Jac.* 1. *cap.* 5, and 21 *Jac.* 1. *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 *church-warden* 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 *church-wardens'* 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 church-wardens 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 re-imbursing them all money advanced, is good. 2 *Andr.* 32.

If there be a select committee or vestry elected by custom, and the church-wardens 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 church-wardens with respect to their accounts as church-wardens. 1 *Keb.* 574: 4 *Vin.* (8vo.) 532.

CHURCHESSET, or *churchset*, *circsceat.*] 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, *ceorle*, *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 a 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 Dict. 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 in 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 mix'd actions: and if any erroneous judgment is given in the *Cinque Ports* before any of the mayors and jurats,

error

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, an *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 an *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 title *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 titles *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*, *Weſtmerland*, *Lancaſhire*.

CIRCUMSPECTE AGATIS, Is the title of a ſtatute made *anno* 13 *Ed.* 1. *ſtat.* 4, relating to *prohibitions*, preſcribing certain caſes to the judges, wherein the king's prohibition lies not. 2 *Inſt.* 187. See title *Prohibition*.

CIRCUMSTANTIAL EVIDENCE. See title *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 *H.* 8. *cap.* 6. and *Stat.* 5. *Eliz. c.* 25, for *Wales*. See alſo title *Jury*.

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.* 8. *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 title *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 *H.* 8. *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 *H.* 7. *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 ſtiled *London-Burg*; 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 ſhews that thoſe writers were miſtaken, that tell us every *city* was or is a biſhop's ſee. And tho'

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 biſhoprick 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 *H.* VIII. erecting it into a biſhoprick—See *Burnet's Reform Apdx.* 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 two 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 *Ed.* 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 title *Parliament*, *Biſhops*, *Borough*, *&c.*

CITIZENS of *London*, See title *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 authentick 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 ſhew 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 *Authenticks* were publiſhed at ſeveral times without any method: they are termed *Novels* as they are *new laws*, and *Authenticks*, 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 ſhews 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 enquired 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

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. *Dict.*

How far the Civil law is adopted and of force in this kingdom. See title *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 auhority 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 title *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 *H.* 6. *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 *hippocras*: 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. Sect.* 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 title *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 Common 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. *Lit. Sect.* 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 *R.* 3. *cap.* 7. See title *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 title *Entry*; as alſo title *Deſcent*.

By *Stat.* 32 *H.* 8. *c.* 43, Five years muſt elapſe 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 continual claim as before the ſtatute. And by *Stat.* 4 *An. 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 titles *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 to 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 title *Navigation Acts*.

CLARIGARIUS ARMORUM, An 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 Londonienſi*, 8 *Junii* 1522.

CLAUD, *Brit.*] A ditch: *Claudere*, to encloſe, or turn open fields into incloſures. *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 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 titles *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, ann.* 14 *H.* 7.

CLAWA, A cloſe, or ſmall meaſure of land. *Mon. Angl. tom.* 2. *pag.* 250.

CLEPTOR, A rogue or thief. *Hoveden anno* 946.

CLERGY.

Clerus.] Signifies the aſſembly or body of clerks or eccleſiaſticks, 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 *Judæa*; 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 title *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 frankpledge, which almoſt every other perſon is obliged to do. 2 *Inſt.* 4. (See title *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* & *morando*, to perform ſervice. *Stats.* 50 *E.* 3. *c.* 5: 1 *R.* 2. *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; it is doubted how far they are capable of ſitting as members of the Houſe of Commons. See *poſt.* title *Parliament*.—By *Stat.* 21 *H.* 8. *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 have not ſufficient glebe, and the land is taken for the neceſſary expences of their houſehold. *Stat.* § 8.—Nor, on like penalty

naſty to keep any tan-houſe, or brew-houſe.—Nor may they engage in any trade, or ſell merchandize, on forfeiture of treble value. But ſee title *Bankrupt*.

By the ſtatute called *Articuli Cleri*, 9 *E.* 2. *ſt.* 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 before 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 biſhopricks 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 biſhoprick 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; that 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 nullam 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 enquiry 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 *E.* 1. *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, be-

gan 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.* 7. *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 *ſtat.* 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.* 8. *c.* 1, and 32 *Hen.* 8. *c.* 3; but it is held, (*Hob.* 294: 2 *Hal. P. C.* 375,) to have been virtually reſtored by *ſt.* 1 *Edw.* 6. *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 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 delivered 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.* 1. *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 *W.* 3. *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 *An. 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.* 1. *c.* 11: 6 *Geo.* 1. *c.* 23, when any perſons ſhall be convicted of 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.* 3. *c.* 74, offenders liable to tranſportation, may in lieu thereof be employed, if males, (except in the caſe of petty larceny) in hard labour, for the benefit of ſome publick 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 carried into execution. See further titles *Felons*, *Tranſportation*. 2 *Hawk. P. C. c.* 58. § 10.

By the ſame *Stat.* 19 *Geo.* 3. *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 publickly 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.

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 *E.* 6. *c.* 12; (which is likewiſe held to extend to peereſſes; *Dutcheſs 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

or impriſonment, 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 *man ſlaughters*, *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 *An. 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 re-introduction 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 An.* 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 *H.* 8. *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; alledging 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; alledging 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 *H.* 8. *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; alledging 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.*

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 *E.* 3. *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 *H.* 4. *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 rigor 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 *H.* 8 *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

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 of 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 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 accessory; 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: *Foster* 356, 7.

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 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 title *Felons*, and more particularly the Index to 1 *Hawk. P. C.*

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* title *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* title *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 peculiarly 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.* 2. *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.* 8. *c.* 24. § 5.—To certify the names of felons convict. See title *Clergy, benefit of*; II.—How punished for concealing, &c. any indictment, recognizance, fine or forfeiture. *Stat.* 22 & 23 *C.* 2. *c.* 22. § 9: 3 *Geo.* 1. *c.* 15. § 12.—See title *Estreat, Sheriff.*—To take but 2*s.* for drawing an indictment, and nothing if defective. 10 & 11 *W.* 3. *c.* 23. §§ 7, 8.—Fineable for falsely recording appearances of persons returned on a jury. 3 *Geo.* 2. *c.* 25. § 3. See title *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 *H.* 8. *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 dis-allow 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 *H.* 8. *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 *H.* 4. *c.* 10. He is otherwise termed Clerk of the Crown-office, and exhibits informations, by order of the court, for divers offences. See title *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 ingrossed, &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 *Commons 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.* 2. *c.* 2: 20 *Car.* 2. *c.* 4. See title *Error*.

CLERK OF THE ESSOINS, An officer belonging 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 title *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 reconderentur* hanapi *& scutræ cæteraque vasa quæ in censum & tributum persolvi solebant*; or it may be for that the yearly tribute which 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 *G.* 2. *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 3000*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 INROLLMENTS. An officer of the *Common Pleas*, that inrolls 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 *R.* 2. *cap.* 4; and 16 *R.* 2. *c.* 3; by which every clerk of the market is to have weights and meaſures with him when he makes eſſay of weights, *&c.* mark'd according to the ſtandard; and to ſeal weights and meaſures, under penalties.

The *Stat.* 16 *Car.* 1. *c.* 19, enacts, That clerks of the market of the King's or Prince's houſhould, 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 *C.* 2. *c.* 8: 23 *C.* 2. *c.* 12, and title *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 *nihiled* 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 *R.* 2. *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 title *Pariſh Clerk*.

CLERK OF THE PARLIAMENT ROLLS, *clericus rotulorum parliamenti.*] An officer who records all things done in the high court of *parliament*, and ingroſſeth 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.* 1.

CLERK OF THE PEACE, *Clericus pacis.*] An officer belonging to the ſeſſions of the peace: his duty is to read indictments, inrol the proceedings, and draw the proceſs; he keeps the counter-part of the indenture of armour; records the proclamation of rates for ſervants wages; has the cuſtody of the regiſter-book of licences 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 title *Clergy, benefit of*—And as to his duty reſpecting Eſtreats, ſee title *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 *H.* 8. *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.* 2. *c.* 46. § 14, No Clerk of the peace, or his deputy, 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

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 chuse 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 PELL, *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.* 2. *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, gaugers, 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 recognizances 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 ingrossing of all leases of the king's lands; having a *secondary* and several clerks under him. In the reign of King *Hen.* VI. this officer was called *Ingrossator magni rotuli.* See *Stat.* 33 *Hen.* 8. *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 attornies 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 making 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 *R.* 2. *c.* 11: 27 *H.* 8. *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 *Ed.* 3. *c.* 4. The Clerk of the pipe and Remembrancer, shall be sworn to make a schedule of persons discharged in their offices. *Stat.* 5 *Ric.* 2. *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.* 2. *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 title *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 *H.* 8. *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 title *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 title *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 *E.* 4. *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 inrolls 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. *p.* 129.

CLIPPING *the Coin*, See title *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. *ſt.* 9 & 10 *W.* 3. *c.* 28. *ſect.* 2.—Makers ſhall engrave their names on clocks and watches. *ſt.* 9 & 10 *W.* 3. *c.* 28. *ſect.* 2.—Penalties on workmen, &c. imbezilling materials of clocks and watches, *ſt.* 27 *Geo.* 2. *c.* 7. See title *Manufacturers.*

CLOERE, A priſon or dungeon; it is conjectured to be of *Britiſh* original: the dungeon or inner priſon of *Walling ford caſtle*, *temp. H.* 2. 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 pendant 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 *Ed.* 4. *c.* 3, and 33 *H.* 8. *c.* 9. It is ſaid to have been the ſame with our *nine-pins*; and is called *cloſhcayles* by *ſt.* 33 *H.* 8. *c.* 9. At this time it is allowed, and called *bailes*, or *ſkittles*. See title *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 *Ed.* 3. *c.* 3.—See titles *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 *Ed.* 4. *c.* 1: 27 *H.* 8. *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 *Ed.* 6. *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.* 1. *c.* 2: 21 *Jac.* 1. *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 *An. c.* 16.—By *Stat.* 1 *Geo.* 1. *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.* 1. *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 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 mill-men ſending clothiers any cloths before inſpected, forfeit 40*s.* The inſpectors to be paid by the clothiers 2*d.* *per* cloth. *Stat.* 13 *Geo.* 1. *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 month's impriſonment; and for the third offence be tranſported as a felon, &c. *Stat.* 15 *Geo.* 2. *cap.* 27.—See title *Drapery*; and more particularly titles *Manufacturers*, *Servants*, *Wool.*

CLOVE, The two-and-thirtieth part of a weigh of cheeſe, *i. e.* eight pounds. *Stat.* 9 *H.* 6. *c.* 8.

CLOUGH, A word made uſe of for a 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 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 *An. c.* 23, made perpetual by 3 *Geo.* 1. *c.* 7, and enlarged as to the number of coaches, by 11 *Geo.* 3. *c.* 24; ſo as to make the whole number, to be licenſed, 1000, and enlarged alſo as to chairs, by 10 *An. c.* 19. and 12 *Geo.* 1. *c.* 12, making the whole number of thoſe 400.

The other ſtatutes now in force are, 12 *An. ſt.* 1. *c.* 14: 1 *Geo.* 1. *c.* 57: 30 *Geo.* 2. *c.* 22: (See *Carts*) 4 *Geo.* 3. *c.* 36:

c. 36: 7 *Geo.* 3. *c.* 44: 10 *Geo.* 3. *c.* 44: 11 *Geo.* 3. *cc.* 24 and 28: 12 *Geo.* 3. *c.* 49: 24 *Geo.* 3. *ſt.* 2. *c.* 27: 26 *Geo.* 3. *c.* 72: 32 *Geo.* 3. *c.* 47.

The following is a general abſtract of the united effect of theſe ſeveral acts.

Five Commiſſioners are appointed to licenſe and regulate them. And the proprietor of each coach pays 10*s.* *per* week every month. Each coach is to be numbered on both ſides, not to be altered, on penalty of 5*l.* A like penalty on driving or letting to hire a coach without licence.—Mourning coaches and hearſes are within the acts.—The horſes muſt be 14 hands high —Coachmen compellable to go in the day ten miles, but after dark two miles and a half on turnpike roads.—To have check ſtrings, on penalty of 5*s.*—The rates are as follows, (*December* 1793.)

By way	For one mile and quarter, or leſs	1*s.* 0*d.*
	From that to two miles -	1 6

And then 6*d.* for each additional half-mile entered upon.

By time	Three quarters of an hour, or leſs	1*s.* 0*d.*
	Between that and an hour -	1 6
	One hour and twenty minutes	2 0

And then 6*d.* for each additional twenty minutes entered upon.

For a day of twelve hours 14*s.* 6*d.* and 6*d.* for each twenty minutes over.

A coachman refuſing to go, or exacting more than his fare, to forfeit from 10*s.* to 3*l*; and by miſbehaviour or impudence, incurs the ſame penalty, and his licence may be revoked, or he committed to the houſe of correction. Perſons refuſing to pay the fare, or defacing the coach, may be compelled by a juſtice to make ſatisfaction. There are ſeveral uſual ſtands, but a coach may ſtand in any ſtreet thirty feet wide, at the road, (except *St. James's Street* and *Pall-mall.*)—The penalties are recoverable before the aldermen of the city, and juſtices of peace, as well as before the Commiſſioners.

Stage Coaches, By *Stats.* 28 *Geo.* 3. *c.* 57, and 30 *Geo.* 3. *c.* 36, Drivers of ſtage coaches are not to admit more than *one* outſide paſſenger on the box, and four on the roof of the coach, on penalty of 5*s.* for each paſſenger, at every turnpike-gate.—Some other wholeſome regulations are alſo 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 title *Carrier*.

Duties. By *Stat.* 25 *Geo.* 3. *c.* 47, there ſhall be paid for every four-wheeled coach, landau, &c. kept for private uſe, or to let to hire, (except hackney coaches) a tax of 7*l.* *per an.* (and by 29 *Geo.* 3. *c.* 49, 20*s.* more.) in the whole 8*l.* for the firſt carriage.—9*l.* for the ſecond, by 29 *Geo.* 3. *c.* 43.—And where three or more are kept, 8*l.* for the firſt, and 10*l.* for all others. And by ſaid *Stat.* 25 *Geo.* 3. *c.* 47, for every two or three-wheeled carriage 3*l.* 10*s.* *per annum*.

COACH-MAKERS, The wares of coachmakers ſhall be ſearched, by perſons appointed by the ſadlers' company. *Stat.* 1 *Jac.* 1. *c.* 22.—By *Stats.* 25 *Geo.* 3. *c.* 49: 27 *Geo.* 3. *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.

ÇOADJUTOR, *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.* 2. *c.* 32. *ſect.* 6. See title *Black-Act*, *Felony*.

COALS, By *Stats.* 7 *E.* 6. *c.* 7: 16 & 17 *Car.* 2. *c.* 2; [made perpetual by 7 & 8 *W.* 3. *c.* 36. § 2.] and 17 *Geo.* 2. *c.* 35, The ſack of coals is to contain four buſhels of clean coals: and ſea coals brought into the river *Thames*, and ſold, ſhall be after the rate of thirty-ſix buſhels to the chaldron: and one hundred and twelve pounds 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 impowered to ſet the price of all coals to be ſold by retail; and if any perſon ſhall refuſe to ſell for ſuch prices, they may appoint officers to enter any wharfs or places where coals are kept, and cauſe the coals to be ſold at the prices appointed. The *Stat.* 12 *An. 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 *H.* 5. *ſt.* 1. *c.* 10: 30 *Car.* 2. *c.* 8: 6 & 7 *Will.* 3. *c.* 10: 11 *Geo.* 2. *c.* 15: 15 *Geo.* 3. *c.* 27. and 31 *Geo.* 3. *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 draw-backs on coals and culm, ſee *Stat.* 9 & 10 *W.* 3. *c.* 13: 9 *An. cc.* 6, 22, 28: 8 *Geo.* 1. *c.* 14: 14 *Geo.* 2. *c.* 41: 22 *Geo.* 2. *c.* 37: 31 *Geo.* 2. *c.* 15: 33 *Geo.* 2. *c.* 15: and 27 *Geo.* 3. *c.* 32.

For the duty on coals in *London*, See *Stats.* 9 *An. c.* 22. and 5 *Geo.* 1. *c.* 9; the duties payable under which, of 3*s.* *per* chaldron, are made perpetual by *Stat.* 6 *Geo.* 1. *c.* 4. and 1 *Geo.* 2. *ſt.* 2. *c.* 8.—See alſo *Stat.* 27 *Geo.* 3. *c.* 13, as to the 1*s.* duty under *Stat.* 19 *Car.* 2. *c.* 3. § 36.

By *Stat.* 6 & 7 *W.* 3. *c.* 18, one mariner is allowed to each 50 ton of ſhipping employed in the coal trade in time of war, protected from being impreſſed.

By *Stat.* 9 *An. 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.* 2. *c.* 26, containing ſeveral regulations as to lightermen and coal buyers, and explained by *ſt.* 11 *Geo.* 2. *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.

By *Stat.* 4 *Geo.* 2. *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.* 2. *c.* 21, Inflicts penalty of treble damages on perſons damaging or deſtroying coal-works.

See the *Stat.* 6 *Geo.* 3. *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.* 3. *c.* 23, (in force by 17 *Geo.* 3. *c.* 13. till the 1st of *June*, 1798,) *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. And by *Stat.* 26 *Geo.* 3. *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 re-measurement settled, if required by the consumer.

By *Stat.* 26 *Geo.* 3. *c.* 14, A Land Coal Meter's Office is appointed for the parishes of *Putney*, *Wandsworth*, *Battersea*, *Lambeth*, *Rotherhithe*, and several parishes in *Southwark*, to continue for twenty-one years. And by *c.* 108, of the said session, a like office is appointed for the city and liberty of *Westminster*, till *June* 1795. The regulations of former acts are adopted and modified by these latter, according to their several districts.

Stat. 28 *Geo.* 3. *c.* 53, was past to indemnify the *London* coal buyers against certain penalties, which they had *literally* incurred under *Stats.* 9 *An. c.* 28. and 3 *Geo.* 2. *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.*

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 over-ruled 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 *An. 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.* 2. *cap.* 18. See title *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.* 6. *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 custom, and had a *cocket* or certificate of discharge: and *cocketta lana* is wool duly entered and *cocketted*, or authorised to be transported. *Mem. in Stat.* 23 *Ed.* 1.

Cocket is likewise used for a sort of measure, *Fleta*, *lib.* 2. *cap.* 9. *Panis vero integer quadrantalis frumenti ponderabit unum* cocket *& dimidium*: and it is made use of for a distinction of bread, in the statute of bread and ale, 51 *H.* 3. *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 testator would add, or where he would explain, alter or retract what he hath done. See titles *Will*, *Devise*.

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 titles *Excise*, *Customs*, and also title *Navigation-Acts*.—The following general features are all which the compass of this Dictionary allows to be noticed.

By *Stat.* 27 *Geo.* 3. *c.* 13, all former custom and excise duties are repealed; and new duties, (less than the former ones) imposed.—The sales of *tea* at the *East-India* house are regulated by *Stats.* 18 *Geo.* 2. *c.* 26: 13 *Geo.* 3. *c.* 44; by the latter of which re-exportation by the Company to *America* is allowed.—By *Stat.* 10 *Geo.* 1. *c.* 10, *chocolate and cocoa paste* are prohibited to be imported.—And cocoa-nut shells without the nuts, by *Stat.* 4 *Geo.* 2. *c.* 14. § 12.—The importation of coffee must be in bags, &c. containing 1 *cwt.* each at least.—The entry and warehousing, removing, and re-exportation of *tea*, *coffee* and *cocoa-nuts*, is regulated by *Stats.* 10 *Geo.* 1. *c.* 10: 11 *Geo.* 1. *c.* 30: 5 *Geo.* 3. *c.* 43: 21 *Geo.* 3. *c.* 55: 22 *Geo.* 3. *c.* 68: 23 *Geo.* 3. *c.* 70: 27 *Geo.* 3. *c.* 13.—By *Stats.* 15 *Geo.* 2. *c.* 11: 20 *Geo.* 3. *c.* 35, *retail dealers* must take out an annual licence.—And all houses for manufacturing and sale, must be entered at the Excise Office; See *Stats.* 10 *Geo.* 1. *c.* 10: 18 *Geo.* 2. *c.* 26: 12 *Geo.* 3. *c.* 46.—And the houses of *all* dealers to be marked, "*Dealer in Coffee, Tea, &c.*" *Stat.* 19 *Geo.* 3. *c.* 69.—Under the said *Stat.* 10 *Geo.* 1. *c.* 10: and *Stat.* 11 *Geo.* 1. *c.* 30, officers may enter houses to search if goods are concealed; but in this case, if an officer by a false or mistaken suggestion obtains a search-warrant (as it is called) from the Commissioners, he is personally answerable in an action of trespass, if no goods are found. *Bostock v. Saunders*, *Bl. Rep.* 912.

To prevent frauds in *manufacturing* these articles, the *Stats.* 10 *Geo.* 1. *c.* 10: 11 *Geo.* 1. *c.* 30, make divers provisions as to *coffee*.—*Stats.* 11 *Geo.* 1. *c.* 30:

4 *Geo.* 2. *c.* 14: 17 *Geo.* 3. *c.* 29, as to *tea.*—*Stats.* 10 *Geo.* 1. *c.* 10: 32 *Geo.* 2. *c.* 10: 11 *Geo.* 1. *c.* 20, as to *chocolate*; the making of which latter for private families, is alſo regulated by *Stat.* 10 *Geo.* 1. *c.* 10. § 23, 24, 25.

The *Stat.* 9 *Geo.* 2. *c.* 35. § 20, prohibits the retailing tea without a permit; or by pedlars even with one. And by *Stat.* 12 *Geo.* 1. *c.* 28, dealers in *cocoa nuts*, muſt not ſell leſs than 28 *lb* at a time.

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 *H.* 8. *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 *Couſenage.*

COGNISANCE, or cognizance, Fr. *connuſance*, Lat. *cognitio.*] Is uſed diverſely in our law: ſometimes for an acknowledgment of a *fine*. See title *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 titles *Diſtreſs*, *Replevin.*

The moſt uſual ſenſe in which this term is now uſed, is relative to the claim of *Cognizance 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 *H.* 4. *c.* 5: 8 *H.* 6. *c.* 26: 3 *Comm.* 298: 4 *Comm.* 277.

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 *no-body can take advantage of this privilege but a defendant*; for if he will bring *certiorari*, that will remove the cauſe, *but he may wave it if he will*, ſo that the privilege is only for his benefit. 3 *Salk.* 79, 80. *pl.* 4: *Hil.* 1 *An. B. R. Croſſe* v. *Smith.*

King *Hen.* 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 conuſance, 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 ſhewn to the contrary), in *Eaſter Term*, 9 *Geo.* 2. in the caſe of *Woodcocke* and *Brooke. Hardw.* 241.—See further under title *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 *H.* 8. *c.* 5.

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 *Rol.* 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 *R.* 2. *cap.* 10.

COHUAGIUM,

COHUAGIUM, A tribute paid by thoſe who met promiſcuouſly in the market or fair; *cohua* 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 title *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 ſtatute 25 *E.* 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 *Mar. 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, *Portugal* 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.

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 *W.* 3. *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.* 2. *c.* 28, if any perſon colours or alters any ſhilling or ſix-pence, either lawful or counterfeit, to make them reſpectively reſemble a guinea or half-guinea: or any half-penny or farthing to make them reſpectively reſemble a ſhilling or ſix-pence; 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 *E.* 1. *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 *E.* 3 *ſt.* 2, no ſterling money ſhall be melted down, upon pain of forfeiture thereof.—By *Stat.* 17 *E.* 3, 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 *H.* 5. *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.* 6. *c.* 9,) incurs a forfeiture of an 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.—By *Stat.* 13 & 14 *Car.* 2. *c.* 31, the offence of melting down any current ſilver money, ſhall be puniſhed with forfeiture of

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 *W.* 3. *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 title *Clergy*.]—By *Stat.* 8 & 9 *W.* 3. *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 *W.* 3. *c.* 21: 13 *Geo.* 3. *c.* 71: and 14 *Geo.* 3. *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.* 2. *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.* 3. *c.* 40, perſons counterfeiting *copper halfpence* or farthings, with their abetters; 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 a temporary *Stat.* (14 *Geo.* III. *c.* 42,) 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.

The *Coining of money* is in all States the act of the *Sovereign Power*: that it's 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.* 3. *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 not 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. *Dufreſne* 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 *Hans-towns* 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 *E.* 3. *c.* 13.—So that the King's prerogative ſeemeth not to extend to the debaſing or inhancing the value of the coin, below or above the ſterling value. 2 *Inſt.* 577: though Sir *Matthew Hale*, (1 *Hal. 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 *H. 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 *Hal. 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 an 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 penny-weights 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 re-coin 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.* ſix-pences, 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.* 1. 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 expence of the King's *coinage*, but not to exceed 3000 *l. per ann. Stat.* 18 *Car.* 2. *cap.* 5. This duty for *coinage* hath been continued and advanced, from time to time by divers ſtatutes; and by *Stat.* 27 *Geo.* 2. *c.* 11, (explained by *Stat.* 27 *Geo.* 3. *c.* 13. § 64,) the Treaſury is to apply 15,000 *l.* a-year to the expences of the mints in *England* and *Scotland.*—*Stat.* 14 *Geo.* 3. *c.* 92, regulates the ſtamping of *money-weights*, the fees for which are ſettled by *Stat.* 15 *Geo.* 3. *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. *lateralè*, 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 licence; 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: *Manwood, p.* 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 common ſtock, from whence theſe relations are branched out. 2 *Comm.* 204, ſee title *Deſcent.*

Collateral Diſcent, and Collateral Warranty, See *Diſcent* 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, *inſtanter.*

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.* 2. *c.* 10: *Abr. Caſ. Eq. p.* 254. See titles *Hutchpot*, *Executor.*

COLLATION to a BENEFICE, *collatio beneficii.*] Signifies the beſtowing of a *benefice* by the biſhop, when he hath right of patronage. See title *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 admitance, the King may beſtow his preſentation on another. *Reg. Orig.* 31.

Collatione Hermitagii, A writ whereby the King conferred the keeping of an *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 title *Advowſon.*

COLLECTORS of money due to the King. *Stat.* 20 *Car.* 2. See *Receivers.*

COLLEGE, *collegium.*] A particular corporation, company or ſociety of men, having certain privileges founded by the King's licence: 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 titles *Corporations*, *Leaſes*, *Univerſities.*

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 title *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

to do other acts for the benefit of such as are entitled to the property of the deceased. 2 *Comm.* 505. See title *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 shews 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 dependant 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 *Ed.* 1. *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 title *Fraud*.

COLONIES, See title *Plantation*.

COLONUS, An 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 land; 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 *ldy 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.

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 as a shadow and *colour*. *Plowd. Comment.* 64. See *Bribery*; *Extortion*.

COLPICES, *colpicium*, *colpiciis*.] Young poles, which being cut down, make leavers or lifters; and in *Warwickshire* they are called *colpices* to this day. *Blount*.

COLPO, A small wax candle, *à copo 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. & duodecim vassellos dominicos, & quadraginta grossos longos* colpones *de dominica candela regis*. &c. *anno* 1194.

COMBARONES, The fellow barons, or commonalty of the Cinque Ports. *Placit. temp. Ed.* 1. & *Ed.* 2. 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 title *Parliament*.

COMBA TERRÆ, 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 titles *Confederacy*, *Conspiracy*.

COMBUSTIO PECUNIÆ, The ancient way of trying mixt 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 examination of money by *combustion*, was to reduce an equation of money only of *sterling*, *viz.* a due proportion of allay with copper; or to reduce it to a fine pure silver without allay, doth

not appear. On making the conſtitution for trial, it was conſidered, that though the money did anſwer *numero & pondere*, it might be deficient in value; becauſe mixed with copper or braſs, &c. Vide *Lowndes's Eſſay upon Coin*, *p.* 5. See title *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 talliatus 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 titles *County*, *Sheriff*.

According to Lord *Littleton*, in his *Hiſtory of Hen.* II. *lib.* 2. *fo.* 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 tythings, ſee *Ld. Lit. l.* 2. *fo.* 259: Alſo ſee *Bract. l.* 3. *c.* 10.

COMITATU COMMISSO, Is a writ or comiſſion 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 *Brompton*, *Regn. H.* 2. And ſometimes it ſignifies a troop or company of robbers: as in *Walſingham*, *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 ſtiled 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 *H.* 8. *c.* 2. The manors and lands belonging to the priory of *St. John of Jeruſalem*, were given to King *Hen.* VIII. by *Stat.* 32 *Hen.* 8. *c.* 20; about the time of the diſſolution of abbies 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 title *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. *Brv.* 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 title *Acceſſary*.

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 title *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: *H. 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 title *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 of 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 licences 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 then abſolutely void.—A *commendam*, founded on the ſtatute 25 *H.* 8. *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

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 *H.* 4.

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*.

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 *sub-commendati* were like undertenants, 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.*] Traffick, 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 traffick and dealings among ourselves at home.

No municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffick and merchandize: 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 title *Merchant*. See also title *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 authorise 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,

fines, and answers, are taken, witnesses examined, offices found, &c. *Bro. Ab.* 12: *Rep.* 39.—See *Stat.* 42 *E.* 3. 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.* 1. *c.* 11: and 13 *Car.* 2. *c.* 2. Of *commissions* divers may be seen in the table of the *Register of Writs*. See also *Stats.* 4 *Hen.* 4. *c.* 9: 7 *Hen.* 4. *c.* 11: 6 *An. 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 *H.* 8.

COMMISSION OF ARRAY, See title *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 title *Assise*, *Circuit*.

COMMISSION OF BANKRUPT, See title *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 enquire of and redress the abuse, &c. *Stat.* 43 *Eliz. c.* 4.—See titles *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 *H.* 8. *c.* 19. Now generally three of the common law judges, and two Civilians, sit as delegates.

COMMISSION TO ENQUIRE OF FAULTS AGAINST THE LAW, Was an ancient commission set forth on extraordinary occasions and corruptions.

COMMISSIONS OF THE PEACE, See title *Justices of Peace*.

COMMISSION OF LUNACY, A commission out of *Chancery* to enquire whether a person represented to be a lunatick be so or not; that if lunatick, the King may have the care of his estate, &c. See title *Lunatick*.

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 kings laws, whersoever 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 title *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. *Stats.* 23 *H.* 8. *c.* 5: 13 *Eliz. c.* 9. See title *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 *Foss. Rep.* 154: 1 *Comm.* 419: *Broadfoot's* case, *Comb.* 245: *Tubbs's* case. *Cowp.* 517.—See titles *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.* 4. *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 antient 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-licences*, *alienations*, &c. of which there are an infinite number.

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 num-

ber 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 title *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 *Committée* of a lunatick, ideot, *&c.* is the perſon to whom the care and cuſtody of ſuch lunatick is *committed* by the Court of *Chaucery*. See title *Lunatick*.

Moſt Corporations have their *committees* of ſelect members to perform the general routine of buſineſs. See title *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*, title *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 impowered 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.* 2. *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 adviſeable 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.) pre-ſuppoſe 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.* 323.

As to commitments by the *Secretary of State*; In the caſe of *Entick* v. *Carrington*, *C. B. Mich.* 6 *Geo.* 3, 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 enquiry 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, 9.—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.* 2. *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 *C.* 1, by *Secretary Conway*, on ſuſpicion of high-treaſon: but the Court thought the cauſe of the ſuſ-

picion

Picion ſhould have been expreſſed. *Palm.* 558.—4. *Crofton* was committed by the *council*, *an.* 14 *C.* 2, for high-treaſon generally. *Vaugh.* 142: 1 *Sid.* 78: 1 *Keb.* 305.—5. *Fitzpatrick* by the *Privy Council*, *an.* 7 *W.* 3, 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: *Skinn.* 369.—7. *Kendal* and *Roe* were committed, *an.* 7 *W.* 3, 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, 5: *Comb.* 343: 12 *Mod.* 82: 1 *Salk.* 347.——8. *Derby* was committed, 10 *An.* 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.* 1. 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.* 1, by *Lord Townſhend*, 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 recognizance, *an.* 7 *Geo.* 2. 8 *Mod.* 177: 11 *S. T.* 309.—12. *Henſey* was committed, *an.* 31 *Geo.* 2, by the Earl of *Holderneſs*, *Secretary of State*, for high-treaſon, in adhering to the king's enemies. 1 *Burr.* 642.— 13. *Shebbear* was committed, 31 *Geo.* 2, on two warrants from the *Secretary of State*, for a libel. 1 *Burr.* 460.—14. *Wilkes* was committed, *an.* 3 *Geo.* 3. 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.* 3, by warrant from the Earl of *Rochford*, *Secretary of State*, for high treaſon, and bailed by *Lord Mansfield*. *Black. Rep.* 1165.—See further title *Bail* II. and alſo title *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 ſhew 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*, 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 titles *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.* 1, 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.* 2. *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*,

Tangier, or into any parte, 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 *Ed.* 3. *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.* 7. *cap.* 10. Alſo by *Stat.* 5 *Hen.* 4. *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 *H.* 4. *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.* 3. *c.* 19. § 3, made perpetual by *Stat.* 6 *Geo.* 1. *c.* 19, to enable juſtices of peace to build and repair gaols in their reſpective counties, where a clauſe like that in *Stat.* 5 *H.* 4. *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.* 2. *c.* 55.

By *Stat.* 6 *Geo.* 1. *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.* 2. *c.* 55, If a perſon is apprehended, upon a warrant indorſed, 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.* 1. *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.* 2. *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.* 7. *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.* 2. *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 aſſize, or juſtice of the peace, to any common work-houſe, 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 titles *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 *Ed.* 1. *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 antiently, 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 Introduct. to Engl. 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* Incloſure.
III. *The Commoners' 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. *F. 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. *F. N. B.* 180: 4 *Rep.* 37.

Common pur 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 pur 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 re-ſown: 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 *Rol. Abr.* 398.

Common appurtenant for a certain number of beaſts may be granted over. 1 *Danv.* 802.

By *Stat.* 13 *Geo.* 3. *c.* 81. § 21, *Rams* are not to remain on commons from the 25th of *Auguſt* to the 25th of *November*.

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. *F. 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 incloſure. 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 *Rol.* 90. 405.

By ſtatute, 20 *H.* 3. *c.* 4, (*Stat. of Merton*,) lords may *approve* againſt their tenants, *viz.* incloſe 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 incloſures; but may put in their cattle, although the lord ploughs and ſows the land. 2 *Inſt.* 88: 1 *Rol. 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 incloſing, may apply to the court, &c. firſt obtaining the conſent of the lord, does not abridge the lord's common-law right of incloſing without any ſuch application, provided he leave common ſufficient for the tenants. 2 *Term Rep.* 391, 2.

By *Stat.* 29 *Geo.* 2. *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 incloſe 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.* 1. *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 ſhall incur the ſame penalty. And by *Stat.* 31 *Geo.* 2. *c.* 41, The recompence 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.

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: 2 *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.* 8. 2: 13 *Hen.* 8. 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 *Rol. Abr.* 405: 2 *Bulſt.* 116.—But ſee *ante* II. and *poſt*.

Every *commoner* may break the *common* if it be incloſed; 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 *Rol. Abr.* 406. That is, ſuppoſing the incloſure made by the lord, and that there is not ſufficient *common*; or that the incloſure 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. Rep.* 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. *F. 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 ſuperintendance 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. *Lord 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 *E.* 1. *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. *F. 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 method 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 *Rol. 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 incloſes 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 chuſes 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. *F. 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: *F. N. B.* 123. But if the commoner does not chuſe 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

If any *commoner* incloſes, 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 *Rol. 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 *Nelſ.* 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, although 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 forfeitures, by *Stat.* 32 *H.* 8. *c.* 13. New erected cottages, though they have four acres of ground laid to them, ought not to have *common* in the waſte. 2 *Inſt.* 740. In law proceedings, where there are two diſtinct *commons*, the two titles muſt be ſhewn: cattle are to be alledged *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.* 3. *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 expence to be bor'n 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, 9, 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.* title *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 title *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 chimnies; but if he erect any new chimnies, he will not be allowed to ſpend any eſtovers in ſuch new chimnies. 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. *F. 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: *F. N. B.* 58, 159.

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 licence to dig turf upon the ground of another, or in the lord's waste. This common is appendant or appurtenant to an house, and not to lands; for turfs are to be burnt in the house: and it 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 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, 5.

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 stiled *Justiciarii de Banco*. See title *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 *H.* 3. *Stat.* 2. and *Stat.* 3. Concerning general *days in bank*, see title *Days in Bank*.

COMMON FIELD LAND, See title *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 *Ed.* 1. *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 title *Parliament*.

COMMON INTENDMENT. Is common meaning or understanding, 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. Lit.* 78; See *Co. Lit.* 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 safe-guard 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*, *pag.* 24, 44, 45.

As

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 ſtiled *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 ſtiled *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.* 3. 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.* 2. 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 *Ed.* 4. 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 ſtiled *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 compleated by *Hen.* III. See *Mad. Hiſt. Exc.* 63, 539. 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 Anglia.* 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

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. It's 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. title *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* requiring 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 *Inrollment 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, *procedendo's*, &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; inrols 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 non-suits, &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 Inrolments* 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* ingrosseth 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 *Attornies* 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, *Prees 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.* 2. *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 catholick church; and the whole congregation of Christian people, &c. for the King and Royal Family; the ministers of God's word, nobility, magistrates, and 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 titles *Church, Church-warden, 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

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 title *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.* 4. *c.* 27. But *Stat.* 26 *H.* 8. *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 *Ed.* 1. *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 ſeigniory 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 the *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 titles *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. *F. N. B.* 89: *Reg. Orig.* 161. Since the ſtatute 12 *Car.* 2. *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 *H.* 8. *c.* 13. and title *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 adventrous, 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 title *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 *St.* 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 title *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 antient *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 antient 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.* 1. *c.* 11.—And to advertiſe a reward for the return of things ſtolen, incurs a forfeiture of 50 *l.* by *Stat.* 25 *Geo.* 3. *c.* 36. See titles *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 title *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. Symb. ſect.* 1. Matters *compromiſed*, are alſo matters of law referred, or made an end of.—See title *Award.*

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 title *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 5280 feet, or 1760 yards to each mile; and the ſame ſhall be reckoned not by ſtrait 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 perſons, having nothing to ſhew 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 title *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.

CONCIONATORES, Common-council-men, freemen, called to the hall or aſſembly, as *moſt worthy.*—*Quodam tempore cum convenijſſent* 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 title *Pleading*—And as to the concluſion of Deeds, ſee title *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 titles *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 title *Fine.*

CONCUBARIA, A fold, pen, or place where cattle lie. *Cowel.*

CONCUBEANT, Lying together. *Stat.* 1 *H.* 7. *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.* 1. *c.* 23.

CONDITION.

Conditio.] A reſtraint annexed to a thing, ſo that by the non-performance, the party to it ſhall receive prejudice and loſs; and by the performance, commodity and advantage. Or it is a reſtriction of men's acts, qualifying or ſuſpending the ſame, and making them uncertain whether they ſhall take effect or not. Alſo it is defined to be what is referred to an uncertain chance, which may happen or not happen. *Weſt's Symb. part.* 1. *lib.* 2. *ſect.* 156.

A *Condition* is alſo defined to be a kind of law or bridle, annexed to one's act, ſtaying or ſuſpending the ſame, and making it uncertain whether it ſhall take effect or no: or it is a *modus*, a quality, annexed by him that hath eſtate, intereſt or right to the land, *&c.* whereby an eſtate, *&c.* may either be created, defeated, or enlarged, upon an uncertain event. This differs from a *limitation*, which is the bounds or compaſs of an eſtate, or the time how long an eſtate ſhall continue. *Shep. Touchſt.* 117. See title *Limitation.*

A *condition* may be alſo conſidered as one of the terms upon which a grant may be made; in this ſenſe a condition in a deed is a *clauſe of contingency* on the happening of which the eſtate granted may be defeated. 2 *Comm.* 299.

Of

Of *Conditions* there are divers kinds, *viz.* *conditions* in *deed*, or *expreſs*; and in *law*, or *implied*; *conditions precedent*, and *ſubſequent*; *conditions inherent*, and *collateral*, &c.

A *Condition in a deed* or *expreſs*, is that which is joined by expreſs words to a feoffment, leaſe, or other grant; as if a man makes a leaſe of lands to another, reſerving a rent to be paid at ſuch a feaſt, upon *condition* if the leſſee fail in payment, at the day, then it ſhall be lawful for the leſſor to enter. *Condition* in *law* or implied is when a perſon grants another an office, as that of keeper of a park, ſteward, bailiff, &c. for term of life; here, though there be no *condition* expreſſed in the grant, yet the law makes one; which is, if the grantee do not juſtly execute all things belonging to the office, it ſhall be lawful for the grantor to enter and diſcharge him of his office, *Lit. lib.* 3. *c.* 5.

Condition Precedent is when a leaſe or eſtate is granted to one for life, upon *condition* that if the leſſee pay to the leſſor a certain ſum at ſuch a day, then he ſhall have fee ſimple; in this caſe the *condition* precedes the eſtate in fee, and on performance thereof gains the fee-ſimple. *Condition ſubſequent* is when a man grants to another his manor of *Dale*, &c. in fee, upon *condition* that the grantee ſhall pay to him at ſuch a day ſuch a certain ſum, or that his eſtate ſhall ceaſe: here the *condition* is ſubſequent, and following the eſtate, and upon the performance thereof continues and preſerves the ſame: ſo that a *condition precedent* doth *get* and *gain* the thing or eſtate made upon *condition* by the performance of it; as a *condition ſubſequent keeps* and *continues* the eſtate by the performance of the *condition*. 1 *Inſt.* 201, 327: *Terms de Ley*. If one agree with another to do ſuch an act, and for the doing thereof the other ſhall pay ſo much money; here the doing the act is a *condition precedent* to the payment of the money, and the party ſhall not be compelled to pay till the act is done: but where a day is appointed for the payment of money, which day happens before the thing contracted for can be performed, there the money may be recovered before the thing is done; for here it appears that the party did not intend to make the performance of the thing a *condition precedent*. 3 *Salk.* 95. See poſt, I, IV.

Inherent Conditions are ſuch as deſcend to the heir with the land granted, &c.

A *Collateral Condition* is that which is annexed to any collateral act.

Conditions are likewiſe *affirmative*, which conſiſt of doing; *negative*, and conſiſt of not doing: ſome are further ſaid to be *reſtrictive*, for not doing a thing: and ſome *compulſory*, as that the leſſee ſhall pay the rent, &c.

Alſo ſome *conditions* are *ſingle*, to do one thing only; ſome *copulative*, to do divers things; and others *diſjunctive*, where one thing of ſeveral is required to be done. *Co. Lit.* 201.—See further *Shep. Touch.* 117, &c.

As to certain eſtates on condition expreſſed or implied, See more particularly titles *Mortgage*, *Statute-Merchant*, *Elegit*.

Among theſe ſeveral kinds of conditions, the caſes which moſt frequently occur fall under the diſtinctions of conditions *precedent* and *ſubſequent*. We ſhall therefore ſpeak of them more at large under the following diviſions; wherein ſhall be conſidered; in the firſt place, generally,

I. 1. *Of Eſtates on Conditions implied*; *and* 2. *On Condition expreſſed*.—Then more particularly,

II. *To what Conditions may be annexed: what Conditions are good: and by what Words they may be created.*

III. *What ſhall be a good Performance of a Condition; and in what Manner the Breach of it muſt be taken Advantage of.*

IV. *Of Conditions* precedent *and* ſubſequent.

I. 1. Eſtates upon condition *implied in law*, are where a grant of an eſtate has a condition annexed to it inſeparably, from it's eſſence and conſtitution; although no condition be expreſſed in words. As if a grant be made to a man of an *office*, generally, without adding other words; the law tacitly annexes hereto a ſecret condition, that the grantee ſhall duly execute his office; (*Lit.* § 378;) on breach of which condition it is lawful for the grantor, or his heirs, to ouſt him, and grant to another perſon. *Lit.* § 379. For, an office, either public or private, may be forfeited by *mis-uſer* or *non-uſer*, both of which are breaches of this implied condition.—By *mis-uſe* or *abuſe*: as if a judge takes a bribe, or a park-keeper kills deer without authority. By *non-uſer*, or neglect; which in public offices, that concern the adminiſtration of juſtice, or the Common-wealth, is of itſelf a direct and immediate cauſe of forfeiture; but non-uſer of a private office is no cauſe of forfeiture, unleſs ſome ſpecial damage is proved to be occaſioned thereby. *Co. Lit.* 233. For in the one caſe delay muſt neceſſarily be occaſioned in the affairs of the public, which require a conſtant attention: but, private offices not requiring ſo regular and unremitted a ſervice, the temporary neglect of them is not neceſſarily productive of miſchief, upon which account ſome ſpecial loſs muſt be proved, in order to vacate theſe. Franchiſes alſo, being regal privileges in the hands of a ſubject, are held to be granted on the ſame condition of making a proper uſe of them, and therefore they may be loſt and forfeited, like offices, either by abuſe or by neglect. 9 *Rep.* 50.

Upon the ſame principle proceed all the forfeitures which are given by law of life-eſtates and others; for any acts done by the tenant himſelf, that are incompatible with the eſtate which he holds. As if tenant for life or years enfeoff a ſtranger in fee-ſimple: this, is, by the Common law, a forfeiture of their ſeveral eſtates; being a breach of the condition which the law annexes thereto, *viz.* that they ſhall not attempt to create a greater eſtate than they themſelves are entitled to. *Co. Lit.* 215. So if any tenants for years, for life, or in fee, commit a felony; the King or other lord of the fee is entitled to have their tenements, becauſe their eſtate is determined by the breach of the condition, "that they ſhall not commit felony" which the law tacitly annexes to every feodal donation.

2. An eſtate on condition *expreſſed in the grant* itſelf, is, where an eſtate is granted either in fee-ſimple or otherwiſe, with an expreſs qualification annexed, whereby the eſtate granted ſhall either commence, be enlarged or be defeated, upon performance or breach of ſuch qualification or condition. *Co. Lit.* 201.

Theſe conditions are therefore either *precedent* or *ſubſequent*. Precedent are ſuch as muſt happen or be performed before the eſtate can veſt or be enlarged; ſubſe-

quent are ſuch, by the failure or non-performance of which an eſtate already veſted, may be defeated. Thus, if an eſtate for life be limited to *A.* upon his marriage with *B.* the marriage is a precedent condition, and till that happens no eſtate is veſted in *A. Show. P. C.* 83. *&c.*—Or if a man grant to his leſſee for years, that upon payment of an hundred marks within the term he ſhall have the fee, this alſo is a condition precedent, and the fee ſimple paſſeth not till the hundred marks be paid, *Co. Litt.* 217.—But if a man grant an eſtate in fee-ſimple, reſerving to himſelf and his heirs a certain rent, and that, if ſuch rent be not paid at the times limited, it ſhall be lawful for him or his heirs to re-enter, and avoid the eſtate: in this caſe the grantee and his heirs have an eſtate upon condition ſubſequent, which is defeaſible, if the condition be not ſtrictly performed *Litt.* § 325. See *poſt.* IV.

To this claſs may alſo be referred all baſe fees and fee ſimples conditional at the common law. Thus an eſtate to a man and his heirs, *tenants of the manor of Dale*, is an eſtate on condition that he and his heirs continue tenants of that manor. And ſo, if a perſonal annuity be granted at this day to a man and the heirs of his body; as this is no tenement within the ſtatute of *Weſt.* 2. it remains as at common law, a fee-ſimple on condition that the grantee has heirs of his body. Upon the ſame principle depend all determinable eſtates of freehold, as *durante viduitate, &c.* Theſe are eſtates upon condition that the grantee do not marry and the like. And, on the breach of any of theſe ſubſequent conditions by the failure of the contingencies, by the grantee not continuing tenant of the manor of *Dale*, by not having heirs of his body: or by not continuing ſole, the eſtates which were reſpectively veſted in each grantee are wholly determined and void.

A diſtinction is however made between *a condition in deed* and a *limitation*, which *Littleton* § 380, 1 *Inſt.* 234, denominates alſo a *condition in law*. For when an eſtate is ſo expreſsly confined and limited by the words of it's creation, that it cannot endure for any longer time than till the contingency happens upon which the eſtate is to fail, this is denominated a *limitation*: as when land is granted to a man *ſo long as* he is parſon of *Dale*, or *while* he continues unmarried, or *until* out of the rents and profits he have made 500 *l.* and the like; in ſuch caſe the eſtate determines as ſoon as the contingency happens; (when he ceaſes to be parſon, marries a wife, or has received the 500 *l.*;) and the next ſubſequent eſtate, which depends upon ſuch determination, becomes immediately veſted, without any act to be done by him who is next in expectancy. See 10 *Rep.* 41.—But when an eſtate is, ſtrictly ſpeaking, upon *condition in deed* (as if granted expreſsly *upon condition* to be void upon the payment of 40 *l.* by the grantor, or *ſo that* the grantee continues unmarried, or *provided* he goes to *York*, *&c.*) the law permits it to endure beyond the time when ſuch contingency happens, unleſs the grantor, or his heirs or aſſigns take advantage of the breach of the condition, and make either an entry or a claim, in order to avoid the eſtate. *Litt.* § 347: *Stat.* 3 *Hen.* VIII. *c.* 34: See 10 *Rep.* 42. Yet, though ſtrict words of condition be uſed in the creation of the eſtate, if on breach of the condition the eſtate be limited over to a third perſon, and does not immediately revert to the grantor or his repreſentatives; (as if an eſtate be granted by *A.* to *B.* on condition that within two years *B.* intermarry with *C.* and on failure thereof, then to *D.* and his heirs;) this the law conſtrues to be a limitation and not a condition: 1 *Vent.* 202; becauſe if it were a condition, then, upon the breach thereof, only *A.* or his repreſentatives could avoid the eſtate by entry, and ſo *D*'s remainder might be defeated by their neglecting to enter; but, when it is a limitation, the eſtate of *B.* determines, and that of *D.* commences, and he may enter on the lands, the inſtant that the failure happens. So alſo, if a man by his will deviſes lands to his heir at law, on condition that he pays a ſum of money, and for non-payment, deviſes it over, this ſhall be conſidered as a limitation; otherwiſe no advantage could be taken of the non-payment, for none but the heir himſelf could have entered for a breach of condition. *Cro. Eliz.* 205: 1 *Rol. Abr.* 411.

In all theſe inſtances, of limitations or conditions *ſubſequent*, it is to be obſerved, that ſo long as the condition either expreſs or implied, either in deed or in law, remains unbroken, the grantee may have an eſtate of freehold; provided the eſtate upon which ſuch condition is annexed be in itſelf of a freehold nature; as if the original grant expreſs either an eſtate of inheritance, or for life, or no eſtate at all, which is conſtructively an eſtate for life. For the breach of theſe conditions being contingent and uncertain, this uncertainty preſerves the freehold. *Co. Lit.* 42; becauſe the eſtate is capable to laſt for ever, or at leaſt for the life of the tenant, ſuppoſing the condition to remain unbroken. But where the eſtate is at the utmoſt, a chattel-intereſt, which muſt determine at a time certain, and may determine ſooner (as a grant for ninety-nine years, provided *A. B.* and *C.* or the ſurvivor of them, ſhall ſo long live) this ſtill continues a mere chattel and is not, by ſuch its uncertainty, ranked among eſtates of freehold.

Theſe expreſs conditions, if they be *impoſſible* at the time of their creation, or afterwards become impoſſible by the act of God or the act of the feoffor himſelf, or if they be *contrary to law*, or *repugnant* to the nature of the eſtate, are void. In any of which caſes, if they be conditions *ſubſequent*, that is, to be performed after the eſtate is veſted, the eſtate ſhall become abſolute in the tenant. As if a feoffment be made to a man in fee-ſimple, on condition, that unleſs he goes to *Rome* in twenty-four hours; or unleſs he marries with *A. B.* by ſuch a day; (within which time the woman dies, or the feoffor marries her himſelf) or unleſs he kills another; or in caſe he aliens in fee; that then and in any of ſuch caſes the eſtate ſhall be vacated and determine: here *the condition is void*, and the eſtate made abſolute in the feoffee. For he hath by the grant the eſtate veſted in him, which ſhall not be defeated afterwards, by a condition either impoſſible, illegal, or repugnant. *Co. Lit.* 206. But if the condition be *precedent*, or to be performed before the eſtate veſts, as a grant to a man that, if he kills another or goes to *Rome* in a day, he ſhall have an eſtate in fee; here, the void *condition* being precedent, the *eſtate* which depends thereon is alſo *void*, and the grantee ſhall take nothing by the grant: for he hath no eſtate until the condition be performed. *Ibid*: 2 *Comm.* 152—7.

II. *Conditions* may be annexed to any eſtate, whether in fee-ſimple, fee-tail, for life or years: they run with the eſtate, and bind in the hands of whomſoever they come. *Lit. Rep.* 128. But a *condition* may not be made but

but on the part of the leſſor, donor, &c. for no man may annex a *condition* to an eſtate, but he that doth create the eſtate itſelf. *Conditions* are good to enlarge or limit eſtates: There are four incidents, which conditions to create and increaſe an eſtate ought to have. 1. They ſhould have a particular eſtate, as a foundation whereupon the increaſe of the greater eſtate ſhall be built. 2. Such particular eſtate ſhall continue in the leſſee or grantee, until the increaſe happens. 3. It muſt veſt at the time the contingency happens, or it ſhall never veſt. 4. The particular eſtate and increaſe muſt take effect by the ſame deed, or by ſeveral deeds delivered at the ſame time. 8 *Rep.* 75.

Conditions to create eſtates ſhall be favourably conſtrued: but *conditions* which tend to deſtroy, or reſtrain an eſtate, are to be taken ſtrictly. A feoffment upon *condition*, that the feoffee ſhall not alien, is void: but a *condition* in a feoffment not to alien for a particular time, or to a particular perſon, may be good. *Hob.* 13. 261. And if a *condition* is, that tenant in tail ſhall not alien in fee, &c. or tenant for life or years not alien during the term, theſe *conditions* are good: where the reverſion of an eſtate is in the donor, he may reſtrain an alienation by *condition*. 10 *Rep.* 39: 1 *Inſt.* 222. If one make a gift in *tail*, on *condition* that the donee or his heirs ſhall not aliene, this is good to ſome intents, and void to others: for if he make a feoffment in *fee*, or any other eſtate by which the reverſion is diſcontinued tortiouſly, the donor may enter; but it is otherwiſe if he ſuffer a common recovery. 1 *Inſt.* 223.

A liberty inſeparable from an eſtate cannot be reſtrained; and therefore a *condition* that a tenant in tail ſhall not levy a fine, within the *Stat.* 4 *H.* 7. *c.* 24, or ſuffer a recovery; or not make a leaſe within the *Stat.* 32 *Hen.* 8. *c.* 36, is void and repugnant. But if the *condition* reſtrain levying a fine at common law, it may be good. 2 *Danv. Abr.* 22. A gift in tail, or in fee, upon condition that a feme ſhall not be endowed; or baron be tenant by the curteſy, is repugnant and void. So is a *condition* in a leaſe, &c. that the leſſee ſhall not take the profits: and where a man grants a rent-charge out of land, provided it ſhall not charge the lands. *Co. Litt.* 146.

Conditions repugnant to the eſtate, impoſſible, &c. are void: and if they go before the eſtate, the eſtate and *condition* are void; if to follow it, the eſtate is abſolute, and the *condition* void. 1 *Inſt.* 206: 9 *Rep.* 128. But if at the time of entring into a *condition*, a thing be poſſible to be done and become afterwards impoſſible by the act of God, the eſtate of a feoffee (created by livery) ſhall not be avoided. 2 *Mod.* 204: See *ante* I. 2.

Where a *condition* is of two parts, one poſſible, and the other not ſo, it is a good *condition* for performing that part which is poſſible. *Cro. Eliz.* 780. Though if a *condition* is of two parts *diſjunctive*, and one part becomes impoſſible, by the act of God, the perſon bound is not obliged to perform the other. 1 *Rol. Abr.* 446. *l.* 45: 2 *Mod.* 202, 203. If a condition be in the *copulative*, and is not poſſible to be performed, it is ſaid it may be taken in the diſjunctive. 1 *Danv. Abr.* 73.

Where an eſtate is to be wholly created upon a *condition* impoſſible to be performed, there the eſtate ſhall never come *in eſſe*. 1 *Leon. c.* 311. A woman makes a feoffment to a man that is married, upon condition that he ſhall marry her; this condition is not impoſſible, for the man's wife may die, and then he may marry her. 2 *Danv.* 25. A reverſion may be granted in tail upon condition, that if the grantee pays ſo much, he ſhall have the fee. 8 *Rep.* 73. But if a man grants lands, &c. for *years*, upon condition that if the leſſee pay 20*s.* within one year, that he ſhall have it for *life*: and that if he after the year pay 20*s.* he ſhall have the *fee*; though both ſums are paid, he ſhall have *but* an *eſtate* for *life*: the *eſtate* for *life*, at the time of the grant, being only in *contingency*, and a *poſſibility* cannot increaſe upon a *poſſibility*, nor can the *fee* increaſe upon the *eſtate* for *years*. 8 *Rep.* 75.

If a leaſe be made to two, with condition to raiſe a fee, and one dies, the ſurvivor may perform the condition, and have the fee; but if they make partition, the condition is deſtroyed. 8 *Rep.* 75, 76. If a feoffee grant the reverſion of part of the land, on a leaſe for years, on which a rent upon condition is reſerved, all the condition is confounded and gone; though if the *leſſee* aſſign part, the condition remains, for *he* cannot diſcharge the eſtate of the condition. 2 *Danv. Abr.* 119. A man makes a feoffment upon condition, and after levies a fine to a ſtranger, the condition is gone. *Ibid.* 120. If a feoffee upon condition to infeoff another, infeoff a ſtranger; or if it be to re-infeoff the feoffor, and he grant the land to another perſon, upon condition to perform the condition, the condition is broken, becauſe the feoffee hath diſabled himſelf to do it: ſo where ſuch feoffee, upon condition to re-infeoff, &c. takes a wife, that the land is ſubject to the dower of the wife; and ſo if the land is recovered, and execution ſued out by another, the condition is broken. *Co. Lit.* 221: 1 *Danv.* 79.

If one diſſeiſe the feoffee, or any other who hath land by juſt title, and thereof infeoff a ſtranger on condition, and the land is lawfully recovered from him that hath the title; by this the condition is deſtroyed: and if a diſſeiſor make a feoffment in fee upon condition, and after the diſſeiſee doth enter upon the feoffee, this doth extinguiſh the condition. *Perk. ſect.* 821. If the feoffee makes a feoffment of all or part of the land to the feoffor, before the condition is broken; the condition is gone for ever: and if he make a leaſe for life or years only, then the condition will be ſuſpended for that time. *Co. Lit.* 218. But it is otherwiſe where the feoffment or leaſe for life or years, are made to any other but the feoffor. *Ibid.* Where the condition of a feoffment is, that if the feoffor or his heir pay a certain ſum of money to the feoffee ſuch a day, and before that day the feoffor dieth without heir: or if the feoffment be made by a woman on condition to pay her 10*l.* or that the feoffee infeoff her by a certain day, and they intermarry before the day, and the marriage doth continue till after it; in theſe caſes the condition is gone. *Perk. ſect.* 763, 764.

A condition that would take away the whole effect of a grant is void; and ſo it is if it be contrary to the expreſs words of it. Conditions againſt law are void; but what may be prohibited by law, may be prohibited by deed. 1 *Inſt.* 206, 220. He that taketh an eſtate in remainder, is bound by condition in a deed, though he doth not ſeal it.

Conditions in reſtraint of marriage have not generally been favoured, as contrary to ſound policy; but where a legacy has been given over to another, there the condition has always been held good; and it ſeems that ſuch conditions,

tions as only reasonably restrain children from imprudent marriages will be always supported.—That is to say, where they operate only as particular, not as universal restrictions. In the case of *Scott* v. *Tyler*, 2 *Bro. C. R.* 431, &c. it was determined after very long arguments, that a condition annexed to a legacy, that the legatee should not marry *under twenty-one*, without consent of her mother, (or rather that the legacy should vest previous to twenty-one, if the legatee married with such consent,) was a valid condition.—And upon marriage without such consent, it was determined to go to the mother under a gift of a general residue.—See the first paragraph of Div. III. of this title.—And the cases of *Peyton* v. *Bury*, 2 *P. Wms.* 626. and the following cases cited in Mr. *Cox's* note there, *viz. Bellasis* v. *Ermine*, 1 *C. C.* 22: *Fry* v. *Porter*, 1 *C. C.* 138: *Jervoise* v. *Duke*, 1 *Vern.* 19: *Stratton* v. *Grymes*, 2 *Vern.* 357: *Aston* v. *Aston*, 2 *Vern.* 452: *Creagh* v. *Wilson*, 2 *Vern.* 572: *Gillet* v. *Wray*, 1 *P. Wms.* 284: *Piggot* v. *Morris*, *S. C. C.* 26: *Sempbill* v. *Bayly*, *Pre. Ch.* 562: *King* v. *Withers*, *Gilb.* 26: *Harvey* v. *Aston*, *Talb.* 212: *Com. Rep.* 726, and 1 *Atk.* 361: *Pullen* v. *Ready*, 1 *Wilf.* 21: *Underwood* v. *Morris*, 2 *Atk.* 184: *Daley* v. *Desbouverie*, 2 *Atk.* 265: *Elton* v. *Elton*, 1 *Wilf.* 159: *Chauncy* v. *Graydon*, 2 *Atk.* 616: *Reynish* v. *Martin*, 3 *Atk.* 330: *Wheeler* v. *Bingham*, 3 *Atk.* 364: 1 *Wilf.* 135: *Long* v. *Dennis*, 4 *Burr.* 2052: *Hemings* v. *Munckley*, 1 *Bro. C. R.* 303.—That where a legacy is given on consideration that the legatee should not marry without consent, and there is no devise over, the condition is void, See 4 *Burr.* 2055; *Com. Rep.* 739, and the cases there cited.—The case of *Scott* v. *Tyler* above-mentioned, and *Amos* v. *Horner*, 1 *Eq. Ab.* 112. *p.* 9, have determined that a bequest of *the residue*, notwithstanding some contradictory authorities, is equivalent to a limitation over; where the condition is precedent and never performed.—As to the invalidity of a legacy in perfect restraint of marriage see *Knapp* v. *Noyes*, *Ambl.* 662: and *Elton* v. *Elton*, 1 *Wilf.* 159. And the rule of the ecclesiastical law is, that where a portion is given in consideration that a daughter should never marry, the condition is void. *Swinb.*—See also *Rose's* notes on *Com. Rep.* 728, and the cases there cited; and at large on this subject, *Fonblanque's Treatise of Equity* i. 245, &c. and this Dict. title *Marriage*.

The word "If" will not always make a condition; but sometimes it makes a limitation, as where a lease is made for years, *if A. B.* lives so long. And this is contrary to a condition; for a stranger may take advantage of an estate determined thereby, &c. *Co. Lit.* 236: *Dyer* 300. *Sub conditione* is the most proper word to make a condition: *proviso* is as good a word, when not dependant upon another sentence; but in some cases, the word *proviso* may make no *condition*, but be only a qualification or explanation of a covenant. 2 *Danv.* 1, 2. And neither the word *proviso*, nor any other, makes a condition, unless it is *restrictive*. *Plowd.* 34: 1 *Nelf.* 466.

Regularly the word "for" does not import a condition, though it has the force of a condition *when the thing granted is* executory, *and the consideration of the grant is a* service, *or some such thing, for which there is no remedy*; *but the stopping the thing granted*; as in the case of an annuity granted *pro consilio*, or for executing the office of a steward of a court, or the service of a captain or keeper of a fort, here the failure of giving counsel, or performing the service, is a kind of eviction of that which is to be done for the annuity, the grantor having no means either to exact the counsel, or recompence for it, but by stopping the annuity; and in these cases the *condition* is *not precedent*, and therefore the *performance* thereof *need not* be *averred* when the annuity is demanded. *Per Hobart* Ch. J. *Hob.* 41. *Mich.* 10 *Jac.* in the case of *Cowper* v. *Andrews*.

As the intent of the testator chiefly governs in wills, such construction is always made of the words, as will best support his intent, and therefore these words *ad faciendum*, *faciendo*, *ea intentione*, *ad effectum*, &c. in a will create a *condition*. *Co. Lit.* 204 *a.* See titles *Devise*, *Will*.

A grant to one to the intent he shall do so and so, is no *condition*, but a *trust* and *confidence*. *Dyer* 138. Some words in a lease do not make a *condition* but a *covenant*, upon which the lessor may bring his action. A lease being the deed of lessor and lessee, every word is spoken by both; and a *condition* may be therein, though it sounds in *covenant*. 1 *Nelf.* 464. A *covenant* not to grant, sell, &c. *may* be a *condition*; and *covenant* that, paying the rent, the lessee shall enjoy the land, is *conditional*. 2 *Danv.* 2. 6. Where words are indefinite, and proper to defeat an estate, they shall be taken to have the force of a *condition*. *Palm.* 503.

III. A condition may be well performed, when it is done as near to the intent as may be: for if the condition of a feoffment be that the feoffee shall make an estate back to the feoffor and his wife, and the heirs of their two bodies, remainder to the right heirs of the feoffor; in this case, if the feoffor die before, the estate shall be made to the wife without impeachment of waste, the remainder to the heirs of the body of the husband begotten on the wife, &c. *Co. Lit.* 219: 8 *Rep.* 69. If a condition be performed in *substance* and *effect*, it is good although it differs in words; as where it is to deliver letters-patent, and the party bound having lost them, delivers an exemplification, &c. 2 *Danv.* 40. Though payment of the money before the day, is payment at the day, in performance of a condition; yet a feoffor, &c. cannot re-enter, and revest his old estate by force of the condition, till the day whereon the condition gives him power to re-enter. *Ibid.* 121. If a man seised of land in right of his wife, make a feoffment in fee on condition, and dies; if the heir of the feoffor enters for the condition broken, and defeats the feoffment, his estate vanishes, and presently it is vested in the wife. *Co. Lit.* 202. And if a person seised of land, as *heir* on the part of his *mother*, makes a feoffment on *condition* and dieth; though the heir on the part of the *father*, who is *heir* at *Common law*, may *enter* for the *condition* broken, the *heir* of the part of the *mother* shall enter upon him, and enjoy the land. *Ibid.* 12.

Where there is a condition in a feoffment or lease, that if no distress can be found, the feoffor, &c. shall re-enter; if the place is not open to the distress, as if there be only a cupboard in the house, which is locked, &c. it is all one as if there was no distress there, and the feoffor, &c. may enter. 2 *Danv.* 46. When a rent is to be paid upon condition at a certain day, the lessor cannot enter for the condition broken, before *demand* of the *rent*. *Ibid.* 98. And the lessor ought to demand the rent *at the day*, or the condition shall not be broken by the non-payment of the rent. A re-entry may be given on a

feoffment, &c. though none be reſerved: if one make a leaſe for life or feoffment upon condition, that if the feoffee or leſſee does ſuch an act, the eſtate ſhall be void: now although the eſtate cannot be void before entry, this is a good condition, and ſhall give an entry to the leſſor, &c. by implication. 1 *Rol. Abr.* 408. A leaſe for life on condition, being a freehold, cannot ceaſe without entry; but if it be a leaſe for years, the leaſe is void *ipſo facto*, on breach of the condition without any entry. 1 *Inſt.* 214. If a leaſe for years is, that, on breach of the condition, the term ſhall ceaſe, the term is ended without entry; but where the words are, that the leaſe ſhall be void, it is otherwiſe. *Cro. Car.* 511: 3 *Rep.* 64. Regularly, where one will take advantage of a condition, if he may enter, he muſt do it; and if he cannot enter, he muſt make a claim. *Co. Lit.* 218. Where on condition broken, leſſor brings an *ejectment*, *entry* is not neceſſary; if tenant defends, he is bound by the rule, to confeſs *entry*.

No one can reſerve the power or benefit of re-entry, on breach of a condition to any other but himſelf, his heirs, executors, &c. parties and privies, in right and repreſentation: privies in law, grantees of reverſions, &c. are to have no advantage by it. But by the *Stat.* 32 *H.* 8. *c.* 28, Grantees of reverſions may take advantage againſt leſſees, &c. by action. 1 *Inſt.* 214, 215: *Plowd.* 175. Where one doth enter for a condition broken, it generally makes the eſtate void *ab initio*, and the party comes in of his firſt eſtate; and he ſhall have the land in the ſame manner it was when he parted with it; and his poſſeſſion at the time of making the condition; therefore he ſhall avoid all ſubſequent charges on the lands. 4 *Rep.* 120: *Plowd.* 186: *Co. Lit.* 233. If one enters on a condition performed, he ſhall avoid all incumbrances upon the land after the condition made: and a condition when broken, or performed, &c. will defeat the whole eſtate. So that if there be a leaſe for life, remainder in fee, on condition that the leſſee for life ſhall pay 20*l.* to the leſſor; if he pay not this money, the eſtate in remainder will be avoided alſo. *Dyer* 127: 8 *Rep.* 90. But this may be otherwiſe by ſpecial limitation to an uſe: and if tenant for life, and he in remainder join in a feoffment on condition, that if, &c. then the tenant for life ſhall re-enter, this may be good without defeating the whole eſtate; though regularly a condition may not avoid part of an eſtate, and leave another part entire, nor can the eſtate be void as to ſome perſons, and good as to others. 8 *Rep.* 190: 1 *Inſt.* 214.

Leſſee for life makes a feoffment on condition, and enters for the condition broken; by this he ſhall be reſtored to his eſtate for life, and reduce the reverſion to the leſſor; and the rent due to the leſſor ſhall be revived: but in this caſe the leſſee will not be in the ſame courſe as he was before, for his eſtate is ſubject to a forfeiture, though he be tenant for life ſtill. *Roll.* 474: *Shep. Abr.* 405.

Tenants by the curteſy, tenant in tail after poſſibility of iſſue extinct, tenant in dower, for life, or years, &c. hold their eſtates ſubject to a condition in law, not to grant a greater eſtate than they have, nor to commit waſte, &c. 1 *Inſt.* 233. And eſtates made by deed to infants, and feme coverts, upon condition, ſhall bind them, becauſe the charge is on the land. 2 *Danv.* 30. A releaſe of all a man's right may be upon condition; a leſſee may ſurrender upon condition; a contract may be upon condition, &c. But a parſon cannot reſign upon condition, any more than be admitted upon condition: and a condition cannot be releaſed on condition. 9 *Rep.* 85.

No perſon ſhall defeat any eſtate of freehold upon condition without ſhewing the deed wherein the condition is contained: but of chattels real or perſonal, &c. a man may plead that ſuch grants or leaſes were made upon condition without ſhewing the deeds; and in the caſe of a condition to avoid a freehold, though it may not be pleaded without the deed, it may be given in evidence to a jury, and they may find the matter at large. *Lit.* 374: 5 *Rep.* 40. A condition may be apportioned by act of law, or of the leſſee. 4 *Rep.* 120. But a man cannot by his own act divide, or apportion a condition, which goes to the deſtruction of an eſtate. 1 *Nelſ. Abr.* 474. A condition in a *will* is a thing odious in law, which ſhall not be created without ſufficient words. 2 *Leon.* 40. A deviſe to the heir at law, provided he pay to *A*, *B.* 20*l.* is a void condition, becauſe there is no perſon to take advantage of the non-performance. 1 *Lutw.* 797. Yet conditional deviſes, as well of lands as of goods, are allowed by our law, and not being performed, the heir or executors ſhall take advantage of them. 1 *Nelſ.* 467.

Where there are *negative* and *affirmative conditions*, the pleader muſt ſhew, not only that he has *not broke* the *negative* ones, but alſo that he has *performed* the *affirmative* ones. *Fletcher* v. *Richardſon*, *Hardw.* 322.

As to *relief* againſt the breach of conditions. Some ſay that in all caſes of penalty or forfeiture that lie in compenſation, Equity will relieve; for where they can make compenſation, no harm is done. So that although an expreſs time be appointed for the performance of a condition, the judge may, after that day is paſt, allow a reaſonable ſpace to the party, making reparation for the damage, if it be not very great, nor the ſubſtance of the covenant deſtroyed by it. See *Fonblanque's Treat. Eq.* i. 387, and the caſes there cited.

The ſubſtantial diſtinction which governs the interference of Courts of Equity in caſes of conditions broken, is not whether the condition be precedent or ſubſequent, but whether compenſation can or cannot be made: and therefore, where *A.* conveyed lands to *B.* &c. upon truſt, that if *C.* the ſon of *A.* within ſix months after the death of *A.* ſhould ſecure to truſtees 500*l.* for the younger children of *C.* then after ſuch ſecurity given to convey to *C.* and his heirs; and until the time for giving ſuch ſecurity in truſt for the eldeſt ſon of *C.* and in default of ſuch ſecurity, to convey to ſuch eldeſt ſon and his heirs; *C.* died before ſuch ſecurity given: yet this *condition precedent* being only in the nature of a penalty, the *intent of the truſt* ſhall be regarded, which was to ſecure 500*l.* to the younger children. *Wallis* v. *Crimes*, 1 *C. C.* 89: See *Glaſcock* v. *Brownell*, *Finch.* 178: *Pitcairne* v. *Bruce*, *Finch.* 403: *Woodman* v. *Blake*, 2 *Vern.* 222: *Bertie* v. *Falkland*, 2 *Vern* 339: *Hayward* v. *Angell*, 1 *Vern.* 222: *Bland* v. *Middleton*, 2 *C. C.* 1: *Francis's Maxims*, *p.* 49.

But though Equity will, under ſome circumſtances, relieve againſt the breach of a condition precedent, where damages are *certain*; yet it ſeems, that they will not where the damages accrued are contingent, and cannot be eſtimated. *Sweet* v. *Anderſon*, 5 *Vin.* 93. *pl.* 15. See *Treatiſe of Equity*, *pp.* 209, 367, 391.

IV. There

CONDITION IV.

IV. There are no preciſe technical words required in a deed, to make a ſtipulation a condition *precedent* or *ſubſequent*; neither does it depend on the circumſtance whether the clauſe is placed prior or poſterior in the deed, ſo that it operates as a proviſo or covenant; for the ſame words have been conſtrued to operate as either the one or the other according to the nature of the tranſaction, *per Aſhhurſt* Juſtice, 1 *Term Rep.* 645.—Further, as to the nature of conditions precedent and ſubſequent, See 3 *Atk.* 364: 2 *P. Wms.* 419, 626: 1 *Vern.* 83: 3 *C. C.* 130: 3 *Lev.* 132: *Fearne on Cont. Rem*: 2 *Burr.* 899: 4 *Burr.* 1930: 1 *Wilſ.* 105, 136: 2 *Bro. C. R.* 67: and *Ib.* 431, 489, as to a condition annexed to a legacy, that the legatee ſhould marry with conſent of her mother, which was held to be valid. In 1 *Eq. Ab.* 108, it is ſaid that conditions precedent are ſuch as are annexed to eſtates, and muſt be punctually performed *before* the eſtate can veſt. A condition ſubſequent, is when the eſtate is executed; but the *continuance* of ſuch eſtate depends on the breach or performance of the condition. The two moſt material points of diſcuſſion reſpecting the doctrine and different operations at law, and in equity, of conditions precedent and ſubſequent ariſe, 1. From caſes where conditions are annexed to deviſes, making them void on the marriage of the deviſee without conſent: See *ante* II. and title *Marriage*: And 2. From caſes ariſing on the *veſting* of portions and legacies made payable at a future time. See titles *Deviſe*, *Legacy*, *Portions*.

Conditions *precedent* are ſuch as muſt be punctually performed before the eſtate can veſt; but on a condition *ſubſequent*, the eſtate is immediately executed: yet the *continuance* of ſuch eſtate dependeth on the breach or performance of the condition. *Co. Lit.* 218: *Eq. Abr.* 108. As if I grant, that if *A.* will go to ſuch a place, about my buſineſs, that he ſhall have ſuch an eſtate, or that he ſhall have 10*l.* &c. this is a condition *precedent*. 1 *Rol. Abr.* 414. So if I retain a man for 40*s.* to go with me to *Rome*, this is a condition precedent, for the duty commences by going to *Rome*. 1 *Rol. Abr.* 914. So if a man, by will deviſes certain legacies, and then deviſes all the reſidue of his eſtate to his executor, after debts, legacies, &c. paid and diſcharged, this is a condition precedent; ſo that the executor cannot have the reſidue of the eſtate before the debts and legacies are diſcharged. 1 *Rol. Abr.* 415: 1 *Jones* 327: *Cro. Car.* 335.

But if a man deviſes a term to *A.* and that if his wife ſuffers the deviſee to enjoy it for three years, that ſhe ſhall have all his goods as executrix; but if ſhe diſturbs *A.* then he makes *B.* executor, and dies, his wife is executrix preſently; for though in *grants* the eſtate ſhall not veſt till the condition precedent is performed, yet it is otherwiſe in a *will*, which muſt be guided by the intent of the parties; and this ſhall not be conſtrued as a condition *precedent*, but only as a condition to abridge the power of being executrix, if ſhe perform it not. *Cro. Eliz.* 219.

Where the *one promiſe* is the conſideration *of the other*, and where the performance and not the promiſe is, *muſt be gathered from the words and nature of the agreement*, and depends intirely thereupon; for, if there was a *poſitive* promiſe that one ſhould releaſe his equity of redemption, and on the other ſide, that the other would pay 7*l.* then the one might bring his action without any averment of performance; but where the agreement is, that the plaintiff ſhould releaſe his equity of redemption, in conſideration whereof the defendant was to pay him 7*l.* ſo that the *releaſe is the conſideration*, and therefore, being *executory*, it is a condition *precedent*, which muſt be averred. 12 *Mod.* 455, 460. *Thorp* v. *Thorp*.

If there be a *day ſet for the payment* of money, *or doing the thing* which one promiſes, agrees or covenants to do *for* another thing, and that day *happens to incur before* the time, *the thing* for which the promiſe, agreement or covenant *is made, is to be performed by the tenor of the agreement*; there, though the words be, that the party ſhall pay the money, or do the thing for ſuch a thing, or in conſideration of ſuch a thing; after the day is paſt the other ſhall have action for the money, or other thing, though the thing for which the promiſe, agreement, or covenant was made, be not performed; for it would be repugnant there to make it a condition *precedent*; and therefore they are in that caſe left to mutual remedies, on which, by the expreſs words of the agreement, they have depended. *Per Holt* Ch. Juſtice. 12 *Mod.* 461: *Paſch.* 13 *W.* 3. *Thorp* v. *Thorp*.

M. agrees *to give* A. *ſo much for the uſe of a coach and horſes for a year*, and *A. agreed* further with *M. to keep the coach in repair*; it was averred the coach and horſes were delivered to *M.* but nothing of the repair; and *Holt* Ch. Juſtice held upon this evidence, that *repairing* was not a condition *precedent*, and therefore need not be averred. *Per Holt* Ch. Juſtice at *Guildhall*, and judgment *pro querente*. 12 *Mod.* 503: *Paſch.* 13 *Will.* 3. *Atkinſon* v. *Morris*.

But if the agreement had been that *A.* had agreed *to give* M. *a coach and horſes for a year, and to repair the coach, and* that *for that* M. *promiſed ſo much money, then* the repairing had been a condition *precedent* neceſſary to be averred. *Per Holt* Ch. Juſtice. 12 *Mod.* 503. *Paſch.* 13 *W.* 3. in S. C.

Condition that *A.* ſhall do, and *for the doing* B. *ſhall pay*, is a condition *precedent*, but *time fixed for payment* will verify the condition; *per Holt* Ch. Juſtice. 1 *Salk.* 171. *Paſch.* 13 *Will.* 3. *B. R. Thorp* v. *Thorp*.—See this *Dict.* title *Award*.

If *A.* makes a leaſe for five years to *B.* upon condition, that if *B.* pays him 10*l.* within two years, that then he ſhall have a fee-ſimple in the lands, and make livery and ſeiſin to *B.* this paſſes the freehold immediately, and *B.* has a fee conditional; becauſe if the freehold was not to veſt in *B.* till the condition performed, it would be difficult to determine in whom the freehold lay; for conditions may be inſerted in ſuch deeds as are perfected privately, which might prove greatly prejudicial to ſtrangers. *Lit. ſect.* 350: *Co. Lit.* 216, 217.

But in caſe of a leaſe for life, with ſuch a condition, the freehold paſſes not before the condition performed; becauſe the livery may preſently work upon the freehold. But if a man grants an advowſon, &c. (which lie in grant) for years, upon ſuch condition, the grantee ſhall have no fee till the condition performed. *Co. Lit.* 217.

If *A.* leaſes to *B.* for years, upon condition, that if *B.* pays money to *A.* or his heirs, at a day, that *B.* ſhall have the fee, and before the day *A.* is attainted of treaſon and executed; now though the condition became impoſſible by the act and offence of *A.* yet *B.* ſhall not have a fee, becauſe a *precedent* condition to increaſe an eſtate muſt be performed; and if it becomes impoſſible, no eſtate ſhall riſe. *Co. Lit.* 210. Alſo in equity, with reſpect

reſpect to conditions precedent and ſubſequent, the prevailing diſtinction ſeems to be, to relieve againſt the breach or non-performance, not ſo much whether the condition be *precedent* or *ſubſequent*, as whether a *compenſation* can be made. 1 *Vern.* 79, 167. As if *A.* conveys lands to *B.* &c. and their heirs, upon truſt, that if *C.* the ſon of *A.* within ſix months after the death of *A.* ſhould ſecure to the truſtees 500*l.* for the younger children of *C.* then after ſuch ſecurity given, to convey to *C.* and his heirs, and until the time for giving ſuch ſecurity, in truſt for the eldeſt ſon of *C.* and in default of ſuch ſecurity, to convey to ſuch eldeſt ſon and his heirs, if *C.* dies before any ſuch ſecurity given, yet this condition, though *precedent*, being only in nature of a penalty, the intent of the truſt ſhall be regarded, which was to ſecure 500*l.* for the younger children. 1 *Chan. Ca.* 89.

If a feme covert, having power by will to deviſe lands, deviſes them to her executors, to pay 500*l.* out of them to her ſon; provided, that if the father gives not a ſufficient releaſe of certain goods to her executors, that then the deviſe of the 500*l.* ſhould be void, and go to the executors; and after her death a releaſe is tendered to the father, and he refuſes, yet upon making the releaſe after, the money ſhall be paid to the ſon; for it was ſaid to be the ſtanding rule of the court, *that a forfeiture ſhould not bind, where a thing* may *be done after, or a* compenſation *made for it*; as where the condition is to pay money, &c. and though it is generally binding, where there is a deviſe over, yet here, it being to go to the executors, it is no more than the law implies. 2 *Vent.* 252.

See more concerning Conditions under title *Bond*.—See alſo 2 *Com. Dig.* title *Condition*.—And 1 *Inſt.* 201, 203, 206, 237, *in the notes*.

CONDUITS, for water in *London*, ſhall be made and repaired, and the Lord Mayor and Aldermen may inquire into defaults therein, &c. *Stat.* 35 *H.* 8. *c.* 10.—See further title *London*.

CONE AND KEY, A woman at the age of fourteen or fifteen years might take the charge of her houſe, and receive *cone and key*: *cone* or *colne* in the *Sax.* ſignifying *computus*; ſo that ſhe was then held to be of competent years, when ſhe was able to keep the *accounts* and *keys* of the houſe. *Bract. lib.* 2. *cap.* 37. And there is ſomething to the ſame purpoſe in *Glanv. lib.* 7. *cap.* 9.

CONEY-BURROWS, Places where conies or rabbits breed and haunt, &c. Commoners cannot lawfully dig up coney-burrows in the common. 2 *Wilſ.* 51.—See title *Common*.

CONFEDERACY, *confœderatio.*] Is when two or more combine together to do any damage or injury to another, or to do any unlawful act. And falſe *confederacy* between divers perſons ſhall be puniſhed, though nothing be put in execution: but this *confederacy*, puniſhable by law before it is executed, ought to have theſe incidents; *firſt*, it muſt be declared by ſome matter of proſecution, as by making of bonds, or promiſes the one to the other; *ſecondly*, it ſhould be malicious, as for unjuſt revenge; *thirdly*, it ought to be falſe againſt an innocent perſon; and *laſtly*, it is to be out of court voluntarily. *Terms de Ley.* Where a writ of conſpiracy doth not lie, the *confederacy* is puniſhable: and inquiry ſhall be made of *conſpirators* and *confederaters*, who bind themſelves together, &c. See *poſt*, title *Conſpiracy*.

CONFESSION, *confeſſio*] Is where a priſoner is indicted of treaſon or felony, and brought to the bar to be arraigned; and his indictment being read to him, the court demands what he can ſay thereto; then he either confeſſes the offence, and the indictment to be true, or pleads *Not guilty*, &c.

Confeſſion may be made in two kinds, and to two ſeveral ends: the one is, that the criminal may confeſs the offence whereof he is indicted openly in the court, before the judge, and ſubmit himſelf to the cenſure and judgment of the law; which confeſſion is the moſt certain anſwer, and beſt ſatisfaction that may be given to the judge to condemn the offender; ſo that it proceeds freely of his own accord, without any threats or extremity uſed; for if the confeſſion ariſe from any of theſe cauſes, it ought not to be recorded: as a woman indicted for the felonious taking of a thing from another, being thereof arraigned, confeſſed the felony, and ſaid that ſhe did it by commandment of her huſband; the judges in pity would not record her confeſſion, but cauſed her to plead *Not guilty* to the felony; whereupon the jury found that ſhe did the fact by compulſion of her huſband, againſt her will, for which cauſe ſhe was diſcharged. 27 *Aſſiſ. pl.* 50.

The other kind of confeſſion is, when the priſoner confeſſes the indictment to be true, and that he hath committed the offence whereof he is indicted, and then becomes an *approver*, or *accuſer* of others, who are guilty of the ſame offence whereof he is indicted, or other offences with him; and then prays the judge to have a coroner aſſigned him, to whom he may make relation of thoſe offences and the full circumſtances thereof. See title *Acceſſory*.

There was alſo a third ſort of confeſſion, formerly made by an offender in felony, not in court before the judge, but before the coroner in a church, or other privileged place, upon which the offender, by the ancient law of the land, was to abjure the realm. 3 *Inſt.* 129.—See title *Abjuration*.

Confeſſion is likewiſe in civil caſes, where the defendant confeſſes the plaintiff's action to be good: by which confeſſion there may be a mitigation of a fine againſt the penalty of a ſtatute; though not after verdict. *Finch.* 387: 2 *Keb.* 408.

There is alſo a confeſſion indirectly implied, as well as directly expreſſed in criminal caſes; as if the defendant, in a caſe not capital, doth not directly own himſelf guilty of the crime, but by ſubmitting to a fine owns his guilt; whereupon the judge may accept of his ſubmiſſion to the King's mercy. *Lamb. lib.* 4. *c.* 9. By this indirect confeſſion, the defendant ſhall not be barred to plead *Not guilty* to an action, &c. for the ſame fact: the entry of it is, that the defendant *puts himſelf on the King's mercy*. And of the direct confeſſion, *that he acknowledges the indictment*. And this *laſt* confeſſion carries with it ſo ſtrong a preſumption of guilt, that being entered on record, on indictment of treſpaſs, it eſtops the defendant to plead *Not guilty* to an *action* brought afterwards againſt him for the ſame matter: but ſuch entry of a confeſſion of an indictment of a *capital crime*, it is ſaid, will *not* eſtop a defendant to plead *Not guilty* to an *appeal*, it being in caſe of life. And where a perſon upon his arraignment actually confeſſes himſelf guilty, or unadviſedly diſcloſes the ſpecial manner of the fact, ſuppoſing that it doth not amount to felony, where it doth; the judges, upon pro-

bable circumſtances, that ſuch confeſſion may proceed from fear, weakneſs, or ignorance, may refuſe ſuch a confeſſion, and ſuffer the party to plead *Not guilty*. 2 *Hawk. P. C. c.* 31. § 2.

A *confeſſion* may be received, and the *plea* of *Not guilty* be withdrawn, though recorded. *Kel.* 11. The confeſſion of the defendant, whether taken upon an examination before juſtices of peace, in purſuance of the 1 & 2 *P. & M. c.* 13. or 2 & 3 *P. & M. c.* 10, upon an offender's being bailed or committed for felony; or taken by the Common law, upon an examination before a Secretary of State, or other magiſtrate, for treaſon or other crimes, is allowed to be given in evidence againſt the party confeſſing; but not againſt others. Alſo two witneſſes of a confeſſion of high treaſon, upon an examination before a juſtice of peace, were ſufficient to convict the perſon ſo confeſſing, within the meaning of 1 *Ed.* 6. *cap.* 12, and 5 & 6. *Ed.* 6. *cap.* 11, which required two witneſſes in high treaſon; unleſs the offender ſhould willingly confeſs, &c. But the *Stat.* 7 *W.* 3. *cap.* 3, requires two witneſſes, except the party ſhall *willingly* without violence confeſs, &c. *in open court*, 2 *Hawk. P.C. c.* 46. § 3.—See title *Evidence*.

It has been held, that wherever a man's confeſſion is made uſe of againſt him, it muſt all be taken together, and not by parcels. 2 *Hawk. P. C. c.* 46. § 5. And no confeſſion ſhall, before final judgment deprive the defendant, of the privilege of taking exceptions in arreſt of judgment, to faults apparent in the record. *Ibid. c.* 32. § 4. A demurrer amounts to a *confeſſion* of the indictment as laid, ſo far, that if the indictment be good, judgment and execution ſhall go againſt the priſoner. *Bro.* 86: *S. P. C.* 150: *H. P. C.* 246. And in criminal caſes, not capital, if the defendant demur to an indictment, &c. whether in abatement, or otherwiſe, the court will not give judgment againſt him to anſwer over, but final judgment. 2 *Hawk. c.* 32. § 7.—See title *Abatement*. Where a priſoner confeſſes the fact, the court has nothing more to do than to proceed to judgment againſt him. *Confeſſus in judicio pro judicato habetur*. 11 *Rep.* 30: 4 *Inſt.* 66.—See further, 2 *Hawk. P. C. c.* 32, and this Dict. title *Evidence*.

CONFESSOR, Lat. *confeſſor, confeſſionarius.*] Hath relation to private confeſſion of ſins, in order to abſolution: and the prieſt who received the auricular confeſſion, had the title of confeſſor, though improperly; for he is rather the confeſſee, being the perſon to whom the confeſſion is made. This receiving the confeſſion of a penitent, was in old *Engliſh* to ſhreve or ſhrive; whence comes the word beſhrieved, or looking like a confeſſed or ſhrieved perſon, on whom was impoſed ſome uneaſy penance. The moſt ſolemn time of confeſſing was the day before *Lent*, which from thence is ſtill called *Shrove-Tueſday*. *Cowel.*—See title *Papiſt*.

CONFIRMATION, *confirmatio*, from the verb *confirmare, firmum facere.*] A conveyance of an eſtate, or right *in eſſe*, that one hath in or to lands, &c. to another that hath the poſſeſſion thereof, or ſome eſtate therein; whereby a voidable eſtate is made ſure and unavoidable; or a particular eſtate is increaſed, or a poſſeſſion made perfect. 1 *Inſt.* 295: See *Shep. Touch.* 311. It is a ſtrengthening of an eſtate formerly made, which is voidable, though not preſently void: as for example; a biſhop granteth his chancellorſhip by patent, for term of the patentee's life; this is no void grant, but voidable by the biſhop's death, except it be ſtrengthened by the confirmation of the dean and chapter.

Confirmation, is alſo defined to be the approbation or aſſent to an eſtate already created; which as far as is in the confirmer's power, makes it good and valid: ſo that the confirmation doth not regularly *create an eſtate*, but yet ſuch words may be mingled in the confirmation as may create and enlarge an eſtate: but that is by force of ſuch words as are foreign to the buſineſs of confirmation, and by their own force and power, tend to create the eſtate. *Gilb. Ten.* 75.

A *Confirmation* is of a nature nearly allied to a *releaſe*; the words of making it are theſe, *Have given, granted, ratified, approved, and confirmed. Litt.* § 515, 531.

The words *dedi & conceſſi*, are as ſtrong as the word *confirmavi*, for they amount to a grant of the right of the perſon in poſſeſſion; and if he has any right, I can never after impeach his eſtate. *Gilb. Ten.* 79. See further what words ſhall enure as a confirmation in *Vin. Abr.* title *Confirmation*. (X.)

Madox in *p.* 19. of the *Diſſert.* annexed to the *Formul. Angl.* ſays, that moſt ancient Confirmations made after the conqueſt, often run like feoffments; and are diſtinguiſhable from them, chiefly by ſome words importing a former feoffment or grant.

In ancient times, when feoffees were frequently diſſeiſed of their lands upon ſome ſuggeſtion or other, charters of confirmation ſeem to have been in great requeſt. For in the early times after the conqueſt, ſo many confirmations may be met with, ſucceſſively made to the ſame perſons, or their heirs or ſucceſſors, of the ſame lands and poſſeſſions, that it looks as if they did not think themſelves ſecure in their poſſeſſions againſt the King, or the great lords who were their feoffors, or in whoſe fees their lands lay, unleſs they had repeated confirmations, from them, their heirs or ſucceſſors. And theſe Confirmations very anciently ſeem to have been ſome times made, either by *precept* or *writ* from the King, or other lords, to put the feoffees, or their heirs or ſucceſſors into ſeiſin, after they had been diſſeiſed, or to keep them in their ſeiſin undiſturbed, or elſe by charter of expreſs Confirmation. *Shep. Touch. edit.* 1791. *p.* 314. *in n.* And on this ſubject of confirmation in general, See *Sheppard's* whole chapter.

Confirmation, *aut eſt* perficiens, creſcens *aut* diminuens: *Perficiens*, as if feoffee upon condition make a feoffment, and the feoffor confirm the eſtate of the ſecond feoffee: *Creſcens*, that doth always enlarge the eſtate of a tenant; as tenant for years, to hold for life, &c. *Diminuens*, as when the lord of whom the land is holden, confirms the eſtate of his tenant, to hold by a leſs rent. 9 *Rep.* 142.

The lord may diminiſh the ſervices of his tenant by confirmation; but not reſerve new ſervices, ſo long as the former eſtate in the tenancy continues: and therefore if he confirm to the tenant, to yield him a hawk, &c. yearly, it is void. *Lit. ſect.* 539: 1 *Co. Inſt.* 296. Leaſes for years may be confirmed for part of the term, or part of the land, &c. But it is otherwiſe of an eſtate of freehold, which being entire, cannot be confirmed for part of the eſtate. 5 *Rep.* 81. There may be a confirmation implied by law, as well as expreſs by deed; where the law by conſtruction makes a confirmation of a grant made to another purpoſe: and a confirmation may enlarge

large an eſtate, from an eſtate held at will to term of years, or a greater eſtate; from an eſtate for years to an eſtate for life; from an eſtate for life, to an eſtate in tail, or in fee; and from an eſtate in tail to an eſtate in fee-ſimple. 1 *Inſt.* 305: 9 *Rep.* 142: *Dyer* 263. But if the confirmation be made to *leſſee* for life or years, of his *term* or *eſtate*, and *not* of the *land*, this doth *not* increaſe the eſtate, though if the leſſor confirm the *land*, to have and to hold the *land* to the leſſee and his heirs, this will inlarge the *eſtate*, and ſo of the reſt. *Co. Lit.* 299: *Plowd.* 40.

In every good confirmation, there muſt be a precedent rightful or wrongful eſtate in him to whom made, or he muſt have the poſſeſſion of the thing as a foundation for the confirmation to work upon; the confirmor muſt have ſuch an eſtate and property in the land, that he may be thereby enabled to confirm the eſtate of the confirmee; the precedent eſtate muſt continue till the confirmation come, ſo that the eſtate to be increaſed comes into it; and it is required that both theſe eſtates be lawful. *Co. Lit.* 296: 1 *Rep.* 146: *Dyer* 109: 5 *Rep.* 15. If one have common of paſture in another's land, and he confirms the eſtate of the tenant of the land, nothing paſſes of the common, but it remains as it was before: ſo if a man have a rent out of the land, and he doth confirm the eſtate which the tenant hath in the land, the rent remaineth. *Lit. ſect.* 537.

Tenant for life makes a leaſe for years to a man, and after leaſes the land to another perſon for years; and he in reverſion confirms the laſt leaſe, and after that the firſt leaſe, this is not good: the ſecond leſſee hath an intereſt before by the confirmation of him in reverſion. But in a like caſe, confirmation of the firſt leaſe, after the ſecond was confirmed, was held good: for the leaſe takes no intereſt by the confirmation, but only to make it durable and effectual. *Moor, c.* 180: 1 *Inſt.* 296: *Plowd.* 10.

If a diſſeiſee confirm the land to the diſſeiſor but for one hour, one week, a year, or for life, *&c.* it is a good confirmation of the eſtate for ever: and if he confirms the eſtate of the diſſeiſor without any word of heirs, he hath a fee-ſimple; and if a diſſeiſor make a gift in tail, and the diſſeiſee doth confirm the eſtate of the donee, it ſhall enure to the whole eſtate: alſo if the diſſeiſor enfeoffs *A.* and *B.* and the heirs of *B.* and the diſſeiſee confirms the eſtate of *B.* for his life; this ſhall extend to his companion, and for the whole fee-ſimple. *Co. Lit.* 291, 297, 299.

But where the eſtate is divided, it is otherwiſe; as if there be an eſtate for life, the remainder over, there the confirmation may be of either of the eſtates: and if the leſſee of a diſſeiſor of a leaſe for twenty years, make a leaſe for ten years; the diſſeiſee may confirm to one of them, and not to the other. 1 *Cro.* 472: 5 *Rep.* 81. If a diſſeiſor or any other make a leaſe for years to begin at a day to come, a confirmation to the leſſee before the leaſe begins will not be good; for there is no eſtate in him. *Co. Lit.* 296.

The tenant in tail of land hath a reverſion in fee expectant; in this caſe, the confirmation of the eſtate-tail will not extend to the reverſion. And if my diſſeiſor make a leaſe for life, the remainder in fee, and I confirm the eſtate of the tenant for life; this ſhall not confirm the eſtate of him in remainder: but if I confirm the remainder eſtate, without any confirmation to tenant for life, it ſhall enure to him alſo. *Co. Lit.* 297, 298. If lands are given to two men, and the heirs of their two bodies begotten, and the donor confirms their eſtate in the lands, to have and to hold to them two and their heirs; this ſhall be conſtrued a joint eſtate for their lives, and after they ſhall have ſeveral inheritances. *Co. Lit.* 299. Tenant in tail, or for life, of land, lets it for years, if after he makes a confirmation of the land to the leſſee for years, to hold to him and his heirs for ever, the leſſee hath only an eſtate for the life of the tenant in tail, *&c.* and therein his leaſe for years is extinct. *Lit. ſect.* 606.

A freehold for life, and term for years, it is ſaid, cannot ſtand together of the ſame land, in the ſame perſon. 1 *Nelſ. Abr.* 480. If a feme leſſee for years marries, and the leſſor confirms the eſtate of huſband and wife, to hold for their lives, by ſuch a confirmation the term will be drowned; and the huſband and wife are jointenants for their lives. *Co. Lit.* 300. But if the feme were leſſee for life, then by the confirmation to huſband and wife for their lives, the huſband holdeth only in right of his wife for her life; but ſhall take a remainder for his life. *Ibid.* 299. Confirmation to leſſee for life, and a ſtranger to hold for their *lives*, is void, for there is no privity: but it is otherwiſe, if for *years*. 2 *Danv. Abr.* 141. If *tenant for life* grant a rent-charge, *&c.* to one and his heirs, he in reverſion is to confirm it, otherwiſe it is good only for the life of tenant for life. *Lit.* 529. A tenant for life, and remainder-man in fee, join in a leaſe, this ſhall be taken to be the leaſe of tenant for life, during his life, and confirmation of him in remainder: though after the death of tenant for life, it is the leaſe of him in remainder, and confirmation of tenant for life. 6 *Rep.* 15: 1 *Nelſ. Abr.* 481.

If leſſee for years, without impeachment for waſte, accepts a confirmation of his eſtate for life; by this he hath loſt the privilege annexed to his eſtate for years. 8 *Rep.* 76. Acceptance of rent in ſome caſes makes a confirmation of a leaſe: As if a man leaſes for life, reſerving rent upon a condition of re-entry; if after the condition is broken, by non-payment of the rent, the leſſor diſtrains for the ſaid rent, this act ſhall be a confirmation of the leaſe, ſo as he cannot enter. 2 *Danv.* 128, 129.

What a perſon may defeat by his entry, he may make good by his confirmation. *Co. Lit.* 300. But none can confirm, unleſs he hath a right at the time of the grant; he that hath but a right in reverſion cannot enlarge the eſtate of a leſſee. 2 *Danv.* 140, 141. And where a perſon hath but *intereſſe termini*, he hath no eſtate in him, upon which a confirmation may enure. *Co. Lit.* 290.

As confirmation is to bind the right of him who makes it, but not alter the nature of the eſtate of him to whom made, it ſhall not diſcharge a condition. *Poph.* 51. If *A.* enfeoffs *B.* upon condition, and after *A.* confirms the eſtate of *B.* yet the condition remains: though if *B.* had enfeoffed *C.* ſo that the eſtate of *C.* had been only ſubject to the condition in another deed, and after *A.* had confirmed the eſtate of *C.* this would have extinguiſhed the condition, which was annexed to the eſtate of *B.* 1 *Rep.* 147. A confirmation will take away a condition annexed by law: and by confirmation, a condition after broken in a deed of feoffment is extinguiſhed. 1 *Co. Rep.* 146. Confirmations may make a defeaſible eſtate good; but cannot work upon an eſtate that is void in law. *Co. Lit.* 295.

A confirmation of letters-patent, which are void as they are againſt law, is a void confirmation. 1 *Lil. Abr.* 295. If there be lord and tenant, and the tenant having iſſue, is attainted of felony, if the King pardons him, and the lord confirms his eſtate, and the tenant dies, his iſſue ſhall not inherit, but the lord ſhall have it againſt his own confirmation: for that could not enable him to take by deſcent, who by the attainder of his father was diſabled. 9 *Rep.* 141.

Grants and leaſes of biſhops not warranted by the *Stat.* 32 *H.* 8. *c.* 28, muſt be confirmed by dean and chapter: and grants and leaſes of parſons, *&c.* by patron and Ordinary. 1 *Inſt.* 297, 300, 301. Biſhops may grant leaſes of their church-lands for three lives, or twenty-one years, having the qualities required by 32 *H.* 8. *c.* 28, and concurrent leaſes for twenty-one years, with confirmation of dean and chapter. See 1 *El. cc.* 4, 19. If a prebend leaſes parcel of his prebendary, and the biſhop, who is patron, confirms it; this ſhall not bind the ſucceeding biſhop, without confirmation of dean and chapter, becauſe the patronage is parcel of the poſſeſſions of the biſhoprick; but it ſhall bind the preſent biſhop, *&c.* 2 *Danv.* 139. If a parſon grants a rent, the confirmation of the patron and biſhop is ſufficient without the dean and chapter, and ſhall be good againſt the ſucceeding biſhop. *Ibid.* 140. The dean of *Wells* may paſs his poſſeſſions, with the aſſent of the chapter, without any confirmation of the biſhop. *Ibid.* 135. Leaſes of biſhops are affirmed *ex aſſenſu & conſenſu decani & totius capituli*. See further title *Leaſes*.

To the grants of a *Sole Corporation*, as Parſon, Prebendary, Vicar, and the like, the Patron muſt give his conſent: becauſe ſuch ſole corporation has not the abſolute fee: but a corporation *aggregate*, as Dean and Chapter, Maſter, Fellows and Scholars of a College, *&c.* or any ſole corporation that has the abſolute fee, as a biſhop with conſent of the dean and chapter, may by the Common law make any grant of their poſſeſſions without their founder or patron. 1 *Inſt.* 300 *b.*—See further in what caſes the confirmation of the Patron and Ordinary is neceſſary; and as to confirmation by dean and chapter of the grant of the biſhop; *Vin. Abr.* title *Confirmation.* (G.) (H.): *Bac. Abr. Leaſes.* (G.)

A confirmation, as has been already ſaid, is in nature of a releaſe, and in ſome things is of greater force: and in this deed, it is good to recite the eſtate of the tenant, as alſo of him that is to confirm it; and to mention the conſideration; the words *ratify* and *confirm*, are commonly made uſe of; but the words *give, grant, demiſe, &c.* by implication of law, may enure as a confirmation. 1 *Inſt.* 295: *Weſt. Symb.* 1. *p.* 457.

CONFISCATE, or CONFISCATED. From the Lat. *confiſcare*, and that from *fiſcus*, which ſignifies metonymically the Emperor's treaſure: and as the *Romans* ſay, ſuch goods as are forfeited to the Emperor's treaſury for any offence are *bona confiſcata*, ſo we ſay of thoſe that are forfeited to our King's *Exchequer*. And the *title* to have theſe goods is given to the King by the law, when they are *not claimed* by ſome other: as if a man be indicted for ſtealing the goods of another perſon, when they are in truth his own proper goods, and when the goods are brought into court againſt him, and he is aſked what he ſays to the ſaid goods, if he *diſclaims* them, he ſhall loſe the goods, although that afterwards he be acquitted of the felony, and the King ſhall have them as *confiſcated*; but it is otherwiſe if he do not diſclaim them. It is the ſame where goods are found in the poſſeſſion of a felon, if he *diſavows* them, and afterwards is attainted for other goods, and not for them; for there the goods which he *diſavows* are *confiſcate* to the King; but had he been attainted for the ſame goods, they ſhould have been ſaid to be *forfeited* and not *confiſcate*. So if an appeal of robbery be brought, and the plaintiff leaves out ſome of his goods, he ſhall not be received to enlarge his appeal; and foraſmuch as there is none to have the goods ſo left out, the King ſhall have them as *confiſcate*, according to the rule, *Quod non capit Chriſtus, capit fiſcus. Staund. P. C. lib.* 3. *cap.* 24.

Goods confiſcated are generally ſuch as are arreſted and ſeized for the King's uſe: but *confiſcare* and *foriſfacere* are ſaid to be *ſynonima*; and *bona confiſcata* are *bona foriſfacta*. 3 *Inſt.* 227.—See title *Forfeiture.*

CONFORMITY to the church of *England*. See *Stat.* 1 *Eliz. c.* 2, *&c.* and titles *Recuſant, Nonconformiſt, Religion.*

CONFRAIRIE, *confraternitas.*] A fraternity, brotherhood, or ſociety; as the *confrairie de St.* George, or *les chevaliers de la bleu gartier*, the honourable ſociety of the Knights of the Garter.

CONFRERES, *confratres.*] Brethren in a religious houſe; fellows of one and the ſame ſociety. *Stat.* 32 *Hen.* 8. *c.* 24.

CONFUSION, *property* by—Where goods of two perſons are ſo intermixed, that the ſeveral portions can no longer be diſtinguiſhed, if the intermixture be by conſent, it is ſuppoſed the proprietors have an intereſt in common, in proportion to their reſpective ſhares: but, if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or caſt gold in like manner into another's melting pot or crucible, our law does not allow any remedy in ſuch caſe; but gives the entire property, without any account, to him, whoſe original dominion (or property) is invaded, and endeavoured to be rendered uncertain, without his own conſent. 2 *Comm.* 405.

CONGEABLE, From the Fr. *congé*, leave or permiſſion.] Signifies in our law as much as lawful, or lawfully done, or done with permiſſion: as entry congeable, *&c. Lit. ſect.* 420.

CONGE D'ACCORDER, *Fr.*] Leave to accord or agree, mentioned in the ſtatute of *fines*, 18 *Ed.* 1. in theſe words.—When the original writ is delivered in the preſence of the parties before juſtices, a *pleader* ſhall ſay this, Sir juſtice, *congé d'accorder*; and the juſtice ſhall ſay to him, What ſaith Sir *R.* and name one of the parties, *&c.*

CONGE D'ESLIRE, *Fr.* i. e. leave to chooſe.] The King's licenſe or permiſſion ſent to a dean and chapter to proceed to the election of a biſhop, when any biſhoprick becomes vacant. See title *Biſhop.*

CONGIUS, An ancient meaſure, containing about a gallon and a pint. *Charta Edmondi Regis, anno* 946.

CONINGERIA, A coney-borough, or warren of conies. *Inquiſ. anno* 47 *H.* 3.

CONJUGAL RIGHTS, A ſuit for *reſtitution of conjugal rights*, is one of the ſpecies of matrimonial cauſes: and is brought when either the huſband or wife is guilty of the injury of *ſubtraction*, or lives ſeparate from the other

other without any ſufficient reaſon; in which caſe the eccleſiaſtical juriſdiction will compel them to come together again, *if either party be weak enough to deſire it, contrary to the inclination of the other.* 3 *Comm.* 94.—See title *Baron and Feme.*

CONJURATIO, An oath; and *conjuratus*, the ſame with *conjurator*, viz. one who is bound by the ſame oath. *Conjurare* is where ſeveral affirm a thing by oath. *Mon. Angl. tom.* 1. *p.* 207.

CONJURATION, *conjuratio.*] Signifies a plot or compact made by perſons combining by *oath*, to do any public harm: but was more eſpecially uſed for the having (as was ſuppoſed) perſonal conference with the devil, or ſome evil ſpirit, to know any ſecret, or effect any purpoſe. The difference between *conjuration* and *witchcraft* was ſaid to be, that a perſon uſing the one, endeavoured by prayers and invocations to compel the devil to ſay or do what he commanded him, the other dealt rather by friendly and voluntary conference, or agreement with the devil or familiar, to have his deſires ſerved, in lieu of blood or other gift offered. Both differed from *enchantment* or *ſorcery*; becauſe the latter were ſuppoſed to be perſonal conferences with the devil, and the former were but medicines and ceremonial forms of words uſually called *charms*, without apparition. *Cowel.*

Hawkins, in his Pleas of the Crown, lib. 1. *c.* 3, ſays, that *conjurors* are thoſe who, by force of certain magick words, endeavour to raiſe the devil, and oblige him to execute their commands. *Witches* are ſuch who by way of conference bargain with an evil ſpirit, to do what they deſire of him: and *Sorcerers* are thoſe, who by the uſe of certain ſuperſtitious words, or by the means of images, &c. are ſaid to produce ſtrange effects, above the ordinary courſe of nature. All which were anciently puniſhed in the ſame manner as *hereticks*, by the writ *de hæretico comburendo*, after a ſentence in the eccleſiaſtical court: and they might be condemned to the pillory, &c. upon an indictment at Common law. 3 *Inſt.* 44: *H. P. C.* 38.

The *Stats.* 33 *H.* 8. *c.* 8: and 1 *Jac.* 1. *c.* 12, againſt *conjuration* and *witchcraft* are repealed, by *Stat.* 9 *Geo.* 2. *c.* 5, which enacts, that no proſecution ſhall be commenced on the ſame: but where perſons pretend to exerciſe any kind of *witchcraft* or *conjuration*, &c. or undertake to tell fortunes, or from pretended ſkill in any crafty ſcience to diſcover where goods ſtolen or loſt may be found; upon conviction, they ſhall be impriſoned a year, and ſtand in the pillory once in every quarter, in ſome market-town, and may be ordered to give ſecurity for their good behaviour. See 4 *Comm.* 60.

CONQUEST *Conquæſtus*, the feodal term for *purchaſe*; As to *countries* granted by conqueſt, See title *Plantations.* And alſo title *King.*

CONSANGUINEO, A writ mentioned in *Reg. Orig. de avo, proavo & conſanguineo, &c. f.* 226. See *Coſinage.*

CONSANGUINEUS FRATER, A brother by the father's ſide. 2 *Comm.* 232.

CONSANGUINITY, *conſanguinitas.*] Is a kindred by blood or birth: as *affinity* is a kindred by marriage: and it is conſiderable in the *diſcent* of lands, who ſhall take it as next of blood, &c. and alſo in *adminiſtrations*, which ſhall be granted to the next of kin. See title *Deſcent*; *Executor.*

CONSCIENCE, COURTS OF. Theſe are courts for recovery of ſmall debts, conſtituted by act of parliament, in *London* and *Weſtminſter*, &c. and other trading and populous diſtricts. See titles *Courts*; *Arreſt*; *Proceſs*, &c.

CONSECRATION, See titles *Biſhops*, *Church.*

CONSENT. In all caſes when any *thing executory* is created by *deed*, it may, by conſent of all perſons that were parties to the creation of it by their deed, be *defeated* and annulled, and therefore it was ſaid, that *warranties*, *recognizances*, rents, charges, annuities, covenants, leaſes for years, uſes at common law, &c. may, by a *defeaſance* made with the mutual conſent of all that were parties to the creation of them by deed, be annulled, diſcharged, and defeated. 1 *Rep.* 113. *Albany's Caſe.*

A conſent *ex poſt facto* is not of any ſignification; for it cannot be had for things which cannot be otherwiſe; *per Vaughan* Ch. J. *Mod.* 312, *Fry* v. *Porter.*

The conſent of the *heir* makes good a *void deviſe.* *Chanc. Caſes, Trin.* 23 *Car.* 2. *Lord Cornbury* v. *Middleton.* 1 *C. C.* 208. Conſent of remainder-man for life, tho' but *verbal*, is binding, and decreed to confirm building leaſes accordingly. 2 *Chan. Caſes* 28: *Paſch.* 32 *Car.* 2: *Sidney* v. *The Earl of Leiceſter.* Conſent *to a trial* of a title to land *in another county than where the land lies* will not help, it being an error, though ſuch conſent be of record: agreed *per cur.*' 2 *Show.* 98, *pl.* 97: *Paſch.* 32 *Car.* 2. *B. R. Lord Clare* v. *Reach.*

A *burgeſs of a corporation conſenting to be turned out* from his burgeſs's place, and the common council of the corporation removing him accordingly, does not amount to a reſignation; and a peremptory *mandamus* was granted to reſtore him. *Holt* 450: *Mayor of Glouceſter*'s caſe.

CONSEQUENTIAL LOSSES or DAMAGES. It is a *fundamental principle* in law and reaſon, that he who does the firſt wrong ſhall anſwer for all conſequential damages. 12 *Mod.* 639: *Roſwell* v. *Prior*: but this admits of limitation. Though a man does a lawful thing, yet if any damage do thereby befal another, he ſhall anſwer *if he could have avoided it*; and this holds *in all civil caſes.* As if a man *lops a tree*, and the boughs fall upon another *ipſo invito*, yet an action lies. So if a man *ſhoots at butts*, and hurts another unawares. So if I have land thro' which a river runs to your mill, and I lop the ſallows growing on the river ſide which accidentally *ſtop the water* ſo as your *mill is hindred.* So if I am building my own houſe, and *a piece of timber falls on my neighbour's houſe* and breaks part of it. So if a man aſſaults me, and *I lift up my ſtaff to defend myſelf, and ſtrike another* in lifting it up; but it is otherwiſe *in criminal caſes*, for there *actus non facit reum niſi mens ſit rea. Raym.* 422, 423. See title *Chance-Medley.*

If I have a *pond*, I cannot ſo let it out that it ſhall drown my neighbour's land. Arg. *Het.* 119. cites 6 *Ed.* 4. 6. If a ſtranger *drive my cattle upon your land, whereby they are diſtrained* by you, I ſhall recover againſt the ſtranger for this diſtreſs by you; *Lane* 67, cites 9 *Ed.* 4. 4. A *ſmith pricks the horſe* of a ſervant being on his journey to pay money for his maſter to ſave the penalty of a bond, both the maſter and ſervant may have their ſeveral action on the caſe, for the ſeveral wrongs they have thereby ſuſtained; *per Coke* Ch. J. 2 *Bulſt.* 344.

Where one is *party to a fraud*, all which follows by reaſon of that fraud, ſhall be ſaid as done by him. Arg. *Cro. J.* 469. Action lies *for threatening workmen* to maim and proſecute them, whereby the maſter loſes the ſelling

of his goods, the men not daring to go on with their work. *Cro. J.* 567: *Garret* v. *Taylor*. *A. breaks the fence* of *B.* by which cattle get into *C.*'s ground, *C.* ſhall have caſe againſt *A.* but not treſpaſs. *Per Roll*: *Sty.* 131: *Cowper* v. *St. John*. If A. *beats my horſe by which he runs on* B. *A.* is the treſpaſſer, and not *B.* 2 *Salk.* 631.

He that makes a *fire in his field* muſt ſee that it does no harm, and anſwer the damage if it does; but if a ſudden ſtorm riſeth which he cannot ſtop, it is a matter of evidence, and he muſt ſhew it. 1 *Salk.* 13. *pl.* 4: *Turbervil* v. *Stamp*. If a man keeps a *beaſt of a ſavage nature*, as a lion, *&c.* it is at his peril to keep him up, and he is anſwerable for all the conſequences of his getting looſe; *per Raymond* Ch. J. *Gilb.* 187. *The King* v. *Huggins*. See title *Action*.

CONSERVATOR, *Lat.*] A protector, preſerver, or maintainer; or a ſtanding arbitrator, choſen and appointed as a guarantee to compoſe and adjuſt differences that ſhould ariſe between two parties, *&c. Paroch. Antiq. p.* 513.

CONSERVATOR OF THE PEACE, *conſervator vel cuſtos pacis.*] Is he that hath an eſpecial charge to ſee the king's peace kept: and of theſe conſervators *Lambard* ſaith, that before the reign of *Ed.* III. who firſt created *Juſtices of the Peace*, there were divers perſons that by the common law had intereſt in keeping the peace; ſome whereof had that charge by tenure, as holding lands of the king by this ſervice, *&c.* And others as incident to their offices which they bore, and ſo included in the ſame, that they were nevertheleſs called by the name of their office only: alſo ſome had it ſimply, as of itſelf, and were therefore named *cuſtodes pacis*, wardens or conſervators of the peace. The Chamberlain of *Cheſter* is a conſervator of the peace in that county, by virtue of his office. 4 *Inſt.* 212. *Sheriffs* of counties at common law are conſervators of the peace; and *conſtables*, by the common law were conſervators, but ſome ſay they were only ſubordinate to the conſervators of the peace, as they are now to the juſtice.

The King's Majeſty is, by his office and dignity royal, the principal conſervator of the peace within all his dominions; and may give authority to any other to ſee the peace kept, and to puniſh ſuch as break it: hence it is uſually called the King's peace. The Lord Chancellor or Keeper, the Lord Treaſurer, the Lord High Steward of *England*, the Lord Mareſchal, and Lord High Conſtable of *England*, (when any ſuch officers are in being) and all the Juſtices of the court of *King's Bench*, (by virtue of their offices,) and the Maſter of the Rolls, (by preſcription,) are general conſervators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it: the other judges are only ſo in their own courts. The coroner is alſo a conſervator of the peace within his own county; as is alſo the ſheriff, and both of them may take a recognizance or ſecurity for the peace. Conſtables, tythingmen, and the like, are alſo conſervators of the peace within their own juriſdictions; and may apprehend all breakers of the peace, and commit them till they find ſureties for their keeping it. 1 *Comm.* 350. See title *Juſtices of Peace, Commitment*.

CONSERVATOR OF THE TRUCE AND SAFE-CONDUCTS, *conſervator induciarum & ſalvorum regis conductuum.*] Was an officer appointed by the king's letters patent, whoſe charge was to inquire of all offences done againſt the King's truce and ſafe-conducts upon the main ſea, out of the liberties of the cinque ports, as the admirals cuſtomably were wont to do, and ſuch other things as are declared in *Stat.* 2 *Hen.* 5. *ſt.* 1. *c.* 6. Two men learned in the law were joined to conſervators of the truce as aſſociates; and maſters of ſhips ſworn not to attempt any thing againſt the truce, *&c.* And letters of requeſt and of marque were to be granted when truce was broken at ſea to make reſtitution. *Stat.* 4. *H.* 5. *c.* 7: See title *Truce*.

There was anciently a *Conſervator of the privileges of the Hoſpitallers and Templars*. Weſt. 2. c. 43. And the Corporation of the great *level of the fens* conſiſts of a governor, ſix bailiffs, twenty *conſervators*, and commonalty. *Stat.* 15 *Car.* 2. *c.* 17.

CONSIDERATIO CURIÆ, Is often mentioned in law pleadings, and where matters are determined by the court. *Ideo* conſideratum *eſt per* curiam, *i. e.* Therefore it is conſidered and adjudged by the court; *conſideratio curiæ* is the judgment of the court.

CONSIDERATION, *conſideratio.*] The material cauſe, *quid* or *pro quo*, of any contract, without which it will not be effectual or binding. This conſideration is either *expreſſed*; as when a man bargains to give ſo much, for a thing bought; or to ſell his land for 100 *l.* or grants it in exchange for other lands; or where I promiſe that if one will marry my daughter or build me a houſe, *&c.* I will give him a certain ſum of money; or one agrees for a certain ſum to do a thing. Or it is *implied*, when the law itſelf enforces a conſideration; as where a perſon comes to an inn, and there ſtaying eats and drinks, and takes lodging for himſelf and horſe, the law preſumes he intends to pay for both, though there be no expreſs contract for it; and therefore if he diſcharge not the houſe, the hoſt may ſtay his horſe; and ſo if a taylor makes a garment for another, and there is no expreſs agreement what he ſhall have for it; he may keep the clothes till he is paid, or ſue the party for the ſame. 5 *Rep.* 19: *Plowd.* 308: *Dyer* 30, 337.

Conſiderations may be conſidered either as relating to *contracts* generally or to *deeds* in particular; and further relating thereto, See titles *Aſſumpſit*, *Deed*.

As to *contracts*, a conſideration may be defined to be the reaſon which moves the contracting party to enter into the contract.—This conſideration muſt be a thing lawful in itſelf, or elſe the contract is void. A *good* conſideration is that of blood or natural affection between near relations; the ſatisfaction accruing from which, the law eſteems an equivalent for whatever benefit may move from one relation to another. 3 *Rep.* 83: 1 *Inſt.* 271: 1 *Rep.* 176. This conſideration may ſometimes however be ſet aſide, and the contract become void, when it tends in its conſequences to defraud creditors or other third perſons of their juſt rights. But a contract for any *valuable* conſideration, as for marriage, for money, for work done, or for other reciprocal contracts can never be impeached at law: and if it be of a ſufficient adequate value is never ſet aſide in equity: for the perſon contracted with has then given an equivalent in recompence and is therefore as much an owner, or a creditor as any other perſon. 2 *Com.* 444: *Noy's Max.* 87: *Hob.* 230. See titles *Fraud*; *Fraudulent Conveyance*.

These valuable conſiderations are divided by the Civilians into four ſpecies—*Do ut des*—*Facio ut facias*—*Facio ut des.*—*Do ut facias*, the bare mention of which is here ſufficient.

A conſideration of ſome ſort or other is ſo abſolutely neceſſary to the forming of a *contract* that a *nudum pactum* or bare agreement to do or pay any thing on one ſide without any compenſation on the other, is totally void in law: and a man cannot be compelled to perform it. *Dr. & St. d. 2. c. 24.* As if one man promiſes to *give* another 100*l.* here there is nothing contracted for or given on one ſide, and therefore there is nothing binding on the other. And however a man may or may not be bound to perform it in honour or conſcience, which the municipal laws do not take upon them to decide, certainly thoſe laws will not compel the execution of what he had no viſible inducement to engage for, and therefore our law has adopted the maxim of the civil law *ex nudo pacto non oritur actio.* But any degree of reciprocity will prevent the pact from being nude: nay even if the promiſe be founded on a prior moral obligation (as a promiſe to pay a juſt debt, though barred by the ſtatute of limitations) it is no longer *nudum pactum.* And as this rule was principally eſtabliſhed to avoid the inconvenience that would ariſe from ſetting up mere verbal promiſes, for which no good reaſon could be aſſigned, it therefore does not hold in ſome caſes where ſuch promiſe is authentically proved by *written documents. 2 Comm. 445, 6.*—*Blackſtone* inſtances voluntary *bonds* and *notes*—as to which latter, ſee *Fonblanque*'s obſervations in *Treat. Eq. 334. n.*

Deeds alſo muſt be founded upon good and ſufficient conſideration, not upon an uſurious contract. *Stat. 13 Eliz. c. 8.*—Nor upon fraud or colluſion either to deceive purchaſors, *bonâ fide*, or juſt and lawful creditors. *Stats. 13 Eliz. c. 5: 27 Eliz. c. 4* —Any of which bad conſiderations will vacate the deed and ſubject ſuch perſons as put the ſame in ure, to forfeitures, and often to impriſonments. A deed alſo, or other grant made without any conſideration is, as it were of no effect: for it is conſtrued to enure or to be effectual, only to the uſe of the grantor himſelf. *Perk. §. 533.* The conſideration of deeds alſo, like that of contracts, may be either a *good* or *valuable* one.—Deeds made upon good conſideration only, are conſidered as merely voluntary, and are frequently ſet aſide in favour of creditors, and *bonâ fide* purchaſors. *2 Comm. 296.* See further title *Deeds.*

A conſideration ought to be matter of profit and benefit to him to whom it is done; by reaſon of the charge or trouble of him who doth it. *Cro. Car. 8.* If a perſon hath diſburſed ſeveral ſums for another, *without his requeſt*, and afterwards ſuch other ſays, that in conſideration he hath paid the ſaid ſums for him, he promiſes to pay them: this is no conſideration, becauſe it was executed *before.* But it will be otherwiſe, if the ſums were paid *at the requeſt* of the other. *Moor 220: Cro. Eliz. 282.* A mere voluntary curteſy will not be a good conſideration of a promiſe: but the value and proportion of the conſideration is not material, to maintain an action; for a ſhilling or a penny, is as much binding as 100*l.* Though in theſe caſes, the jury will give damages proportionably to the loſs. *Hob. 5: 10 Rep. 76.*

A conſideration that is void in part, is void in the whole: and if two conſiderations be alledged, and one of them is found falſe by the jury, the action fails. *Hob. 126: Cro. Eliz. 848.* But if there be a double conſideration, for the grounding of a promiſe, for the breach whereof an action is brought; though one of the conſiderations be not good, yet if the other be good, and the promiſe broken, the action will lie upon that breach: for one conſideration is enough to ſupport the promiſe. *1 Lill. 297.* A conſideration muſt be lawful, to ground an *aſſumpſit. 2 Lev. 161.* Where conſiderations are valuable, and conſiſt of two or more parts, there the performance of every part ought to be ſhewn. *Cro. Eliz. 579.* In caſe a deed of feoffment be made of lands; or a fine and recovery be paſſed, and no conſideration is expreſſed in the deed, *&c.* for the doing thereof, it ſhall be intended by the law, that it was made in truſt, for the uſe of the feoffor or conuſor; for it ſhall be preſumed he would not part with his land without a conſideration; and yet the deed ſhall be conſtrued to operate ſomething, and that which is moſt reaſonable. *1 Lill. Abr. 299.*

CONSIGN, Is a word uſed by merchants, where goods are aſſigned, delivered over, or tranſmitted from beyond ſea or elſewhere to a factor, *&c. Lex Mercat.* See titles *Merchant, Factor.*

CONSILIUM, *dies conſilii.*] A time allowed for one accuſed to make his defence, and anſwer the charge of the accuſer—It is now uſed for a ſpeedy day appointed to argue a *demurrer*; which the court grants after the demurrer joined, on reading the record of the cauſe, *&c.*

CONSIMILI CASU, writ of *entry* in. A writ of entry. This and the writ in *caſu proviſo* lay not at common law, but are given by ſtatute *Gloc. 6 Ed. 1. c. 7.* and *Weſtm. 2. 13 Ed. 1. c. 24.* for the reverſioner after alienation; but during the life of the tenant in dower, or other tenant for life. See *F. N. B. 205, 206: 3 Comm. 183. n.*

CONSISTOR, A magiſtrate ſo called: *teſtibus* Rogero *de* Gant, Willielmo conſiſtore *Ceſtriæ, &c.* Blount.

CONSISTORY, *conſiſtorium.*] Signifies as much as *prætorium*, or tribunal: it is commonly uſed for a council-houſe of eccleſiaſtical perſons, or place of juſtice in the ſpiritual court; a ſeſſion or aſſembly of prelates. And every archbiſhop and biſhop of every dioceſe hath a conſiſtory court, held before his chancellor, or commiſſary in his cathedral church, or other convenient place of his dioceſe, for eccleſiaſtical cauſes. *4 Inſt. 338.* The biſhop's chancellor is the judge of this court, ſuppoſed to be ſkilled in the civil and canon law: and in places of the dioceſe, far remote from the biſhop's *conſiſtory*, the biſhop appoints a commiſſary (*commiſſarius foraneus*) to judge in all cauſes within a certain diſtrict, and a regiſter to enter his decrees, *&c. 2 Rol. Abr. 286: Seld. Hiſt. of Tithes, 413, 414.* From the ſentence of this conſiſtory court an appeal lies by virtue of *Stat. 24 H. 8. c. 12*, to the archbiſhop of each province reſpectively.

CONSOLIDATION, *conſolidatio.*] Is uſed for the uniting of two benefices into one. *Stat. 37 H. 8. c. 21.* Which union is to be by the aſſent of the ordinary, patron and incumbent, *&c.* and to be of ſmall churches lying near together. Vide titles *Church, Union.* This word is taken from the civil law, where it ſignifies properly an uniting of the poſſeſſion, occupancy or profit of lands, *&c.* with the property. See alſo *Extinguiſhment, Inſurance.*

CONSPIRACY, *conſpiratio.*] This word was formerly uſed almoſt excluſively, for an agreement of two or more perſons falſely to indict one, or to procure him to be indicted of felony; who after acquittal, ſhall have writ

of

of *conſpiracy*. See 33 *Edw.* 1. *ſtat.* 2: 7 *Hen.* 5: 18 *Hen.* 6. *c.* 12. See poſt title *Conſpirator*. Now, it is no leſs commonly uſed for the unlawful combination of journeymen to raiſe their wages, or to refuſe working, except on certain ſtipulated conditions; an offence particularly provided for by *Stat.* 2 & 3 *E.* 6. *c.* 15; (reviſed, continued and confirmed by *Stat.* 22 & 23 *Car.* 2. *c.* 19, now expired;) which enacts among other things, that "if any artificer do conſpire, that they ſhall not do their works but at a certain price, or ſhall not take upon them to finiſh that another hath begun, or ſhall do but a certain work in a day, or ſhall not work but at certain times, every perſon ſo conſpiring, ſhall forfeit for the firſt offence 10*l.* or be impriſoned 20 days, for the ſecond 20*l.* or be pilloried, and for the third 40*l.* or be pilloried, loſe an ear and become infamous."—This *Stat.* 2 & 3 *E.* 6. *c.* 15, appears to be yet in force, though not frequently reſorted to for remedy in this caſe; the proceeding being uſually by indictment for conſpiracy.

By the Common law there can be no doubt but that all confederates whatſoever, wrongfully to prejudice a third perſon are highly criminal. 1 *Hawk. P. C. c.* 72. § 2.—See further *Stat.* 5 *Eliz. c.* 4. particularly §§ 18, 19, 20. and this Dict. titles *Labourers*; *Servants*.

Journeymen confederating and refuſing to work unleſs for certain wages, may be indicted for a conſpiracy; notwithſtanding the ſtatutes which regulate their work and wages do not direct this mode of proſecution; for this offence conſiſts in the conſpiring and not in the refuſal, and all conſpiracies are illegal though the ſubject matter of them may be lawful. See the caſe of *The Tub-women* v. *The London Brewers*, 8 *Mod.* 11, 320.—So alſo a bare conſpiracy to do a lawful act to an unlawful end is a crime; though no act be done in conſequence thereof. 8 *Mod.* 321.—The fact of conſpiring need not be proved on the trial, but may be collected by the jury from collateral circumſtances. 1 *Black. Rep.* 392: *Stra.* 144. And if the parties concur in doing the act, although they were not previouſly acquainted with each other, it is conſpiracy. Lord *Mansfield* in the caſe of the priſoners in the *King's Bench. Hil. T.* 26 *G.* 3.—1 *Hawk. P. C. c.* 72. § 2. *in n.*

Writ of conſpiracy lies for him that is indicted of a treſpaſs, and acquitted, though it was not felony: alſo upon an indictment for a riot. 2 *Mod.* 306: 5 *Mod.* 405. Where a man is falſely indicted of any crime, which may prejudice his fame or reputation; and though it doth not import ſlander, if it endangers his liberty; or if the indictment be injurious to his property, &c. writ of conſpiracy lieth. 3 *Salk* 97. But though a conſpiracy to charge falſely be indictable, yet the party ought to ſhew himſelf to be innocent; and the writ of conſpiracy lies not without an acquittal. *Mod. Caſ.* 137, 185, 186. Not only writ of conſpiracy, which is a civil action at the ſuit of the party; but alſo action on the caſe in the nature of a writ of conſpiracy, doth lie for a falſe and malicious accuſation of any crime, whether capital or not capital, even of high treaſon; and this though the bill of indictment is found *ignoramus*, or it does not go ſo far as an indictment And the ſame damages may be recovered in ſuch action, as in a writ of conſpiracy, where the party is lawfully acquitted by verdict. 1 *Rol. Abr.* 111, 112: 9 *Rep.* 56: See *Gilb. Ca.* 185: 10 *Mod.* 148, 214: *Salk.* 15. An action on the caſe is preferable, as being more in uſe, and the proceedings eaſier, and not attended with ſuch niceties as the writ of conſpiracy. See titles *Malicious Proſecution*; *Action*.

If one falſely and maliciouſly procure another to be arreſted, and brought before a juſtice of peace to be examined concerning a felony, &c. on purpoſe to vex and diſgrace him, and put him to charges and trouble, although he is not indicted for the ſame, yet he may have an *action on the caſe*; in which he need not aver that he was lawfully acquitted, as he ought to do in a writ of conſpiracy: but he muſt aver that the accuſation was *falſe & malitioſe*, which words are neceſſary in the declaration; and it muſt appear that there was no ground for it. And as an *action on the caſe* may be proſecuted, againſt one perſon, where the writ of conſpiracy or indictment doth not lie but againſt two, this action is moſt commonly brought. 1 *Danv. Abr.* 208, 213: 2 *Inſt.* 562, 638.

Conſpirators may be indicted at the ſuit of the King; and at the Common law, one may prefer an indictment againſt conſpirators, who only conſpire together, and nothing is executed: though the conſpiracy ought to be declared by ſome act, or promiſe to ſtand by one another, &c. But a bare conſpiracy will not maintain a writ of conſpiracy, at the ſuit of the party, becauſe he is not damaged by it; though it is a ground for an indictment. 9 *Rep.* 56: 2 *Rol. Abr.* 77. If the defendants can ſhow any foundation or probable cauſe of ſuſpicion, they ſhall be diſcharged: and if a man hath good cauſe of ſuſpicion that a perſon is guilty of felony, and cauſes him to be indicted, in proſecution of juſtice, action of conſpiracy will not lie: but it is otherwiſe if the proſecutor impoſes the crime of felony, where no felony was committed. 1 *Rol. Abr.* 115: 4 *Rep.* 438.

An action lies not againſt a juſtice of peace, who ſends out his warrant upon a falſe accuſation: but it lies if he makes it out without any accuſation. 1 *Leon.* 187. Conſpiracies ought to be out of court; for if a proſecution be ordered in a courſe of juſtice, and witneſſes appear againſt a party, &c. there ſhall be no puniſhment: and if perſons acted only as jurors in a criminal matter, or judges in open court, there is no ground for proſecution. *S. P. C.* 173: 12 *Rep.* 24. If all the defendants but one are acquitted on indictment for conſpiracy, that one muſt be acquitted alſo; becauſe one perſon alone cannot be indicted for this crime: and huſband and wife, being but one perſon, may not be indicted alone for a conſpiracy. 2 *Rol. Abr.* 708. The acquittal of one perſon is the acquittal of another upon indictment of conſpiracy. 3 *Mod.* 220. (*i. e.* where only two are indicted, and it is not laid or proved that they conſpired with others, unknown.) Though where one is found guilty, according to the opinion of the Lord Chief Juſtice *Hale*, if the other doth not come in upon proceſs, or if he dies pending the ſuit, judgment ſhall be had againſt the other. 1 *Vent.* 234. Writ of conſpiracy was brought againſt two perſons, and one found Not-guilty; the other ſhall not have judgment; but in *action on the caſe*, it had been good. *Cro. Eliz.* 701. And action on the caſe in the nature of a conſpiracy may be brought againſt one only. 1 *Hawk. P. C. c.* 72. § 8. If the parties are found guilty of the conſpiracy, upon an indictment of felony, at the King's ſuit; the judgment is, that they ſhall loſe their *frank law* (which diſables them to be put upon any jury, to be ſworn as witneſſes, or to appear in perſon in any of

of the King's courts) and that their lands, goods and chattels be seized as forfeited, and their bodies committed to prison; which is called a *villainous judgment*. 2 *Inst.* 143, 222: *Crompt. Just.* 156: 1 *Hawk. P. C. c.* 72. § 9. There has been no instance of the villainous judgment since the reign of *Edw.* III. The usual mode of punishment at present is, by pillory, fine, imprisonment, and surety for good behaviour. *Burr.* 996, 1027: *Stra.* 196.—The Quarter Sessions have jurisdiction over this offence. *Finch* 80: 8 *Mod.* 321. And on motion in arrest of judgment, the defendant must be personally present in court. *Stra.* 1227: *Burr.* 931.

The matter of the conspiracy ought to touch a man's life, where the villainous judgment is imposed. 1 *Hawk. P. C. c.* 72. For conspiring to charge a person with poisoning another, &c. one of the parties was fined 1000 *l.* and some others had judgment of the pillory, and to be burnt in the cheek with the letters *F.* and *C.* to signify false conspirators. *Moor* 816. As fine and imprisonment is the usual punishment at this day on indictment for *conspiracy*, so on writ of conspiracy, &c. the party shall be fined, and render damages. See further 1 *Hawk. P. C. c.* 72. at large.

Conspirators, *conspiratores.*] By *Stat.* 33 *E.* 1. *st.* 2, are defined to be those that do bind themselves by oath, covenant, or other alliance, that every of them shall aid the other falsely and maliciously to indict persons: or falsely to move or maintain pleas, &c. And such as retain men in the country, with liveries, or fees, to maintain their malicious enterprises, which extends as well to the takers as the givers; and stewards and bailiffs of great lords, who, by their office or power undertake to bear and maintain quarrels, pleas or debates, that concern other parties than such as relate to the estate of their lords or themselves. 2 *Inst.* 384, 562. And against conspirators, false informers and imbracers of inquest, the King hath provided a writ in the *Chancery*; and the justices of either bench and justices of assise, shall, on every plaint, award inquest thereupon. *Stat.* 28 *E.* 1. *st.* 3. *c.* 10. From the description of conspirators, in several of our old law books, conspiracy is taken generally, and confounded with *maintenance* and *champerty*; see those titles. Besides these, there are *conspirators* in *treason*; by plotting against the Government, &c. See title *Treason*.

Conspiratione, The writ that lay against conspirators. *Reg. Orig.* 134: *F. N. B.* 114.

CONSTABLE.

On this subject, recourse has been had to a very useful, accurate and ingenious performance on "*The Office of a Constable*"; [8vo Pamphlet 1791;] which appears, tho' published without the author's name, to come from the pen of a gentleman intimately versed in *English* antiquities; and to whom the Publick are indebted for many, more amusing and other equally instructive, performances.—If it should be objected, that a little too much asperity is attached to some of his *remarks* on this subject, he may plead in his excuse, that as in the body natural, so also in the body politick, where lenitives have been applied in vain, it is sometimes painfully necessary to recur to corrosives. The *effect* of this kind of observations, is, it is hoped, preserved in the following abridgment; though the "hard words, jealousies, and fears" are conveyed in gentler language.

The *Origin* of the *word* Constable, erroneously sought for in the *Saxon* language, is undoubtedly to be found in the *comes stabuli* of the *Eastern* Empire; who was at first, as his title imports, no more than superintendant of the imperial stables; or, in other words, the Emperor's Master of the Horse; but having in process of time obtained the command of the army, his name, (corrupted into *constabulus* and *constabularius*; see *Spelman.*) began to signify a commander: and with this signification appears to have been introduced into *England* at the *Norman* Conquest; or perhaps sooner.

The Constable of England, or *Lord-High-Constable*; was anciently an officer of the highest dignity and importance in the realm. He was the leader of the King's armies; and had the cognizance of all contracts and other matters touching arms or war. 13 *R.* 2. *st.* 1. *c.* 2.—and see *Maddox's History of the Exchequer, p.* 27. He sate as Judge with the Earl-Marshal having precedence of him in the court of Chivalry—and he is by some of our books also called Marshal.—See title *Marshal*.

This office, which appears to have been granted by *William* the Conqueror, to *Walter* Earl of *Gloucester*, or according to others to *William Fitzosborne* or *Roger de Mortimer*, became hereditary in two different families, as annexed to the earldom of *Hereford*: and in that right after a lapse of near two centuries, was revived by judgment of law, in the person of *Edward Stafford* Duke of *Buckingham*; who, being attainted of high treason, an. 13 *H.* 8, this office became forfeited to the crown. Since this period there has been no Lord High Constable, except *pro hac vice* at a Coronation, or on other solemn occasions.

Constables of Castles, were keepers or governors of the castles of the King; or of Great Barons, and who were frequently hereditary or by feudal tenure; such were the Constable of the Tower, the Constable of *London*, or *Baynard's* Castle, the Constables of the castles of *Dover, Windsor, Chester, Flint*, &c. some of which offices though not now hereditary, are remaining to this day. These are the constables intended in *Magna Charta, cc.* 17, 20; and who, in the *Stat.* of *Westm.* 1. (3 *E.* 1.) *c.* 15, are called Constables of Fees, and there considered as keepers of prisons; a constituent part indeed of all ancient castles. See 2 *Inst.* 31. The statute of 5 *H.* 4. *c.* 10, reciting the oppressions of these constables, and enacting that none be imprisoned but in the common gaol, seems to have put an end to a race of tyrants, who by their mis-conduct had rendered themselves odious to the people.

A *Constable of the Exchequer* is mentioned in the *Dialogus Scaccarii, l.* 1. *c.* 5—in the *Stat. de districtione Scaccarii*, 51 *H.* 3. *st.* 5—in *Fleta, l.* 2. *c.* 31—and in *Madox's History of that Court, p.* 274.

The Constable of the Staple is also mentioned in some old statutes. See 27 *E.* 3. *c.* 8: 15 *R.* 2. *c.* 9: 23 *H.* 8. *c.* 6.

The Constable of the Hundred, or the *High, Chief* or *Head Constable* (as he is otherwise called) is next to be spoken of. By the *Stat.* of *Winton* or *Winchester*, 13 *Ed.* 1. (*c.* 6,) it is ordained that in every hundred or franchise there shall be *chosen* two constables to make the view of armour, and to present the defaults of armour, and of the suits of towns and of *highways*, &c.

Lambard (*on Conſtables, p.* 3) *Coke* (4 *Inſt.* 267) and *Hale* (2 *P. C.* 96) all agree in declaring that Conſtables of the hundred were *firſt* introduced by this ſtatute. (And ſee *Cro. Eliz.* 375). And though it has been aſſerted that they were officers and conſervators of the peace at Common law, and that the *Stat.* of *Winton* only enlarged their authority, yet no evidence has hitherto been produced to that purpoſe.—See *Salk.* 175, 381: 11 *Mod.* 215: 2 *Ld. Raym.* 1193, 5.—The firſt mention made of the High Conſtable in any ſtatute ſubſequent to that of *Winton*, is in *Stat.* 3 *E.* 4. *c.* 1.

Nothing, however, can be more certain than that the Conſtable of the hundred, or High Conſtable, whether he be allowed an officer at the Common law, or not, was inſtituted long before the *Stat.* of *Winton*. This curious fact is aſcertained by a writ or mandate of 36 *H.* 8, preſerved in the Adverſaria to *Watts*'s edition of *Matthew Paris*, and from which *cc.* 4 & 6 of the *Stat.* of *Winton* are evidently taken; *though it has hitherto eſcaped the notice of every writer or ſpeaker upon the ſubject.* By this writ it is provided, "that in every hundred there ſhould be *conſtituted* a CHIEF CONSTABLE, at whoſe mandate all thoſe of his hundred ſworn to arms, ſhould aſſemble and be obſervant to him, for the doing of thoſe things which belong to the conſervation of the king's peace." No mention of this officer, it is believed, can be any where found prior to the date of this inſtrument; which perhaps may no more determine the queſtion as to his *original* creation than the *Stat.* of *Winton*. Be this as it will, the diſcovery ought at leaſt to teach thoſe who are deſirous of explaining the antiquities of our law, to look into matters of record, and to truſt very little to opinion.

The CONSTABLE OF THE VILL (or *Petty Conſtable*, as he is frequently called, to diſtinguiſh him from the officer laſt mentioned) is he who is generally underſtood by the term Conſtable, when mentioned without any peculiar addition.

THIS CONSTABLE has been repeatedly acknowledged by the law, to be "one of the moſt ancient officers in the realm for the conſervation of the peace," *Poph.* 13: 4 *Inſt.* 265. It muſt be confeſſed, however, that no mention of him by this identical name, is any where found to occur anterior to the writ or mandate of King *Henry* III, already mentioned; whereby it is alſo provided, that in every village or townſhip, there ſhould be conſtituted a conſtable or two, according to the number of the inhabitants. But it is pretty certain that Lord *Coke*'s idea is right, and that *This officer is actually owing to the inſtitution of the frank-pledge, uſually attributed to King* ALFRED, and was in fact originally the ſenior or chief pledge of the tithing or *decima*. See the *Stats.* 2 *E.* 3. *c.* 3: 20 *H.* 6. *c.* 14: 28 *H.* 8. *c.* 10.

Thus it appears that the ordinance of *Hen.* III, far from inſtituting the office, merely enlarged the number of officers, placing them in towns and villages, inſtead of franchiſes; ſince it might frequently happen, that a manor of great extent, had only a ſingle conſtable for ſeveral townſhips; a caſe exactly ſimilar, indeed, ſometimes occurring at this day, where a townſhip, comprehending ſeveral hamlets, equally populous it may be with itſelf, has only one conſtable for the whole. [For a conſtablewick cannot be created at this day, unleſs by act of parliament. 1 *Mod.* 13.]

We find the *Conſtable* beginning to be familiarily known by that name, in the time of King *Edward* I; but not previouſly. In ſome articles of enquiry at the Eyre, perhaps, or Trailbaſton, certainly in the time of *Edward* I, are *items* in which this officer is mentioned. *Coll. Madox. Muſ. Brit.* iii, 285.—He ſeems alſo to be meant in the two chapters of the Eyre, as given in *Fleta, lib.* 1. *c.* 20. §§ 126, 133.

He is named in the *Stat.* of 2 *E.* 3. *c.* 3, for the firſt time; as alſo in thoſe of 4 *E.* 3. *c.* 10: 5 *E.* 3. *c.* 14: 25 *E.* 3. *ſt.* 1. *c.* 6: and 36 *E.* 3. *ſt.* 1. *c.* 2; and in ſeveral ſtatutes now repealed or obſolete, in the reigns of *R.* 2, *H.* 4, and *H.* 6: 1 *H.* 7. *c.* 7. *&c.*

Notwithſtanding any thing that has been ſaid or omitted in the courſe of this enquiry, it ſeems highly probable that, at the Common law, and before the mandate of *Henry* III, the Conſtable of the hundred, and the Conſtable of the manor were officers of the ſame nature and authority, originating at the ſame time, and differing only as to the extent of their ſeveral diſtricts; in ſhort, that they bore to each other the ſame analogy as ſubſiſted between the bailiff of the hundred and the bailiff of the manor. It follows that the conſtable of the hundred neither poſſeſſed nor could have exerciſed any more authority within the precinct of the latter, than the conſtable of one manor poſſeſſed or could have exerciſed in another; the manor being to all intents and purpoſes exempt from, and excluded out of the hundred.

Lord *Bacon* obſerves, that though the High Conſtable's authority hath the more ample circuit "yet I do not find, ſaye he, that the petty conſtable is ſubordinate to the high conſtable, or to be ordered or commanded by him." Thoſe caſes wherein it has been adjudged, that the being ſubject to a particular leet, ſhall not excuſe a man from ſerving the office of conſtable of the hundred, ſeem therefore to have been decided upon a wrong principle. See 3 *Keb.* 197, 230, 1: *Freem.* 348: 11 *Mod.* 215.

All this is ſpoken with an exception, not of acts of parliament only, but alſo of the powers and pretenſions exerciſed or *aſſerted* by the Quarter Seſſions, which latter has now *uſurped* ſo much and ſo long, with reſpect to the election and controul, both of the conſtable of the hundred and the conſtable of the vill, that it is become difficult, if not impoſſible, to determine, with any degree of preciſion, the actual rights of either.

In conſidering the powers and duties of this important officer, we may divide our reſearches, according to the treatiſe already quoted, under the following heads.

I. 1. *His Quality, and* 2. *Qualifications.*
II. 1. *His Election; and* 2. *Who are exempted.*
III. *His Power and Authority.*
IV. *His Duty.* [*Theſe two are in many inſtances co-extenſive, and are therefore carefully to be compared together*].
V. *His Protection, Indemnity, and Allowances; and laſtly,*
VI. *His Reſponſibility and Puniſhment.*

But firſt it may be neceſſary to ſtate a few particulars as to the HIGH CONSTABLE, or Conſtable of the hundred or ſimilar diviſion; who is as much the officer of the juſtices of the peace as the Conſtable of the vill. *Fort.* 128. He is elected at the leet or turn of the hundred, or by juſtices of the peace. 1 *Ro. Ab.* 535: *Bulſt.* 174: 3 *Keb.*

197. And by *Stat.* 29 *Geo.* 2. *c.* 25. § 8, 9, in *Weſtminſter* a High Conſtable is to be elected annually by the Dean or High Steward or his deputy at a court leet.—As to his *power*—he may hold petty or ſtatute ſeſſions (for hiring ſervants) according to ancient uſage. *Stat.* 5 *Eliz. c.* 4. But it is doubtful whether he can arreſt for breach, or take ſurety, of the peace. 1 *Salk.* 381: *Cro. Eliz.* 375, 6.—He is ſaid to be an officer within the annual mutiny-act, for billeting of ſoldiers; and liable to the penalties thereby inflicted for mal-practice in ſo doing; and he may occaſionally make a deputy, whoſe acts in his principal's abſence, will be good. 1 *Blackſt.* 350: 3 *Burr.* 1262: but ſee the act § 1.—Under *Stats.* 4 *E.* 4. *c.* 1, 39 *Eliz. c.* 20, and 13 *Geo.* 1. *c.* 23. He may determine complaints of clothiers, and ſee after abuſes mentioned in thoſe acts.—His *Duty* is.—To preſent thoſe who harbour ſtrangers for whom they will not anſwer. 13 *Ed.* 1. *c.* 6.—To deliver liſts of perſons qualified to ſerve on juries. 3 *Geo.* 2. *c.* 25: and ſee 3 & 4 *Ann. c.* 18.—On receiving notice of any robbery to make freſh ſuit and hue and cry after the felons, and to defend actions againſt the hundred by thoſe robbed. 8 *Geo.* 2. *c.* 16. See title *Hue and Cry*, and *Stat.* 13 *E.* 1. *c.* 6.—To collect the county rate, and pay it to the treaſurer, or account, at the Seſſions, on pain of impriſonment. 12 *Geo.* 2. *c.* 29.—The *Stat.* 17 *Geo.* 2. *c.* 5, as to his paying the allowance for vagrants is altered by *Stat.* 26 *Geo.* 2. *c.* 34.—To enforce the laws againſt profane ſwearing 19 *Geo.* 2. *c.* 21.—To give notice to the conſtables of the orders of the Lieutenant or Deputy Lieutenant as to the militia. 26 *Geo.* 3. *c.* 107.—This officer is removable by the juſtices of the peace, on good cauſe. *Bulſt.* 174: 1 *Salk.* 150.—He ſhall be diſcharged from ſerving the office of collector of the poor's rate during his office. 2 *Jones* 46.

I. 1. The Constable was ordained *to repreſs felons* and *to keep the peace*, of which he is a conſervator by the Common law. 10 *E.* 4. 18: *Cromp. Juſt.* 201: 4 *Inſt.* 265.

His office is therefore, Firſt, original or primitive as conſervator of the peace; and Secondly, miniſterial and relative to juſtices of the peace, coroners, ſheriffs, &c. whoſe precepts he is to execute. 1 *Hale P. C.* 88.

He is however an officer only for his own precinct, and cannot execute a warrant directed *to the conſtable of the vill, or to all conſtables*, generally, of that particular juriſdiction; for he is a conſtable no where elſe; nor is he *compellable* to do it, though the warrant be directed to him by name; but he may, if he will, and ſo indeed may any other perſon. 1 *Hale P. C.* 459: *Comb.* 446: *Carth.* 508: 1 *Salk.* 176: 3 *Salk.* 99: 2 *Ld. Raym.* 1300: 12 *Mod.* 316: *Foſt.* 312, *n*: 2 *Black. Rep.* 1135: 1 *H. Black.* 13.—See *Stat.* 24 *Geo.* 2. *c.* 55; under which a conſtable may execute a warrant in any other county, &c. if indorſed by a juſtice of ſuch other county, &c. and carry the offender before a juſtice of ſuch other county, &c. and if the offender ſhall give bail, the conſtable is to deliver the recognizance, examination or confeſſion of the offender, and all other proceedings relating thereto to the clerk of aſſiſes, or clerk of the peace of the county, &c. where the offence was committed, under the penalty of 10*l.* But if the offence ſhall not be bailable, or the offender ſhall not give bail, the *conſtable* ſhall carry the offender before a juſtice of the county where the offence was committed.

He is an officer of the court of Quarter-Seſſions, over whom they have power. *Comb.* 204.

2. The Common law requires, that every conſtable ſhould be *idoneus homo*, *i. e.* apt and fit to execute the ſaid office; and he is ſaid in law to be *idoneus*, who has theſe three things, honeſty, knowledge and ability: honeſty to execute his office truly, without malice, affection or partiality; knowledge to know what he ought duly to do; and ability as well in eſtate as body, that he may intend and execute his office when need is, diligently; and not for impotence or poverty neglect it. 8 *Rep.* 41 *b.* And if one be elected conſtable who is not *idoneus*, he by the law may be diſcharged of his office, and another who is *idoneus* appointed in his place.

He muſt be an inhabitant of the place for which he is choſen. 12 *Mod.* 256.

He ought not to be the keeper of a publick houſe. 6 *Mod.* 42.—And this is made an expreſs diſqualification in *Weſtminſter*, by *Stat.* 29 *Geo.* II. *c.* 25.

II. 1. The Constable is choſen by the Common law, at the leet; or, where there is no leet, at the tourn; ſometimes by the ſuitors and ſometimes by the Steward; and now in many towns and pariſhes by the pariſhioners; all according to ancient and particular uſage. If he be preſent when choſen, he is to take the oath in court; if abſent, he may be ſworn before a (ſingle) juſtice of the peace. But in the latter caſe he ought to have ſpecial notice of his election, and a time and place ſhould be appointed for his taking the oath, [well and truly to ſerve the office]. 4 *Inſt.* 265: 2 *Salk.* 502: *Comb.* 416: 2 *Jones* 212: *Salk.* 175: *Ld. Raym.* 70, 1: 2 *Stra.* 1119, 1149: 5 *Mod.* 130, 1: 2 *Hawk. P. C. c.* 10. § 46.

Conſtables of *London*, (which city is divided into twenty-ſix wards, and every ward into precincts, in each whereof is a conſtable), are *nominated* by the inhabitants of each precinct on *St. Thomas*'s day, and confirmed, or otherwiſe, at the court of *wardmote*; and after they are confirmed, they are *ſworn* into their offices at a court of *Aldermen*, on the next *Monday* after Twelfth day; their oath is long and particular, and goes to duties now ſeldom performed, but regulated by articles of the wardmote inqueſt, which directs the ſeveral matters to be obſerved by the conſtable; who is in the nature of a general ſuperintendant of the morals of the inhabitants; and he ought to notice all new-comers, who if of bad character, may be required to give ſecurity for their good behaviour, or be impriſoned; and ſee *Carth.* 129, 138.—Every Conſtable may execute warrants through the whole city.

In caſe a Conſtable die, or quit the precinct, two juſtices may make and ſwear a new one, till the lord of the manor ſhall hold a court leet, or till the next quarter ſeſſions, who may either approve of the conſtable ſo made, or appoint another. Alſo, if he continue above a year in office, the quarter ſeſſions may diſcharge him, and put another in his place until the lord ſhall hold a court. But juſtices of the peace, either in or out of the quarter ſeſſions, cannot in any other caſe diſcharge a conſtable choſen in the leet. *Stat.* 13 & 14 *Car.* 2. *c.* 12: *Comb.* 328: *Stra.* 789, 1050, 1213: *Bulſt.* 174: *Sty.* 362: *Barn.* 51.

A mandamus may be granted to the ſteward of a court-leet to ſwear a conſtable. *Comb.* 285.

A perſon may be indicted for not taking upon him the office of conſtable. *Stra.* 920: ſee 5 *Mod.* 96, for the form of the indictment.

In the leet or tourn where one is elected conſtable, and refuſes to be ſworn, he may, if preſent, be fined for the contempt; if abſent, amerced or ſubjected to a penalty for non-acceptance of the office according to the order. 5 *Mod.* 130.

Though the juſtices of the peace have not originally the making of the conſtable, it is matter of the peace within their general juriſdiction, and they may examine it in their ſeſſions. 2 *Jon.* 212: ſee 1 *Mod.* 13. And on juſt cauſe remove them. 4 *Inſt.* 267. And by warrant compel them to appear and be ſworn. 5 *Mod.* 128: *All.* 78.

An information in the nature of a *quo warranto* is grantable againſt one to ſhew by what authority he exerciſes the office of conſtable. 2 *Stra.* 1213.

2. EXEMPTIONS from ſerving the office.—1. *Aged Perſons*, incapacitated by weakneſs ſhould never be elected; and in *Weſtminſter* thoſe of ſixty-three years old are expreſsly exempted by *Stat.* 31 *Geo.* 2. *c.* 17. § 13.—2. *Aldermen of London.* *Doug.* 538: 1 *Jon.* 462: *Cro. Car.* 585.—3. *Apothecaries* practiſing in, or within ſeven miles of *London*, free of the company, or in the country having ſerved ſeven years. *Stat.* 6 & 7 *W.* 3. *c.* 4.—4. *Attornies* of the courts of *K. B.* and *C. P. Noy.* 112: *Mar.* 30: *Cro. Car.* 389: *Doug.* 538.—5. *Barbers*, ſee *poſt*, *Surgeons*. 6. *Practiſing Barriſters.* 2 *H. P. C.* 103: 1 *Mod.* 22.—7. *Diſſenters* being teachers and preachers, but not others, by *Stat.* 1 *W.* & *M. c.* 18. See *poſt.*—8. *Foreigners* naturalized, 5 *Burr.* 2790, who may rather be ſaid to be incapacitated.—9. *Militia*, ſerjeants or private men ſerving in. 26 *Geo.* 3. *c.* 107. § 130.—10. *Parliament*, ſervants to members of. 1 *Mod.* 13. but this ſeems doubtful.—11. *Phyſicians*, Preſident and Fellows of the college in *London* by *Stat.* 32 *H.* 8. *c.* 40: but no other phyſicians, nor they elſewhere. See 1 *Mod.* 22, & *contra* 1 *Sid.* 431: 2 *Keb.* 578: 2 *H. P. C.* 100.—12. *Proſecutors of Felons*; the original proprietor, or firſt aſſignee of a certificate, (commonly called a Tyburn-ticket) if a pariſh or ward office; within the pariſh or ward in which the felony happened; to be only once uſed, by *Stat.* 10 & 11 *W.* 3. *c.* 23: but this is no exemption from ſerving the office for a manor; nor, as it ſhould ſeem, for a vill or townſhip; nor where the office is to be executed out of the privileged diſtrict. 2 *Burr.* 1182.—13. *Surgeons*, free of the ſurgeons' company in *London*, examined, approved and exerciſing the ſcience; by *Statt.* 5 *H.* 8. *c.* 6: 32 *H.* 8. *c.* 42: 18 *Geo.* 2. *c.* 15: and by cuſtom *all* ſurgeons. *Com. Rep.* 312. and it ſeems by the ſame ſtatutes, *barbers* free of that company in *London.*—A college *barber* at *Oxford.* *Doug.* 531.—*But not* Maſters of Arts. 5 *Vin.* 429.—Nor Juſtices of peace in another county. *Stra.* 698, But ſee *ante Aldermen.*—Nor Officers of the Guards. 1 *Lev.* 233: 1 *Sid.* 272, 355: 2 *H. P. C.* 100.—Nor Officers or watchmen at the *Cuſtom Houſe.* 1 *Sid.* 272.—Nor Tenants in ancient demeſne. 1 *Vent.* 344.—Nor, a younger brother of the *Trinity-Houſe.* 1 *Term Rep.* 679.

If however a gentleman of quality, or a phyſician, officer, &c. be choſen *conſtable*, where there are ſufficient perſons beſide, and no ſpecial cuſtom concerning it; it is ſaid ſuch perſons may be relieved in *B. R.* 2 *Hawk. P. C.* 100. *c.* 10 § 41.

A *Conſtable* may make a Deputy; but the *conſtable* is anſwerable, and his deputy ought to be ſworn, though it is not in all caſes neceſſary. *Sid.* 355: and ſee 1 *Bur.* 129: 3 *Bur.* 1262: *Stra.* 942: *Cromp. J. P.* 201: *Bacon L. T.* 187: *Moore* 845: 3 *Bulſt.* 78: 1 *Ro. Rep.* 274: 1 *Ro. Ab.* 591: 1 *Term Rep.* 682.—But if the Deputy is duly allowed and ſworn, the principal is not anſwerable. *Wood b.* 1. *c.* 7.—*Diſſenters* choſen to the office of *conſtables*, &c. ſcrupling to take the oaths, may execute the office by deputy, who ſhall comply with the law in this behalf, *Stat.* 1 *W.* & *M. c.* 18. *Conſtables* may appoint a deputy, or perſon to execute a warrant, when by reaſon of ſickneſs, &c. they cannot do it themſelves. A woman made *conſtable*, by virtue of a cuſtom, that the inhabitants of a town ſhall ſerve by turns, on account of their eſtates or houſes, may procure another to ſerve for her, and the cuſtom is good. *Cro. Car.* 389: 2 *Term Rep.* 395. See 2 *Hawk. P. C. c.* 10. § 37.

III. THE CONSTABLE hath as good authority in his place, as the Chief Juſtice of *England* hath in his. 1 *Ro. Rep.* 238.

It may ſave much trouble to the enquirer to claſs the objects of his power and authority, as well as thoſe of his duty, in alphabetical order; a method in ſome meaſure formerly purſued in Law Dictionaries, but not with ſufficient care and accuracy.

1. *Affray.*—If *He ſee one* making affray, or aſſaulting another, or breaking the peace, or hear or know one to menace, or threaten to kill, wound, maim, or beat another, the Conſtable may take and ſet him in the ſtocks, or commit him to priſon, (as he may perſons about to make an affray, and commanded to diſperſe,) till the offender find ſurety to keep the peace, or for his good behaviour. *Cromp. J. P.* 130, 1, 155, 201: *Dalt.* 33: *Lamb.* 135, 141.—But he may not ſet one who *hath broken* the peace in the ſtocks, if he can have him to the next gaol for the night. 22 *E.* 4. 35.—Neither may he commit a party *after* an affray to compel him to find ſurety of the peace, as he cannot take any man's oath that he is in fear of his life. But he may *upon complaint* arreſt the party, and bring him before a juſtice of peace, (which indeed is always the ſafeſt way) to find ſurety. *Cro. El.* 375: *Bro. Tit. Faux Imp.* 6: 2 *Hale P. C.* 88, 90. If men be making affray in a houſe, and the doors are ſhut, or perſons making affray, run into a houſe, the conſtable may enter to ſee the peace kept. And if man-ſlaughter, or bloodſhed is likely to enſue, and *entrance upon demand is refuſed*, he may break open the doors to keep the peace and prevent the danger. *Cromp. J. P.* 130 *b*: 2 *Hale P. C.* 95, 135. See *poſt.* 2.

Aid of the ſubject, requiring; See next diviſion *Arreſt.*

Alehouſes. See 3. and *poſt.* IV.

2. *Arreſt of felons*, &c. Where a felony is committed, though out of his precinct, the conſtable may, *ex officio*, without a warrant, arreſt the felon, (if found within his precinct,) and impriſon him till he can be conveyed to a juſtice of peace, or to the common jail. 2 *Hale P. C.* 90, 95, 120.—If the felon in any caſe reſiſts or flies, whether after arreſt or before, and cannot be taken, the Conſtable may kill him, and ſuch killing is juſtifiable. 1 *Hale P. C.* 481, 9: 2 *Hale P. C.* 90.—Where a felony has been *actually committed*, the conſtable, (or any perſon) upon probable grounds of ſuſpicion, may lawfully (and

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it is the constable's duty to) apprehend the suspected person, and carry him before a magistrate. *Cromp. J. P.* 153 *b*: 201 *b*: 2 *Hale P. C.* 9: 11 *Mod.* 248: *Doug.* 345: *Ledwith* v. *Catchpole*, *Pasch.* 23 *Geo.* 3. *B. R. Hawk. P. C. c.* 11. § 15 *n.*—*Stat.* 22 *G.* 3. *c.* 58. empowers constables and watchmen to arrest persons suspected of conveying away stolen goods by night.—Probable grounds are very many, *e. g.* common fame; hue and cry levied, goods found on a person, *&c. Cromp. J. P.* 87, 154: *Ow.* 121: 12 *Rep.* 92: 2 *Hale P. C.* 81: 3 *Bulst.* 287.—In case of a felony committed, or in danger to be committed, (as if one beat or wound another dangerously,) the constable, either upon complaint, or hue and cry, may break open the doors to take the offender, if *upon demand and notice*, he will not yield himself, or *entrance be refused*; or if the constable act under a justice's warrant for treason or felony. And he may imprison the offender till the injured party is out of danger. 2 *Hale P. C.* 82, 90, 4: *Cromp. J. P.* 141: *Brownl*, 211: 1 *Bulst.* 146.—The Constable may officially imprison for a time to *prevent* felony; as if he see two with weapons drawn ready to fight: or if a man in a fury be purposed to kill, maim, or beat another. He may also arrest and imprison one for a felonious intent, as if a man bring a helpless infant into a field or elsewhere, and leave it to perish for want; and the constable see this himself. *Moore* 284: *Poph.* 13. Though no felony has actually been committed, constable and his assistants are justified in arresting on *a given charge* of felony. *Doug.* 359, 360, and in this case constable may discharge the person suspected. *Cro. El.* 202, 752: *Dalt.* 272. He may arrest persons coming before the King's justices with force and arms, or who bring force in affray of the peace, or go or ride armed in a warlike and unnecessary manner. *Stat.* 2 *E.* 3. *c.* 3.—And see the *Stat.* 5 *E.* 3. *c.* 14, as to his arresting of *Roberdesmen*, *Wastours*, and *Drawlatches*.—He may take aid of his neighbours to arrest another, or in execution of any part of his duty at Common law, and under several statutes, and they are compelled to assist him; upon affray or such like he may raise the people of the realm to cause the peace to be observed. *Cromp. J. P.* 141: 201 *b*: *Comb.* 309.—He may carry one that he has arrested for felony to the common gaol, and the gaoler is bound to receive him. 1 *Hale P. C.* 595.

As to what Constable shall do with a prisoner when taken, if for an affray, see *Affray* above.—In other offences he may convey his prisoners to the sheriff, or his jailor of the county; or to the jailor of the franchise in which they are taken, who are bound to receive them, *Stat.* 4 *E.* 3. *c.* 10: See *Stats.* 5 *H.* 4. *c.* 10: 23 *H.* 8. *c.* 2. But the best way *in all cases* is, to take him to a justice of peace, to bail or discharge him; till when it is the duty of the constable to keep and imprison an offender. 2 *H. P. C.* 95, 120.—If a felon fly, constable ought to seize his goods, and keep them for the King's use, and send hue and cry after him. *Stat.* 27 *El. c.* 13: *Dalt.* 289, 340: *Cromp. J. P.* 201 *b.* and on notice of robbery, is to make hue and cry. *Stat.* 8 *Geo.* 2. *c.* 16.

Armed going. See *ante* 2.

Assault. See *ante* 1, 2.

3. *Breaking open Doors.* See this division *passim.*—Other occasions not yet mentioned which justify so doing, are—A *capias utlagatum*, or *capias pro fine.*—On *forcible entry* and detainer found by inquisition, or view of justices.—On *escape* from a lawful arrest.—On *warrant* to search for stolen goods *if found.* 2 *Hale P. C.* 151, 117.—It is best always, and generally requisite, first to signify the cause of the constable's coming, and to demand that the door should be opened. 2 *Hawk. P. C. c.* 14: *Fost.* 136, 320.

4. *Deserters*; Constable may apprehend persons suspected to be such, and take them before a justice; under the annual mutiny acts; and he is allowed 20*s.* for each.

5. *Disorderly Houses and Persons.*—If there be disorderly drinking or noise at an unseasonable time of night, especially in inns, taverns, or ale-houses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder; as is constantly done in *London* and *Middlesex.* 2 *Hale P. C.* 95.—He or his watchmen, (or indeed any men,) may apprehend indecent night walkers, and commit them till morning. 2 *Hale P. C.* 98.—And he may arrest and commit lewed persons frequenting bawdy-houses, to make them find security for their good behaviour. *Cromp. J. P.* 153 *b.* See title *Bawdy-houses*, and *Stat.* 5 *E.* 3. *c.* 14.

Felons.—Arrest, imprisonment, and flight of. See *ante* 2.

Hue and Cry.—See *ante* 2 *ad finem*; and IV.

6. *Husbandry.*—He may grant testimonials under seal to servants in, licensing them to change their masters. *Stat.* 5 *Eliz. c.* 4. And by the same statute, he is to cause all persons mete for labour, to serve by the day, in mowing, reaping, *&c.* or on refusal, set them in the stocks. By *Stats.* 43 *Eliz. c.* 7, and 15 *Car.* 2. *c.* 2, persons unlawfully cutting corn growing, robbing orchards or gardens, breaking fences, pulling up fruit trees, spoiling woods, *&c.* (not being felony,) not satisfying the damages, shall be committed to the constable to be whipped.

Imprisonment.—See this division *passim.*

7. *Inn-keepers.*—The constable on complaint may compel them to receive guests. *Br. Act. sur le Case*, 76: *Cromp. J. P.* 201. See *Stat.* 1 *Jac.* 1. *c.* 9.

8. *Insult*, to himself; He may imprison any one insulting, assaulting, or making affray on him, or opposing him, though only verbally, in execution of his office. 1 *Ro. Rep.* 238: *Crom. J. P.* 131: *Clayt.* 10.

9. *Lunatics* or *Madmen.*—The constable may take and imprison; and he shall not be charged if they die there. *Ow.* 98. and see *Stat.* 17 *Geo.* 2. *c.* 5. § 20. and this Dict. title *Lunatics.*

10. *Peace, Surety of.* See *ante* 1, 2.—The constable may take surety by obligation in his own name, but not otherwise, and may certify it at the sessions. 10 *E.* 4. *c.* 18: *Br. Peace, pl.* 2: *Sureties, pl.* 23: *Cromp. J. P.* 131: 4 *Inst.* 265: *Cro El.* 375, 6.

11. *Plague*, in the time of—Constable may command infected persons to keep in the house. *Stat.* 1 *Jac.* 1. *c.* 31. See title *Plague.*

12. *Warrants.*—Where constable has a warrant, he is tied up thereby, to act only as it directs. 11 *Mod.* 248.—If he arrests on a general warrant, (before some justice) he may carry his prisoner to what justice he will. 5 *Rep.* 59. See *Stat.* 24 *Geo.* 2. *c.* 55, as to indorsed warrants, by which offenders may be taken in any county; *ante* I. 1.

Though the constable is not named in 3 & 4 *W. & M. c.* 10, nor appointed to be the officer to execute the warrants, yet the justices may command him to execute them. 1 *Salk.* 381. And a constable need not return his warrant,

rant, but ſhould keep it for his own juſtification.—See *Stat.* 24 *Geo.* 1. *c.* 44: 1 *Salk.* 381: 2 *Ld. Raym.* 1196.

The *Conſtable* is the proper officer to a juſtice of peace, and bound to execute his lawful warrants; and therefore where a ſtatute authoriſes a juſtice to convict a perſon of any crime, and to levy the penalty, &c. without ſaying to whom ſuch warrant ſhall be directed, the *conſtable* is the officer to execute the warrant, and muſt obey it. 5 *Mod.* 130: 1 *Salk.* 381. *Conſtable* muſt at his peril take notice that his warrant is by one in the commiſſion of the peace. 12 *Mod.* 347. and that the matter is within the juſtice's juriſdiction. 2 *Hawk. P. C. c.* 13. § 11.—And if guilty of miſdemeanour in executing a lawful warrant, he becomes a treſpaſſer. 12 *Mod.* 344.—But a warrant properly penned, (even though the magiſtrate who iſſue it ſhould exceed his juriſdiction,) will by *Stat.* 24 *Geo.* 2. *c.* 44, at all events indemnify the officer who executes it miniſterially. 4 *Comm.* 288.

13. *Watch.*—Conſtable hath power *ex officio* to keep a watch for the purpoſe to raiſe or purſue hue and cry upon robberies committed, by the ſtatute of *Winton*, *c.* 1; to ſearch for lodgers in ſuburbs of cities that are ſuſpicious perſons, which is to be done every week, or at leaſt once in fifteen days, by the ſame ſtatute *c.* 4; for ſuch as ride or go armed, by the ſtatute of 2 *E.* 3. *c.* 3; for night walkers and perſons ſuſpicious, either by night or day, by the ſtatute of 5 *E.* 3. *c.* 4. And it is in his power to hold ſuch watches as often as he pleaſes, and the watchmen are his miniſters and aſſiſtants, and are under the ſame protection with him, and may act as he doth, and regularly he ought to be in company with them in their walk and watch. 2 *Hale P. C.* 97.

A watchman hath a double protection of the law, *viz.* 1. As an aſſiſtant to the conſtable when he is preſent or in the watch. 2. Purely as a watchman ſet by order of law; and the law takes notice of his authority; and the killing of a watchman in the execution of his office is murder. 2 *Hale P. C. ubi ſup.*—If an inhabitant refuſe to watch in his turn, conſtable may ſet him in the ſtocks. 3 *Lev.* 208.—See *Stat.* 14 *Geo.* 3. *c.* 90, for regulating the nightly watch and duty of conſtables in *Weſtminſter*; 10 *Geo.* 2. *c.* 22. for *London*, and other acts only of very local importance, and which thoſe who are to act under ſhould diligently conſult. See this Dict. title *Watchmen*.

IV. The Constable's duty and office continue till his ſucceſſor be ſworn. 12 *Mod.* 256. Though he may for juſt cauſe be removed by the authority which elected him. *Bulſt.* 174: 2 *Hawk. P. C. c.* 10. § 37, 38.

Affray. See III. 1.

Ale-houſes.—Conſtables are to enforce the penalties againſt the keepers of. See *ante* III. and this Dict. title *Alehouſes*. And *Stats.* 1 *Jac.* 1. *c.* 9: and 3 *C.* 1. *c.* 4.—And by *Stat.* 26 *G.* 2. *c.* 31, Conſtable is to give notice of the days appointed for licenſing.

Armed going. See *ante* III. 2. and this *Dict.* title *Arms*.

Bawdy-houſes. See III.

Bridges. By *Stat.* 22 *H.* 8. *c.* 5, Conſtable and two moſt able inhabitants in the pariſh, are to make an aſſeſſment for the repairs of *bridges*, to be allowed by juſtices. See 1 *Hawk. P. C. c.* 77. § 7.

Burglary.—If Conſtable have notice that one is committed, it is his duty to purſue the felon immediately, though in the night. *Cro. El.* 16.

Cuſtoms.—By ſeveral ſtatutes, conſtables are to be aſſiſting to all perſons appointed for the collecting and management of the *cuſtoms*; and to perſons having a warrant from the lord treaſurer, &c. to make a ſearch for goods that have not paid the cuſtoms. See *int. al. Stats.* 12 *Car.* 2. *c.* 19, 23; and 13 & 14 *Car.* 2. *c.* 11.

Diſtreſs, for rent.—Conſtables are to aſſiſt in. See this Dict. title *Diſtreſs*.—He is to make diſtreſſes under juſtices' warrants. *Stat.* 27 *Geo.* 2. *c.* 20; under which conſtable may take his own *reaſonable* charges.

Drunkenneſs.—To aſſiſt the juſtices in puniſhing; under *Stat.* 4 *Jac.* 1. *c.* 5.

Eſcape. See *poſt.* VI.

Felons. See *ante* III. 2. *Felons' goods*, conſtable muſt keep goods found on the felon till trial, and then return them according to the directions of the court.

Fires, conſtables to aſſiſt at. See this Dict. title *Fires*.

Fiſhing unlawful, conſtable is to aſſiſt in enforcing acts againſt.

Forcible entry, conſtable is to give aſſiſtance to juſtices of the peace, in removing, or ſhall be committed and fined. 5 *Rep.* 2.

Game acts, to enforce. See this Dict. title *Game*.

Gunpowder. Under *Stat.* 12 *Geo.* 3. *c.* 61, conſtable may by warrant ſearch for gunpowder. See title *Gunpowder*.

Hawkers and Pedlars. By *Stat.* 8 & 9 *W.* 3. *c.* 25, conſtable is to aſſiſt in putting the laws in execution againſt *hawkers* and *pedlars*, that travel without licenſes, and by *Stat.* 11 *Geo.* 2. *c.* 26, againſt hawkers of ſpirits.

Highways, conſtable is to be aiding and aſſiſting in putting the acts in execution relating to; and to return liſts of perſons qualified for the office of ſurveyor, &c. but he is not bound to preſent them if out of repair. 1 *Vent.* 336. See this Dict. title *Highway*.

Horſes, conſtable is to be aſſiſting in driving off commons, foreſts, &c. *horſes* and cattle; on pain of 40*s.* *Stat.* 32 *H.* 8. *c.* 13. but ſee *Stats.* 8 *Eliz. c.* 8. and 21 *Jac.* 1. *c.* 28.—And in levying duties on *horſes* under *Stat.* 25 *Geo.* 3. *c.* 49.

Hue and Cry. By *Stats.* 13 *E.* 1. *ſt.* 2. *c.* 6: 27 *El. c.* 13: 8 *Geo.* 2. *c.* 16; to make *hue* and *cry* after offenders where a felony or robbery is committed: to call upon the pariſhioners to aſſiſt in the purſuit; and if the criminal be not found in the precinct of the firſt *conſtable*, he is to give notice to the next, and thus continue the purſuit from town to town, and county to county. And where offenders are not taken, conſtables ſhall levy the tax to ſatisfy an execution, on recovery againſt a hundred, and pay the ſame to the ſheriffs, &c. and neglecting to make *hue* and *cry*, ſhall forfeit 5*l.* See this Dict. tit. *Hue and Cry*.

Huſbandry. See *ante* III.

Inn-keepers. See *ante* III.

Juries. Under *Stats.* 4 & 5 *W.* & *M. c.* 24: 7 & 8 *W.* 3. *c.* 32: 8 & 9 *W.* 3. *c.* 10: 3 & 4 *An. c.* 18: 3 *Geo.* 2. *c.* 25, *Conſtables* are to give in to the juſtices at *Michaelmas* ſeſſions yearly, a liſt of perſons qualified to ſerve on *juries*. Theſe liſts are to be made from the rates of each pariſh; and *conſtables* wilfully omitting perſons qualified, or inſerting wrong perſons, ſhall forfeit 20*s.* See this Dict. title *Jury*.

Labourers, See III.

Land-tax Acts, to aſſiſt operation of.

Lead, See *Thieves*.

Lottery

Lottery Offices illegal, conſtable is to endeavour to ſuppreſs. *Stat.* 27 *Geo.* 3. *c.* 1.

Malt. See this Dict. title *Malt.*

Meaſures. By *Stat.* 22 *Car.* 2. *c.* 8, conſtable is to ſearch and examine if any perſons uſe other *meaſures* than ſuch as are *Winchester* meaſure, and agreeable to the ſtandard; and to ſeize and break the ſame; and ſee *Stat.* 31 *Geo.* 2. *c.* 17, for *Weſtminſter.*

Militia, conſtable's duty as to. See the ſtatutes relating to *The Militia.*

Night Walkers. See III.

Phyſicians, College of. By *Stats.* 14 & 15 *H.* 8. *c.* 5: and 32 *H.* 8. *c.* 40, In the city of *London,* conſtable is to be aſſiſting to them in putting their laws in execution.

Plague. See *ante* III.

Poor's Rate. Under *Stat.* 43 *Eliz. c.* 2. § 12, the weekly rate for the relief of the poor is to be aſſeſſed, in caſe the pariſhioners diſagree, by the churchwardens and conſtables, who are in either caſe to levy the rate; and by § 35, the churchwardens and conſtables of every pariſh are to collect the ſums rated, and pay the ſame over to the High-Conſtable. And ſee *Stat.* 12 *Geo.* 2. *c.* 29. and this Dict. title *Poor.*

Poſtage. Under *Stat.* 9 *An. c.* 10, to levy money due for poſtage of letters under 5*l.* § 30.

Preſentments. Conſtable is at the quarter-ſeſſions to make preſentment of all things againſt the *peace,* and belonging to his office. *Dalt. J. P.* 474: *Fitz. J. P.* 6. And they are uſually ſummoned by the ſheriff to attend the quarter-ſeſſions and aſſiſes to make preſentments; which ſeems juſtified by no expreſs law, though perhaps by uſage.

Riot. Conſtables are to ſuppreſs, and they may *ex officio* commit offenders, &c. See *Stat.* 1 *Geo.* 1. *c.* 5. and this Dict. title *Riot.*

Robbery. See *Hue and Cry.*

Scavengers' rates in *London* ſhall be made by conſtables and churchwardens under *Stat.* 2 *W.* & *M. ſt.* 2. *c.* 8.

Scolds. Under a preſentment in the leet and the ſteward's warrant, conſtable and his aſſiſtant may put them in the cucking ſtool. *Moore* 847.

Servants. See III. Conſtable to aſſiſt in levying duty on, under *Stat.* 25 *Geo.* 3. *c.* 43.

Soldiers. Conſtables are to quarter *ſoldiers* in inns, alehouſes, victualling houſes, &c. Not to receive any reward to excuſe quartering them. To give in liſts to the juſtices, of the houſes and perſons obliged to quarter *ſoldiers,* and to provide carriages for troops on their march. See the annual ſtatutes concerning *Soldiers,* and *ante* III.

Statutes, or Acts of Parliament; conſtables are called upon to aſſiſt in the execution of theſe, on almoſt innumerable occaſions.

Sunday. Conſtable is to enforce acts 1 *C.* 1. *c.* 1, and 29 *C.* 2. *c.* 7, againſt the profanation of. See this Dict. title *Holidays.*

Swearing. By *Stat.* 19 *Geo.* 2. *c.* 21, Conſtable is to levy the penalty for profane *ſwearing*; which is 1*s.* for a ſervant, labourer, &c. 2*s.* for others under the degree of a gentleman; and 5*s.* for a gentleman; and as the crime is repeated, the penalty is to be doubled.

Thieves petty, of lead, iron, copper, &c. Conſtable, watchmen and beadles are to apprehend. *Stat.* 29 *Geo.* 2. *c.* 30.

Turnpikes. Conſtable to aſſiſt in enforcing the act 13 *Geo.* 3. *c.* 84.

Vagrants. Conſtables to aſſiſt in enforcing the laws againſt. See this Dict. title *Vagrants.*

Warrants of Juſtices. It is part, and a great part of conſtable's duty to execute theſe, which are iſſued under an amazing variety of acts of parliament; in all which caſes conſtable's office is chiefly miniſterial. See *ante* III.

Watch. See *ante* III.

Weavers. Kidderminſter, conſtables to aſſiſt, by *Stats.* 22 & 23 *C.* 2. *c.* 8.

Weights. Under *Stats.* 8 *H.* 8. *c.* 5, and 16 *C.* 1. *c.* 19, conſtables, being head officers of places, ſhall have in their cuſtody ſealed weights, &c. under penalties: perſons buying or ſelling by falſe *weights* or meaſures, forfeit 5*s.* leviable by conſtables.

Wreck. Under *Stat.* 12 *An. ſt.* 2. *c.* 18, Conſtables may call together aſſiſtance to ſave ſhips from *wreck*; and ſee this Dict. title *Wreck.*

V. If a Constable doth not his duty, he may be indicted and fined by the juſtices of peace; on the other hand, he is protected by law, in the execution of his duty.

It has been already mentioned that he ſhall have aid of the county to pacify affrays.

By *Stat.* 7 *Jac.* 1. *cap.* 5, If any *action* is brought againſt a conſtable, for any thing done *by virtue of his office,* he, and alſo all others who in his aid, or by his command, ſhall do any thing concerning his office, may plead the *general iſſue,* and give the ſpecial matter in evidence, and if he recovers he ſhall have *double coſts.* But this muſt be certified on the record by the judge. 2 *Vent.* 45: *Doug.* 294.—And ſee *Stat.* 19 *Geo.* 2. *c.* 21, againſt profane ſwearing, which gives treble coſts.

By *Stat.* 24 *Geo.* 2. *c.* 44, No *action* ſhall be brought againſt any conſtable, or other officer, or any perſon acting by his order, and in his aid, for any thing done in obedience to any warrant of a juſtice of peace, until *demand* of the peruſal and copy of ſuch warrant, and the ſame hath been refuſed or neglected by the ſpace of ſix days; and in caſe after ſuch demand, and compliance therewith, any action ſhall be brought againſt ſuch conſtable, &c. without making the juſtice a defendant; then on producing and proving ſuch warrant, the jury ſhall give a verdict for the defendant, notwithſtanding any defect of juriſdiction in ſuch juſtice; and if ſuch action be brought jointly againſt ſuch juſtice, and alſo againſt ſuch conſtable, &c. then on proof of ſuch warrant, the jury ſhall find for ſuch conſtable, &c. and if the verdict ſhall be given againſt the juſtice, the plaintiff ſhall recover his coſts againſt him, to be taxed ſo as to include coſts plaintiff ſhall be liable to pay to ſuch defendant, &c. No action ſhall be brought againſt any conſtable, &c. unleſs commenced within ſix calendar months after the act committed.—This ſtatute extends only to actions of tort. See *Bullei's N. P.* 24.

The charges of ſending malefactors to jail, were at Common law to be borne by the vill, in which they were apprehended. 1 *Hale. P. C.* 96. But now under *Stats.* 3 *Jac.* 1. *c.* 10, and 27 *Geo.* 2. *c.* 3, where a malefactor has not ſufficient property in the county where he is taken, on application by the conſtable or officer conveying him, a juſtice of peace may on oath examine into and aſcertain

aſcertain the reaſonable expences to be allowed; and by warrant without fee, order the treaſurer of the county to pay the ſame; except in *Middleſex*, where ſuch expences are to be paid by the overſeers of the place where the offender was taken.

If in the execution of his office, and acting within his own diſtrict, after competent notice that he is conſtable, he, or any that come to his aſſiſtance, be killed, it is murder; although the party killing do not know his perſon. 1 *Hale P. C.* 9. 459. 460. 1: 2 *Ld. Raym.* 1300. But ſee *Leach*'s caſes in *Crown Law* 211.

If two men are combating, and the conſtable come to part them and is hurt, he ſhall have action of treſpaſs; and if he hurt them, they ſhall not have action againſt him. And ſo of thoſe who aid him; every man who is aſſiſting to the conſtable in the execution of his office having the ſame protection that the law gives to the conſtable. *Cromp. J. P.* 130: 2 *Hale P. C.* 97.

If he be removed without juſt cauſe, the court of King's Bench will by rule of court order him to be reſtored to his place. *Bulſt.* 174.

A Juſtice of peace's warrant is a ſufficient juſtification of a conſtable in a matter within the juriſdiction of ſuch juſtice. *Stra.* 711. See ante III. 12.

By *Stat.* 18 *Geo.* 3. *c.* 19, Every conſtable is every three months, and within fourteen days after he goes out of office, to deliver to the overſeers of the poor an account entered in a book, kept for the purpoſe, and ſigned by him, of all ſums by him expended and received on account of the pariſh, *&c.* which overſeers are within fourteen days to lay the ſame before the inhabitants, and, if approved, are to pay the money due out of the poor rates; but, if diſallowed, are to deliver the book back to the conſtable, who may produce it before a juſtice of peace, giving reaſonable notice to the overſeers; which juſtice is to examine the account, determine objections, ſettle the ſum due, and enter it in, and ſign the account; and the overſeers are to pay ſuch ſum out of the poor's rate; but may appeal (giving notice) to the quarter-ſeſſions.

VI. A CONSTABLE arreſting one poſſeſſed of money, who dies, is chargeable with the money. And ſo where he takes from a felon money of which he had robbed another, even though he ſhould be afterwards robbed of it himſelf. *Ow.* 121.

Neglecting a duty incumbent on him, either by Common law, or by ſtatute, he is for his default indictable. 1 *Salk.* 381: 2 *Ro. Rep.* 78.

If he will not return his warrant, or certify what he has done under it, he may be fined. 6 *Mod.* 83: 1 *Salk.* 381; but ſee 5 *Mod.* 96: *Gib.* 192.

If he wilfully lets a felon eſcape out of the ſtocks, and go at large, it is felony. 1 *Hale P. C.* 596. And it ſeems generally agreed, that all voluntary eſcapes in the officer, amount to the ſame crime as the offender was guilty of, whether treaſon or felony. 2 *Hawk. P. C. c.* 19. § 22 *& ſeq.*

It is a miſdemeanour in him to diſcharge *an offender* brought to the watch-houſe by a watchman in the night. 2 *Burr.* 867. But ſee III. 2.

He is liable to various pecuniary and ſometimes perſonal puniſhments, on neglecting the duty impoſed on him by ſeveral ſtatutes.

THE CONSTABLE'S OATH.

YOU *ſhall ſwear, that you will well and truly ſerve our Sovereign Lord the King in the office of Conſtable for the townſhip of* C. *within this manor,* [*hundred or county*] *for the year now next enſuing, or until you ſhall be thereof diſcharged by due courſe of law: you ſhall ſee the King's peace kept, and keep all ſuch watch and ward as are uſually accuſtomed and ought to be kept: and you ſhall well and truly do and execute all other things belonging to the ſaid office according to the beſt of your knowledge.*

So help you God.

FORM of an OBLIGATION to be taken by a *Conſtable* for *keeping the Peace.*

KNOW ALL MEN *by theſe preſents, That I* A. B. *of* C. *in the county of* D. *labourer, am held and firmly bound unto* E. F. *yeoman, conſtable of the townſhip* [*manor,* &c.] *of* C. *aforeſaid, in the ſum of forty pounds to be paid to the ſaid* E. F. *or his certain attorney, executors, adminiſtrators or aſſigns; for which payment to be well and faithfully made, I bind myſelf, my heirs, executors, and adminiſtrators, firmly by theſe preſents, ſealed with my ſeal. Dated this —— of ——, in the* 30*th year of the reign of our Sovereign Lord George the Third, by the Grace of God of* Great Britain, France, *and* Ireland, *King, Defender of the Faith and ſo forth, and in the year of our Lord* 1790.

THE CONDITION *of the above written obligation is ſuch, That if the above bounden* A. B *ſhall* [*perſonally appear at the next general quarter ſeſſions of the peace, to be holden in and for the county of* D. *to do and receive what ſhall be there and then enjoined him by the court, and in the mean time ſhall*] *keep the peace,* [*and be of the good behaviour*] *toward the King and all his liege people, and eſpecially toward* G. R. *of* C. *in the ſaid county, yeoman, then the ſaid obligation to be void, or elſe to remain in full force and virtue.*

Signed, ſealed and delivered in the preſence of }

OATH of the APPRAISERS of Goods *diſtrained* for Rent; to be adminiſtered by the CONSTABLE.

YOU *ſhall ſwear that you will faithfully appraiſe and value the goods now taken in diſtreſs, and mentioned in the inventory to you ſhewn, as between buyer and ſeller, according to the beſt of your ſkill and underſtanding.*

So help you God.

APPOINTMENT of a DEPUTY.

I A. B. *Conſtable of* C. *in the county of* D. *do hereby make, ſubſtitute and appoint* E. F. *of the ſame place, yeoman, my true and lawful Deputy in the office aforeſaid, as long as I ſhall hold the ſame*; or thus, *during the continuance of my will and pleaſure,* [or for any particular purpoſe] *dated,* &c.

For a command or PROCLAMATION for RIOTERS to diſperſe, See title RIOT.

CONSTAT,

CONSTAT, *Lat.*] The name of a certificate, which the clerk of the pipe, and auditors of the *Exchequer*, make at the requeſt of any perſon who intends to plead or move in that court, for the diſcharge of any thing: and the effect of it, is the certifying what *conſtat* (appears) upon *record*, touching the matter in queſtion. See *Stats.* 3 & 4 *Ed.* 6. *c.* 4: 13 *Eliz. c.* 6. A *conſtat* is held to be ſuperior to an ordinary certificate, becauſe it contains nothing but what is evident on record. And the exemplification under the great ſeal, of the inrolment of any letters-patent, is called a *conſtat. Co. Lit.* 225.

CONSTRUCTIVE TREASON. The *Stat.* 25 *Ed.* 3. *c.* 2, was made to define *treaſon*, and prevent the ſubject from being condemned for *conſtructive treaſon*. See title *Treaſon*.

CONSUETUDINARIUS, A ritual or book, containing the rites and forms of divine offices, or the cuſtoms of abbeys and monaſteries: it is mentioned in *Brampton*.

CONSUETUDINIBUS ET SERVICIIS, Is a writ of right cloſe, which lies againſt the tenant that deforceth his lord of the rent or ſervice due to him. *Reg. Orig.* 159: *F. N. B.* 151. When the writ is brought by the party in the *right* only, he ſhall count of the ſeiſin of his anceſtor, and the writ be in the *debet*; but when he counts of his own *ſeiſin*, then the writ is in the *debet et ſolet, &c.* And if the party ſay in the writ *ut in redditibus et arreragiis*, theſe words prove that the demandant himſelf was ſeiſed of the ſervices; and then if he count in ſuch writ of ſeiſin of his *anceſtors*, and not of his *own ſeiſin*, the writ ſhall abate: ſo that if he will bring a writ of cuſtoms and ſervices of the ſeiſin of his anceſtors, he ought to leave theſe words *ut in redditibus, &c.* out of the writ. Where a perſon brings a writ of cuſtoms and ſervices againſt any tenant, and by count demands homage, the writ ought to make ſpecial mention thereof; as *ut in homagio, &c.* or the writ ſhall abate. *New Nat. Brev.* 338: *F. N. B.* 151. If this writ be brought againſt tenant for life, where the remainder is over in fee, there the tenant may pray in aid of him in the remainder, *&c.*

CONSUL, *Lat.*] In our law books ſignifies an earl. *Bract. l.* 1. *c.* 8, tells us, that as *comes* is derived from *comitatu*, ſo *conſul* is derived from *conſulendo*: and in the laws of *Edward the Confeſſor*, mention is made of *vicecomites* and *viceconſules*. Blount.—*Conſuls* among the ancient *Romans*, were chief officers, of which two were yearly choſen, to govern the city of *Rome*. Thoſe who now paſs under the name of *Conſuls* reſiding in *England* ſent from foreign nations, and in foreign ports ſent from *England*, are merchants, or perſons of eminence and knowledge, appointed to take care of the affairs and intereſts of merchants. See *Lex. Mercat.*

CONSULTA ECCLESIA, A church full, or provided for. *Cowel.*

CONSULTATION, *conſultatio.*] A writ whereby a cauſe having been removed by Prohibition from the Eccleſiaſtical court, to the King's court, is returned thither again; for if the judges of the King's court, upon comparing the libel with the ſuggeſtion of the party, find the ſuggeſtion falſe, or not proved, and therefore the cauſe to be wrongfully called from the Eccleſiaſtical court, then upon this *conſultation* or deliberation they decree it to be returned; whereupon the writ in this caſe obtained, is called a *Conſultation. Reg. Orig.* 44, *&c.* Statute of *Writ of Conſultations*, 24 *Ed.* 1.

This writ is in nature of a *procedendo*; but properly a *conſultation* ought not to be granted, but in caſe where a man cannot recover at the Common law, in the King's courts. *New Nat. Br.* 119. Cauſes of which the Eccleſiaſtical or Spiritual courts have juriſdiction, are of adminiſtrations, admiſſions of clerks, adultery, appeals in eccleſiaſtical cauſes, apoſtacy, general baſtardy, blaſphemy, ſolicitation of chaſtity, dilapidations and church repairs, celebration of divine ſervice, divorces, fornication, hereſy, inceſt, inſtitution of clerks, marriage rites, oblations, obventions, ordinations, commutation of penance, penſions, procurations, ſchiſm, ſimony, tithes, probate of wills, *&c.* and where a ſuit is in the Eccleſiaſtical court, for any of theſe cauſes, or the like, and not mixed with any temporal thing, if a ſuggeſtion is made for a prohibition, a *conſultation* ſhall be awarded. 5 *Rep.* 9.

To move for a prohibition in another court, after motion in the *Chancery, &c.* on the ſame libel which is granted, is merely vexatious, for which a *conſultation* ſhall be had. *Cro. Eliz.* 277. Where a *conſultation* is granted upon the right of the thing in queſtion, there a new prohibition ſhall never be granted on the ſame libel; but where granted upon any default of the prohibition, in form, *&c.* there a prohibition may be granted upon the ſame libel again. 1 *Nelſ. Abr.* 485. See title *Prohibition*.

CONTEMPT, *contemptus.*] A diſobedience to the rules, orders or proceſs of a Court, which hath power to puniſh ſuch offence; and one may be impriſoned for a *contempt* done in court; but not for a *contempt* out of court, or a private abuſe. *Cro. Eliz.* 689. But for contempt out of court, an attachment may be granted. Attachment alſo lies againſt one for *contempt* to the court, to bring in the offender to anſwer on interrogatories, *&c.* and if he cannot acquit himſelf, he ſhall be fined. 1 *Lill.* 305. If a ſheriff, being required to return a writ directed to him, doth not return the writ, it is a *contempt*: and this word is uſed for a kind of miſdemeanor, by doing what one is forbiden; or not doing what he is commanded. 12 *Rep.* 36. And as this is ſometimes a greater, and ſometimes a leſſer offence; ſo it is puniſhed with greater or leſs puniſhment, by fine, and ſometimes impriſonment. *Dyer* 128, 177: 1 *Bulſt.* 85.

If a defendant in Chancery on ſervice of a *ſubpœna*, does not appear within the time limited by the rules of the court, and plead, demur or anſwer to the bill againſt him, he is then ſaid to be *in contempt*; and the reſpective proceſſes of contempt are in ſucceſſive order awarded againſt him. Theſe are *attachment*; *attachment with proclamations*; *a commiſſion of rebellion*; and finally a *ſequeſtration*. 3 *Comm.* 443.

An attachment of *contempt* may iſſue againſt a biſhop, or other peer: but for not returning a *fieri facias de bonis eccleſiaſticis*, it is proper to move againſt the chancellor, commiſſary, or official. *Rex* v. *Biſhop of St. Aſaph*, 1 *Wilſ.* 332.

It is a contempt to inſtitute a ſuit fictitiouſly, though the demand is real, either to hurt any perſon, or to get the opinion of the court. *Coxe* v. *Phillips*, *Hardw.* 237, 239.—See further title *Attachment*; and 4 *Comm.* 283.

Contempts againſt the King's prerogative; are by refuſing to aſſiſt him for the good of the publick; either in his councils, by advice, if called upon; or in his wars, by perſonal ſervice, for defence of the realm, againſt a rebellion or invaſion. 1 *Hawk. P. C. c.* 22.

Under this claſs may be ranked the neglecting to join the *poſſe comitatus*, or power of the county, being thereunto required by the ſheriff or juſtices according to the *Stat.* 2 *Hen.* 5. *c.* 8; (ſee title *Riots*;) which is a duty incumbent upon all that are 15 years of age, under the degree of nobility and able to travel. *Lamb. Eliz.* 315.

Contempts againſt the prerogative may alſo be by preferring the intereſts of a foreign potentate to thoſe of our own; or doing or receiving any thing that may create an undue influence, in favour of ſuch extrinſic power; as by taking a *penſion* from any *foreign prince* without the conſent of the King. 3 *Inſt.* 144.—Or by diſobeying the king's lawful commands; whether by writs iſſuing out of his courts of juſtice, or by a ſummons to attend his privy council; or by letters from the king to a ſubject, commanding him to return from beyond the ſea; (for diſobedience to which his lands ſhall be ſeized till he doth return, and himſelf afterwards puniſhed;) or by his writ of *ne exeat regno* or proclamation commanding the ſubject to ſtay at home.

Diſobedience to any of theſe commands is a high miſpriſion and contempt; and ſo, laſtly, is diſobedience to any act of parliament, where no particular penalty is aſſigned; for then it is puniſhable, like the reſt of theſe contempts, by fine and impriſonment, at the diſcretion of the King's courts of juſtice. 4 *Comm.* 122: See alſo 1 *Hawk. P. C. cc.* 22, 23, 24: And this Dict. titles *Oaths*, *King*.

CONTENEMENT, *contenementum.*] Is ſaid to ſignify a man's countenance or credit, which he hath together with, and by reaſon of, his freehold: in which ſenſe, it is uſed in the *Stat.* of 1 *Ed.* 3. and other ſtatutes: and *Spelman* in his *Gloſſary* ſays, contenementum *eſt æſtimatio et conditionis forma, qua quis in repub. ſubſiſtit.* But *contenement* is more properly that, which is neceſſary for the ſupport and maintenance of men, agreeable to their ſeveral qualities, or ſtates of life. See *Magna Charta*, *c.* 14: and *Glanvil. lib.* 9. *c.* 8. and this Dict. tit. *Diſtreſs*.

CONTINGENT LEGACY, See title *Legacy*.

CONTINGENT REMAINDER, Contingent or *executory* remainders (whereby no preſent intereſt paſſes) are where the eſtate in remainder is limited to take effect, either to a dubious and uncertain *perſon*, or upon a dubious and uncertain *event*; ſo that the particular eſtate may chance to be determined, and the remainder never take effect. 3 *Rep.* 20: 2 *Comm.* 169: And ſee 10 *Rep.* 85: See this Dict. titles *Eſtate*, *Limitation*, *Remainder*; and alſo title *Executory Deviſe*.

CONTINGENT USE, Is a uſe limited in a conveyance of land, which may or may not happen to veſt, according to the *contingency* expreſſed in the limitation of ſuch *uſe*: a *uſe* in *contingency* is ſuch which by poſſibility may happen in poſſeſſion, reverſion or remainder. 1 *Rep.* 121.

CONTINUAL CLAIM, See title *Claim*.

CONTINUANCE. Is the continuing of a cauſe in court, by an entry upon the records there for that purpoſe. There is a *continuance* of the *aſſize*, &c. And *continuance* of a *writ* or *action* is from one term to another, in caſe where the ſheriff hath not returned a former writ, iſſued out in the ſaid action. *Kiteb.* 262. *Continuances* and eſſoins are amendable upon the roll, at any time before judgment: they are the acts of the court, and at Common law they may amend their own acts before judgment, though in another term; but their judgments are only amendable in the ſame term wherein they are given. 3 *Lev.* 431. Upon an Original, a term or two or three terms may be meſne between the teſte and the return; and this ſhall be a good *continuance*; for the defendant is not at any prejudice by it, and the plaintiff may give a day to the defendant beyond the common day, if he will.

But a *continuance* by *capias* ought to be made from term to term, and there cannot be any meſne term, becauſe the defendant ought not to ſtay ſo long in priſon. 2 *Danv. Abr.* 150. If a man recover upon demurrer, or by default, &c. and a writ of inquiry of damages is awarded, there ought to be *continuances* between the firſt and ſecond judgment, otherwiſe it will be a diſcontinuance; for the firſt is but an award, and not compleat, till the ſecond judgment, upon the return of the writ of inquiry of damages. *Ibid.* 153. If the plaintiff be nonſuit, by which the defendant is to recover coſts; if the plaintiff will not enter his *continuances*, on purpoſe to ſave the coſts, the defendant ſhall be ſuffered to enter them. *Cro. Jac.* 316, 317. The courſe of the Court of *King's Bench* is to enter no *continuance* upon the roll, till after iſſue or demurrer, and then to enter the *continuance* of all upon the back, before judgment: and if it is not entered, it is error. *Trin.* 16 *Jac. B. R.* Vide titles *Diſcontinuance*, *Proceſs*.

CONTINUANDO, A word uſed in a ſpecial declaration of treſpaſs, when the plaintiff would recover damages for ſeveral treſpaſſes in the ſame action: and to avoid multiplicity of ſuits, a man may in one action of treſpaſs recover damages for many treſpaſſes, laying the firſt to be done with a *continuando* to the whole time, in which the reſt of the treſpaſſes were done; which is in this form, *Continuando* (*by continuing* the treſpaſs aforeſaid, &c. from the day aforeſaid, &c.) until ſuch a day, including the laſt treſpaſs. *Terms de Ley*.

In treſpaſs with a *continuando* of divers things, though of ſome of thoſe things there could be no *continuando*, yet it ſhall be good for thoſe things for which the *continuando* could be, and not for the others: but if the *continuando* had been particularly of ſuch things whereof a *continuando* could not be, then it had been nought. 3 *Lev.* 94. Every day's treſpaſs is ſaid to be a ſeveral treſpaſs; tho' a *continuando* may not be of men's continuing a treſpaſs day and night, for ſome time together; for mankind muſt take ſome reſt: where cattle do treſpaſs upon ground, they are continually treſpaſſing night and day, and therefore the *continuando* in that caſe is good. 1 *Lill. Abr.* 307. Treſpaſs for breaking an houſe with a *continuando*, is good; and until a re-entry is made, the continuation of the poſſeſſion, is a continuing of the treſpaſs. *Lutw.* 1342. See title *Treſpaſs*.

CONTRABAND GOODS, From *contra*, and the Ital. *bando*, an edict or proclamation.] Are thoſe which are prohibited by act of parliament, or the King's proclamation to be imported into, or exported out of this into any other nation. See titles *Navigation-Acts*: *Cuſtoms*.

CONTRACAUSATOR, A criminal, or one proſecuted for a crime: this word is mentioned in *Leg. H.* 1. *cap.* 61.

CONTRACT, *contractus.*] A covenant or agreement between two or more perſons, with a lawful conſideration or cauſe, *Weſt. Symb. part* 1. As if a man ſells his horſe

or other thing to another, for a ſum of money; or covenants in conſideration of 20*l.* to make him a leaſe of a farm, &c. theſe are good *contracts*, becauſe there is a *quid pro quo*, or one thing for another: but if a perſon make promiſe to me, that I ſhall have 20*s.* and that he will be debtor to me therefore, and after I demand the 20*s.* and he will not give it me, yet I ſhall never have any action to recover this 20*s.* becauſe this promiſe was no *contract*, but a bare promiſe, or *nudum pactum*; though if any thing were given for the 20*s.* if it were but to the value of a penny, then it had been a good *contract*. See title *Conſideration*.

Every *contract* doth imply in itſelf an *aſſumpſit* in law, to perform the ſame; for a *contract* would be to no purpoſe, if there were no means to enforce the performance thereof. 1 *Lill. Abr.* 308. Where an action is brought upon a *contract*, and the plaintiff miſtakes the *ſum agreed upon*, he will fail in his action: but if he brings his action on the *promiſe* in *law*, which ariſes from the debt, there, although he miſtakes the ſum, he ſhall recover. *Alleyn* 29. See titles *Action*, *Aſſumpſit*.

There is a diverſity where a *day of payment* is limited on a *contract*, and where not; for where it is limited, the *contract* is good preſently, and an action lies upon it, without payment: but in the other not: If a man buys 20 yards of cloth, &c. the *contract* is void, if he do not pay the money preſently; but if day of payment be given, there the one may have an action for the money, and the other trover for the cloth. *Dyer* 30, 293. Where a ſeller ſays to a buyer, he will ſell his horſe for ſo much, and the buyer ſays he will give it; if he preſently tell out the money it is a *contract*; but if he do not, it is no *contract*. *Noy's Max.* 87: *Hob.* 41. The property of any thing ſold is in the buyer immediately by the *contract*; though regularly it muſt be delivered to the buyer, before the ſeller can bring his action for the money. *Noy* 88. If one contract to buy a horſe or other thing of me, and no money is paid, or earneſt given, nor day ſet for payment thereof, nor the thing delivered; in theſe caſes, no action will lie for the money, or the thing ſold, but it may be ſold to another. *Plowd.* 128, 309.

All *contracts* are to be certain, perfect and compleat: For an agreement to give ſo much for a thing as it ſhall be reaſonably worth, is void for incertainty; ſo a promiſe to pay money in a ſhort time, &c. or to give ſo much, if he likes the thing when he ſees it. *Dyer* 91: 1 *Bulſt.* 92. But if I *contract* with another to give him 10*l.* for ſuch a thing, if I like it on ſeeing the ſame; this bargain is ſaid to be perfect at my pleaſure: though I may not take the thing before I have paid the money; if I do, the ſeller may have treſpaſs againſt me; and if he ſell it to another, I may bring an action on the caſe againſt him. *Noy* 104. If a *contract* be to have for cattle ſold 10*l.* if the buyer do a certain thing, or elſe to have 20*l.* it is a good *contract*, and certain enough. And if I agree with a perſon to give him ſo much for his horſe, as *J. S.* ſhall judge him worth, when he hath judged it, the *contract* is compleat, and an action will lie on it; and the buyer ſhall have a reaſonable time to demand the judgment of *J. S.* But if he dies before the judgment is given, the *contract* is determined. *Perk. ſect.* 112, 114: *Shep. Abr.* 294.

In *contracts*, the *time* is to be regarded, *in* and *from* which the *contract* is made: the words ſhall be taken in the common and uſual ſenſe, as they are taken in that place where ſpoken; and the law doth not ſo much look upon the *form of words*, as on the *ſubſtance and mind* of the parties therein. 5 *Rep.* 83: 1 *Bulſt.* 175. A *contract* for goods may be made as well by word of mouth, as by deed in writing; and where it is in writing only, not ſealed and delivered, it is all one as by word. But if the *contract* be by writing ſealed and delivered, and ſo turned into a deed, then it is of another nature; and in this caſe generally the action on the verbal *contract* is gone, and ſome other action lies for breach thereof. *Plowd.* 130, 309: *Dyer* 90.

Contracts, not to be performed in a year, are to be in writing, ſigned by the party, &c. or no action may be brought on them: but if no day is ſet, or the time is uncertain, they may be good without it. *Stat.* 29 *Car.* 2. *c.* 3. And by the ſame ſtatute, no *contract* for the ſale of goods for 10*l.* or upwards, ſhall be good, unleſs the buyer receive part of the goods ſold; or give ſomething in earneſt to bind the *contract*; or ſome note thereof be made in writing, ſigned by the perſon charged with the *contract*, &c. See title *Frauds*; *Agreement* III, IV.

If two perſons come to a draper, and one ſays, let this man have ſo much cloth, and I will pay you; there the ſale is to the undertaker only, though the delivery is to another by his appointment: but if a *contract* be made with *A. B.* and the vendor ſcruples to let the goods go without money, and *C D.* comes to him and deſires him to let *A. B.* have the goods, and undertakes that *he* ſhall pay him for them, that will be a promiſe *within* the ſtatute 29 *Car.* 2. *c.* 3, and ought to be in writing. *Mod. Caſ.* 249.

A *contract* made and entered into upon good conſideration, may for good conſiderations be diſſolved. See *Agreement* and *Sale*. As to *Uſurious Contracts*, See title *Uſury*.

CONTRAFACTION, *contrafactio.*] A counterfeiting; contrafactio *ſigilli* regis, a counterfeiting the King's ſeal. *Blount.*

CONTRA FORMAM COLLATIONIS, A writ that lay where a man had given lands in perpetual alms, to any late houſes of religion, as to an abbot and convent, or to the warden or maſter of any hoſpital and his convent, to find certain poor men with neceſſaries, and do divine ſervice, &c. If they aliened the land, to the diſheriſon of the houſe and church, then the donor or his heirs, ſhould bring this writ to recover the lands. It was had againſt the abbot or his ſucceſſor; not againſt the alienee, though he were tenant of the land: and was founded upon the ſtatute of *Weſtm.* 2. *c.* 1: *Reg. Orig.* 238: *F. N. B.* 210.

CONTRA FORMAM FEOFFAMENTI, A writ that lay for the heir of a tenant enfeoffed of certain lands or tenements, by charter of feoffment from a lord to make certain ſervices and ſuits to his court, who was afterwards diſtrained for more ſervices than were mentioned in the charter. *Reg. Orig.* 176: *Old Nat. Br.* 162.

CONTRA FORMAM STATUTI, *contrary to the form of the ſtatute in ſuch caſe made and provided.*] The uſual concluſion of every indictment, &c. laid on an offence created by ſtatute.

If *one ſtatute be relative to another*, as where the *former making the offence*, *the latter adds a penalty*, the indictment ought to conclude *contra formam ſtatutorum*. 2 *Hale's Pl. C.* 173. *cap.* 24.

Where there are *several statutes*, and it does not appear on which the information is founded, the concluding *contra formam statuti* is ill. *Cro. Jac.* 142. *pl.* 19. *Broughton* v. *Moor*, cited as adjudged in *Talbot & al'*. Where *one act makes the offence*, and *another gives the penalty*, an information must be *contra formam statutorum*; in the case of *Talbot* and *Sheldon*, indicted for recusancy *contra formam statuti*, 23 *Eliz. c.* 1. and the judgment reversed because the penalty was demanded; for the 10 *Eliz.* made the offence, and the 23d gave the penalty: but, if the information had been for the offence only, it had been good; *per Coke. Ow.* 135. *Trin.* 9 *Jac.* See 5 *Vin. Abr.* 552, 556.—See further titles *Statutes*, *Indictment*.

CONTRAMANDATIO PLACITI, A respiting or giving a defendant further time to answer; or a *countermand* of what was formerly ordered. *Leg. H.* 1. *c.* 59.

CONTRAMANDATUM, Is said to be a lawful excuse which the defendant in a suit by attorney alledgeth for himself, to shew that the plaintiff hath no cause of complaint. *Blount*.

CONTRAPOSITIO, A plea or answer. *Leg. Hen.* 1. *c.* 34.

CONTRARIENTS, In the reign of King *Edw.* 2. *Thomas* Earl of *Lancaster* taking part with the *Barons* against the King, it was not thought fit, in respect of their great power, to call them rebels or traitors, but *contrarients*: and hence we have a record of those times, called *Rotulum Contrarientium*.

CONTRATENERE, To with-hold. *Si quis decimas* contrateneat. *Leg. Alfredi apud Brompton*, *c.* 9.

CONTRIBULES, *contribunales*, kindred or cousins. *Lamb. p.* 75.

CONTRIBUTION, *contributio.*] Is where every one pays his share, or *contributes* his part to any thing. One *parcener* shall have *contribution* against another; one *heir* have *contribution* against another *heir*, in equal degree: and one *purchaser* shall have *contribution* against another. Also *conusors* in a statute shall be equally charged, and not one of them solely extended. 3 *Rep.* 12, 13, *&c.* On a statute or recognisance, there is a *contribution* and stay till the full age of the heir, *&c.* and this doth extend to the lessee for life or years, of the conusor, who has part of the land liable, and the heir within age the residue; for the land of every one of them ought to be charged equally, because the whole is liable to the judgment; and this cannot be, if during the nonage, the burden shall fall upon one only. *Jenk. Cent.* 36. If lands are *mortgaged*, and then devised to one person for life, with remainder to another; *both devisees* shall make *contribution* to payment of the mortgage-money. *Chan. Cas.* 224, 271.—See title *Mortgage*.

Where goods are cast into the sea, for the safe-guard of a ship, or other goods, *&c.* aboard in a tempest; there is a *contribution* among merchants, towards the loss of the owners. See title *Insurance*. And where a *robbery* is committed on the highway, and damages are recovered against one or a few persons, in an action against the *hundred*, the rest of the inhabitants shall make *contribution* to the same. 27 *Eliz. c.* 13. See title *Robbery*.

CONTRIBUTIONE FACIENDA, A writ that lieth where there are tenants in common, that are bound to do one thing, and one is put to the whole burden; as where they jointly hold a mill *pro indiviso*, and take the profits equally, and the mill falling into decay, one of them will not repair the mill; now the other shall have a writ to compel him to *contribute* to the reparations. And if there be three coparceners of land, that owe suit to the lord's court, and the eldest performs the whole; then may she have this writ to compel the other to make their contribution. So where one suit is required for land, and that land being sold to divers persons, suit is demanded of them all, or some of them by distress, as entirely as if all the land were still in one. *Reg. Orig.* 175: *F. N. B.* 162.

CONTROLLER, Fr. *contrerolleur*, Lat. *contrarotulator.*] An Overseer or officer relating to public accounts, *&c.* And we have divers officers of this name; as *controller* of the *King's Household*; of the *Navy*; of the *Customs*; of the *Excise*; of the *Mint*, *&c.* And in our courts, there is the controller of the *Hamper*, of the *Pipe*, and of the *Pell*, *&c.* The office of *Controller of the Household*, is to control the accounts of the Green Cloth; and he sits with the Lord Steward and other officers in the counting-house, for daily taking the accounts of all expences of the household. The *Controller of the Navy* controls the payment of wages; examines and audits accounts; and inquires into rates of stores for shipping, *&c.* *Controllers of the Customs and Excise*, their office is to control the accounts of those revenues. And the *Controller of the Mint*, controls the payment of wages, and accounts relating to the same. *Controller of the Hamper* is an officer in the *Chancery* attending the Lord Chancellor daily in, term-time, and upon seal-days; whose office is to take all things sealed from the Clerk of the *Hamper*, inclosed in bags of leather, and to note the just number and effect of all things so received, and enter the same in a book, with all the duties appertaining to his Majesty, and other officers for the same. The *Controller of the Pipe* is an officer of the Exchequer, who writes out summons twice every year to the sheriffs to levy the farms and debts of the Pipe; and keeps a controlment of the Pipes, *&c.* *Controller of the Pell* is also an officer of the Exchequer; of which sort there are two, who are the Chamberlain's clerks, that do or should keep a controlment of the Pell, of receipts and goings out: and this officer was originally such as took notes of other officers' accounts or receipts, to the intent to discover if they dealt amiss, and was ordained for the Prince's better security. *Fleta. lib.* 1. *cap.* 18: *Stat.* 12 *Ed.* 3. *cap.* 3. This last seems to be the original use and design of all *Controllers*.

CONTROVER, *controuveur*] Signifies in our law one that of his own head devises or invents false news. 2 *Inst.* 227.

CONVENABLE, *Fr.*] Agreeable. *Stat.* 27 *Ed.* 3. *c.* 21. See *Covenable*.

CONVENIENT, *conveniens*] Of the use of this word, Sir *Edw. Coke* in his Institute says,—*Non solum quod licet sed quod est* conveniens *est considerandum, nihil quod est* inconveniens *est licitum.* 1 *Inst.* 66.

CONVENT, *conventus.*] Signifies the fraternity of an *abbey* or *priory*; as *societas* doth the number of fellows in a college. *Bract. lib.* 2. *c.* 35.—See title *Monastery*, *Mortmain*.

CONVENTICLE, *conventiculum.*] A private assembly or meeting for the exercise of religion; first used as a term of disgrace for the meetings of *Wickliffe* in this nation, above two hundred years since: and now applied to the illegal meetings of the *Non-conformists*: it is mentioned in the

the ſtatutes 2 *Hen.* 4. *c.* 15: 1 *H.* 6. *c.* 3. and 16 *Car.* 2. *c.* 4; which ſtatute was made to prevent and ſuppreſs *conventicles*: and by *Stat.* 22 *Car.* 2. *cap.* 1, It is enacted, that if any perſons of the age of ſixteen years, ſubjects of this kingdom, ſhall be preſent at any *conventicle*, where there are five or more aſſembled, they ſhall be fined 5*s.* for the firſt offence, and 10*s.* for the ſecond; and perſons preaching incur a penalty of 20*l.* Alſo ſuffering a meeting to be held in a houſe, &c. is liable to 20*l.* penalty. Juſtices of peace have power to enter ſuch houſes, and ſeize perſons aſſembled, &c. And if they neglect their duty, they ſhall forfeit 100*l.* And if any conſtable, &c. know of ſuch meetings, and do not inform a juſtice of peace, or chief magiſtrate, he ſhall forfeit 5*l.* But the *Stat.* 1 *W.* & *M. ſt.* 1. *c.* 18, ordains that proteſtant diſſenters ſhall be exempted from penalties: though if they meet in a houſe, with the doors locked, barred, or bolted, ſuch diſſenters ſhall have no benefit from that ſtatute. By *Stat.* 10 *An. c.* 2, Officers of the government, &c. preſent at any *conventicle*, at which there ſhall be ten perſons, if the Royal family be not prayed for in expreſs words, ſhall forfeit 40*l.* and be diſabled. See titles *Hereſy*, *Non-conformiſts*, *Religion*.

CONVENTIO, A word uſed in ancient law-pleadings, for an agreement or covenant: as *A. B. queritur*, &c. *de* C. D. &c. *pro eo quod non teneat* conventionem, &c. There is a ſtrange *record* of the *court* of the manor of *Hatfield*, *in Com. Ebor.* held *anno* 11 *Ed.* 3, relative to a *convention* to ſell *the Devil*, and on earneſt given, and non-delivery, action brought; which on hearing was adjudged *in infernum*.

CONVENTIONE, A writ that lies for the breach of any covenant in writing, whether real or perſonal: and it is called a *Writ of Covenant*. *Reg. Orig.* 115: *F. N. B.* 145.

CONVENTION, A parliament aſſembled, but in which no act is paſſed, or bill ſigned. *Dict.*

The term *Convention*, is rather applied to the meeting of the Lords and Commons, without the aſſent of, or being called together by, the King; and which can only be juſtified *ex neceſſitate rei*.

Of this nature was the *Convention-Parliament*, which reſtored King *Charles* II. and which met above a month before his return: the Lords by their own authority, and the Commons in purſuance of writs iſſued in the name of the keepers of the liberty of *England* by authority of parliament. And if this Convention had not ſo met, it was morally impoſſible that the kingdom ſhould have been ſettled in peace.

In a ſimilar manner, at the time of the Revolution, *A. D.* 1688, the Lords and Commons by their own authority, and upon the ſummons of the Prince of *Orange*, (afterward *William* III.) met in a *Convention*, and therein diſpoſed of the Crown and Kingdom. And it is declared by *Stat.* 1 *W.* & *M. ſt.* 1. *c.* 1. that this *Convention* was really the two houſes of parliament, notwithſtanding the want of writs or other defects of form.

If we may be allowed to ſuppoſe a poſſible caſe, that the whole Royal line ſhould at any time fail and become extinct, which would indiſputably vacate the throne; in this ſituation it ſeems reaſonable to preſume that the body of the nation, conſiſting of Lords and Commons, would have a right to meet and ſettle the government: otherwiſe there muſt be no government at all. But whenever the throne is full, no national meeting, nor any meeting pretending to be ſuch, can be legal, but the *parliament* aſſembled by command of the King. See title *Parliament*. and 1 *Comm.* 151, 2.

The Conſtitution of *Great Britain* having placed the repreſentation of the nation, and the expreſſion of the national, will in the parliament, no other meeting or *Convention* even of every individual in the kingdom, would be a competent organ to expreſs that will; and meetings of ſuch a nature tending merely to ſedition, and to delude the people into an imaginary aſſertion of rights, which they had before delegated to their repreſentatives in parliament, could only tend to introduce Anarchy and Confuſion; and to overturn every ſettled principle of government. An act of parliament was paſſed in *Ireland*, in the year 1793 to prevent any ſuch meetings or *Conventions*; and a few ignorant individuals, who in the ſame year had dared to aſſemble under that title in *Scotland*, were quickly diſperſed, and their leaders convicted of ſeditious practices; for which they were ſentenced to tranſportation. See further titles *Parliament*, *Treaſon*, *Seditious Aſſemblies*.

CONVENTUALS, Religious men united together in a *convent* or religious houſe. *Cowel.*

CONVENTUAL CHURCH, A church that conſiſts of regular clerks, profeſſing ſome order of religion; or of Dean and Chapter, or other ſocieties of Spiritual men.

CONVERSION, Is where a perſon finding or having the goods of another in his poſſeſſion, *converts* them to his own uſe, without the conſent of the owner, and for which the proprietor may maintain an action of *Trover* and *Converſion* againſt him.—And refuſal to reſtore goods is, *primâ facie*, ſufficient *evidence* of a converſion, though it does not amount to a converſion. 10 *Rep.* 56: 3 *Comm.* 152. See title *Trover*.

CONVERSOS. The *Jews* here in *England* were formerly called *Converſos*, becauſe they were converted to the *Chriſtian* religion. King *Hen.* III, built an houſe for them in *London*, and allowed them a competent proviſion or ſubſiſtence for their lives; and this houſe was called *Domus Converſorum*. But by reaſon of the vaſt expences of the wars, and the increaſe of thoſe *converts*, they became a burden to the Crown; ſo that they were placed in abbeys and monaſteries for their ſupport and maintenance. And the *Jews* being afterwards baniſhed, King *Ed.* III, in the 51ſt year of his reign, gave this houſe which had been uſed for the converted *Jews*, for the keeping of the Rolls; and it is ſaid to be the ſame which was till lately enjoyed by the Maſter of the Rolls. *Blount. Harg*: *Co. Lit.* 271 *b.*

CONVEYANCE, A deed which paſſes or conveys land from one man to another. *Conveyance* by *feoffment*, and *livery*, was the general *conveyance* at Common law; and if there was a tenant in poſſeſſion, ſo that livery could not be made, then was the reverſion granted, and the tenant always attorned: alſo upon the ſame reaſon, a *leaſe*, and *releaſe* was held to be a good *conveyance*, to paſs an eſtate; but the leſſee was to be in actual poſſeſſion, before the releaſe. But the leaſe is now conſidered as operating ſo as to give the poſſeſſion, which it does in point of law.

By the *Common law*, when an eſtate did not paſs by feoffment, the vendor made a leaſe for years, and the leſſee

leſſee actually entered; and the leſſor granted the reverſion to another, and the leſſee attorned: afterwards, when an inheritance was to be granted, then likewiſe was a leaſe for years uſually made, and the leſſee entered (as before) and then the leſſor releaſed to him: but after the *ſtatute of uſes*, it became an opinion, that if a *leaſe for years* was made upon a valuable conſideration, a *releaſe* might operate upon it without an actual entry of the leſſee; becauſe the ſtatute did execute the leaſe, and raiſed an uſe preſently to the leſſee: and ſerjeant *Moor* was the firſt who practiſed this way. 2 *Mod.* 251, 252.

The moſt common *Conveyances* now in uſe are *deeds of gift, bargain and ſale, leaſe and releaſe, fines and recoveries, ſettlements to uſes*, &c.

The following further obſervations on conveyances at Common law and thoſe which derive their effect from the ſtatute of Uſes, are abridged from the long and learned note on 1 *Inſt.* 271 *b*; to which the curious enquirer is referred for a more particular inveſtigation of the ſubject. See alſo this Dict. titles *Deed*; *Eſtate*; *Leaſe and Releaſe*; *Limitation*; *Truſts*; *Uſes*.

FEOFFMENTS and GRANTS were the two chief modes uſed in the Common law for transferring property. The moſt comprehenſive definition which can be given of a FEOFFMENT ſeems to be, a conveyance of *corporeal* hereditaments, by delivery of the poſſeſſion, upon, or within view of, the hereditaments conveyed. This delivery was thus made, that the lord and the other tenants might be witneſſes to it. No charter of feoffment was neceſſary; it only ſerved as an authentication of the tranſaction; and when it was uſed, the lands were ſuppoſed to be transferred, not by the charter, but by the livery which it authenticated. Soon after the Conqueſt, or perhaps towards the end of the *Saxon* government, all eſtates were called *fees*; the original and proper import of the word feoffment is, the grant of a fee. It came afterwards to ſignify a grant with livery of ſeiſin of a free inheritance to a man and his heirs: more reſpect being had to the perpetuity, than to the feudal tenure, of the eſtate granted. In early times, after the Conqueſt, charters of Feoffment were various in point of form. In the time of *Ed.* I. they began to be drawn up in a more uniform ſtile. The more antient of them generally run with the words *dedi, conceſſi*, or *donavi*. It was not till a later period that *feoffavi* came into uſe. The more antient feoffments were alſo uſually made in conſideration of, or for the homage and ſervice of the feoffee, and to hold of the feoffor and his heirs. But after the *Stat. Quia emptores*, (18 *E.* 1. *ſt.* 1.) feoffments were always made to hold to the chief lords of the fee, without the words *pro homagio & ſervitio*. See further, 1 *Inſt.* 6 *a*: 271 *b*.

The proper limitation of a feoffment is to a man and his heirs; but feoffments were often made of conditional fees, (or of eſtates-tail as they are now called,) and of life eſtates; to which may be added, feoffments of eſtates given in frankmarriage and frankalmoigne. To make the feoffment complete, the feoffor uſed to give the feoffee ſeiſin of the lands: this is what the feudiſts call Inveſtiture. It was often made by ſymbolical tradition, but it was always made upon or within view of the lands. When the King made a feoffment he iſſued his writ to the ſheriff, or ſome other perſon to deliver ſeiſin: other great men did the ſame; and this gave riſe to powers of attorney. See *Mad. Form. pref.*

A GRANT in the original ſignification of the word, is a conveyance or transfer of an *incorporeal* hereditament. As livery of ſeiſin could not be had of theſe, the transfer of them was always made by writing, in order to produce that notoriety, which in the transfer of corporeal hereditaments was produced by delivery of the poſſeſſion. But in other reſpects a feoffment and a grant did not materially differ.

Such was the original diſtinction between a *feoffment* and a *grant*; but from this real difference in their *ſubject matter* only, a difference was ſuppoſed to exiſt in their *operation*. A *feoffment* viſibly operated on the *poſſeſſion*; a *grant* could only operate on the *right* of the party conveying. Now as poſſeſſion and freehold were ſynonimous terms, no perſon being conſidered to have the poſſeſſion of the lands but he who had at leaſt an eſtate of freehold in them, a *conveyance* which was conſidered as transferring the poſſeſſion, muſt neceſſarily be conſidered as transferring an eſtate of freehold; or, to ſpeak more accurately, as transferring the whole fee. But this reaſoning could not apply to grants; their eſſential quality being that of transferring things which did not lie in poſſeſſion: they therefore could only tranſfer the right; that is, could only transfer that eſtate which the party had a right to convey. It is in this ſenſe the expreſſions are to be underſtood, that a feoffment is a *tortious* and a grant a *rightful* conveyance. See title *Diſſeiſin*.

This appears to have been the outline of conveyances at Common law. The introduction of uſes produced a great revolution in this reſpect. Uſes at the Common law, were, in moſt reſpects what truſts are now. When a feoffment was made to uſes, the legal eſtate was in the feoffee. He filled the poſſeſſion, did the feudal duties, and was in the eye of the law the tenant of the fee. The perſon to whoſe uſe he was ſeiſed, called the *ceſtuy que uſe*, had the beneficial property of the lands; had a right to the profits; and a right to call upon the feoffee to convey the eſtate to him, and to defend it againſt ſtrangers. This right at firſt depended on the conſcience of the feoffee: if he with held the profits from the *ceſtuy que uſe*, or refuſed to convey the eſtate as he directed, the feoffee was without remedy. To redreſs this grievance the writ of *ſubpœna* was deviſed, or rather adopted from the Common-law courts, by the court of Chancery, to oblige the feoffee to attend in court and diſcloſe the truſt; and then the court compelled him to execute it.

Thus uſes were eſtabliſhed: they were not conſidered as iſſuing out of, or annexed to the land, as a rent or condition, or a right of common; but as a *truſt* repoſed in the feoffee, that he ſhould diſpoſe of the lands at the diſcretion of the *ceſtuy que uſe*, permit him to receive the rents, and in all other reſpects have the beneficial property of the lands. To all other perſons except the *ceſtuy que uſe*, the feoffee was as much the real owner of the fee as if he did not hold it to the uſe of another: *his* wife was entitled to dower; *his* infant heir was in wardſhip to the lord; and upon *his* attainder the eſtate was forfeited.

To remedy theſe inconveniences, the *Stat.* 27 *H.* 8. *c.* 10, was paſſed; by which the poſſeſſion was deveſted out of the perſons ſeiſed to the uſe, and transferred to the *ceſtuy que uſe*. For by that ſtatute it is enacted "that when

when any perſon ſhall be ſeiſed of any lands to the uſe, confidence, or truſt of any other perſon or perſons, by reaſon of any bargain, ſale, feoffment, fine, recovery, contract, agreement, will, or otherwiſe; in ſuch caſe the perſons having the uſe, confidence or truſt, ſhould from thenceforth be deemed and adjudged in lawful ſeiſin, eſtate and poſſeſſion of and in the lands, in the ſame quality, manner and form as they had before in the uſe."—There ſeems to be little doubt but that the intention of the Legiſlature in paſſing this act, was utterly to annihilate the exiſtence of *uſes* conſidered as diſtinct from the poſſeſſion. But they have been preſerved under the appellation of *truſts*. The courts heſitated much before they allowed them under this new name. And at length ſecret modes of transferring the poſſeſſion itſelf, have been diſcovered, and have totally ſuperſeded that notorious and publick mode of transferring property, which the Common law required, and the ſtatute intended to reſtore; and many modifications or limitations of real property have been allowed, which the Common law did not admit. See title *Leaſe and Releaſe*.

A ſon did *give* and *grant* lands to his mother, and her heirs; though this was a defective *conveyance* at Common law, yet it was adjudged good by way of *uſe*, to ſupport the intention of the donor, and therefore, by theſe words, an *uſe* did ariſe to the mother by way of *covenant to ſtand ſeiſed*. 2 *Lev.* 225. A feoffment without *livery and ſeiſin*, will not enure as a grant; but where made in conſideration of a marriage, &c. it has been adjudged, that it did enure as *a covenant to ſtand ſeiſed* to *uſes*. 2 *Lev.* 213.

Tenant in fee, in conſideration of marriage, *covenanted*, *granted*, and *agreed* all that meſſuage to the uſe of himſelf for life, then to his wife for life, for her jointure, then to their firſt ſon in tail male, &c. Now by theſe words it appeared, that the huſband intended ſome benefit for his wife, wherefore the court ſupplied other words to make the *conveyance* ſenſible. 1 *Lutw.* 782: 1 *Inſt.* 271 *b. n.*

A *conveyance* cannot be fraudulent in part, and good as to the reſt: for if it be fraudulent and void in part, it is void in all, and it cannot be divided. 1 *Lil. Abr.* 311. Fraudulent *conveyances* to deceive creditors, defraud purchaſers, &c. are void, by *Stats.* 13 *Eliz. cap.* 5: 27 *Eliz. cap.* 4.—See title *Fraud*.

CONVICT AND CONVICTION.

CONVICT, *convictus*.] He that is found guilty of an offence by verdict of a jury. *Staund. P. C.* 186. *Crompton* ſaith, That *conviction* is either when a man is outlawed, or appeareth and confeſſeth, or is found guilty by the inqueſt: and when a ſtatute excludes from clergy perſons found guilty of felony, &c. it extends to thoſe who are *convicted* by confeſſion. *Cromp. Juſt.* 9. The law implies that there muſt be a *conviction*, before puniſhment, though it is not ſo mentioned in a ſtatute: and where any ſtatute makes a ſecond offence felony, or ſubject to a heavier puniſhment than the firſt, it is always implied that ſuch ſecond offence ought to be committed after a *conviction* for the firſt. 1 *Hawk. P. C. c.* 10. § 9: *c.* 41. § 3.

Judgment amounts to *conviction*; though it doth not follow that every one who is *convict*, is adjudged. A *conviction* a the King's ſuit may be pleaded to a ſuit by an informer, on a penal ſtatute; becauſe while in force it makes the party liable to the forfeiture, and no one ought to be puniſhed twice for the ſame offence: but *conviction* may not be pleaded to a new ſuit by the king. 1 *Hawk. P. C. c.* 10. A perſon *convicted* or attainted of one felony, may be proſecuted for another, to bring acceſſaries to puniſhment, &c. *Fitz. Coron.* 379.

Perſons *convicted* of felony by verdict, &c. are not to be admitted to *bail*, unleſs there be ſome ſpecial motive for granting it; as where a man is not the ſame perſon, &c. for bail ought to be before trial, when it ſtands indifferent whether the party be guilty, or not. 2 *Hawk. P. C. c.* 15. § 45, 80. See title *Bail*.—*Conviction* of felony, and other crimes, diſables a man to be a juror, witneſs, &c. In our books, *conviction* and attainder are often confounded. See title *Attainder*.

SUMMARY PROCEEDINGS are directed by ſeveral acts of parliament for the *conviction* of offenders, and the inflicting of certain penalties impoſed by thoſe acts. In theſe there is no intervention of a jury, but the party accuſed is acquitted or condemned by the ſuffrage of ſuch perſon only, as the ſtatute has appointed for his judge.

Of this ſummary nature are all trials for offences and frauds contrary to the laws of the *Exciſe*, and other branches of the *Revenue*: which are to be inquired into and determined by the commiſſioners of the reſpective departments, or by juſtices of peace in the country. And experience has ſhewn that ſuch convictions are abſolutely neceſſary for the due collection of the public money; and are in fact a ſpecies of mercy to the delinquents, who would be ruined by the expence and delay of frequent proſecutions by action or indictment.

Another branch of ſummary proceedings, is that before *juſtices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament, for many diſorderly offences; ſuch as common ſwearing, drunkenneſs, vagrancy, idleneſs, and a vaſt variety of others ſubjected to their juriſdiction. See title *Juſtice of Peace*, and the titles of the various offences throughout this Dict. Theſe offences uſed formerly to be puniſhed by the verdict of a jury in the court leets, and ſheriff's tourn, the King's ancient courts of law; and which were formerly much revered and reſpected, but are now fallen very much into diſuſe and contempt.

The proceſs of theſe ſummary *convictions* is extremely ſpeedy. Though the courts of Common law have thrown one check upon them, by making it neceſſary to *ſummon* the party accuſed before he is condemned; which is now held an indiſpenſible requiſite, and is highly conſonant to the general principles of juſtice. See *Stra.* 261, 678: *Salk* 181: 2 *Ld. Raym.* 1405.—After this ſummons, the magiſtrate may go on to examine one or more witneſſes, as the ſtatute may require, upon oath; and then make his *conviction* of the offender in writing: upon which he uſually iſſues his warrant, either to apprehend the offender, in caſe corporal puniſhment is to be inflicted on him; or elſe to levy the penalty incurred by diſtreſs and ſale of his goods, according to the directions of the ſeveral ſtatutes which create the offence, or inflict the puniſhment; and which uſually chalk out the method by which offenders are to be convicted in ſuch particular caſes.

See further this Dictionary title *Juſtices of Peace*.—*Burn's Juſtice*, title *Conviction*; and 4 *Comm. c.* 20, as to the policy of extending this ſummary mode of proceeding.

CONVICT RECUSANT, According to the ſtatutes, See titles *Recuſant*, *Papiſt*.

CONVIVIUM, Signifies the ſame thing among the laity, as *procuratio* doth with the clergy, *viz.* When the tenant by reaſon of his tenure is bound to provide meat and drink for his lord once or oftener in the year. *Blount.*

CONVOCATION, *convocatio.*] The aſſembly of the repreſentatives of the Clergy, to conſult of eccleſiaſtical matters in time of parliament. As there are two houſes of parliament, ſo there are two houſes of *convocation*; the one called the *Higher* or *Upper Houſe*, where the archbiſhops and all the biſhops ſit ſeverally by themſelves; and the other, the *Lower Houſe of Convocation*, where all the reſt of the clergy ſit, *i. e.* All deans and archdeacons, one proctor for every chapter, and two proctors for all the clergy of each dioceſe, making in the whole number *one hundred and ſixty-ſix* perſons. Each *convocation* houſe hath a prolocutor, choſen from among themſelves, and that of the lower houſe is preſented to the biſhops, &c.

The Archbiſhop of *Canterbury* is the Preſident of the *Convocation*, and prorogues and diſſolves it by mandate from the King. The *convocation* exerciſes juriſdiction in making of canons, with the King's aſſent: for by the *Stat.* 25 *H.* 8. *c.* 19, the *convocation* is not only to be aſſembled by the King's writ; but the canons are to have the royal aſſent: they have the examining and cenſuring of heretical and ſchiſmatical books, and perſons, &c. But appeal lies to the King in Chancery, or to his delegates. 4 *Inſt.* 322: 2 *Rol. Abr.* 225. But in caſe the King himſelf be a party, the appeal lies by *Stat.* 24 *H.* 8. *c* 12, to all the biſhops aſſembled in the Upper Houſe of Convocation. See 3 *Comm.* 67.

Mr. *Chriſtian*, in his note on 1 *Comm.* 280, remarks that from the ſtatement there given, the ſtudent would perhaps be apt to ſuppoſe that there is only one convocation at a time. But the King before the meeting of every new parliament, directs his writ to each archbiſhop to ſummon a convocation in his peculiar province.

Godolphin ſays, that the convocation of the province of *York*, conſtantly correſponds, debates and concludes the ſame matters with the provincial ſynod of *Canterbury*. *God.* 99. But they are certainly diſtinct and independent of each other; and when they uſed to tax the clergy, the different convocations ſometimes granted different ſubſidies. In 22 *Hen.* 8, the convocation of *Canterbury* had granted the King 100,000*l.* in conſideration of which an act of parliament was paſſed, granting a free pardon to the clergy for all ſpiritual offences; but with a proviſo, that it ſhould not extend to the province of *York*, unleſs its convocation would grant a ſubſidy in proportion; or unleſs its clergy would bind themſelves individually to contribute as bountifully. This ſtatute is recited at large in *Gib. Cod.* 77.

All Deans and Archdeacons (as has been already obſerved) are members of the convocation of their province; each chapter ſends one proctor or repreſentative, and the parochial clergy in each *dioceſe* of *Canterbury*, two proctors: but on account of the ſmall number of dioceſes in the province of *York*, each *archdeaconry* elects two proctors. In *York* the convocation conſiſts only of one houſe; but in *Canterbury* there are two houſes, of which the twenty-two biſhops form the Upper Houſe; "wherein the Archbiſhop preſides with regal ſtate," (ſays *Blackſtone*, 1 *Comm.* 279); and before the reformation, abbots, priors, and other mitred prelates ſat with the biſhops. The Lower Houſe of Convocation, in the province of *Canterbury*, conſiſts of twenty-two Deans, fifty-three Archdeacons, twenty-four Proctors for the Chapters, and forty-four Proctors for the Parochial Clergy.—*Total* 144.

By *Stat.* 8 *H.* 6. *c.* 1. the clergy in their attendance on the Convocation, have the ſame priviiege in freedom from arreſt as the members of the Houſe of Commons in their attendance on Parliament.

CONUSANCE OF PLEAS, A privilege that a city or town hath to hold pleas. See *Cogniſance*.

CONUSANT, Fr. *connoiſſant.*] Knowing or underſtanding: as if the ſon be *conuſant*, and agreed to the feoffment, &c. *Co. Lit.* 159.

COOPERS, Shall make their veſſels of ſeaſonable wood, and mark them with their own marks, on pain of 3*s.* 4*d.* forfeiture; and the contents of veſſels are appointed to be obſerved under like penalty, as the beer barrel ſhall contain thirty-ſix gallons, a kilderkin eighteen, a firkin nine, &c. The wardens of the *Coopers'* company in *London*, with an officer of the mayor, are to ſearch all veſſels for ale, beer, and ſoap to be ſold there; and to mark them that are right, and they may burn thoſe that be not ſo: and if any *cooper*, &c. diminiſh a veſſel by taking out the head, or a ſtave thereof, it ſhall be burnt, and the offender forfeit 3*s.* 4*d.*—*Stat.* 23 *H.* 8. *c.* 4.

COOPERTIO, The head or branches of a tree cut down; though *Coopertio Arborum* is rather the bark of timber-trees felled, and the chumps and broken wood. *Cowel.*

COOPERTURA, A thicket or covert of wood. *Chart. de Foreſta*, *cap.* 12.

COPARCENERS, *participes.*] Otherwiſe called *Parceners*, are ſuch as have equal portion in the inheritance of an anceſtor; and by *law* are the iſſue female, which, in default of heirs male, come in equality to the lands of their anceſtors. *Bract. lib.* 2. *cap.* 30. They are to make partition of the lands; which ought to be made by *coparceners* of full age, &c. And if the eſtate of a *coparcener* be in part evicted, the partition ſhall be avoided in the whole. *Lit.* 243: 1 *Inſt.* 173: 1 *Rep.* 87. The Crown of *England* is not ſubject to *coparcenary*; and there is no *coparcenary* in dignities, &c. *Co. Lit.* 27. *Stat.* 25 *H.* 8. *c.* 22.—See title *Deſcent*; *Parceners*.

COPARTNERSHIP. See title *Partners* and *Partnerſhip*.

COPE, A cuſtom or tribute due to the King, or lord of the ſoil, out of the *lead mines* in ſome part of *Derbyſhire*; of which *Manlove* ſaith:

Egreſs and regreſs to the King's highway,
The miners have; *and* lot *and* cope *they pay*:
The thirteenth diſh of ore within their mine,
To the lord, for lot, *they pay at meaſuring time*;
Six pence a load for cope *the lord demands,*
And that is paid to the berghmaſter's *hands*, &c.

See alſo Sir *John Pettus's Fodinæ Regales*, where he treats on this ſubject. This word, by *Domeſday Book*, as Mr. *Hagar* hath interpreted it, ſignifies a hill: and *Cope* is taken for the ſupreme cover, as the *cope of heaven*. Alſo it is uſed for the roof and covering of a houſe; the upper garment of a prieſt, &c.

COPIA LIBELLI DELIBERANDA, A writ that lay where a man could not get the *copy of a libel* at the hand of a judge eccleſiaſtical, to have the ſame delivered to him. *Reg. Orig.* 51.

COPPA, A cop or cock of graſs, hay or corn divided into titheable portions; as the tenth cock, *&c.* This word, in ſtrictneſs, denotes the gathering or laying up the corn in *copes* or heaps, as the method is for barley or oats, *&c.* not bound up, that it may be the more fairly and juſtly tithed: and in *Kent* they ſtill retain the word, a *cop* or *cap* of *hay*, ſtraw, *&c. Thorn in Chron.*

COPPER AND COPPER ORE. Copper plates and copper fully wrought, to what duties liable, 4 & 5 *W. & M. c.* 5. *ſect.* 2. All copper may be exported paying the lawful duties and cuſtoms, 5 *W. & M. c.* 17.—See title *Navigation Acts.*

COPPER-PLATE ENGRAVINGS.—See title *Literary Property.*

COPY, *copia.*] In a legal ſenſe the tranſcript of an original writing; as the *copy* of a *patent*, of a *charter*, deed, *&c.* A clauſe out of a patent, taken from the chapel of the Rolls, cannot be given in evidence; but there muſt be a true copy of the whole charter examined: it is the ſame of a record. And if upon a trial, ſome part of an office copy is given in evidence to prove a deed, which deed is to prove the party's title to the land in queſtion that gives it in evidence; if that part of the office copy given in evidence, be not ſo much of it as doth any ways concern the land in queſtion, the court will not admit of it: for the court will have a copy of the whole given, or no part of it ſhall be admitted. 1 *Lil. Abr.* 312, 313. Where a deed is inrolled, certifying an atteſted copy is proof of the inrolment; and ſuch copy may be given in evidence. 3 *Lev.* 387. A common deed cannot be proved by a copy or counterpart, when the original may be procured. 10 *Rep.* 92. And a copy of a will of lands, or the probate, is not ſufficient; but the will muſt be ſhewn as evidence. 2 *Rol. Abr.* 74. Copies of court-rolls admitted as evidence. See at large title *Evidence.*

COPYHOLD,

TENURA *per copiam rotuli curiæ.*] A tenure for which the tenant hath nothing to ſhew but the *copy* of the *rolls*, made by the ſteward of the lord's *court*; on ſuch tenant's being admitted to any parcel of land or tenement belonging to the manor. 4 *Rep.* 25. It is called *baſe tenure*, becauſe held at the will of the lord: and *Fitzherbert* ſays, it was anciently *tenure in villenage*, and that *copyhold* is but a new name. See this Dict. title *Tenures* III. 13. Some *Copyholds* are held by the *verge* in *ancient demeſne*; and though they are by *copy*, yet are they a kind of freehold; for if a tenant of ſuch *copyhold* commit felony, the King hath the year, day and waſte, as in the caſe of freeholders: ſome other *copyholds* are ſuch as the tenants hold by common tenure, called *mere copyhold*, whoſe land, upon felony committed, eſcheats to the lord of the manor. *Kitch.* 81. But *copyhold* land cannot be made at this day; for the pillars of a *copyhold* eſtate are, That it hath been demiſed *time out of mind* by copy of court-roll; and that the tenements are parcel of, or within, the manor. 1 *Inſt.* 58: 4 *Rep.* 24.

A copyhold cannot be created by operation of law: and therefore where waſtes are ſevered from the manor, by a grant of the latter, with the exception of the former, though the copyholders continue to have a right of common in the waſtes by immemorial uſage: yet if afterwards a grant of the ſoil of thoſe waſtes be made to truſtees for the uſe of the copyholders in free ſocage, the lands, when incloſed, will be freehold, and not copyhold. 2 *Term Rep.* 415, 705.

A *copyhold* tenant had originally in judgment of law but an eſtate at will; yet cuſtom ſo eſtabliſhed his eſtate that by the cuſtom of the manor it was deſcendible, and his heirs inherited it: and therefore the eſtate of the *copyholder* is not merely *at the will of the lord*, but *at the will of the lord, according to the cuſtom of the manor*; ſo that the cuſtom of the manor is the life of *copyhold* eſtates; for without a cuſtom, or if *copyholders* break their cuſtom, they are ſubject to the will of the lord: and as a *copyhold* is created by cuſtom, ſo it is guided by cuſtom. 4 *Rep.* 21. A *copyholder*, ſo long as he doth his ſervices, and doth not break the cuſtom of the manor, cannot be ejected by the lord; if he be, he ſhall have treſpaſs againſt him: but if a *copyholder* refuſes to perform his ſervices, it is a breach of the cuſtom, and forfeiture of his eſtate.

It appears that eſtates held by copy of *court-roll*, but not at the will of the lord, have been deemed freehold by Lord *Coke*, (See 1 *Inſt.* 59 *b*,) and others; and in order to diſtinguiſh them from the ordinary kind, have been denominated *cuſtomary freeholds*. In conſequence of the prevalence of this notion, a conſiderable number of ſuch tenants claimed a right of voting as *freeholders* at the election of knights of the Shire.—This gave occaſion to a ſhort treatiſe on this ſubject, in which the origin of lands held in this peculiar way is traced, and it is proved that though theſe tenures in ſome reſpects *reſemble* freeholds, they are in truth nothing more than a ſuperiour kind of copyhold. Soon after the publication of this treatiſe, the *Stat.* 31 *Geo.* 2. *c.* 14, was paſt, declaring that no perſon holding by copy of court-roll ſhould be entitled to vote at the election of Knights of the Shire.

In ſome manors where the cuſtom hath been to permit the heir to ſucceed the anceſtor in his tenure, the eſtates are ſtiled *Copyholds of inheritance*: in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only. For the cuſtom of the manor has in both caſes ſo far ſuperſeded the will of the lord, that provided the ſervices be performed, or ſtipulated for by fealty, he cannot in the firſt inſtance refuſe to admit the heir of his tenant upon his death; nor in the ſecond can he remove his preſent tenant ſo long as he lives, though he holds nominally by the precarious tenure of his lord's will. 2 *Comm.* 97, 147.—And ſee title *Ancient Demeſne.*

If the lord refuſes to admit he ſhall be compelled in *Chancery*. 2 *Cro.* 368.—And if the lord refuſe to admit a ſurrenderee, on account of a diſagreement about the fine to be paid, the court of *B. R.* will grant a *mandamus* to compel the lord to admit without examining the right to the fine. 2 *Term Rep.* 484.—But that court will not grant a *mandamus* to admit a copyholder by deſcent; becauſe without admittance he has a complete title againſt all the world but the lord. 2 *Term Rep.* 198.

Copyholds deſcend according to the rules and maxims of the Common law, (unleſs in particular manors, where there are contrary cuſtoms, of great antiquity); but ſuch cuſtomary inheritances ſhall not be aſſets, to charge the heir in action of debt, *&c.* 4 *Rep.* 22: *Kitch.* Though

a leaſe for one year of *copyhold* lands, which is warranted by the Common law, ſhall be aſſets in the hand of an executor. 1 *Vent.* 163. *Copyholders* hold their eſtates free from charges of dower, being created by cuſtom, which is paramount to title of dower. 4 *Rep.* 24. *Copyhold* inheritances have no collateral qualities, which do not concern the deſcent; as to make them aſſets; or whereof a wife may be endowed; a huſband be tenant by the curteſy, &c. But by particular cuſtom, there may be dower and tenancy by the curteſy. *Cro. Eliz.* 361. There may be an *eſtate-tail* in *copyhold* lands by cuſtom, with the cooperation of the *Stat. W.* 2. And as a *copyhold* may be entailed by cuſtom, ſo by cuſtom the tail may be cut off by ſurrender. 1 *Inſt.* 60.

Where by ſpecial cuſtom a deſcent of copyholds may be, contrary to the rules of the Common law, ſuch cuſtom ſhall be interpreted ſtrictly: thus, where there is a cuſtom within a manor, that lands ſhall deſcend to the *eldeſt ſiſter*, where there is neither a ſon nor a daughter; this ſhall not extend to an *eldeſt niece*: but in default of ſuch ſon, daughter and ſiſter, the lands muſt deſcend according to the rules of the Common law. 1 *Term Rep.* 466.

A *copyhold* may be barred by a recovery, by ſpecial cuſtom; and a ſurrender may bar the iſſue by cuſtom. A fine and recovery at Common law will not deſtroy a *copyhold* eſtate; becauſe Common law aſſurances do not work upon the aſſurance of the *copyhold*: though *copyhold* lands are within the *Stat.* 4 *H.* 7. *c.* 24, of fines and proclamations, and five years non-claim, and ſhall be barred. 1 *Rol. Abr.* 506. See title *Fines*.

A *plaint* may be made in the court of the manor, in the nature of a *real* action, and a recovery ſhall be had in that *plaint* againſt tenant in tail, and ſuch a *recovery* ſhall be a *diſcontinuance* to the eſtate-tail. 1 *Brownl.* 121. And the ſuffering a recovery by a *copyholder* tenant for life in the lord's court is no forfeiture, unleſs there is a particular cuſtom for it. 1 *Nelſ. Abr.* 507. *Copyholders* may entail *copyhold* lands, and *bar* the *entails* and *remainders*, by *committing* a *forfeiture*, as making leaſe without licence, &c. and then the lord is to make three proclamations, and ſeize the *copyhold*, after which the lands are granted to the *copyholder*, and his heirs, &c. This is the manner in ſome places, but it muſt be warranted by cuſtom. 2 *Danv. Abr.* 191: *Sid.* 314.

Cuſtoms ought to be time out of memory; to be reaſonable, &c. And a cuſtom in deprivation or bar of a *copyhold* eſtate, ſhall be taken ſtrictly; but when for making and maintaining, it ſhall be conſtrued favourably. *Comp. Cop. ſect.* 33: *Cro. El.* 879. An unreaſonable cuſtom, as for a lord to exact exorbitant fines; for a *copyholder* for life to cut down and ſell timber-trees, &c. is void. A *copyholder* for life pleaded a cuſtom, that every *copyholder* for life might, in the preſence of two other *copyholders*, appoint who ſhould have his *copyhold* after his death; and that the two *copyholders* might aſſeſs a fine, ſo as not to be leſs than had been uſually paid; and it was adjudged a good cuſtom. 4 *Leon.* 238. But a cuſtom to compel a lord to make a grant, is ſaid to be againſt law; though it may be good to admit a tenant. *Moor* 788.

By the cuſtom of ſome manors, where *copyhold* lands are granted to two or more perſons for lives, the perſon firſt named in the copy may ſurrender all the lands. 1 *Nelſ. Abr.* 497. There are cuſtoms *ratione loci*, different from other places: but though a cuſtom may be applied to a particular place; yet it is againſt the nature of a cuſtom of a manor to apply it to one particular tenant. 1 *Nelſ.* 504: 1 *Lutw.* 126.

There are uſually *cuſtom-rolls* of manors, exhibited on oath by the tenants; ſetting forth the bounds of the manor, the royalties of the lord, ſervices of the *copyhold* tenants, the tenures granted, whether for life, &c. concerning admittances, ſurrenders, and the rights of the *copyholders*, as to taking timber for repairs, fire-bote, &c. Common belonging to the tenants, payment of rent, ſuing in the court of the manor, taking heriots, &c. All which cuſtoms are to be obſerved. *Comp. Court Keep.* 21.

When an act of parliament altereth the ſervice, cuſtoms, tenure, and intereſt of land, in prejudice of the lord or tenant, there the general words of ſuch an act ſhall not extend to *copyholds*. 3 *Rep.* 7.—*Copyholds* are not within the *Stat.* 27 *H.* 8. *c.* 10, of *jointures*; nor *Stat.* 32 *H.* 8. *c.* 28, of *leaſes*, *Copyholds* being in their nature demiſable only by *copy*: they are not within the ſtatute of *uſes*; nor are *copyholds* extendible in *execution*: but *copyholds* are within the ſtatute of *limitation of actions*; and the ſtatutes againſt *bankrupts*. The lord ſhall have the cuſtody of the lands of *ideots*, &c. And a *copyholder* is not within the act 12 *Car.* 2. *c.* 24, to diſpoſe of the *cuſtody* and *guardianſhip* of the heir; for if there be a cuſtom for it, it belongs to the lord of the manor. 3 *Lev.* 395: 1 *Nelſ. Abr.* 492, 522.

Copyholders ſhall neither *implead* nor be *impleaded* for their tenements by writ, but by plaint in the lord's court held within the manor: and if on ſuch plaint, erroneous judgment be given, no writ of falſe judgment lies, but petition to the lord in nature of a writ of falſe judgment, wherein errors are to be aſſigned, and remedy given according to law. *Co. Lit.* 60.

Where a man holds *copyhold* lands in truſt to ſurrender to another, &c. if he refuſes to ſurrender to the other accordingly, he may be compelled by bill exhibited in the lord's court, who, as chancellor, has power to do right. 1 *Leon.* 2. A *copyholder* may have a formedon in deſcender in the lord's court. *Leſſee* of a *copyholder* for life for one year, ſhall maintain an ejectment. 4 *Rep.* 26: *Moor* 679. It is every day's practice to bring ejectments, to recover the poſſeſſion of copyholds; for defendant by the rule, obliging himſelf to confeſs leaſe, entry, and ouſter, the *title* only can come in queſtion on the trial. But the leſſor of plaintiff, before he brings his ejectment ſhould be admitted. See title *Ejectment*.

A manor is loſt when there are no cuſtomary tenants or *copyholders*: and if a *copyhold* comes into the hands of the lord in fee, and the lord leaſes it for one year, or half a year, or for any certain time, it can never be granted by copy after: but if the lord aliens the manor, &c. his alienee may re-grant land by copy. If the lord keeps the *copyhold* for a long time in his hand, it is no impediment but that he may after grant it again by copy. 2 *Danv. Abr.* 176, 177. A *copyholder* in fee accepts of a leaſe, grant, or confirmation of the ſame land from the lord, this determines his *copyhold* eſtate. 2 *Cro.* 16: *Cro. Jac.* 253. If a *copyholder* bargains and ſells his *copyhold* to a leſſee for years, &c. of the manor, his *copyhold* is *extinguiſhed*. 2 *Danv.* 205. A *copyholder* may grant his eſtate to his lord, by bargain and ſale, releaſe, &c. for between lord and tenant the conveyance need not be according to cuſtom. 1 *Nelſ.* 504. A *copyholder* in other

caſes cannot alien by deed: though he that hath a right only to a *copyhold* may *releaſe* it by deed. And if a *copyholder* ſurrenders upon condition, he may afterwards *releaſe* the condition by deed. 2 *Danv.* 205: *Cro. Jac.* 36. Alſo one joint *copyholder* may *releaſe* to another, which will be good without any admittance, &c. *Ibid.*

A *Copyholder* cannot convey or tranſfer his *copyhold* eſtate to another, otherwiſe than by ſurrender; which is the yielding up of the land by the tenant to the lord, according to the cuſtom of the manor, to the uſe of him that is to have the eſtate: or it is in order to a new grant, and further eſtate in the ſame.

As to *copyhold grants*; which are made either in fee, or for three lives, &c. the *lord of the manor* that hath a lawful eſtate therein, whether he be tenant for life or years, tenant by ſtatute merchant, &c. or at will, is *dominus pro tempore*, and may grant lands, herbage of lands, a fair, mill, tithes, &c. and any thing that concerns lands, by *copy of court*-roll, according to cuſtom; and ſuch grants ſhall bind thoſe in remainder: the rents and ſervices reſerved by them ſhall be annexed to the manor, and attend the owner thereof after their particular eſtates are ended. 4 *Rep.* 23: 11 *Rep.* 18. And if a lord of the manor for the time being, leſſee for life, years, &c. take a ſurrender, and before admittance he dieth, or the years or intereſt determine, though the next lord comes in above the leaſe for life or years, or other particular intereſt, yet he ſhall be compelled to make admittance according to the ſurrender. *Co. Lit.* 59. But a lord at will, of a *copyhold* manor, cannot licence a *copyhold* tenant to make a leaſe for years; though he may grant a *copyhold* for life according to the cuſtom: if a lord for life gives licence to a tenant to make a leaſe for years, this leaſe ſhall continue no longer than the life of the lord. 2 *Danv. Abr.* 202.

If he that is lord of the manor for the time being admits one to a *copyhold*, he diſpenſes with all precedent forfeitures; not only as to himſelf, but alſo as to him in reverſion; for ſuch grant and admittance amount to an entry for the forfeiture, and a new grant; but a lord by tort cannot by ſuch admittance purge the forfeiture as to the rightful lord. 1 *Lev.* 26. Grants by copy of court-roll by infants, &c. will be binding: and if a guardian in ſocage grants a *copyhold* in reverſion, according to the cuſtom of the manor, this ſhall be a good grant; 2 *Rol. Abr.* 41. If baron and feme ſeiſed of a manor in right of the feme grant a *copyhold*, this ſhall bind the feme notwithſtanding her coverture. 4 *Rep.* 23. An executor may make grants of *copyhold* eſtates, according to the cuſtom of the manor, where a deviſe is made that the executor ſhall grant copies for payment of debts. 2 *Danv.* 178.

A manor may be held by copy of court-roll, and the lord of ſuch manor may grant copies; and ſuch cuſtomary manor may paſs by ſurrender and admittance, &c. A cuſtomary manor may be holden of another manor, and ſuch cuſtomary lord may grant copies and hold courts: but a *copyholder*, lord of ſuch a manor, cannot hold a court baron to have forfeitures, and hold pleas in a writ of right, &c. 1 *Nelſ. Abr.* 524.

All grants of *copyhold* eſtates are to be according to the cuſtom of the manor; and rents and ſervices cuſtomary muſt be reſerved; for what acts of the lord in granting *copyholds* are not confirmed by cuſtom, but only ſtrengthened by the power and intereſt of the lord, have no longer duration than the lord's eſtate continueth. *Comp. Court Keeper* 421. If by the cuſtom, a *copyhold* may be granted for three lives, and the lord grants it to one for life, remainder to ſuch woman as he ſhall marry, and to the firſt ſon of his body; both theſe remainders are void: and a remainder limited upon a void eſtate in the creation, will be likewiſe void. But if by cuſtom it is demiſable in fee, a ſurrender may be to the uſe of one for life, remainder in tail, remainder in fee. 2 *Danv. Abr.* 203: *Cro. Eliz.* 373. It is held, where by the cuſtom of a manor the lord can grant a *copyhold* for three lives, he may grant it for an eſtate coming within the intent of the cuſtom; as to *A. B.* and his aſſigns, to hold to him and his aſſigns for the lives of three others, and of the longer liver of them ſucceſſively, &c. 2 *Ld. Raym.* 994, 1000.

The lord of a manor may himſelf grant a *copyhold* eſtate at any place out of the manor; but the ſteward cannot grant a *copyhold* at a court held out of the manor. 4 *Rep.* 26. Though the ſteward may take ſurrenders out of the manor, as well as the lord. 2 *Danv. Abr.* 181. A ſteward is in place of the lord, and without a command to the contrary may grant lands by copy, &c. But if a lord command a ſteward that he ſhall not grant ſuch a copy, if he grants it, it is void: and if the ſteward diminiſhes the ancient rents and ſervices, the grant will be void. *Cro. Eliz.* 699.

Things of neceſſity done by a ſteward, who is but in reputed authority, are good if they come in by preſentment of the jury; as the admittance of an heir upon preſentment, &c. Though acts voluntary, as grants of *copyhold*, &c. are not good by ſuch ſtewards. *Cro. Eliz.* 699. If an under-ſteward hold a court without any diſturbance of the lord of the manor, though he hath no patent nor deputation to hold it, yet it is good; becauſe the tenants are not to examine what authority he hath, nor is he bound to give them an account of it. *Moor* 110. A deputy ſteward may authoriſe another to do a particular act; but cannot make a deputy to act in general. 2 *Salk.* 95.

In *admittances*, in court upon *voluntary* grants, the lord is *proprietor*; in admittances upon *ſurrender*, the lord is *not proprietor* of the lands, but only a neceſſary *inſtrument* of *conveyance*; and in admittances by *deſcent* the lord is a mere *inſtrument*, not being neceſſary to ſtrengthen the heir's title, but only to give the lord his fine. 4 *Rep.* 21, 22. The heir of a *copyholder* may enter, and bring treſpaſs, before admittance, being in by deſcent; and he may ſurrender before admittance: but he is not compleat tenant to be ſworn of the homage, or to maintain a plaint in the lord's court. And if the heir do not come in and be admitted, on the death of his anceſtor, where the ſame is preſented and proclamation made, he may forfeit his eſtate. *Cro. El.* 90: 4 *Rep.* 22, 27.

On ſurrender of a *copyhold*, the ſurrenderor or perſon making the ſame, continues tenant till the admittance of the ſurrenderee; and the ſurrenderee may not enter upon the lands, or ſurrender before admittance, for he hath no eſtate till then; though it is otherwiſe of the *heir* by *deſcent*, who is in by courſe of law, and the cuſtom caſts the poſſeſſion upon him. *Comp. Court-Keep.* 436. A ſurrender is not of any effect until admittance, and yet the ſurrenderee cannot be defrauded of the benefit of the ſurrender; for the ſurrenderor cannot paſs away the land to another or make it ſubject to any other incumbrances; and if the

lord refuſe the ſurrenderee admittance, he is compellable in *Chancery*. *Comp. Cop. ſect.* 39. A grantee hath no intereſt veſted in him till he is admitted: but admittance of a copyholder for life is an admittance of him in remainder, for they are but one eſtate; and the remainderman may, after the death of tenant for life, ſurrender without admittance. 3 *Lev.* 308: *Cro. El.* 504.

Every admittance upon a deſcent or ſurrender may be pleaded as a grant; and a perſon may alledge the admittance of his anceſtor as a grant; and ſhew the deſcent to him, and that he entered, *&c.* But he cannot plead that his father was ſeiſed in fee, *&c.* and that he died ſeiſed, and the land deſcended to him. 2 *Danv.* 208. Admittance on ſurrenders muſt, in all reſpects, agree with the ſurrender; the lord having only a cuſtomary power to admit *ſecundum formam & effectum ſurſum-redditionis*. 4 *Rep.* 26. If any are admitted otherwiſe, they ſhall be ſeiſed according to the ſurrender: yet where a voluntary ſurrender is general, without ſaying to whoſe uſe, a ſubſequent admittance may explain it. 2 *Danv.* 187, 204.

In voluntary admittances, if the lord admits any one contrary to cuſtom, it ſhall not bind his heir or ſucceſſor. If a copyholder ſurrender to the uſe of another, and after the lord, having knowledge of it, accepts the rent of ſuch other out of court, this is an admittance in law: and any act, implying the conſent of the lord to the ſurrender, ſhall be adjudged a good admittance. 1 *Nelſ. Abr.* 493. If the ſteward accept a fine of a copyholder, it amounts to an admittance. 2 *Danv.* 189. But delivering a copy is no admittance.

Where a *widow's eſtate* is created by cuſtom, that ſhall be an admittance in law: and her eſtate ariſing out of that of her huſband's, his admittance is the admittance of her. *Hut.* 18. And ſhe who hath a widow's eſtate by the cuſtom of the manor, upon the death of her huſband, need not pay a fine to the lord for the eſtate; for this is only a branch of the huſband's. *Hob.* 181. When a cuſtom is, that the wife of every copyholder for life ſhall have her free bench, after the death of the baron, the law caſts the eſtate upon the wife, ſo that ſhe ſhall have it before admittance, *&c.* 2 *Danv.* 184. But if a wife is entitled to her free bench by cuſtom, and a copyholder in fee ſurrenders to the uſe of another, and then dies; it has been adjudged, that the ſurrenderee ſhould have the land, and not the wife; becauſe the wife's title doth not commence till after the death of her huſband; but the plaintiff's title begins with the ſurrender, and the admittance relates to that. 1 *Inſt.* 59: 1 *Salk.* 185.

The widow's title commenceth not by the marriage; if it did, then the huſband could do nothing in his lifetime to prejudice it: but it is plain he may alien or extinguiſh his right, ſo as to bind the eſtate of the widow: the free bench grows out of the eſtate of the huſband; and it is his dying ſeiſed which gives the widow a title, and as the huſband has a defeaſible eſtate, ſo the wife may have her free-bench defeated. 4 *Mod. Rep.* 452, 453.

Admittances are never by attorney, for the tenant ought to do fealty: though ſurrenders are oftentimes by attorney. 2 *Danv.* 189. A copyholder in fee may *ſurrender* in court, by letter of attorney: but not out of court, without a ſpecial cuſtom. 9 *Rep.* 75, 76. If one cannot come into court to ſurrender in perſon, the lord may appoint a ſpecial ſteward to go to him, and take the ſurrender. 1 *Leon.* 36. A copyholder being in *Ireland*, the ſteward of a manor here made a commiſſion to one to receive a ſurrender from him there, and it was held good. 2 *Danv.* 181.

The intent of *ſurrenders* is, that the lord may not be a ſtranger to his tenant, and the alteration of the eſtate. As a Copyholder cannot transfer his eſtate to a ſtranger by any other conveyance than ſurrender; ſo if one would exchange a copyhold with another, both muſt ſurrender to each other's uſe, and the lord admit accordingly: and if any perſon would deviſe a copyhold eſtate, he cannot do it by his will: but he muſt ſurrender to the uſe of his laſt will and teſtament, and in his will declare his intent. *Comp. Cop. ſect.* 39. Alſo where a copyholder ſurrenders to the uſe of his will, the lands do not paſs by the will, but by the ſurrender; the will being only declaratory of the uſes of the ſurrender. 1 *Bulſt.* 200.

In caſe of a will, the Chancery will ſupply the defect of a ſurrender, in the behalf of children, if not to diſinherit the eldeſt ſon; and for the benefit of creditors, where a copyhold eſtate is charged by will with the payment of debts, though there is no ſurrender to thoſe uſes, it will be good in equity. 4 *Rep.* 25: 1 *Salk.* 187: 3 *Salk.* 84. Yet it is held, that equity ſhall not ſupply the want of ſuch ſurrender in favour of a grandchild; or baſtard, who is not conſidered as a child; or a wife againſt the heir; nor in behalf of legatees: but where the ſurrender is refuſed, a will of copyhold may be ſufficient without it. *Abr. Caſ. Eq.* 122, 124.

There is no doubt but that the Courts of Equity will ſupply the ſurrender of a copyhold. It is ſaid however to be now ſettled that, unleſs there be a valuable conſideration, they will not interpoſe for ſuch purpoſe, but in favour of three deſcriptions of perſons only; *Creditors*, *Wife* and *Children*; and even in ſuch caſes they proceed ſubject to ſeveral reſtrictions. For though they will ſupply the ſurrender of copyholds in favour of creditors, if the other eſtates, liable to the payment of debts, are not ſufficient; (*Drake* v. *Robinſon*, 1 *P. Wms.* 444: *Bixby* v. *Eley*, 2 *Bro. C. R.* 325:) Yet if there be both freehold and copyhold eſtates deviſed for the payment of debts, and the freehold be ſufficient for ſuch purpoſe, they will not ſupply the ſurrender of the copyhold. *Raſtor* v. *Stock*, 1 *Eq. Ab.* 123, 4: *Hillier* v. *Farrant*, *Exch. Trin.* 1791; and ſee 3 *P. Wms.* 98. *in n.*

In ſupplying a ſurrender in favour of a wife, or younger children, courts of Equity, as has been already obſerved, reſpect the claims of the heir at law; and therefore will not interpoſe, if the heir would thereby be left unprovided for. *Kettle* v. *Townſhend*, 1 *Salk.* 187: *Hawkins* v. *Leigh*, 1 *Atk.* 387.—But the heir whoſe claim is to be thus reſpected, muſt be one for whom the teſtator was under as ſtrong a moral obligation to provide, as for the deviſee. *Chapman* v. *Gibſon*, 3 *Bro. C. R.* 229. And if the ſupplying of the ſurrender would not diſinherit ſuch heir, courts of Equity will ſupply it in favour of the wife, though ſhe be otherwiſe provided for. *Smith* v. *Baker*, 1 *Atk.* 386.—But it was held in *Roſs* v. *Roſs*, 1 *Eq. Ab.* 124, that they ought not to ſupply a ſurrender for younger children againſt an elder, to make them in a better ſituation than the elder.—Yet ſee *Cook* v. *Arnham*, 3 *P. Wms.* 283: *Forreſter* 35.

In thoſe caſes in which the Court will ſupply a ſurrender, it is to be underſtood that the effect of the ſurrender is bounded by the motive which induces the court

to

to ſupply it; therefore where the teſtator deviſed a copyhold to truſtees, in truſt, to ſell and to pay the intereſt of the produce to the wife during her life, and after her death to a ſtranger; the Court, though it ſupplied the ſurrender in favour of the wife, decreed that the cuſtomary heir ſhould be at liberty to apply after her death. *Marſton* v. *Gowen*, 3 *Bro. C. R.* 170.—Courts of Equity will in ſupplying the ſurrender of a copyhold eſtate in favour of a *purchaſor* for a valuable conſideration, go ſtill further; for they will not only ſupply it againſt the party himſelf and his heir; (*Barker* v. *Hill*, 2 *Ch. Rep.* 113;) but will alſo ſupply it againſt his aſſignees and creditors, if he become a bankrupt. *Taylor* v. *Wheeler*, 2 *Vern.* 565.

In the caſe of copyholds deviſed to charitable uſes, the want of ſurrrender in ſuch caſes is made good, not by the diſcretion of the court, but by the ſtrong and general words of *Stat.* 43 *Eliz. c.* 4. *Attorney General* v. *Burdett*, 2 *Vern.* 755: *Duke's Char. Uſes* 84: *Attorney General* v. *Andrews*, 1 *Vez.* 225.

A *ceſtui que truſt* may deviſe an intereſt in land, *&c.* without ſurrender; and if copyhold lands are in mortgage, the mortgagor can diſpoſe of the equity of redemption by will, without any ſurrender made; becauſe he hath at that time no eſtate in the land, whereof to make a ſurrender. *Preced. Canc.* 320, 322. One jointenant may ſurrender his part in the lands to the uſe of his will, *&c.* And where there are two jointenants of a copyhold in fee, if one of them make a ſurrender to the uſe of his will, and die, and the deviſee is admitted, the ſurrender and admittance ſhall bind the ſurvivor. 2 *Cro.* 100.

A ſurrender may not be to commence *in futuro*; as after the death of the ſurrenderor, *&c.* though copyholds may be ſurrendered to the uſe of a man's will. *March* 177. A copyholder cannot ſurrender an eſtate abſolutely to another, and leave a particular eſtate in himſelf: though he may ſurrender to uſes, *&c.* A copyholder ſurrendered to the uſe of his wife and younger ſon, without mentioning what eſtate: and adjudged, that they had an eſtate for life. 4 *Rep.* 29. If a man having bought a copyhold to himſelf, his wife and daughter, and their heirs, afterwards ſurrenders it to another and his heirs, for ſecuring a ſum of money; after his death, the ſurrenderee ſhall not be entitled to the land, it being an advancement for the wife and daughter. 2 *Vern.* 120.

A feme covert may receive a copyhold eſtate, by ſurrender from her huſband, becauſe ſhe comes not in immediately by him, but by the admittance of the lord, according to the ſurrender. 4 *Rep.* 29 *b.* A feme covert is to be ſecretly examined by the ſteward, on her ſurrendering her eſtate. *Co. Lit.* 59. An infant ſurrendered his copyhold, and afterwards entered at full age, and it was held lawful, though the ſurrenderee was admitted. *Moor* 597.

By the general cuſtom of copyhold eſtates, copyholders may ſurrender in court, and need not allege any particular cuſtom to warrant it: but where they ſurrender out of court, into the hands of the lord by cuſtomary tenants, *&c.* cuſtom muſt be pleaded. 9 *Rep.* 75: 1 *Rol. Abr.* 500. Surrenders out of court are to be *preſented* at the next court; for it is not an effectual ſurrender till preſented in court. Where a copyholder in fee ſurrenders out of court, and dies before it is preſented, yet the ſurrender, being preſented at the next court, will ſtand good, and *ceſtui que uſe* ſhall be admitted: ſo if *ceſtui que uſe* dies before it is preſented, his heir ſhall be admitted. But if the ſurrender be not preſented at the next court, it is void. *Co. Lit.* 62: 2 *Danv.* 188. If the tenants by whoſe hands the ſurrender was made ſhall die, and this upon proof is preſented in court, it is well enough. 4 *Rep.* 29.

Tenants refuſing to make preſentment, are compellable in the lord's court. And by ſurrender of copyhold lands to the uſe of a mortgagee, the lands are bound in equity, though the ſurrender be not preſented at the next court. 2 *Salk.* 449. When a copyholder ſurrenders upon condition, and this is preſented abſolutely, the preſentment is void; but where a conditional ſurrender is preſented, and the ſteward omits entering the condition, on proof thereof the condition ſhall not be avoided; but the roll ſhall be amended. 4 *Rep.* 25. A copyholder may ſurrender to the uſe of another, reſerving rent with a condition of re-entry for non-payment, and in default of payment may re-enter. *Ibid.* 21.

If a copyholder of inheritance takes a leaſe for years of his copyhold eſtate, it is a ſurrender in law of his copyhold. Where there is a tenant for life, and remainder in fee, he in remainder may ſurrender his eſtate, if there be no cuſtom to the contrary. 3 *Leon.* 329. If a ſurrender is made with remainders over, caſe lies, for him in remainder againſt a copyholder for life, who commits waſte, *&c.* 3 *Lev.* 128. A ſurrenderee of a reverſion of a copyhold is an aſſignee within the equity of the *Stat.* 32 *H.* 8. *c.* 34, to bring action of debt or covenant againſt leſſee, *&c.* 1 *Salk.* 185. A copyholder in fee ſurrenders to the uſe of one for life, with remainder to another for life, remainder to another in fee; as the particular eſtates and remainders make but one eſtate, there is but one fine due to the lord. 2 *Danv.* 191.

The *fruits* and *appendages* of a copyhold tenure, that it hath in common with free tenures are *Fealty*, *Services*, (as well in rents as otherwiſe,) *Reliefs* and *Eſcheats*. The two latter belong only to copyholds of inheritance: the former to thoſe for life alſo. But beſides theſe, Copyholds have alſo *Heriots*, *Wardſhip* and *Fines*. Heriots are incident to both ſpecies of copyhold; but wardſhip and fines to thoſe of inheritance only.—Wardſhip in copyhold eſtates partakes both of that in chivalry, and that in ſocage. Like that in chivalry the lord is the legal guardian, who uſually aſſigns ſome relation of the infant tenant to act in his ſtead: and he, like guardian in ſocage, is accountable to his ward for the profits. Of fines, ſome are in the nature of *primer ſeiſins* due on the death of each tenant; others are mere fines for the alienation of the lands: In ſome manors only one of theſe ſorts can be demanded; in ſome both, and in others neither. They are ſometimes arbitrary and at the will of the lord, ſometimes fixed by cuſtom: but even when arbitrary, the courts of law, in favour of the liberty of copyholders have tied them down to be *reaſonable* in their extent: otherwiſe they might amount to a diſheriſon of the eſtate. No fine therefore is allowed to be taken upon deſcents or alienations (unleſs in particular circumſtances) of more than two years' improved value of the eſtate. 2 *Ch. Rep.* 134. See 2 *Comm.* 97.

Fines

Fines are paid to the lord on admittances; and may be due on every change of the eſtate by lord or tenant: The lord may have an action of debt for his fine; or may diſtrain by cuſtom. 4 *Rep.* 27: 13 *Rep.* 2.

An *heriot* is a duty to the lord, rendered at the death of the tenant, or on a ſurrender and alienation of an eſtate: and is the beſt beaſt or goods, found in the poſſeſſion of the tenant deceaſed, or otherwiſe, according to cuſtom. And for heriots, reliefs, &c. the lord may diſtrain, or bring action of debt. *Plowd.* 96. See title *Heriot.*

Relief is a ſum of money which every copyholder in fee, or freeholder of a manor pays to the lord, on the death of his anceſtor; and is generally a year's profits of his land. See titles *Tenure*; *Relief.*

Services ſignify any duty whatſoever accruing unto the lord from tenants; and are not only annual, and accidental; but corporal, as homage, fealty, &c. *Comp. Court Keep.* 7, 8, 9, &c.

Copyholds eſcheat, and are *forfeited* in many caſes; *eſcheat* of a *copyhold* eſtate, is either where the lands fall into the hands of the lord for want of an heir to inherit them; or where the copyholder commits felony, &c. But before the lord can enter on an eſtate eſcheated, the *homage jury ought to preſent it. Forfeitures* proceeding from treaſons, felonies, alienation by deed, &c. a *preſentment* of them muſt be alſo made in court, that the lord may have notice of them. A copyholder refuſing to do ſuit of court, being ſufficiently warned, is a forfeiture of his eſtate; unleſs he be prevented by ſickneſs, inundations of water, &c. If the lord demandeth his rent, and the copyholder being preſent, denies to pay it at the time required, this is a forfeiture; but if the tenant be not upon the ground when demanded, the lord muſt continue his demand upon the land, ſo that by continual denial in law, it may amount to a denial in fact: though it is ſaid there muſt be a demand from the perſon of the copyholder, and a wilful denial, to make a forfeiture.

If a Copyholder do not perform the ſervices due to his lord; or if he ſue a replevin againſt the lord, upon the lord's lawful diſtreſs for his rent or ſervices, theſe are forfeitures. If the lord upon admittance of a copyholder, the fine by the cuſtom of the manor being certain, demandeth his fine, and the copyholder denieth to pay it upon demand, this is a forfeiture.

Upon the deſcent of any copyhold of inheritance, the heir by the general cuſtom is tied, upon three ſolemn proclamations, made at three ſeveral courts, to come in and be admitted to his copyhold; or if he faileth therein, this failure worketh a forfeiture; but if an infant come not in to be admitted at three proclamations, it is no forfeiture: ſo of one beyond ſea, &c.

An ideot, lunatick, &c. though able to take copyholds, they yet are unable to forfeit them: and in reſpect to others, forfeitures may be mitigated by cuſtom, and the copyholder only amerced. By *Stat.* 9 *Geo.* 1. *c.* 29, On default of infants and feme coverts appearing to be admitted tenants to copyhold lands, the lord or his ſteward may name a perſon to be guardian or attorney for them, and by ſuch guardian, &c. admit them: and if the uſual fine thereon be not paid in three months, being demanded in writing, the lord may enter on the copyhold, receive the rents, &c. till the fine is paid with all charges. And by this ſtatute no infant or feme covert ſhall forfeit any copyhold lands for their neglect to come to court to be admitted, or refuſal to pay any fine.

The general cuſtom of copyholds allows a copyholder to make a leaſe for one year of his copyhold eſtate, and no more, without incurring a forfeiture: but a copyholder may make a leaſe for one year, and covenant with the leſſee, that, after the end of that year, he ſhall have the ſame for another year, and ſo from year to year during the ſpace of ſeven years, &c. and be no forfeiture. *Cro. Jac.* 300. For this does not amount to a leaſe, but is only a covenant, ſubjecting the covenantor to an action for damages. Though a copyholder may not make a leaſe to hold for one year, and ſo from year to year during his life, excepting one day yearly, &c. which will be a forfeiture, being a mere evaſion. But a licence to leaſe may be had. A woman who was a copyholder in fee married, her huſband made a leaſe for years, not warranted by the cuſtom, which was a forfeiture; the huſband died; and adjudged that the lord ſhall not take advantage of this forfeiture after his death, but the wife ſhall enjoy the eſtate. *Cro. Car.* 7. And ſee 4 *Rep.* 21 *to* 25, &c.

Livery upon any conveyance of a copyhold eſtate amounts to a forfeiture. And yet if a copyholder for life ſurrender to another in fee, this is no forfeiture; for it paſſeth by the ſurrender to the lord, and not by livery.

If copyholder for life cut down timber-trees, it is a forfeiture of his copyhold; though ſuch copyholder may take houſe-bote, hedge-bote, and plough-bote, upon his copyhold, of common right, as a thing incident to the grant; if he be not reſtrained by cuſtom, to take them by the aſſignment of the lord or his bailiff. Where a copyholder for life fells timber-trees, the lord may take them, and the eſtate is forfeited: but if under-leſſee for years of a copyholder cut down timber, this ſhall not be a forfeiture of the copyhold eſtate, but the lord is put to his action on the caſe againſt the leſſee. 1 *Bulſt.* 150: *Style* 233. A copyhold granted to two for their lives ſucceſſively, where the cuſtom of the manor is, that they ſhall not fell trees; if the firſt copyholder for life cut down trees, &c. it is not only a forfeiture of his own eſtate for life, but of him in remainder. *Moor* 49.

In other caſes, a copyholder for life, committing waſte, ſhall not forfeit the eſtate of him in remainder. *Cro. Eliz.* 880. If copyholder for life, where the remainder is over for life, commits a forfeiture by waſte, &c. he in remainder ſhall not enter, but the lord. 2 *Danv.* 198. A copyholder committing waſte voluntary, or permiſſive, this is a forfeiture: voluntary, as if he pull down any houſe, though built by himſelf; lop trees, and fell them, plough up meadow, whereby the ground is made worſe, &c. Permiſſive, if he ſuffer the roof of the houſe to let in rain, or the houſe to fall; or if he permit his meadow ground to be ſurrounded with water, ſo that it becomes marſhy, or his arable land to be thus ſurrounded and become unprofitable, &c. theſe and the like are forfeitures. See 2 *Danv. Abr.* 192, 193, 196, &c: 1 *Nelſ. Abr.* 509, 510, &c.

If a feme copyholder for life takes huſband, who commits waſte and dies, the eſtate of the feme is forfeited: Though not if a ſtranger commit the waſte, without the aſſent of the huſband. 4 *Rep.* 37. *Sed. qu.* the difference between

between copyholder for life, and copyholder in fee, in this reſpect; unleſs waſte is diſtinguiſhed from other forfeitures?

Moſt forfeitures are cauſed by acts contrary to the tenure: But a ſucceeding lord of a manor, ſhall not have any advantage of a forfeiture, by waſte done by a copyholder in the time of his predeceſſor. 2 *Sid.* 8. And if a preſent lord doth any thing whereby he acknowldges the perſon to be his tenant after forfeiture, this acknowledgment is a confirmation of his eſtate, *Coke's Cop.* 61.

The court of Chancery will ſometimes relieve againſt a forfeiture for waſte, and compel the lord to re-admit, on receiving ſatisfaction for the injury he has ſuſtained. Such relief is particularly given where the waſte is committed, through ignorance; or where the waſte is merely permiſſive, and there has not been an obſtinate perſeverance, in neglecting to repair after notice. 1 *C. C.* 95: *Pre. Ch.* 568. Another inſtance in which relief againſt forfeiture for waſte is ſaid to be proper, is where the leſſee of a copyholder commits waſte without his direction or privity. *Toth.* 237. But in this latter caſe it may be doubted whether the waſte is a forfeiture. See *Mo.* 49.

Alſo, When the eſtate is forfeited for non-payment of rent, a fine, or ſuch things, where a value may be ſet on them, and compenſation made the lord on any laches of time, the tenant may be relieved; for there the land is but in nature of a ſecurity for thoſe ſums. *Preced. Chan.* 569, 572.

In caſe of making a leaſe for years, without licence, and not warranted by cuſtom, found to be a forfeiture at law, equity has nothing do with it, to give any remedy; it is like to a feoffment made, or fine levied by particular tenants, againſt which there can be no relief. *Ibid.* 574. Where copyhold lands are purchaſed in fee, in truſt for an alien, the lands are not ſeizable by the King; nor is the truſt forfeited to him; for if the lands were forfeited as purchaſed for ſuch alien, then the lord of the manor would loſe his fines and ſervices, *&c.* *Hard.* 436.

By *Stat.* 10 *Geo.* 2. *c.* 26, Copyhold eſtates of poor priſoners, may be aſſigned to creditors, and the aſſignees admitted by the lord, on paying the uſual fine due on a ſurrender, *&c.* and ſee *Stat.* 1 *Geo.* 3. *c.* 17. § 14, as to *Inſolvents.*

By *Stat.* 31 *Geo.* 2. *c.* 14. § 1, already mentioned, copyholders are not to vote for Knights of the Shire.—The admiſſion of infants and feme coverts entitled by deſcent, or ſurrender to the uſe of a will is regulated by *Stat.* 9 *Geo.* 1. *c.* 29 —And the *Stat.* 5 *Geo.* 3. *c.* 46, (explained by 6 *Geo.* 3. *c.* 49,) compels the ſteward to receive the ſtamp duty on admiſſion, *&c.* at the ſame time he receives the fees of court.

See further as to Copyholds in general *Com. Dig.* title *Copyhold.* See *Comp. Court Keeper*, throughout. *Nelſon's Lex Manerior'*, 2*d* edit. *Coke's Compleat Copyholder.* *And* 4 *Rep.* 21 *to* 25, *&c.*

COPY-RIGHT. The excluſive right of printing and publiſhing *copies* of any literary performance; extended alſo to muſic, engravings, *&c.* See tit. *Literary Property.*

CORAAGE, *Coraagium.*] A kind of extraordinary impoſition, growing upon ſome unuſual occaſion, and ſeems to be of certain meaſures of corn: for *corus tritici* is a meaſure of wheat. See *Bract. lib.* 2. *c.* 116: *Numb.* 6. *Numb.* 8. Blount.

CORACLE, A ſmall boat uſed by fiſhermen on ſome parts of the river *Severn*, made of an oval form, of ſplit ſallow twigs interwoven, and on that part next the water covered with leather, in which one man, being ſeated in the middle, will row himſelf ſwiftly with one hand, while with the other he manages his net or fiſh-tackle: and coming off the water, he will take the light veſſel on his back, and carry it home. This boat is of the ſame nature as the Indian *canoes*: though not of the ſame form, or employed to the like uſe. But *quere* if not long out of uſe?

CORAM NON JUDICE, Is when a cauſe is brought and determined in a court whereof the judges have not any juriſdiction; then it is ſaid to be *coram non judice*, and void. 2 *Cro.* 351.

CORBEL STONES, Are ſtones wherein images ſtand: the old *Engliſh corbel*, was properly a nich in the wall of a church, or other ſtructure in which an image was placed for ornament or ſuperſtition; and the *corbel* ſtones were the ſmooth poliſhed ſtones, laid for the front and outſide of the *corbels* or niches. The niches remain on the outſide of very many churches and ſteeples in *England*, though the little ſtatutes and reliques are moſt of them broken down. *Paroch. Antiq.* 575.

CORD OF WOOD, Is a quantity of wood eight feet long, four feet broad, and four feet high, ordained by the ſtatute.

CORDAGE, *Fr.*] Is a general appellation for all ſtuff to make ropes, and for all kind of ropes belonging to the rigging of a ſhip: it is mentioned in 15 *Car.* 2. *c.* 13. and ſee *Stat.* 25 *Geo.* 3. *c.* 56, againſt frauds in the manufacture of cordage for ſhipping.

CORDINER, See *Cordwainer.*

CORDUBANARIUS, A *Cordwainer*; A ſhoemaker. *Cowel.* from the Fr. *Cordouannier*, a ſhoemaker; we call him vulgarly a *Cordwainer*; and ſo this word is uſed in divers ſtatutes; as 3 *H.* 8. *c.* 10: 5 *H.* 8. *c.* 7: 27 *H.* 8. *c.* 14: 5 *and* 6 *Ed.* 6. *c.* 13: 1 *Jac.* 1. *c.* 22, *&c.* By which laſt ſtatutes the Maſters and Wardens of the *Cordwainers'* Company in *London*, *&c.* are to appoint ſearchers and triers of leather; and leather is not to be ſold before ſearched and ſealed, *&c.*

CORETES, From the Brit. *Cored*, pools, ponds, *&c.* —*Et cum ſuis piſcibus et* coretibus *anguillarum et cum toto territorio ſuo.* Du Freſne.

CORIUM FORISFACERE, Was where a perſon was condemned to be whipped; which was anciently the puniſhment of a ſervant. *Corium perdere*, the ſame: and *corium redimere* is to compound for a whipping.

CORN. As to the general proviſions relative to the importation and exportation of *Corn*, See title *Navigation-Acts.*—And as to the exportation of Corn to enemies in time of war. See *Stat.* 33 *Geo.* 3. *c.* 27; and tit. *Treaſon.*

No *corn* was formerly to be exported, without the King's licence: except for the victualling of ſhips, and in ſome ſpecial caſes, from ſome ports only: and none might by *Stat.* 5 *Eliz. c.* 12. buy *corn* to ſell again, without licence from juſtices. But now *corn*, as wheat, barley, oats, *&c.* may be exported to States in amity when they exceed not certain prices, regulated by many ſtatutes; and the exporters of it ſhall pay no duty or cuſtom, but be intitled to bounty-money or a certain allowance for exportation

By *Stat.* 11 *Geo.* 2. *c.* 22, If any perſon uſe violence on another perſon to hinder him from buying or carrying *corn*

to

to any ſea-port town to be tranſported, &c. he ſhall be impriſoned by two juſtices, for not more than exceeding three months, and be publickly whipped, &c. and committing a ſecond offence, or deſtroying granaries, or *corn* in any boat or veſſel, to be adjudged a felon, and tranſported for ſeven years: and the hundred to make good the damage, if not above 100 *l.* as in caſes of robbery; where an offender is not apprehended and convicted within twelve months; but notice muſt be given to the conſtable in two days.—*Stat.* 24 *Geo.* 2. *c.* 56, ordains the bounty, on ground corn to be regulated by weight; and *Stat.* 26 *Geo.* 2. *c.* 15, appoints intereſt to be paid on debentures for the bounty of corn exported. A corn-market eſtabliſhed at *Weſtminſter* by *Stat.* 31 *Geo.* 2. *c.* 25. § 1. Forms of the certificates of prices of grain, to regulate the price of bread are ſettled by *Stat.* 31 *Geo.* 2. *c.* 29. See title *Bread.*

The laſt acts now in force to regulate the returns of the prices of grain are *Stats.* 31 *Geo.* 3. *c.* 30: 33 *Geo.* 3. *c.* 65. by the former of which, *Stats.* 1 *Jac.* 2. *c.* 19: 1 *W. & M. c.* 12: 5 *Geo.* 2. *c.* 12: 10 *Geo.* 3. *c.* 39: 13 *Geo.* 3. *c.* 43: 21 *Geo.* 3. *c.* 50. & 29 *Geo.* 3. *c.* 58. are all repealed; as alſo every proviſion in any other act for regulating the importation of wheat, &c. except ſuch as relate to the making of *malt* for exportation and the exportation thereof.—So much of *Stat.* 15 *Car.* 2. *c.* 7. as prohibits the buying of corn to ſell again, and the laying it up in granaries is alſo repealed.

By theſe *Statutes* 31 *Geo.* 3. *c.* 30: 33 *Geo.* 3. *c.* 65. bounties are granted on exportation at certain prices, and the exportation prohibited when at higher prices,—the quantity of corn to be exported to foreign countries is ſettled.—The maritime counties of *England* are divided into diſtricts.—The exportation of corn to be regulated in *London, Kent, Eſſex* and *Suſſex* by the prices at the Corn-Exchange, the proprietors of which are to appoint an Inſpector of corn returns, to whom weekly returns are to be made by the factors: and he is to make up weekly accounts, and tranſmit the average price to the Receiver of the returns, to be tranſmitted to the officers of the cuſtoms, and inſerted in the *London* gazette.—The exportation in other diſtricts, and in *Scotland*, to be regulated by the prices at different appointed places, for which mayors juſtices, &c. are to elect Inſpectors.—Declarations are to be truly made by factors of the corn ſold by them:—Orders of council may be made to regulate importation or exportation, from time to time. Such orders to be laid before parliament.—See alſo *Stat.* 32 *Geo.* 3. *c.* 50, and 33 *Geo.* 3. *c.* 3, as to the exportation of wheat, and as to trans-ſhipping of corn brought coaſtwiſe.

[The above is a ſhort abſtract of the law on a very fluctuating ſubject; at the time this part of the work was paſſing through the preſs. *January* 1794.]

CORNAGE, *Cornagium*, from the Lat. *Cornu* a horn.] A kind of tenure in grand ſerjeanty; the ſervice of which was to blow a horn when any invaſion of the *Scots* was perceived: and by this tenure many perſons held their lands Northward, about the wall commonly called the *Picts Wall. Cambd. Britan.* 609. This old ſervice of *horn-blowing* was afterwards paid in money, and the ſheriffs accounted for it under the title of *Cornagium.*—Sir *Edward Coke* in his firſt Inſtitute, *pag.* 107. ſays *cornage* is alſo called in the old books *Horngeld*; but they ſeem to differ much. See *Hornegeld.*

CORNARE, To blow in the horn.—*Mat. Paris p.* 181.

CORN-RENTS. By *Stat.* 18 *El. c.* 6, on college leaſes, one third of the old rent to be reſerved in wheat or malt, &c. The invention of Lord Treaſurer *Burleigh*, and Sir *Tho. Smith*, who obſerved the value of money to ſink much, and the price of proviſions to riſe greatly, on our communication with the *Indies*; and therefore deviſed this method for upholding the revenues of the colleges. 2 *Comm.* 322.

CORNWALL, A royal duchy belonging to the Prince of *Wales* abounding with mines, and having *Stannary* courts, &c. It yields a great revenue to the Prince. How leaſes are to be made of lands in the dutchy of *Cornwall*, for three lives, or thirty-one years, under the ancient rents, &c. See *Stat.* 13 *Car.* 2. *c.* 4. and 12 *Ann. c.* 22: 24 *Geo.* 2. *c.* 50: and 1 *Geo.* 3. *c.* 11. Aſſizes for *Cornwall* not confined to *Launceſton.* 1 *Geo.* 1. *c.* 45. Leaſes by *Prince of Wales* of lands in *Cornwall* where good. 10 *Geo.* 2. *c.* 29. *ſect.* 9, 10 & 11. What leaſes and grants by the king ſhall be good 33 *Geo.* 2. *c.* 10. See title *King.*

CORODY, *Corodium.*] Signifies a ſum of money or allowance of meat, drink, and clothing due to the King from an abbey, or other houſe of religion, whereof he was founder towards the ſuſtentation of ſuch a one of his ſervants as he thought fit to beſtow it upon. The difference between a *corody* and a *penſion* ſeems to be, that a *corody* was allowed towards the maintenance of any of the King's ſervants in an abbey: a *penſion* is given to one of the King's chaplains, for his better maintenance, till he may be provided of a benefice: And as to both theſe, See *Fitz. Nat. Br. fol.* 250; where are ſet down all the *Corodies* and penſions that our abbies, when they were ſtanding were obliged to pay to the King.

Corody is ancient in our laws: And it is mentioned in *Staundf. Prærog.* 44. And by the *Stat.* of *Weſtm.* 2. *c.* 25, it is ordained, that an aſſiſe ſhall lie for a *corody.* It is alſo apparent by *Stat.* 34 & 35 *H.* 8. *cap.* 26, that *corodies* belonged ſometimes to biſhops, and noblemen, from monaſteries: And in the *New Terms of Law*, it is ſaid that a *corody* may be due to a common perſon, by grant from one to another; or of common right to him that is a founder of a religious houſe, not holden in *Frank-almoigne*; for that tenure was a diſcharge of all *corodies* in itſelf: By this book it likewiſe appears, that a *corody* is either certain or uncertain, and may be not only for life or years, but in fee. *Terms de Ley*: 2 *Inſt.* 630. See the *Monaſticon Anglicanum*, for the form of a grant of a corody.

CORODIO HABENDO, A writ to exact a *corody* of an abbey or religious houſe. *Reg. Orig.* 264.

CORONA MALA, or MALA CORONA, The clergy who abuſed their character, were formerly ſo called. *Blount.*

CORONARE FILIUM, to make one's ſon a prieſt. Anciently lords of manors, whoſe tenants held by *villenage*, did prohibit them *coronare filios*, leſt ſuch lords ſhould loſe a villein by their entering into holy orders: For ordination changed their condition, and gave them liberty, to the prejudice of the lord, who could before claim them as his *natives* or *born ſervants.*—*Homo Coronatus* was one who had received the firſt *tonſure*, as preparatory to ſuperior orders; and the *tonſure* was in form of a *corona*, or crown of thorns. *Cowel.*

CORONER. CORONATOR, *à Corona.*] An ancient officer at the Common law. Mention is made of him in King *Athelſtan*'s charter to *Beverly*, *Anno* 925.

He is called Coroner, *Coronator*—becauſe he hath principally to do with pleas of the crown, or ſuch wherein the king is more immediately concerned, 2 *Inſt.* 31 : 4 *Inſt.* 271. And in this light the Lord Chief Juſtice of the King's Bench is the principal Coroner in the kingdom, and may (if he pleaſes) exerciſe the juriſdiction of a coroner in any part of the realm. 4 *Rep.* 57. But there are alſo particular coroners for every county of *England*; uſually four, but ſometimes ſix, and ſometimes fewer. *F. N. B.* 163. This office is of equal antiquity with that of ſheriff, and was ordained together with him to keep the peace, when the earls gave up the wardſhip of the county. *Mirror c.* 1, § 3.

I. *His Election*; *and Removal.*
II. 1. *His Power and Duty*; 2. *His Fees for the Execution of his Duty*; *and* 3. *His Puniſhment for the Breach of it.*

I. HE IS STILL CHOSEN by all the freeholders in the county-court; as by the policy of our antient laws, the ſheriff and conſervators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people. 2 *Inſt.* 558. And as verderors of the foreſt ſtill are, whoſe buſineſs it is to ſtand between the Prerogative and the Subject in the execution of the foreſt laws. For this purpoſe there is a writ at common law *de coronatore eligendo* *F. N. B.* 163. in which it is expreſsly commanded the ſheriff, "*quod talem eligi faciat, qui melius et ſciat, et velit, et poſſit, officio illi intendere.*" See *poſt.* And, in order to effect this the more ſurely, it was enacted by *Stat. Weſtm.* 1, 3 *Ed.* I. *c.* 10, that none but lawful and diſcreet *knights* ſhould be choſen; and there was an inſtance in the 5 *Ed.* III. of a man being removed from this office becauſe he was only a merchant. 2 *Inſt.* 32. But it ſeems it is now ſufficient if a man hath lands enough to be made a knight; (which by the *ſtatutum de militibus*, 1 *Ed.* II. were lands to the amount of 20*l. per annum*;) whether he be really knighted or not, *F. N. B.* 163, 4. For the Coroner ought to have an eſtate ſufficient to maintain the dignity of his office, and anſwer any fines that may be ſet upon him for his miſbehaviour. *Ibid.* And if he hath not enough to anſwer, his fine ſhall be levied on the county, as the puniſhment for electing an inſufficient officer. *Mirror, c.* 1. § 3: 2 *Inſt.* 175. Now indeed, through the culpable neglect of gentlemen of property, this office has been ſuffered to fall into diſrepute, and get into low and indigent hands; ſo that, although formerly no coroners would condeſcend to be paid for ſerving their country, and they were by the aforeſaid *Stat. Weſtm.* 1, expreſsly forbidden to take a reward, under pain of great forfeiture to the king; yet for many years paſt they have only deſired to be choſen for the ſake of their perquiſites: being allowed fees for their attendance. See *poſt.* II. 2.

By *Stat.* 28 *Ed.* 3. *c.* 6. it is enacted, "That all coroners of the counties ſhall be choſen in the full counties of the moſt mete and lawful people that ſhall be found in the ſame counties, to execute the ſaid office; ſaved always to the King, and other lords, who ought to make ſuch coroners, their ſeignories and franchiſes."

The oaths of allegiance, ſupremacy, and abjuration, are to be taken, and then the oaths of office; when the coroner is elected, and ſworn into his office, he is to remember the qualification-acts, and in due time, to take the ſacrament, and oaths of abjuration. *Impey's Sheriff.*

In the caſe of election by freeholders, where the majority cannot be determined by the view, upon the holding up of hands, the Sheriff upon the demand of a poll to be taken of the numbers, ought not to deny it; nor ought he to deny a ſcrutiny into the polls, when properly required, upon a ſuggeſtion that non-freeholders have polled: for how otherwiſe can the majority of freeholders be aſcertained? It is an election at common law, and this ſcrutiny is as incident to enquire into the polls, as numbering of the polls is incident to the holding up of hands; nor can the juſt majority be otherwiſe duly diſcovered or declared. *Freem.* 17 : 2 *Vent.* 25 : 1 *Vent.* 206 : 2 *Lev.* 50.

The Coroner is choſen for life: but may be removed, by either being made ſheriff, or choſen verderor, which are offices incompatible with the other; or by the King's writ *de coronatore exonerando*, for a cauſe to be therein aſſigned; as that he is engaged in other buſineſs, is incapacitated by years, or ſickneſs, hath not a ſufficient eſtate in the county, or lives in an inconvenient part of it. *F. N. B.* 163, 4: See *poſt.* And by *Stat.* 25 *Geo.* II. *c.* 29, extortion, neglect, or miſbehaviour, are alſo made cauſes of removal. See *poſt.* II. 3.

There are Special Coroners, within divers liberties, as well as the ordinary officers in every county; as the *Coroner of the Verge*, which is a certain compaſs about the King's court; who is likewiſe called *Coroner of the King's houſehold.* Cromp. Juriſ. 102.

The King's coroner ſhall execute his office within the verge. *Stat.* 32 *H.* 8. *c.* 20. *ſect.* 7. Some corporations and colleges are licenſed by charter to appoint their coroners within their own precincts. 4 *Inſt.* 271. For what ariſes on the high ſea, we read of coroners appointed by the King or his admiral. 2 *Hale's Hiſt. P. C.* 53. See *poſt. Coroner of the King's Houſehold.*

It is ſaid Coroners are of *three kinds.* 1, By virtue of an office. 2, By charter or commiſſion. 3, By election.

1. The Chief Juſtice of *K. B.*—2. The *Lord Mayor of London* is by charter 18 *E.* IV. Coroner of *London.* See *poſt.*—The *Biſhop of Ely* alſo hath power to make coroners, by a charter of *Hen.* VII: and there are coroners of particular lords of franchiſes and liberties who by charter have power to create their own coroners, or to be coroners themſelves, eſpecially the juriſdiction of the Admiralty, as well as that of the verge above referred to.—3. The general coroners of counties.—See 1 *Hale* 52 : 4 *Rep.* 57 : 1 *Comm.* 384.

The Coroner of *Portſmouth* has juriſdiction on board a man of war lying in *Portſmouth* harbour: for though the Admiralty have a coroner of their own, he never takes inquiſitions of *felo de ſe. Stra.* 1097 : *Andr.* 231.

II. THE OFFICE OF CORONERS eſpecially concerns the pleas of the crown; and they are conſervators of the peace in the county where generally elected. Their authority is *judicial* and *miniſterial*: *Judicial*, where one comes to a violent death, and to take and enter appeals of murder, pronounce judgment upon outlawries, &c. And to inquire of lands and goods, and eſcapes of murderers, treaſure-trove, wreck of the ſea, deodands, &c. The *miniſterial*

power is where the coroners execute the King's writs, on exception to the ſheriff, as by his being party to a ſuit, kin to either of the parties, on default of the ſheriff, &c. 4 *Inſt.* 271: 1 *Plowd.* 73. And the *authority* of coroners does not determine by the demiſe of the King. 2 *Inſt.* 174.

Where Coroners are empowered to act as judges, as in taking an inquiſition of death, or receiving an appeal of felony, &c. the act of one of them is of the ſame force as if they had all joined; but after one of them has proceeded to act, the act of another of them will be void: And where they are authoriſed to act only *miniſterially*, in the execution of a proceſs directed to them upon the incapacity of the ſheriff, their acts are void, if they do not all join. 2 *Hawk. P. C. c.* 9. § 45: *Hob.* 70.

So that Coroners as *miniſters* muſt all join; but as *judges*, they may divide. But two coroners ought to be judges in re-diſſeiſin; and though one ſerves to pronounce an outlawry, the entry ought to be in the name of all of them: And ſo of all proceſſes directed to the coroners. *Staundf.* 53: *Jenk. Cent.* 85.

If the ſheriff is either plaintiff or defendant, or one of the cogniſees, the writ muſt be directed to the coroner, *Cro. Car* 300. But the coroner is not the officer of *B. R.* but where the ſheriff is improper; not where there is no ſheriff; for if the ſheriff die, the coroner cannot execute a writ. In caſe of two coroners, if one is challenged, the other may execute the writ, &c. yet both make but one officer: It is the ſame with two ſheriffs of a city, &c. 1 *Salk.* 144. A *venire facias* ſhall go to the coroner, where the ſheriff is a party, or the defendant is a ſervant to the ſheriff, &c. but it ought to be on a principal challenge to the favour. *Moor* 470.

On defaults of ſheriffs, coroners are to impanel juries, and return iſſues on juries not appearing, &c. As the ſheriff in his torn might enquire of all felonies by the Common law, ſaving the death of a man; ſo the coroner can inquire of no felony but of the death of a perſon, and that *ſuper viſum corporis*. 4 *Inſt.* 271. But in *Northumberland* the coroner by cuſtom, may enquire of other felonies. 35 *H.* 6. 27. But without cuſtom no coroner is authoriſed to take any other inquiſition than on death. 2 *Hale* 65. See *Leach's Hawk. P. C.* ii. *c.* 9. § 35 *n.* By *Magna Charta, cap.* 17. no ſheriff, &c. or coroner ſhall hold pleas of the crown: But by *Stat. Weſtm.* 1. 3 *Ed.* 1. *c.* 10, it is enacted, that the coroners ſhall lawfully attach and preſent pleas of the crown; and that ſheriffs ſhall have counter-rolls with the coroners, as well of appeals, as of inqueſts, &c.

Coroners, before the *Stat. Magna Charta*, might not only receive accuſations againſt offenders, but might try them: But ſince that ſtatute, they cannot proceed ſo far; and appeals before them, are removable into *B. R.* &c. by *certiorari*, directed to the coroners and ſheriffs, &c. Though proceſs may be awarded by the ſheriff and coroner, or the coroner only, in the county-court on appeals, till the exigent, &c. 2 *Hawk. P. C. c.* 9. § 41.

By the *Stat. De officio coronatoris*, 4 *Ed.* 1. *ſt.* 2, The Coroner is to go to the place where any perſon is ſlain or ſuddenly dead, and ſhall by his warrant to the bailiffs, conſtables, &c. ſummon a jury out of the four or five neighbouring towns, to make enquiry upon view of the body; and the coroner and jury are to inquire into the manner of killing, and all circumſtances that occaſioned the party's death; who were preſent, whether the dead perſon was known, where he lay the night before, &c. Examine the body if there be any ſigns of ſtrangling about the neck, or of cords about the members, &c. Alſo all wounds ought to be viewed, and inquiry made with what weapons, &c. And the coroner may ſend his warrant for witneſſes, and take their examination in writing; and if any appear guilty of the murder, he ſhall inquire what goods and lands he hath; and then the dead body is to be buried. A *coroner* may likewiſe commit the perſon to priſon who is by his inquiſition found guilty of the murder; and the witneſſes are to be bound by recogniſance to appear at the next aſſizes, &c.

When the jury have brought in their verdict, the coroner is to inroll and return the inquiſition, whether it be brought in murder, manſlaughter, &c. to the juſtices of the next gaol-delivery of the county, or certify it into *B. R.* where the murderers ſhall be proceeded againſt. 2 *Rol. Abr.* 32. Upon an inquiſition taken before the coroner, he muſt put into writing the effect of the evidence given to the jury before him; and bind them to appear, &c. which is to be certified to the court with the inquiſition; and neglecting it, the coroner ſhall be fined. 1 & 2 *P. & M. c.* 13: 1 *Lil. Abr.* 327.

The word *Murdravit* is not neceſſary in a coroner's inquiſition; though it is in an indictment for killing another perſon. 1 *Salk.* 377. It is not neceſſary that the inquiſition be taken in the place where the body was viewed. 2 *Hawk. P. C. c.* 9. § 25. But a coroner has no authority to take an inquiſition of death without a view of the body; and if the inqueſt be taken by him without ſuch view, it is void. 2 *Lev.* 140.

The coroner may in convenient time take up a dead body that hath been buried, in order to view it: but if it be buried ſo long that he can diſcover nothing from the viewing it, or if there be danger of infection, the inqueſt ought not to be taken by the coroner, but by juſtices of peace, by the teſtimony of witneſſes; for none can take it *on view*, but the coroner. *Bro. Coron.* 167, 173. If the body is buried, the town ſhall be amerced; as it ſhall be if the body is ſuffered to lie ſo long that it ſtinks. 2 *Dam. Abr.* 209, &c. Where the body hath lain for ſome time, that it cannot be judged how it came by it's death, that muſt be recorded; that at the coming of the juſtices of aſſiſe, the town where, &c. may be amerced on ſight of the coroner's rolls.

A coroner may find any nuiſance by which the death of a man happens; and the townſhip ſhall be amerced on ſuch finding. 1 *Nelſ. Abr.* 536. If one is ſlain in the day and the murderer eſcapes, the town where done ſhall be amerced, and the coroner is to inquire thereof on view of the body, *Stat.* 3 *Hen.* 7. *c.* 1. A coroner may take an indictment upon view of the body; as alſo an appeal, within a year after the death of one ſlain. *Wood's Inſt.* 491. But a coroner, *ſuper viſum corporis*, cannot make an inquiſition of an acceſſary after the murder; though he may of acceſſaries before the fact. *Moor* 29.

Coroners ought to ſit and inquire on the body of every priſoner that dies in priſon: They have no juriſdiction within the verge of the King's courts; nor of offences, committed at ſea, or between high and low water mark when the tide is in; though they have in arms and creeks of the ſea. 3 *Inſt.* 134. See *ante* I. *ad finem.* If a body is drowned,

drowned, and cannot be found to the viewed, the inquiſition muſt be taken by juſtices of peace, on the examination of witneſſes, &c. 5 *Rep.* 110.

Where a coroner's inqueſt is quaſhed, he muſt make a new one *ſuper viſum corporis*: And a coroner may attend and amend his inquiſition in matters of form: But if he miſbehaves himſelf, and a *melius inquirendum* is granted upon it, that inquiſition muſt be taken by the ſheriffs or commiſſioners, upon affidavits, and not *ſuper viſum corporis*; becauſe none but a coroner can take inquiſition *ſuper viſum*, &c. and he is not to be truſted again. 1 *Salk.* 190: 2 *Danv. Abr.* 210.

A coroner's inquiſition being final, the coroner ought to hear counſel and evidence on both ſides. 2 *Sid.* 90, 101. The coroner muſt admit evidence, as well againſt the King's intereſt, as for it; but it hath been held, that if a perſon be killed by another, and it is certainly known that he did it, the coroner's jury are to hear the evidence only for the King; and inquire whether the killing were by malice, or without malice, &c. *Per Hale*, Ch. Juſt. Where a coroner would not admit of evidence againſt the King, to prove a *felo de ſe* to be *non compos mentis*, his inquiſition was ſet aſide; and a new inquiſition taken, whereby it was found that the party was *non compos*. 2 *Hale's Hiſt. P. C.* 60. If there be an inquiſition of manſlaughter or murder, and alſo an indictment by the grand jury againſt one, and he is arraigned, and found Not Guilty on the indictment; here it is neceſſary to quaſh the coroner's inquiſition, or to arraign the party upon it, and acquit him on that alſo: For otherwiſe it ſtands as a record againſt him, whereon he may poſſibly be outlawed. 2 *Hale* 65. And where a perſon found guilty by the coroner's inqueſt, pleads, and is acquitted by the petit jury; they muſt give in who it was that killed the man, which ſerves as an indictment againſt that other perſon; and if they cannot tell who, they may mention ſome fictitious name. *Ibid.*

2. By the *Stat.* 3 *Ed.* 1. *cap.* 10, Coroners ſhall demand or take nothing for doing their offices: And by the ancient law of *England*, none having any office concerning the adminiſtration of juſtice, could take any fee for doing his office; and therefore this ſtatute was only in affirmance of the Common law. By *Stat.* 3 *Hen.* 7. *cap.* 1, upon an inquiſition taken on view of the body, the coroner ſhall have 13*s.* 4*d.* fee of the goods of the murderer; and if he be gone, then out of the amercement of the town for the eſcape. Though *Stat.* 1 *H.* 8. *c.* 7, enacts, that where a perſon is ſlain by miſadventure, the coroner is to take no fee, on pain of 40*s.* Juſtices of aſſiſe and of peace have power to enquire of and puniſh extortions of coroners, and alſo their defaults. *Stat. Ibid.*

By the *Stat.* 25 *Geo.* 2. *c.* 29, for every inquiſition, not taken upon the view of a body dying in gaol, which ſhall be taken by any coroner in any townſhip or place contributory to the rates directed by *Stat.* 12 *Geo.* 2. *c.* 29, the ſum of 20*s.* and for every mile which he ſhall travel from the place of his abode, the further ſum of 9*d.* ſhall be paid him out of the money ariſing by the ſaid rates. And for every inquiſition taken upon the view of a body dying in gaol, ſo much money not exceeding 20*s.* ſhall be paid him as the juſtices at ſeſſions ſhall think fit to allow, out of the money ariſing from the ſaid rates. Provided that over and above the recompence by the ſtatute appointed, the coroner who ſhall take an inquiſition upon the view of a body ſlain or murdered, ſhall have the fee of 13*s.* 4*d.* payable by *Stat.* 3 *H.* 7. *c.* 1, out of the goods of the ſlayer or murderer, or out of the amerciaments upon the townſhip, if the ſlayer or murderer eſcape. Coroners taking further fees guilty of extortion.

Provided that no Coroner of the King's houſhold, and of the verge of the King's palaces, nor any coroner of the Admiralty, nor of the County Palatine of *Durham*, nor of the city of *London* and borough of *Southwark*, or of any of the franchiſes belonging to the ſaid city, nor any coroner of any city, borough, town, liberty or franchiſe not contributory to the rates directed by *Stat.* 12 *Geo.* 2. *c.* 29, or within which ſuch ſuch rates have not been uſually aſſeſſed, ſhall be intitled to any fee, recompence or benefit given by this act.

3. If a Coroner be remiſs in coming to do his office, when he is ſent for, &c. he ſhall be amerced by virtue of the above mentioned ſtatute *De coronatoribus*. *S. P. C.* 51: *Salk.* 377: *H. P. C.* 170.

If a Coroner hath been guilty of any corrupt practice, bribery, &c. in taking the inquiſition, a *melius inquirendum* may be awarded for taking a new one by ſpecial commiſſioners, &c. Coroners concealing felonies, &c. are to be fined, and ſuffer one year's impriſonment. 3 *Ed.* 1. *cap.* 9. Alſo for mis-managment in the coroner, the filing of the inquiſition may be ſtopped. 1 *Mod.* 82. A coroner's inquiſition is not traverſable: If it be found before the coroner *ſuper viſum corporis*, that one was *felo de ſe*, the executors or adminiſtrators of the deceaſed, it is ſaid, cannot traverſe it. 3 *Inſt.* 55. But it has been held that the inqueſt being moved into *B. R.* by *certiorari*, may be there traverſed by the executor or adminiſtrator of the deceaſed. 2 *Hawk. P. C. c.* 9. § 54. And it hath been adjudged, that the inquiſition of *felo de ſe* is traverſable; though *fugam fecit* is not. 2 *Leo.* 152.

If a Coroner be convicted of extortion, wilful neglect of duty or miſdemeanor in his office, the court before whom he ſhall be ſo convicted, may adjudge that he ſhall be removed from his office.—See *Stat.* 25 *Geo.* 2. *c.* 29.—

For further matter on this ſubject, ſee 2 *Hawk. P. C. c.* 9, throughout.

CORONER OF THE KING'S HOUSEHOLD, Hath an exempt juriſdiction within the verge, which the Coroner of the County cannot intermeddle with; as the *Coroner of the King's Houſe* may not intermeddle within the county out of the verge. 2 *Hawk. P. C. c.* 9. § 15.—If an inquiſition be found before the coroner of the county, and the coroner of the verge, where the homicide was committed in the county, and it is ſo entered and certified, it will be error. 4 *Rep.* 45. But if murder be committed within the verge, and the King removes, before any indictment taken by the *Coroner of the King's Houſhold*; the coroner of the county, and the *Coroner of the King's Houſe* ſhall inquire of the ſame: And according to Sir *Edw. Coke*, the coroner of the county might inquire thereof at the Common law. 2 *Hawk. P. C. c.* 9. § 15: 2 *Inſt.* 550. If the ſame perſon be coroner of the county, and alſo of the *King's Houſe*, an indictment of death taken before him as coroner, both of the *King's Houſe*, and of the county, is good. 4 *Rep.* 46: 2 *Inſt.* 134.

By the *Stat.* 33 *H.* 8. *c.* 12. §§ 1, 3, *It is ordained, That all inquiſitions made upon the view of perſons ſlain, within any of the King's palaces or houſes, or any other houſe or*

houſes wherein his Majeſty ſhall happen to be abiding in his royal perſon, ſhall be taken by the Coroner *for the time being* of the King's Houſehold, *without any aſſiſting of another coroner of any ſhire within this realm; by the oaths of twelve or more of the yeoman officers* of the King's Houſehold, *returned by the two Clerks Controllers, the Clerks of the Checks, and the Clerks Marſhal, or one of them, of the ſaid Houſehold, to whom the ſaid* Coroner of the Houſehold *ſhall direct his precept; and the ſaid* Coroner *ſhall certify under his ſeal, and the ſeals of ſuch perſons as ſhall be ſworn before him, all ſuch inquiſitions before the Maſter or Lord Steward* of the Houſehold; *who hath the appointment of ſuch coroner*, &c.

Coroner of London. By the charter of King *Ed.* IV, the mayor and commonalty of *London* may grant the office of coroner to whom they pleaſe; and no other coroner but he that belongs to the city, ſhall have any power there: Alſo the Lord Mayor, *&c.* may chuſe two coroners in *Southwark*. When any one is killed, or comes to an untimely death in *London*, the coroner upon notice ſhall attend where the body is, and forthwith cauſe the beadles of the ward to ſummon a jury to make the neceſſary inquiry, how ſuch perſon came by his death: And after inquiſition taken, he ſhall give a certificate to the church-warden, clerk or ſexton of the pariſh, to the intent the corpſe may be buried: The coroner's fees here formerly amounted to 25*s.* now to above double that ſum; unleſs the friends of the deceaſed are poor, and then he ſhall execute his office for nothing. *Cit. Lib.* 46, 47. The Coroners in *London* and *Middleſex*, and in other *cities*, *&c.* may bail felons and priſoners, in ſuch manner as hath been heretofore accuſtomed. *Stat.* 1 & 2 *P. & M. c.* 13. *f.* 6: 1 *Lil. Abr.* 327.

What anciently belonged to Coroners, you may read at large in *Bracton, lib.* 3. *tract.* 2. *cap.* 5, 6, 7 & 8: *Britton, cap.* 1. and *Fleta, lib.* 1. *c.* 18.

Coronatore Eligendo. A writ which lies on the death or diſcharge of any *Coroner*, directed to the Sheriff out of the Chancery, to call together the freeholders of the county, for the choice of a new coroner; and to certify into the Chancery, both the election and the name of the party elected, and alſo to give him his oath, *&c. Reg. Orig.* 177: *F. N. B.* 163. See title *Coroner*.

Coronatore exonerando. A writ for the diſcharge of a coroner, for negligence, or inſufficiency in the diſcharge of his duty: and where coroners are ſo far engaged in any other public buſineſs, that they cannot attend the office; or if they are diſabled by old age or diſeaſe, to execute it; or have not ſufficient lands, *&c.* they may be diſcharged by this writ. 2 *Inſt.* 32: 2 *Hawk. P. C. c.* 9. § 12. But if any ſuch writ be grounded on an untrue ſuggeſtion, the coroner may procure a commiſſion from the Chancery to enquire thereof; and if the ſuggeſtion be diſproved, the King may make a *ſuperſedeas* to the ſheriff, that he do not remove the coroner; or if he have removed him, that he ſuffer him to execute the office. *Reg. Orig.* 177, 178: *F. N. B.* 164. See title *Coroner*. As alſo the coroner's is an office of freehold, the court of Chancery, with whom the power of granting this writ reſides, will not ſuffer it to iſſue, unleſs on affidavit, that the defendant has been ſerved with notice of the petition for it. 3 *Atk.* 184. And on an election of a new coroner by a majority of the freeholders, the power and authority of the old one is *ipſo facto* extinguiſhed. See title *Coroner*.

CORONE, *Fr.*] All matters of the *crown*, were heretofore reduced to this law head or title; they are the things that concern treaſon, felony, and divers other offences, by the Common law, and by ſtatute. *Shep. Epit.* 367.

CORPORAL OATH, And how it is adminiſtered. See title *Oath*.

CORPORATION.

Corporatio.] A Body politic or incorporate; ſo called as the perſons compoſing it are made into a *body*, and of capacity to take and grant, *&c.* Or, it is an aſſembly and joining together of many into one fellowſhip and brotherhood, whereof one is head and chief, and the reſt are the body; and this head and body knit together, make the *Corporation*: alſo it is conſtituted of ſeveral members like unto the natural body, and framed, by *fiction* of law, to endure in perpetual ſucceſſion.

With reſpect to *Corporations*, or communities of old, the forming of cities into communities, *corporations*, or bodies politic, and granting them the privilege of municipal juriſdiction, contributed more than any other cauſe to introduce regular government, police and arts, and to diffuſe them over *Europe*. *Louis the Groſs*, in *France*, to counterbalance his potent vaſſals, conferred new privileges on the towns ſituated within his domaine, called *Charters of community*, and formed the inhabitants into *corporations*, or bodies politic, to be governed by a council and magiſtrates of their own nomination. About the ſame period the great cities in *Germany* began to acquire like immunities; and the practice quickly ſpread over *Europe*, and was adopted in *Spain, England, Scotland*, and all the other feudal kingdoms. *Robertſon's Hiſt. Emp. C.* V. 1 *v.* 32, 34, *&c.*

Of *Corporations* ſome are *ſole*, ſome aggregate; *ſole*, when in one ſingle perſon, as the King, a Biſhop, Dean, *&c.* *Aggregate*, which is the moſt uſual, conſiſting of many perſons, as Mayor and Commonalty, Dean and Chapter, *&c.* Likewiſe *corporations* are *ſpiritual* or *temporal*; ſpiritual, of Biſhops, Deans, Archdeacons, Parſons, Vicars, *&c.* *Temporal*, of Mayors, Commonalty, Bailiffs and Burgeſſes, *&c.* Some *Corporations* are of a *mixt nature*, compoſed of ſpiritual and temporal perſons, ſuch as heads of colleges and hoſpitals, *&c.* All *corporations* are ſaid to be *Eccleſiaſtical*, or *Lay*.

Lay Corporations are of two ſorts, *civil* and *eleemoſynary*. The civil are ſuch as are erected for a variety of temporal purpoſes. The King, for inſtance is made a corporation to prevent in general the poſſibility of an *interregnum*, or vacancy of the throne, and to preſerve the poſſeſſions of the Crown entire; for immediately upon the demiſe of one king, his ſucceſſor is in full poſſeſſion of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular diſtrict, as a mayor and commonalty, bailiff and burgeſſes, or the like; ſome for the advancement and regulation of manufactures and commerce; as the trading companies of *London*, and other towns: and ſome for the better carrying on of divers ſpecial purpoſes; as churchwardens, for conſervation of the goods of the pariſh; the college of Phyſicians and company of Surgeons in *London*, for the improvement of the medical ſcience; the Royal Society, for the advancement of natural knowledge; and the Society of Antiquaries for promoting the ſtudy of antiquities. And among theſe general corporate bodies, the Univerſities of *Oxford* and *Cambridge* muſt be ranked. 3 *Burr.* 1656.

The

The eleemoſynary ſort are, ſuch as are conſtituted for the perpetual diſtribution of the free alms, or bounty, of the founder of them to ſuch perſons as he has directed. Of this kind are all hoſpitals for the maintenance of the poor, ſick, and impotent: and all colleges, both *in* our Univerſities, and *out* of them. Such as at *Weſtminſter*, *Eaton*, *Wincheſter*, &c. which colleges are founded for two purpoſes; 1. For the promotion of piety and learning, by proper regulations and ordinances. 2. For imparting aſſiſtance to the members of thoſe bodies, in order to enable them to proſecute their devotion and ſtudies with greater eaſe and aſſiduity. And all theſe eleemoſynary corporations are, ſtrictly ſpeaking, *lay*, and not eccleſiaſtical, even though compoſed of eccleſiaſtical perſons, and although they in ſome things partake of the nature, privileges, and reſtrictions of eccleſiaſtical bodies. 1 *Ld. Raym.* 6. They are, in fact, lay corporations, becauſe they are not ſubject to the juriſdiction of the eccleſiaſtical courts, or to the viſitations of the Ordinary or Dioceſan in their ſpiritual characters. 1 *Comm.* 471.

I. *How Corporations are created.*
II. *Their Intereſt and Juriſdiction.*
III. *How far their Acts are binding.*
IV. *How they are viſited.*
V. *How they are diſſolved.*

I. Bodies Politic or incorporate may commence and be eſtabliſhed three manner of ways, *viz.* by *preſcription*, by *letters-patent*, or by *act of parliament*; but moſt commonly begin by patent or charter. 1 *Inſt.* 250: 3 *Inſt.* 202: 3 *Rep.* 73.

In making aggregate *corporations*, there muſt be, 1. Lawful authority. 2. Proper perſons to be incorporated. 3. A name of incorporation. 4. A place, without which no *corporation* can be made. 5. Words ſufficient in law to make a *corporation*. 10 *Rep.* 29, 123: 3 *Rep.* 73. The words *incorpora*, *funda*, &c. are not of neceſſity to be uſed in making *corporations*; but other words equivalent are ſufficient: and of ancient time, the inhabitants of a town were incorporated, when the King granted to them to have *Guildam Mercatoriam*. 2 *Danv. Abr.* 214. He that gave the firſt poſſeſſions to the *corporation*, is the founder. The pariſhioners or townſmen of a pariſh or town; and tenants of a manor, are to ſome purpoſes a *corporation*. *Co. Lit.* 95, 342.

If the King grants lands to the inhabitants of *B. their heirs and ſucceſſors*, rendering a rent, for any thing touching theſe lands, this is a *corporation*; though not to other purpoſes: but if the King grants lands to the inhabitants of *B.* and they be not incorporated before, if no rent be reſerved to the King, the grant is void. 2 *Danv.* 214. If the King grants to the men of *Iſlington* to be diſcharged of toll, this is a good *corporation* to this intent; but not to purchaſe, &c. And by ſpecial words the King may make a limited *corporation*, or a *corporation* for a ſpecial purpoſe. *Ibid.*

London is a *Corporation* by preſcription: but though a *corporation* may be by preſcription, it ſhall be intended that it did originally derive its authority by grant from the King; for the King is the head of the commonwealth, and all the commonwealth, in reſpect of him, is but one *corporation*; and all other *corporations* are but limbs of the greater body. 1 *Lil. Abr.* 330. A mayor and commonalty or *corporation*, cannot make another *corporation*, or commonalty. 1 *Sid.* 290. The city of *London* cannot make a *corporation*, becauſe that can only be created by the crown; but *London*, or any other *corporation*, may make a *fraternity*. 1 *Salk.* 193.

The parliament, by its abſolute and tranſcendent authority, may perform this, or any other act whatſoever: and actually did perform it to a great extent, by *Stat.* 39 *Eliz. c.* 5; which incorporated all hoſpitals and houſes of correction founded by charitable perſons, without farther trouble: and the ſame has been done in other caſes of charitable foundations. But otherwiſe it has not formerly been uſual thus to intrench upon the prerogative of the Crown; and the King may prevent it when he pleaſes. And, in the particular inſtance before-mentioned, it was done, as Sir *Edward Coke* obſerves, 2 *Inſt.* 722, to avoid the charges of incorporation and licences of mortmain in ſmall benefactions; which in his days were grown ſo great, that they diſcouraged many men from undertaking theſe pious and charitable works.

The King (it is ſaid) may grant to a Subject the power of erecting corporations; (*Bro. Abr.* tit. *Prerog.* 53: *Viner Prerog.* 88. *pl.* 16. though the contrary was formerly held. *Year Book.* 2 *Hen.* 7. 13;) that is, he may permit the Subject to name the perſons and powers of the corporation at his pleaſure; but it is really the King that erects, and the Subject is but the inſtrument: for though none but the King can make a corporation, yet *qui facit per alium, facit per ſe.* 10 *Rep.* 33. In this manner the Chancellor of the Univerſity of *Oxford*, has power by charter to erect corporations; and has actually often exerted it, in the erection of ſeveral matriculated companies, now ſubſiſting, of tradeſmen ſubſervient to the ſtudents.

When a Corporation is erected, a name muſt be given to it; and by that name alone it muſt ſue and be ſued, and do all legal acts; though a very minute variation therein is not material. 10 *Rep.* 122. Such name is the very being of its conſtitution; and, though it is the will of the King that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions. *Gilb. Hiſt. C. P.* 182. The name of incorporation, ſays Sir *Edward Coke*, is as a proper name, or name of baptiſm; and therefore when a private founder gives his college or hoſpital a name, he does it only as a godfather; and by that ſame name the King baptiſes the Corporation. 10 *Rep.* 28.

And it may change its name, as corporations frequently do in new charters, and will ſtill retain its former rights and privileges. 4 *Co.* 87.

No perſons ſhall bear office in any *corporation*, &c. but ſuch as have received the ſacrament of the church, and taken the oaths. *Stat.* 13 *Car.* 2. *ſt.* 2. *c.* 1. But ſee the *Stat.* 5 *Geo.* 1. *c.* 6, confirming officers in *corporations*. See title *By Laws. Oaths*, *Nonconformiſts*.

What perſons are capable of being elected members of a *corporation*, See *Hardw.* 23.

II. When a *Corporation* is duly created, all incidents, as, to purchaſe and grant, ſue and be ſued, &c. are tacitly annexed to it; and although no power to make laws, ſtatutes or ordinances, is given by a ſpecial clauſe to a *corporation*, it is included by law in the very act of incorporating. *Co. Lit.* 264. A new charter doth not merge or

or extinguiſh any of the ancient privileges of the old charter. And if an ancient *corporation* is incorporated by a new name, yet their new body ſhall enjoy all the privileges that the old *corporation* had. *Raym.* 439: 4 *Rep.* 37.

There are uſually granted in charters to *corporations*, divers franchiſes; as felons' goods, waifs, eſtrays, treaſure-trove, deodands, courts, and cogniſance of pleas, fairs, markets, aſſiſe of bread and beer, *&c.* 4 *Rep.* 65. Actions ariſing in *corporations* may be tried in the *corporation* courts; but if they try actions which ariſe not within their juriſdictions, and encroach upon the Common law, they ſhall be puniſhed for it. *Lutw.* 1571, 1572. Actions triable there, muſt, in general, mean, thoſe actions wherein the corporation is not intereſted.

There may be a *corporation* without a head: but where there is a head, all acts ought to be by and to the head; nor can they ſue without ſuch head; and if he dies, nothing can be done in the vacancy. 10 *Rep.* 30, 32: *Co. Lit.* 264. If land be given to a mayor and commonalty for their lives, they have an eſtate by intendment not determinable: ſo it is, if a feoffment be made of land to a dean and chapter, without mention of ſucceſſors.

In a caſe of *Sole Corporation*, as biſhop, dean, parſon, *&c.* no *chattel*, either in action or poſſeſſion, ſhall go in ſucceſſion; but the executors or adminiſtrators of the biſhop, parſon, *&c.* ſhall have them: but it is otherwiſe of a *corporation aggregate*, as a dean and chapter, mayor and commonalty, and the like: for they in the judgment of law never die. But the caſe of the *Chamberlain of London* differs from all theſe; his ſucceſſor, in his own name, may have execution of a recogniſance acknowledged to his predeceſſor for *orphanage* money; and the reaſon is, becauſe the *corporation* of the chamberlain is by *cuſtom*, which hath enabled the ſucceſſor to take and have ſuch recognizances, obligations, *&c.* that are made to his predeceſſor. *Terms de Ley.*

Though a *Sole Corporation* cannot generally take in ſucceſſion *goods* and *chattels*, *&c.* yet it may take a *fee-ſimple* in ſucceſſion, by the word Sucoeſſors. *Co. Lit.* 8, 9, 46. *Aggregate corporations* may take not only goods and chattels, but lands in fee-ſimple, without the word Succeſſors, for the reaſon before-mentioned. 4 *Inſt.* 249. Succeſſion in a body politic, is an inheritance in a body private. If a leaſe for years be made to a biſhop and his ſucceſſors, it is ſaid his executors ſhall have it *in auter droit*; for regularly no chattel can go in ſucceſſion in caſe of a ſole *corporation*, no more than if a leaſe be made to a man and his heirs, it can go to his heirs. *Co. Lit.* 46.

Grants of *corporations* are to be by deed, under their common ſeal, and are good without delivery; for the common ſeal gives perfection to *corporation* deeds. *Dav.* 44. An obligation ſealed with the common ſeal of a *corporation*, if the mayor ſigns it, he is ſuable, if the *corporation* be diſſolved: but if two of the members ſign it, the particular perſons are not bound by it. 2 *Lev.* 137: *Raym.* 152. A releaſe of a mayor for any ſum of money due to the *corporation*, made in his own name, is not good in law; the *corporation* muſt join and do it by their common ſeal. *Terms de Ley.*

A *Corporation* which hath a head, may make a perſonal command without writing; but a *corporation* aggregate without a head cannot. *Lutw.* 1497. A *corporation* aggregate may employ any one in ordinary ſervices, without deed; though not to appear for them, in any act which concerns their intereſt or title. 1 *Ventr.* 47, 48. Such a *corporation* may appoint a bailiff to take a diſtreſs, without deed or warrant. 1 *Salk.* 191. But cannot without deed command a bailiff to enter into lands for a condition broken; for ſuch command without deed is void. *Cro.* 815.

Though a *Corporation* cannot do an act *in pais* without their common ſeal, they may do an act upon record; and the reaſon is, becauſe they are eſtopped by the record to ſay it is not their act. 1 *Salk.* 192. A promiſe to a *corporation* is good without deed. 2 *Lev.* 252. The head of a *corporation* aggregate may not be charged with the act of his predeceſſor if it be not by common ſeal, or for ſuch things as come to the uſe of the whole body or ſociety. 1 *And.* 23, 196.

A *Corporation* may do an act in that capacity, to one of themſelves in his natural capacity; and any member in his natural capacity may perform an act to the *corporation* in his politic capacity; and ſo they may ſue one another, in their diſtinct capacities. 1 *Shep. Abr.* 436. Treſpaſs for an aſſault and battery, *&c.* will not lie againſt a *corporation*; but it muſt be brought againſt the perſons that do the treſpaſs by their proper names: though if the beaſts of the *corporation* treſpaſs on a man in his ground, action of treſpaſs lies againſt them for this. Proceſs of outlawry will not lie againſt a *corporation*; nor *capias* or exigent, but diſtreſs. 22 *Aſſ.* 67: 39 *Ed.* 3. 13: 21 *Ed.* 4.

A *Corporation* cannot ſue, or appear in perſon, but by attorney: they cannot commit treaſon or felony, or be excommunicate, *&c.* They may not be executors, or adminiſtrators, be jointenants, truſtees, *&c.* Nor ſhall the members of a *corporation* be regularly witneſſes for the *corporation*. 10 *Rep.* 32: 11 *Rep.* 98: *Co. Lit.* 134. But they may be diſfranchiſed, and then be witneſſes; though not ſurrender by conſent. Yet in ſome caſes the judges now admit their teſtimony without diſfranchiſement, where the *intereſt* is *remote*. Attachment doth not lie againſt a *corporation*. *Raym.* 152.

Corporations may have power not only to infranchiſe freemen but to diſfranchiſe a member, and deprive him of his freedom; if he doth any act to the prejudice of the body, or contrary to his oath, *&c.* Though for conſpiring to do any thing contrary to his duty, or for words of contempt againſt the chief officers, he may not be diſfranchiſed; but he may be committed till he find ſureties for his good behaviour. 11 *Rep.* 98: 5 *Mod.* 257. A *corporation* cannot diſfranchiſe for breach of a by-law. 1 *Lil.* 331. And one wrongfully diſfranchiſed may be reſtored, and have his remedy by *mandamus*, &c. in *B. R.* An alderman or freeman of a corporation cannot be removed from his freedom or place without good cauſe, and a cuſtom to remove them *ad libitum* is void, becauſe the party hath a freehold therein. *Cro. Jac.* 540.

A perſon may be bound to the good behaviour for words ſpoke againſt mayors, *&c.* but he may not be indicted for it: and if juſtices of a *corporation* deny to do right, it is a forfeiture of their exemption from the inquiry of the juſtices of the county. *Mod. Caſ.* 125, 164. Head officers of *corporations* are to redreſs abuſes of merchant-ſtrangers, *&c.* or the franchiſe ſhall be ſeized, *Stat.* 9 *Eliz. c.* 3. *ſect.* 1; and have authority in many caſes by ſtatute; for which ſee title *Mayors.*

No ſtrangers ſhall ſell by retail any woollen or linen cloth, or mercery wares, in *corporate towns*, except at fairs,

fairs, on pain of forfeiture, &c. But such persons may sell wares by wholesale, and cloth of their own making by retail. 1 & 2 *P. & M. cap.* 7. Bodies politic ecclesiastical may make leases for three lives, or twenty-one years, under the restrictions in the acts 1 *Eliz. c.* 19: 13 *Eliz. c.* 20.—See title *Leases*. If land is given in fee to a dean and chapter, or to a mayor and commonalty, &c. and after, such body politic or incorporate is dissolved, the donor shall have the land again, and not the lord by escheat. *Co. Lit.* 31.

The *Corporation* of the city of *London* is to answer for all particular misdemeanors, which are committed in any of the courts of justice within the city; and for all other general misdemeanors committed within the city; so it is conceived of all other *corporations*. 1 *Lil. Abr.* 329. If a common officer of a town doth any thing for their common use, it is reasonable the corporate town should be answerable for it. 1 *Leon.* 215.

III. A CORPORATION is properly an investing the people of the place with the local government thereof, and therefore their laws shall be binding to strangers; but a *Fraternity* is some people of a place united together in respect of a mystery and business into a company, and their laws and ordinances cannot bind strangers, for they have not a local power. *Salk.* 193.

No masters and wardens, &c. of any mystery, or other *corporation*, shall make any by-laws or ordinances in diminution of the King's prerogative, or against the common profit of the people; except the same be approved by the Lord Chancellor, or Chief Justices, &c. on pain of 40*l.* And such bodies corporate shall not make any acts or ordinances for the restraining persons to sue in the King's courts for remedy, &c. under the like penalty. *Stat.* 19 *Hen.* 7. *cap.* 7. Ordinances made by *corporations*, to be observed on pain of imprisonment, or of forfeiture of goods, &c. are contrary to *Magna Charta*. 2 *Inst.* 47, 54.

But penalties may be inflicted by by-laws, which may be recovered by distress or action of debt: and a custom for the Lord Mayor and Aldermen of *London*, to commit a citizen for not accepting of the livery, &c. was held a good custom, being for the good government of the city. 5 *Mod.* 320.

Corporations may not, by bond, or otherwise, restrain any apprentice, &c. from keeping shop in the *corporation*, under the penalty of 40*l.* *Stat.* 28 *H.* 8. *c.* 5.—See title *By-Laws*.

In acts done by *corporations*, the consent of the major part shall be binding. *Stat.* 33 *H.* 8. *c.* 27.

This act clearly vacates all private statutes, both prior, and subsequent to its date, which require the concurrence of more than a majority to give validity to any grant or election. *Blackstone*, (1 *Comm.* 478,) is of opinion, that it has not affected the negative given by the statutes to the Head of any society; but it seems that this opinion may be questioned; especially in cases where, in the first instance, he gives his vote with the members of the society. It is the usual language of college statutes to direct that many acts shall be done by *guardianus & major pars sociorum*, or *magister*, or *præpositus et major pars*; and it has been determined by the Court of King's Bench, (*Cowp.* 377) and by the visitor of *Clare-Hall, Cambridge*, and also by the visitors of *Dublin* college, that this expression does not confer upon the warden, master, or provost, any negative; but that his vote must be counted with the rest, and he is concluded by a majority of votes against him.

IV. CORPORATIONS being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to *visit*, inquire into, and correct all irregularities that arise in such corporations, either sole, or aggregate, and whether ecclesiastical, civil, or eleemosynary. With regard to all ecclesiastical corporations, the Ordinary is their visitor, so constituted by the cannon law, and from thence derived to us. The Pope formerly, and now the King, as supreme Ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses, are in ecclesiastical matters the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations. With respect to all *lay* corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary; for in a lay incorporation, the Ordinary neither can nor ought to visit. 10 *Rep.* 31.

The founder of all corporations in the strictest and original sense is, the King alone, for he only can incorporate a society; and in civil incorporations, such as mayor and commonalty, &c. where there are no possessions or endowments given to the body, there is no other founder but the king: but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation; the one *fundatio incipiens*, or the incorporation, in which sense the King is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder: and it is in this last sense that we generally call a man the founder of a college or hospital. 10 *Rep.* 33. But here the King has his prerogative; for, if the King and a private man join in endowing an eleemosynary foundation, the King alone shall be the founder of it. And, in general the King being the sole founder of all civil corporations, and the endower the *perficient* founder of all eleemosynary ones, the right of visitation of the former, results, according to the rule laid down, to the King; and of the latter to the Patron or endower.

The King being thus constituted by law visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction: which is the Court of King's Bench; where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and all their controversies decided. However though the Court of King's Bench, upon a proper complaint and application, can prevent and punish injustice in civil corporations, as in every other part of their jurisdiction; it is not the *language of the profession*, to call that part of their authority a visitatorial power. 1 *Comm.* 481. *n.*

As to eleemosynary corporations, by the dotation, the founder and his heirs are of common right the legal visitors; but, if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed is invested with all the founder's power, in exclusion of

his

his heir. Eleemoſynary corporations are chiefly hoſpitals, or colleges in the Univerſities; theſe were all of them conſidered, by the popiſh clergy, as of mere eccleſiaſtical juriſdiction: however, the law of the land judged otherwiſe; and, with regard to hoſpitals, it has long been held, (*Y. B.* 8 *Ed.* 3. 28: 8 *Aſſ.* 29;) that if the hoſpital be ſpiritual, the biſhop ſhall viſit; but if lay, the patron. This right of lay patrons was indeed abridged by *Stat.* 2 *Hen.* 5. *c.* 1; which ordained, that the Ordinary ſhould viſit *all* hoſpitals founded by Subjects; though the King's right was reſerved, to viſit by his commiſſioners ſuch as were of royal foundation. But the Subject's right was in part reſtored by *Stat.* 14 *Eliz. c.* 5; which directs the biſhop to viſit ſuch hoſpitals only, where no viſitor is appointed by the founder thereof: and all hoſpitals founded by virtue of the *Stat.* 39 *Eliz. c.* 5, are to be viſited by ſuch perſons as ſhall be nominated by the reſpective founders. But ſtill, if the founder appoints nobody, the biſhop of the dioceſe muſt viſit. 2 *Inſt.* 275.

Colleges in the Univerſities, (whatever the common law may now, or might formerly judge) were certainly conſidered by the popiſh clergy. under whoſe direction they were, as *eccleſiaſtical*, or at leaſt as *clerical* corporations; and therefore the right of viſitation was claimed by the Ordinary of the dioceſe. This is evident, becauſe in many of our moſt antient colleges, where the founder had a mind to ſubject them to a viſitor of his own nomination, he obtained for that purpoſe a papal bull, to exempt them from the juriſdiction of the Ordinary; ſeveral of which are ſtill preſerved in the archives of the reſpective ſocieties. And in ſome of our colleges, where no ſpecial viſitor is appointed, the biſhop of that dioceſe, in which *Oxford* was formerly compriſed, has immemorially exerciſed viſitatorial authority; (that is, the Biſhop of *Lincoln*, from whoſe dioceſe that of *Oxford* was taken;) which can be aſcribed to nothing elſe, but his ſuppoſed title as Ordinary to viſit this, among other eccleſiaſtical foundations.

But, whatever might be formerly the opinion of the Clergy, it is now held as eſtabliſhed Common law, that colleges are lay corporations, though ſometimes totally compoſed of eccleſiaſtical perſons; and that the right of viſitation does not ariſe from any principles of the canon law, but of neceſſity was created by the common law. *Ld. Raym.* 8. And yet the power and juriſdiction of viſitors in colleges was left ſo much in the dark at common law, that the whole doctrine was very unſettled till the famous caſe of *Philips* v. *Bury*: (*Ld. Raym.* 5: 4 *Mod.* 106:) In this the main queſtion was, whether the ſentence of the Biſhop of *Exeter*, who, (as viſitor) had deprived Doctor *Bury*, the Rector of *Exeter* college, could be examined and redreſſed by the Court of King's Bench. And the three puiſne judges were of opinion, that it might be reviewed, for that the viſitor's juriſdiction could not exclude the common law; and accordingly judgment was given in that court. But Lord Chief Juſtice *Holt* was of a contrary opinion; and held, that by the common law, the office of viſitor is to judge according to the ſtatutes of the college, and to expel and deprive upon juſt occaſions, and to hear all appeals of courſe: and that from him, and him only, the party grieved ought to have redreſs: the Founder having repoſed in him ſo entire a confidence, that he will adminiſter juſtice impartially, that his determinations are final, and examinable in no other court whatever. And, upon this, a writ of error being brought into the Houſe of Lords, they concurred in Sir *John Holt*'s opinion, and reverſed the judgment of the Court of King's Bench. To which leading caſe all ſubſequent determinations have been conformable. But, where the viſitor is under a temporary diſability, there the Court of King's Bench will interpoſe, to prevent a defect of juſtice. *Sera.* 797. Alſo it is ſaid, (2 *Lutw.* 1566,) that if a founder of an eleemoſynary foundation appoints a viſitor, and limits his juriſdiction by rules and ſtatutes, if the viſitor in his ſentence exceeds thoſe rules, an action lies againſt him; but it is otherwiſe, where he miſtakes in a thing within his power.

No particular form of words is neceſſary for the appointment of a viſitor. *Sit viſitator*, or *viſitationem commendamus*, will create a general viſitor, and confer all the authority incidental to the office; (1 *Burr.* 199;) but this general power may be reſtrained and qualified, or the viſitor may be directed by the ſtatutes to do particular acts, in which inſtance he has no diſcretion as viſitor; as where the ſtatutes direct the viſitor to appoint one of two perſons, nominated by the fellows, to be the Maſter of a college, the Court of King's Bench will examine the nomination of the fellows, and if correct, will compel the viſitor to appoint one of the two. 2 *Term Rep.* 290. New ingrafted fellowſhips, if no ſtatutes are given by the founders of them, muſt follow the original foundation, and are ſubject to the ſame diſcipline and judicature. 1 *Burr.* 203. It is the duty of the viſitor, in every inſtance, to effectuate the intention of the founder, as far as he can collect it from the ſtatutes, and the nature of the inſtitution; and in the exerciſe of this juriſdiction, he is free from all control. Lord *Mansfield* has declared, that the viſitatorial power, if properly exerciſed, without expence or delay, is uſeful and convenient to colleges; and it is now ſettled and eſtabliſhed, that the juriſdiction of a viſitor is ſummary, and without appeal from it. 1 *Burr.* 200.—See 1 *Comm.* 479, *&c.*

V. A CORPORATION may be diſſolved, for it is created upon a truſt; and if that be broken it is forfeited. 4 *Mod.* 58.

Corporations are diſſolved by forfeiture of their charter, miſuſer, *&c.* upon the writ *quo warranto* brought; by ſurrender, or by act of parliament; and if they neglect to chooſe officers, or make falſe elections, *&c.* it is a forfeiture of the *corporation*. 4 *Rep.* 77.

Corporations may be diſſolved in ſeveral ways, which, diſſolution is the civil death of the corporation; and in this caſe their lands and tenements ſhall revert to the perſon, or his heirs, who granted them to the corporation; for the law doth annex a condition to every ſuch grant, that if the corporation be diſſolved, the grantor ſhall have the lands again, becauſe the cauſe of the grant faileth. *Co. Lit.* 13. The grant is indeed only during the life of the corporation; which *may* endure for ever: but, when that life is determined by the diſſolution of the body politic, the grantor takes it back by reverſion, as in the caſe of every other grant for life. The debts of a corporation, either to or from it, are totally extinguiſhed by it's diſſolution; ſo that the members thereof cannot recover, or be charged with them, in their natural capacities. 1 *Lev.* 237.

A Corporation

A Corporation may be diſſolved, 1. By act of parliament; which is boundleſs in its operations. 2. By the natural death of all it's members, in caſe of an aggregate corporation. 3. By ſurrender of its franchiſes into the hands of the king, which is a kind of ſuicide. 4. By forfeiture of it's charter, through negligence or abuſe of its franchiſe: in which caſe the law judges that the body politic has broken the condition upon which it was incorporated, and therefore the incorporation is void. And the regular courſe is to bring an information in nature of a writ of *quo warranto*, to inquire *by what warrant* the members now exerciſe their corporative power, having forfeited it by ſuch and ſuch proceedings: The exertion of this act of law, for the purpoſes of the State, in the reign of King *Charles* and King *James* the Second, particularly by ſeizing the charter of the City of *London*, gave great and juſt offence, though perhaps, in ſtrictneſs of law, the proceedings in moſt of them were ſufficiently regular: but the judgment againſt that of *London* was reverſed by act of parliament. *Stat.* 2 *W. & M. c.* 8, after the Revolution; and by the ſame *Stat.* it is enacted, that the franchiſes of the City of *London* ſhall never more be forfeited for any cauſe whatſoever. And, becauſe by the Common law corporations were diſſolved, in caſe the mayor or head officer was not duly elected on the day appointed in the charter, or eſtabliſhed by preſcription, it is now provided by *Stat.* 11 *Geo.* 1. *c.* 4, that no *corporation* ſhall be diſſolved, for any default to chooſe a mayor, *&c.* but the electors are ſtill to proceed to election; and if no election be made, the court of King's Bench ſhall iſſue a *mandamus* requiring the electors to chooſe ſuch mayor, *&c.*

By *Stat.* 2 *Ann. c.* 20. Where perſons intrude into the office of mayor, *&c.* of a *corporation*, a *quo warranto* ſhall be brought againſt the uſurpers, who ſhall be ouſted, and fined: and none are to execute an office in a *corporation* for more than a year. See further on this ſubject *Kyd's Treatiſe on the Law of Corporations*;—and ſee alſo particularly this Dict. titles *Mortmain*; *Mandamus*; *Quo warranto*.

To prevent improper conduct in *trading corporations* in *elections*, and in diſpoſing of the joint-ſtock, it is by *Stat.* 7 *Geo.* 3. *c.* 48, enacted, that no member of ſuch corporations ſhall be admitted to vote in the general courts, until he ſhall have been ſix months in poſſeſſion of the ſtock neceſſary to qualify him: unleſs it comes to him by bequeſt, marriage, ſucceſſion or ſettlement.—And by the ſame ſtatute, only one half yearly dividend is to be made by one general court, five months at leaſt from the preceding declaration of a dividend; and queſtions for increaſing the dividend are to be decided by ballot. See title *Eaſt India Company*.

To facilitate the proceedings in caſes of *mandamus* and *quo warranto*, and to prevent any undue advantage on either ſide, the *Stat.* 12 *Geo.* 3. *c.* 21, provides that where any perſon ſhall be entitled to be admitted a freeman, *&c.* of any *corporation*, *&c.* and ſhall apply to the proper officer to be admitted, and ſhall give notice of his intention to move the court of King's Bench for a *mandamus* in caſe of refuſal, the officer ſhall pay all the coſts of the application.—And the ſame ſtatute enacts, that the proper officer ſhall, on the demand of two freemen, permit them and their agents to inſpect the entries of admiſſion of freemen, and to take copies and extracts; under penalty of 100*l.*

CORPOREAL INHERITANCE, In houſes, lands, *&c.* See title *Inheritance*.

CORPSE, *ſtealing of*. If any one in taking up a dead body ſteals the ſhroud, or other apparel, it will be felony, 3 *Inſt.* 110: 12 *Rep.* 113: 1 *Hal. P. C.* 515. But ſtealing the corpſe itſelf, only, is not felony, but it is puniſhable as a miſdemeanor by indictment at Common law. 2 *Comm.* 236.

CORPUS CHRISTI DAY. A feaſt inſtituted in the year 1264, in honour of the bleſſed *ſacrament*: to which alſo a *college* in *Oxford* is dedicated. It is mentioned in the *Stat.* 32 *Hen.* 8. *cap.* 21.

CORPUS CUM CAUSA. A writ iſſuing out of the *Chancery*, to remove both the *body* and record, touching the cauſe of any man lying in execution upon a judgment for debt, into the *King's Bench*, *&c.* there to lie till he have ſatisfied the judgment. *F. N. B.* 251. See title *Habeas Corpus*.

CORRECTOR OF THE STAPLE. A clerk belonging to the *ſtaple*, to write and record the bargains of merchants there made. See *Stat.* 27 *Ed.* 3. *ſtat.* 2. *cc.* 22, 23.

CORREDIUM; CONREDIUM; The ſame with *corrodium*. See *Corody*.

CORRUPTION OF BLOOD, *corruptio ſanguinis.*] An infection growing to the ſtate of a man, and to his iſſue; and is where a perſon is attainted of *treaſon* or *felony*, by means whereof his blood is ſaid to be corrupted, and neither his children, nor any of his blood, can be heirs to him or any other anceſtor: alſo if he is of the nobility, or a gentleman, he and all his poſterity by the attainder are rendered baſe and ignoble: but by pardon of the King, the children born afterwards may inherit the land of their anceſtor, purchaſed at the time of the pardon or after; but ſo cannot they, who were born before the pardon. *Terms de Ley.*

If a man that hath land in right of his wife hath iſſue, and his blood is corrupt by attainder of felony, and the King pardons him; in this caſe, if the wife dies before him, he ſhall not be tenant by the curteſy, for the *corruption of the blood* of that iſſue: though it is otherwiſe, if he hath iſſue after the pardon; for then he ſhould be tenant by the curteſy, although the iſſue which he had before the pardon be not inheritable. 13 *H.* 7. 17.

A ſon attainted of treaſon or felony in the life of his anceſtor, obtains the King's pardon before the death of his anceſtor, he ſhall not be heir to the ſaid anceſtor, but the land ſhall rather eſcheat to the lord of the fee by the *corruption of blood.* 26 Aſſ. pl. 32 H. 8.

If the father of a perſon attainted die ſeiſed of an eſtate of inheritance, during his life, no younger brother can be heir; for the elder brother, though attainted, is ſtill a brother, and no other can be heir to his father, while he is alive; but if he die before the father, the younger brother ſhall be heir. 2 *Hawk. P. C. c.* 49. § 49. See further *Co. Lit.* 8, 391: *Dyer* 48: 3 *Inſt.* 211.

Corruption of blood from an attainder is ſo high that it cannot be abſolutely ſalved but by *act of parliament*; for the King's pardon doth not reſtore the blood ſo as to make the perſon attainted capable either of inheriting others, or being inherited himſelf by any one born before the pardon. 1 *Inſt.* 391, 392: 2 *Hawk.* ——. A ſtatute which ſaves the *corruption of blood*, impliedly ſaves the deſcent of the land to the heir; and it prevents the *corruption of*

blood so far: also it saves the wife's dower, &c. But nevertheless the land shall be forfeited for the life of the offender. 3 *Inst.* 47: 1 *Hawk. P. C. c.* 41. § 5.—See further titles *Attainder*; *Forfeiture*; *Escheat*; *Tenure*, &c.

CORSELET, *Fr.* in Lat. *Corpusculum.*] A little body: The name of an ancient armour used to cover the body or trunk of a man, wherewith *pikemen* commonly set in the front and flanks of the battle were formerly armed, for the better resistance of the assaults of the enemy, and the surer guard of the soldiers placed behind; who were more slightly armed for their speedier advancing to and retreating from the attack. 4 & 5 *P. & M. c.* 2.

CORSEPRESENT, From the Fr. *corps present.*] A mortuary: and the reason why it was thus termed seems to be, that where a mortuary became due on the death of any man, the best or second-best beast was, according to custom, offered or *presented* to the priest, and carried with the *corps*. See *Stat.* 21 *H.* 8. *c.* 6. and this Dict. title *Mortuary*.

CORSNED BREAD, *panis conjuratus.*] *Ordeal bread*: it was a kind of superstitious trial used among the *Saxons*, to purge themselves of any accusation, by taking a piece of barley bread, and eating it with solemn oaths and execrations, that it might prove *poison*, or their last morsel, if what they asserted or denied were not punctually true. These pieces of bread were first execrated by the priest, and then offered to the suspected person to be swallowed by way of purgation: for they believed a person, if guilty, could not swallow a morsel so accursed; or if he did, it would choak him.

The form was thus: *We beseech thee, O Lord, that he who is guilty of this theft, when the exorcised bread is offered to him in order to discover the truth, that his jaws may be shut, his throat so narrow that he may not swallow, and that he may cast it out of his mouth, and not eat it.* Du Cange. The old form, or *exorcismus panis hordeacei vel casei ad probationem veri*, is extant in *Lindenbrogius, pag.* 107. And in the laws of King *Canute cap.* 6.—*Si quis altari ministrantium accusetur, & amicis destitutus sit, cum sacramentales non habeat, vadat ad judicium, quod Anglicè dicitur* corsned *& fiat sicut Deus velit, nisi super sanctum corpus Domini permittatur ut se purget*: from which it is conjectured, that *corsned bread* was originally the very sacramental bread, consecrated and devoted by the priest, and received with solemn adjuration and devout expectance that it would prove mortal to those who dared to swallow it with a lie in their mouths; till at length the bishops and clergy were afraid to prostitute the communion bread to such rash and conceited uses; when to indulge the people in their superstitious fancies, and idle customs, they allowed them to practise the same judicial rite, in eating some other morsels of bread, blest or cust to the like uses.

It is recorded of the perfidious *Godwin, Earl of Kent*, in the time of King *Edward the Confessor*, that on his abjuring the murder of the King's brother, by this way of trial, as a just judgment of his solemn perjury, the bread stuck in his throat, and choaked him. *Ingulph.* This with other barbarous ways of purgation, was by degrees abolished: though we have still some remembrance of this superstitious custom in our usual phrases of abjuration; as, *I will take the sacrament upon it*;—*May this bread be my poison*;—or, *May this bit be my last*, &c. See title *Ordeal*.

CORTIS, *curtis.*] A court or yard before a house. *Blount.*

CORTULARIUM, *curtilagium.*] A yard adjoining to a country farm. *Cartul. Glaston. MS. f.* 42.

CORUS, A certain corn-measure heaped up, from the Hebr. *cora*, a *hill*: eight bushels of wheat in a heap, making a quarter, are of the shape of a little hill; and probably a *corus* of wheat was eight bushels; *Decem* coros *tritici, five decem quarteria.* Bract. lib. 2. c. 6.

COSDUNA, custom or tribute. *Mon. Angl. tom.* 1. *p.* 562.

COSENAGE or COSINAGE, Fr. *cousinage,*] i. e. kindred, cousinship: is used for a writ that lies where the *tresail*, that is, the father of the *besail*, or great grandfather, being seised of lands and tenements in fee at his death, and a stranger enters upon the heir and abates; then shall his heir have his writ of *cosinage. Brit. c.* 89: *F. N. B.* 221. See title *Assise of Mort d'Ancestor.*

COSENING, Is an offence where any thing is done deceitfully, whether belonging to contracts or not, which cannot be properly termed by any special name. *West. Symb. p.* 2. *sect.* 68. See title *Cheats.*

COSHERING. As there were many privileges inherent by right and custom, allowed in the *feudal* laws; so were there several grievous exactions imposed by the lords on their tenants, by a sort of prerogative or senioral authority, as to lie and feast themselves and their followers at their tenants' houses, &c. which was called *cosshering. Spelm. of Parliaments. MS.*

COSMUS, From the Greek, κοσμος.] Clean. *Blount.*

COSTARD, An Apple. whence *costard-monger*, i. e. Seller of apples. *Cartular. Abbat. Reading MS. fol.* 9: 6.

COSTERA, Coast, sea-coast. *Memor. in Scaccar. Pasch.* 24 *Ed.* 1.

COSTS.

EXPENSÆ LITIS.] In the prosecution and defence of actions, the parties are necessarily put to certain expences, or as they are commonly called *Costs*; consisting of money paid to the King and Government for fines and stamp duties; to the officers of the court; and to the counsel and attornies for their fees, &c.

These costs may be considered either as between *attorney* and *client*; being what are payable in every case to the attorney, by his client, whether he ultimately succeed or not; or as between *party* and *party*, being those only which are allowed, in some particular cases, to the party succeeding against his adversary. As between party and party, they are *interlocutory* or *final*; the former are given on various interlocutory motions and proceedings in the course of the suit.—the latter, (to which the term of costs is most generally applied, and the rules respecting which are of the most consequence) are not allowed till the conclusion of the suit.

The following abstract of the law relating hereto, is taken principally from *Tidd's Law of Costs*; a short and comprehensive abridgement; to which, and the various other productions on the subject, the practitioner must necessarily have frequent recourse in nice and particular cases.

It will be sufficient for the present purpose, to arrange the information on this subject in the following manner.

I. *In*

COSTS I.

I. *In what Caſes Coſts are given to the Plaintiff.*
II. *In what, to the Defendant.*
III. *Of double and treble Coſts.*
IV. *Of taxing and recovering Coſts.*

I. No coſts were recoverable by the plaintiff or defendant at Common law. 2 *Inſt.* 288: *Hardr.* 152. But by the *Stat.* of *Glouceſter*, (6 *Edw.* 1.) *c.* 1. § 2, it is provided, "that the demandant may recover againſt the tenant the coſts of his *writ* purchaſed; (which, by a liberal interpretation, has been conſtrued to extend to the *whole* coſts of his ſuit, 2 *Inſt.* 288;), together with the damages given by that ſtatute *and that this act ſhall hold place, in all caſes where a man recovers damages.*" This was the origin of coſts *de incremento*. *Gilb. Eq. Rep.* 195. And hence the plaintiff has, generally ſpeaking, a right to coſts, in all caſes where he was entitled to damages, antecedent to, or by the proviſions of the *Stat.* of *Glouceſter*; (10 *Co.* 116 *a*;) as in *aſſumpſit*, covenant, debt on contract, caſe, treſpaſs, replevin, ejectment, *&c.*; or where, by a ſubſequent ſtatute, *double* or *treble* damages are given, in a caſe where *ſingle* damages were before recoverable; (10 *Co.* 116 *a*: 2 *Inſt.* 289: *Cowp.* 368;) as upon *Stat.* 2 *Hen.* 4. *c.* 11, for ſuing in the Admiralty Court; (10 *Co.* 116 *a*, *b*: *Dyer* 159 *b*: *Carth.* 297;) upon *Stat.* 8 *Hen.* 6. *c.* 9. for a forcible entry; (10 *Co.* 115 *b*: *Co. Lit.* 257 *b*: 2 *Inſt.* 289: *Cro. El.* 582;) or upon *Stat.* 2 & 3 *W. & M. ſeſſ.* 1. *c.* 5, for reſcuing a diſtreſs for rent. (*Carth.* 321: 1 *Salk.* 205: 1 *Ld. Raym.* 19: *Skin.* 555: *Holt* 172. S. C.) And he hath alſo a right to coſts, in all caſes where a certain *penalty* is given by ſtatute to the party grieved; (*Cro. Car.* 560: 1 *Rol. Abr.* 574: *Skin.* 363: *Carth.* 230: 1 *Salk.* 206: 1 *Ld. Raym.* 172: *Say. Coſts* 11: *H. Black.* 10;) for otherwiſe the remedy might prove inadequate.

But the *Stat.* of *Glouceſter* did not extend to caſes where *no* damages were recoverable at Common law, as in *ſcire facias*, *prohibition*, (*Comb.* 20,) *&c.*; nor where *double* or *treble* damages were given by a ſubſequent ſtatute, in a new caſe where *ſingle* damages were not before recoverable; as in *waſte* againſt tenant for life or years; (2 *Hen.* 4. 17: 9 *Hen.* 6. 66 *b*: 10 *Co.* 116 *b*: 2 *Inſt.* 289;) upon the *Stat.* of *Glouceſter*, (6 *Edw.* 1. *c.* 5,);—for not ſetting out tithes; (*Moor* 915: *Noy* 136: *Hardr.* 152;) upon *Stat.* 2 & 3 *Ed.* 6. *c.* 13;—or for driving a diſtreſs out of the hundred, (2 *Inſt.* 289: *Dyer* 177: But ſee *Cro. Car.* 560: 1 *Roll. Abr.* 574,) upon *Stat.* 1 & 2 *P. & M. c.* 12.—Nor does this ſtatute extend to *popular* actions, where the whole or part of a penalty is given by ſtatute to a common informer; (1 *Roll. Abr.* 574: 1 *Vent.* 133: *Carth.* 231: 1 *Salk.* 206: 1 *Ld. Raym.* 172: *Caſ. Pr. C. B.* 87: *Barnes* 124. S. C: *Cowp.* 366: 1 *H. Black.* 10: *Bull. N. P.* 333;) as upon *Stat.* 5 *Eliz. c.* 4. § 31, for exerciſing a trade, without having ſerved an apprenticeſhip; or upon the *Stat.* of *Uſury*, 12 *Ann. ſtat.* 2. *c.* 16. In theſe and ſuch like caſes, therefore, the plaintiff is not entitled to coſts, unleſs they are expreſsly given him by the ſtatute; but wherever they are ſo given, he is of courſe entitled to them.

Where *ſingle* damages are given by a ſtatute, ſubſequent to the *Stat.* of *Glouceſter*, in a new caſe wherein no damages were previouſly recoverable, it has been doubted whether the plaintiff ſhall recover coſts, if they are not mentioned in the ſtatute. The rule in *Pilfold*'s caſe is, that he ſhall not; (10 *Co.* 116 *a*;) and accordingly it is holden, that he is not entitled to coſts in *quare impedit*; (2 *Hen.* 4. 17: 27 *Hen.* 6. 10: 10 *Co.* 116 *a*: 2 *Inſt.* 289, 362: *Barnes* 140: And ſee *Cro. Car.* 360: *Carth.* 231: *Cowp.* 367, 8;) wherein damages are given by the *Stat.* of *Weſtm.* 2. (13 *Edw.* 1.) *c.* 5. § 3. But the rule in *Pilfold*'s caſe is contradicted by Lord *Coke* himſelf, (2 *Inſt.* 289,) who ſays, that "this clauſe (reſpecting the *St.* of *Glouceſter*'s holding place, in all caſes where a man recovers damages,) doth extend to give coſts, where damages are given to any demandant or plaintiff in any action by any ſtatute made *after* this parliament." And the rule has been ſince narrowed, by ſeveral modern deciſions; from whence it may be collected, that the plaintiff is entitled to coſts, in all caſes where ſingle damages are given by ſtatute to the party grieved, although coſts are not particularly mentioned in the ſtatute. 2 *Wilſ.* 91: *Barnes* 151. S. C: 3 *Bur.* 1723: 1 *Term Rep.* 71: But ſee the opinion of *Aſton*, Juſt. *cont. Cowp.* 367, 8.

In ſeveral of the foregoing caſes, wherein coſts were not recoverable by the plaintiff at Common law, they are expreſsly given him by *Stat.* 8 & 9 *W.* 3. *c.* 11, by which it is enacted, that "in all actions of *waſte*, and actions of debt upon the ſtatute for not ſetting forth *tithes*, wherein the ſingle value or damage found by the jury ſhall not exceed the ſum of twenty nobles; and in all ſuits upon any writ or writs of *ſcire facias*, and ſuits upon *prohibitions*, the plaintiff obtaining judgment, or any award of execution, after plea pleaded or demurrer joined therein, ſhall likewiſe recover his coſts of ſuit; and if the plaintiff ſhall become nonſuit, or ſuffer a diſcontinuance, or a verdict ſhall paſs againſt him, the defendant ſhall recover his coſts, and have execution for the ſame by *capias ad ſatisfaciendum*, *fieri facias*, or *elegit*."

The plaintiff's general right to Coſts being thus ſettled and eſtabliſhed, upon the footing of the *Stat.* of *Glouceſter*, has been ſince altered, reſtrained and modified by ſeveral ſubſequent ſtatutes.

To prevent trifling and malicious actions for *words*, for *aſſault* and battery, and for *treſpaſs*, it is enacted by *Stats.* 43 *Eliz. c.* 6: 21 *Jac.* 1. *c.* 16: 22 & 23 *C.* 2. *c.* 9. § 136, that where the jury who try any of theſe actions ſhall give leſs damages than 40*s.* the plaintiff ſhall be allowed no more Coſts than damages: unleſs the judge before whom the cauſe is tried ſhall certify under his hand, on the back of the record, that an *actual battery* (and not an aſſault only) was proved; or that in treſpaſs the *freehold* or *title* of the land came chiefly in queſtion. Alſo by *Stats.* 4 & 5 *W. & M. c.* 23: 8 & 9 *W.* 3. *c.* 11, if the treſpaſs were committed in hunting or ſporting, by an inferior tradeſman, or if it appear to be wilfully and maliciouſly committed, the plaintiff ſhall have full Coſts; though his damages, as aſſeſſed by the jury, amount to leſs than 40*s.*

The Legiſlature has alſo been obliged to interfere ſtill further, to guard againſt trifling and vexatious actions, by means of what are commonly called the *Court-of-Conſcience Acts*: Such are *Stats.* 3 *Jac.* 1. *c.* 15. § 4: 14 *G.* 2. *c.* 10; which provide that if an action be brought for leſs than 40*s.* againſt a defendant living in *London*, and liable to the juriſdiction of the Court of Requeſts there, the plaintiff ſhall not recover any Coſts, but ſhall pay them to the defendant.

Several other acts of parliament have been also made, eſtabliſhing Courts of Conſcience in various diſtricts, in and about the metropolis; as in the town and borough of *Southwark*, &c. by *Stat.* 22 *Geo.* 2. *c.* 47.; in the city and liberty of *Weſtminſter*, and part of the Duchy of *Lancaſter*, by *Stat.* 23 *G.* 2. *c.* 27, (explained and amended by *Stat.* 24 *Geo.* 2. 42,); and in the *Tower-hamlets*, by *Stat.* 23 *Geo.* 2. *c.* 30. And by *Stat.* 23 *Geo.* 2. *c.* 33, the county-court of *Middleſex* was put on a different footing, for the more eaſy and ſpeedy recovery of ſmall debts. See titles *County-Courts*, *Courts of Conſcience*.

In general where the act is not *pleaded*, the proper mode to obtain the Coſts, is for the defendant to apply to the court, by affidavit, for leave to enter a ſuggeſtion on the roll, of the facts neceſſary to entitle him to the benefit of the act ſuited to his caſe; which ſuggeſtion may be traverſed or demurred to.

Theſe ſtatutes might perhaps have been with equal propriety claſſed under the 2d diviſion of this title; but are introduced here, as forming an exception to the general title of a plaintiff to Coſts in the caſes already inſtanced.

The *principal* ſtatute, made for reſtraining the plaintiff's right to coſts, is *Stat.* 22 & 23 *Car.* 2. *c.* 9, (extended to *Wales*, and the Counties *Palatine*, by *Stat.* 11 & 12 *W.* 3. *c.* 9); by which it is enacted, that "in all actions of *treſpaſs*, *aſſault and battery*, and *other perſonal actions*, wherein the judge, at the trial of the cauſe, ſhall not find and certify under his hand, upon the back of the record, that an aſſault and battery was ſufficiently proved by the plaintiff againſt the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in queſtion; the plaintiff, in caſe the jury ſhall find the damages to be under the value of forty ſhillings, ſhall not recover or obtain more coſts of ſuit, than the damages ſo found ſhall amount unto." It ſeems to have been the intention of this ſtatute, that the plaintiff ſhall have no more coſts than damages, in any perſonal action whatſoever, if the damages be under forty ſhillings, except in caſes of battery or freehold; and not even in theſe, without a certificate. And this conſtruction was adopted, in ſome of the firſt caſes that aroſe upon the ſtatute. 3 *Keb.* 121, 247. But a different conſtruction ſoon prevailed; and it is now ſettled, that the ſtatute is confined to actions of aſſault and battery; and actions for *local* treſpaſſes, wherein it is poſſible for the judge to certify, that the freehold or title of the land was chiefly in queſtion. *T. Raym.* 487: *T. Jon.* 232: 2 *Show.* 258. S. C.: 3 *Mod.* 39: 1 *Salk.* 208: 1 *Str.* 577: *Gilb. Eq. Rep.* 195: *Barnes* 134: 3 *Wilſ.* 322, S. C. 1 *H. Black.* 294. Therefore it does not extend to actions of *debt*, *covenant*, *aſſumpſit*, *trover*, (3 *Keb.* 31: 1 *Salk.* 208,) or the like; or to actions for a mere *aſſault*; (3 *T. R.* 391;) or for *criminal converſation*; (3 *Wilſ.* 319;) or *battery* of the plaintiff's ſervant, (3 *Keb.* 184: 1 *Salk.* 208: 1 *Stra.* 192,) *per quod conſortium vel ſervitium amiſit.*—In all theſe caſes, though the damages be under 40*s.* the plaintiff is entitled to full coſts without a certificate.

The certificate required by this ſtatute need not, it ſeems, be granted at the trial of the cauſe. 11 *Mod.* 198. And where the defendant lets judgment go by default, (*Bull. N. P.* 329,) or *juſtifies* the aſſault and battery, or pleads in ſuch a manner, as to bring the freehold or title of the land in queſtion, on the face of the record, or a *view* is granted, (1 *Ld. Raym.* 76: 2 *Salk.* 665,) a certificate is holden to be unneceſſary; but it is neceſſary, where, to a plea of a right of way, there is a replication of *extra viam*. *Cochran* v. *Harriſon*, *T.* 22 *Geo.* 3. But where, in an action for an aſſault and battery, the defendant juſtifies the aſſault only, (3 *T. R.* 391,) or an aſſault only is certified by the judge, (2 *Lev.* 102,) the plaintiff, recovering leſs than forty ſhillings, is not entitled to more coſts than damages; though, in the latter caſe, to entitle him to full coſts, the judge may certify, on *Stat.* 8 & 9 *W.* 3. *c.* 11, that the aſſault was wilful and malicious. 3 *Wilſ.* 326.

None of the ſtatutes, made for reſtraining the plaintiff's right to coſts, extend to actions brought in an *inferior* court, and removed by the defendant into a *ſuperior* one: (2 *Lev.* 124: 4 *Mod.* 378, 9: 1 *Ld. Raym.* 395:) and it has been holden, that *Stat.* 21 *Jac.* 1. *c.* 16, and *Stat.* 22 & 23 *Car.* 2. *c.* 9, only reſtrain the *Court* from awarding more coſts than damages; but the *jury*, not being reſtrained thereby, may give what coſts they pleaſe.

It often happens that there are ſeveral *counts* or *pleas*, the iſſues upon which are ſome of them found for the plaintiff, and ſome for the defendant. In this caſe, in the court of *C. P.* where the declaration conſiſts of ſeveral counts, and the plaintiff ſucceeds upon any one of them, he is entitled to the coſts of the whole declaration, though the defendant ſucceed upon the other counts. *Bull. N. P.* 335: 2 *Black. Rep.* 800, 1199. But it is otherwiſe in the court of *K. B.* for there neither party is allowed coſts as to thoſe counts the iſſues upon which are found for the defendant. *Say. Coſts* 212: *Doug.* 8vo. 677. But ſee 1 *Wilſ.* 331. But if there be two diſtinct cauſes of action, in two ſeparate counts, and as to one the defendant ſuffers judgment to go by default, and as to the other takes iſſue, and obtains a verdict, he is entitled to judgment for his coſts on the latter count, notwithſtanding the plaintiff is entitled to judgment and coſts on the firſt count. 3 *Term Rep.* 654.

As to the certificate on the *Stat.* 4 *An. c.* 16, allowing *double pleas*, (See title *Pleading*,) and coſts thereon, where the judge refuſes to grant the certificate, the Court have not a diſcretionary power, whether they will allow the defendant *any* coſts at all; but are bound by the ſtatute to allow him *ſome* coſts, though the *quantum* is left to their diſcretion. *Barnes* 140: 2 *Term. Rep.* 394, 5. The intention of the legiſlature was, that if there be ſeveral matters pleaded, ſome of which are found for the plaintiff, he ſhall be entitled to the coſts of thoſe, notwithſtanding other matters are found for the defendant, which entitle him to judgment upon the whole record; unleſs the judge, before whom the cauſe was tried, ſhall certify, that the defendant had a probable cauſe to plead the matters which are found againſt him.

II. It has already been obſerved, that no coſts were recoverable by a *defendant* at common law: and the reaſon ſeems to be, that if the plaintiff failed in his ſuit, he was amerced to the King *pro falſo clamore*, which was thought to be a ſufficient puniſhment, without ſubjecting him to the payment of coſts. The firſt inſtance of coſts being given to a defendant, was in a writ of right of *ward*, by the ſtatute of *Marlberge*, (52 *Hen.* 3. *c.* 6,) Afterwards, coſts were given to the defendant in *error*, by *Stat.* 3 *Hen.* 7. *c.* 10; and in *replevin*, by *Stat.* 7 *Hen.* 8. *c.* 4.

8. *c.* 4. and *Stat.* 21 *Hen.* 8. *c.* 19, *&c.* But in one of these cases, the defendant is to be considered as an actor; and in the other of them, the provision is virtually for the benefit of the plaintiff in the original action. *Say. Costs* 70.

In *error*, brought by the defendant *before* execution, (*Cro. Jac.* 636,) or by the plaintiff upon a judgment for the defendant, if the judgment be affirmed, the writ of error discontinued, or the plaintiff in error nonsuited, the defendant in error is entitled to costs, by *Stat.* 3 *Hen.* 7. *c.* 10. and 8 & 9 *W.* 3. *c.* 11. § 2; upon the former of which statutes it has been holden, that costs are recoverable in error, for the delay of execution, although none were recoverable in the original action. *Dyer* 77: *Cro. Eliz.* 617, 659: 5 *Co.* 101. S. C.: *Cro. Car.* 145: 1 *Str.* 262: 2 *Str.* 1084: but see *Cro. Car.* 425: 1 *Lev.* 146: 1 *Vent.* 38, 166: 4 *Mod.* 245: *Carth.* 261. S. C. *semb. contra.* By *Stat.* 13 *Car.* 2. *stat.* 2. *c.* 2. § 10, if the judgment be affirmed after verdict, the plaintiff shall pay to the defendant in error, his *double* costs. And by *Stat.* 4 *Ann. c.* 16. § 25, for preventing vexation, from suing out defective writs of error, it is enacted, that "upon the quashing of any writ of error, for variance from the original record, or other defect, the defendant shall recover against the plaintiff in error his costs, as he should have had, if the judgment had been affirmed, and to be recovered in the same manner:" 2 *Str.* 834: *Cas. temp. Hardw.* 137. But none of the statutes before mentioned give costs, upon the *reversal* of a judgment. (1 *Stra.* 617.)

In *replevin*, or second deliverance, the defendant, making avowry, cognizance, or justification, for rents, customs, or services, or for damage feasant, is entitled to costs, by *Stat.* 7 *Hen.* 8. *c.* 4, and *Stat.* 21 *Hen.* 8. *c.* 19. § 3; if the avowry, cognizance, or justification be found for him, or the plaintiff be nonsuit, or otherwise barred: which statutes extend to avowries, *&c.* made by an *executor*; (2 *R. Rep.* 437;) or for an *estray*; (*Cro. Eliz.* 330;) and, as it should seem, for an *amercement* by a court leet; (*Cro. Jac.* 520. *sed vide Cro. E.* 300;) but not to pleas of *prisel en auter lieu*, upon which the writ is abated, (*Com. Rep.* 122,) or to pleas of *property* in the thing distrained. *Hard.* 153. By *Stat.* 17 *Car.* 2. *c.* 7. § 2, the defendant obtaining judgment thereon, for the arrearages of rent, or value of the goods distrained, is also entitled to his *full* costs of suit. And by *Stat.* 11 *Geo.* 2. *c.* 19. § 22, if the defendant avow, or make cognizance, according to that statute, upon a *distress* for rent, relief, heriot, or other service, and the plaintiff be nonsuit, discontinue his action, or have judgment against him, the defendant shall recover *double* costs of suit. But this latter statute does not extend to a *seizure* for a heriot-*custom*.

At length, costs were given to defendants by *Stat.* 23 *Hen.* 8. *c.* 15. § 1. "in *trespass* upon *Stat.* 5 *Rich.* 2. *debt, covenant, detinue, account, trespass, on the case*, or upon any statute for an offence or wrong *personal*, immediately supposed to be done to the plaintiff," in cases of nonsuit, or verdict for the defendant.

The King, and any person suing to his use, (*Stat.* 24 *H.* 8. *c.* 8,) shall neither pay nor receive costs; for besides that he is not included under the general words of the statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. And it seems reasonable to suppose that the Queen consort has the same privilege: for in actions brought by her, she was not at the common law obliged to find pledges of prosecution, nor could be amerced in case there was judgment against her. *F. N. B.* 101: 1 *Inst.* 133. And on this principle of the King not paying or receiving costs, no costs are due on a *certiorari* removing summary proceedings; unless a recognizance be entered into at the time of removing the proceedings. 1 *Term Rep.* 82.

Paupers, (that is such as will swear themselves not worth five pounds,) are by *Stat.* 11 *H.* 7. *c.* 12, to have original writs and subpœnas gratis, and counsel and attorney assigned them without fee; and are excused from paying costs when plaintiffs, by the *Stat.* 23 *H.* 8. *c.* 15. § 2; but shall suffer other punishments at the discretion of the judges. And it was formerly usual on such paupers being nonsuited to give them their election either to be whipped or pay the costs; though that practice is now disused. 1 *Sid.* 261: 7 *Mod.* 114: *Salk.* 506. And in cases of misconduct, or in certain other circumstances they may be dispaupered; that is deprived of their privilege of suing as paupers.—It seems however agreed that a pauper may recover costs, though he pays none: for the counsel and clerks are bound to give their labour to him, but not to his antagonists. 1 *Eq. Ab.* 125.

Executors and *Administrators* are not particularly excepted out of *Stat.* 23 *Hen.* 8. *c.* 16; yet, as that statute only relates to contracts made with, or wrongs done to the plaintiff, (2 *Stra.* 1107,) it has been uniformly holden, (*Cro. Eliz.* 503: *Cro. Jac.* 229: 2 *Bulst.* 261: 1 *Salk.* 207, 314: 3 *Bur.* 1586: *Say. Costs* 97,) that they are not liable to costs, upon a nonsuit or verdict, where they necessarily sue in their representative character, and cannot bring the action in their own right; as upon a *contract* entered into with the testator or intestate, (*T. Jon.* 47: 2 *Ld. Raym.* 1414: 1 *Str.* 682. S. C.: *Cas. Pr. C. B.* 157: *Pr. Reg.* 118. S. C.: *Barnes* 141,) or for a *wrong* done in his life-time. (*Barnes* 129.) But where the cause of action arises after the death of the testator or intestate, and the plaintiff may sue thereon in his own right, he shall not be excused from the payment of costs, though he bring the action as executor or administrator; as upon a *contract*, (6 *Mod.* 91, 181: 1 *Salk.* 207. S. C.: 1 *Ld. Raym.* 436: 1 *Str.* 682: *Barnes* 119: 2 *Str.* 1106: 4 *T. R.* 277,) express or implied; or in *trover* (*Com. Rep.* 162: *Cas. Pr. C. B.* 61: *Barnes* 132: *Cas. temp. Hardw.* 204. But see 3 *Lev.* 60 *semb. contra*,) for a conversion, after the death of the testator or intestate. An executor or administrator is liable to costs, upon a judgment of *non pros*: (*Cas. Pr. C. B.* 14. 157, 8: 3 *Bur.* 1585:) and where he has *knowingly* brought a wrong action, or otherwise been guilty of a *wilful* default, he shall pay costs upon a discontinuance, (*Cas. Pr. C. B.* 79: 3 *Bur.* 1451: 1 *Blac. Rep.* 451. S. C,) or for not proceeding to trial according to notice; (*Cas. Pr. C. B.* 158: 3 *Bur.* 1585;) but otherwise he is not liable to costs, in either of these cases. (2 *Str.* 871: *Barnes* 133: 4 *Burr.* 1927.) Nor, where he merely sues *en auter droit*, is he liable to costs, upon a judgment as in case of a nonsuit. 4 *Bur.* 1928.

The *Stat.* 23 *Hen.* 8. *c.* 15, only relates to cases where the plaintiff is nonsuited, or has a verdict against him. But by *Stat.* 8 *Eliz. c.* 2, "upon process issuing out of the court of King's Bench, if the plaintiff do not declare in three days after bail put in, or if after declaration he do

do not profecute his fuit with effect, but willingly fuffer the fame to be delayed or difcontinued, or he be non-fuited therein, the judges, by their difcretions, fhall award to the defendant his coſts, damages, and charges in that behalf fuſtained."

The plaintiff, it has been obſerved, is not entitled to coſts in a *popular* action, for the whole or part of a penalty given by ſtatute to a common informer, unleſs they are expreſsly given him by the ſtatute. Nor was the *defendant* entitled to coſts in ſuch an action, until they were given by the *Stat.* 18 *Eliz. c.* 5. § 3, made perpetual by *Stat.* 27 *Eliz. c.* 10.

There being ſtill many caſes in which the defendant was not aided by the proviſions of the before-mentioned ſtatutes, the *Stat.* 4 *Jac.* 1. *c.* 3, gives the defendant coſts on a nonſuit or verdict, in all caſes where the plaintiff would have been entitled to them if he had obtained judgment.—The *Stats.* 13 *C.* 2. *ſt.* 2. *c.* 2. § 3: 8 & 9 *W.* 3. *c.* 11. § 2, give coſts to a defendant alſo in caſes of *non proſ.* and *demurrer*: and the latter *Stat.* § 1. gives coſts to one of ſeveral defendants in *treſpaſs, aſſault, falſe impriſonment*, or *ejectment* acquitted; though the other defendants are convicted.

When a *feigned* iſſue is ordered by a court of *law*, whether it be in a civil or criminal proceeding, the coſts always follow the verdict, and muſt be paid to the party obtaining it. 1 *Lill. P. R.* 344: *Barnes* 130: 1 *Wilſ.* 261, 331: *Say. Rep.* 24: 1 *Wilſ.* 324. But when a feigned iſſue is ordered by a court of *Equity*, the coſts do not follow the verdict, as a matter of courſe; but the finding of the jury is returned back, to the court which ordered it, and the coſts there are in the diſcretion of the court. Where the iſſue is ordered by a court of law, on a rule for an information, (*Say. Rep.* 229: 1 *Burr.* 603,) or motion for an attachment, (*Say. Rep.* 253,) the coſts of the original rule, or motion, do not in general follow the verdict, but only the coſts of the feigned iſſue; which coſts are to be reckoned, from the time when the feigned iſſue was firſt ordered and agreed to. 1 *Burr.* 604. Yet, where it was ordered, by the conſent rule, that the coſts ſhould abide the event of the iſſue, the court directed the *whole* coſts to be paid under it. 2 *Burr.* 1021.

III. WHERE the plaintiff recovers *ſingle* damages, he is only entitled to *ſingle* coſts; unleſs more be expreſsly given him by ſtatute. But if *double* or *treble* damages be given by ſtatute, in a caſe wherein *ſingle* damages were before recoverable, the plaintiff is entitled to *double* or *treble* coſts, although the ſtatute be ſilent reſpecting them; (*Say. Coſts* 228;) as in an action upon *Stat.* 2 *Hen.* 4. *c.* 11, *&c.* In ſome caſes, *double* and *treble* coſts are expreſsly given to the plaintiff; as upon the game laws, by *Stat.* 2 *Geo.* 3. *c.* 19. § 5. And wherever a plaintiff is entitled to *double* or *treble* coſts, the coſts given by the court *de incremento* are to be doubled or trebled, as well as thoſe given by the jury. 2 *Leon.* 52: *Cro. Eliz.* 582: 3 *Lev.* 351: *Carth.* 297, 321: 2 *Str.* 1048. but ſee 1 *Term Rep.* 252. But double or treble coſts are not to be underſtood to mean, according to their literal import, twice or thrice the amount of ſingle coſts. Where a ſtatute gives *double* coſts, they are calculated thus: 1. The common coſts; and then *half* the common coſts. If *treble* coſts, 1. The common coſts; 2. Half of theſe; and then half of the latter.

Double or treble coſts are alſo in ſome caſes expreſsly given to the defendant; as in actions againſt pariſh officers, by *Stat.* 43 *Eliz. c.* 2. § 19;—againſt juſtices of the peace, conſtables, *&c.* by *Stat.* 7 *Jac.* 1. *c.* 5;—for diſtreſſes for rents and ſervices, by *Stat.* 11 *Geo.* 2. *c.* 19. § 21, 2;—and againſt officers of the exciſe or cuſtoms, by *Stats.* 23 *Geo.* 3. *c.* 70. § 34: 24 *Geo.* 3. *ſeſſ.* 2. *c.* 47. § 35. In theſe, and ſuch like caſes, where it does not appear, on the face of the record, that the defendant is entitled to the benefit of the act, (as where he pleads the general iſſue,) and there is no particular mode appointed for recovery of the coſts, the proper mode, after a nonſuit or verdict for the defendant, is to apply to the court, upon an affidavit of the facts, for leave to enter a ſuggeſtion on the roll. 1 *Str.* 49, 50: *Caſ. Pr. C. B.* 16: *Caſ. temp. Hardw.* 125: *Id.* 138: 2 *Str.* 1021. S.C.: *Say. Rep.* 214: 3 *Wilſ.* 442: *Caſ. temp. Hardw.* 125. But where a particular mode is appointed by ſtatute, for the recovery of double or treble coſts, as by the *certificate* of the judge who tried the cauſe, on *Stat.* 7 *Jac.* 1. *c.* 5. there that particular mode muſt be obſerved: (2 *Vent.* 45: *Doug.* 8vo. 307, 8: but ſee *Doug.* 8vo. 308. *n.*) ſo that if the judge certify, there is no need of a ſuggeſtion; and if he do not, it is uſeleſs, except where judgment goes by default. *Caſ. temp. Hardw.* 138, 9.

IV. COSTS are taxed, as between party and party, by the *Maſter* in the King's Bench, or by one of the *Prothonotaries* in the Common Pleas, upon a bill made out by the attorney for the party entitled; or frequently, without a bill, upon a view of the proceedings: and if there have been any *extra* expences, which do not appear on the face of the proceedings, there ſhould be an affidavit made of ſuch expences, to warrant the allowance of them; which is called an affidavit of *increaſed* coſts. *Imp. K. B.* 348. It is uſual, among fair practiſers, to give notice to the oppoſite attorney, of the time when the coſts are intended to be taxed; *Id.* 349. But in order to enforce it, there muſt be a rule to be preſent at taxing coſts: which rule is obtained from the clerk of the rules in the King's Bench, or one of the ſecondaries in the Common Pleas, and ſhould be duly ſerved; after which, if the coſts are taxed without notice, the taxation is irregular, and the attorney liable to an attachment.

The means of recovering Coſts, as between party and party, are by *action* or *execution*, upon a judgment obtained for them; or by *attachment*, upon a rule of court. Thus, in *ejectment*, where there is a verdict and judgment againſt the tenant, an action may be brought, or execution taken out thereon, for the coſts: *Run. Eject.* 140, 141. But where the plaintiff is nonſuited, for not confeſſing leaſe entry and ouſter, the leſſor of the plaintiff muſt proceed by attachment, upon the conſent rule. *Id. ibid.*: 1 *Salk.* 259: *Barnes* 182. And ſo where the nominal plaintiff is nonſuited upon the merits, or has a verdict and judgment againſt him, the only remedy is by attachment againſt the leſſor of the plaintiff. *Run. Ej.* 142, 3. See title *Attachment*.

Beſides the ordinary method of proceeding, there are certain auxiliary means for the recovery of Coſts, as between party and party. Theſe means are by moving to ſtay the proceedings, until ſecurity be given for the payment of Coſts; or until the Coſts are paid of a former

action

action for the same cause; or by deducting the Costs of one action, from those of another. As examples of these means, it may be mentioned, that in *ejectment*, (1 *Str.* 681,) and actions *qui tam*, (*Id.* 697, 705: *Barnes* 126,) where the plaintiff, or his lessor, is *unknown* to the defendant, and in case the plaintiff is a foreigner residing abroad, (1 *Term Rep.* 267, 362, 491,) the defendant may call for an account of his residence, or place of abode, from the opposite attorney; and if he refuse to give it, or give in a fictitious account of a person who cannot be found, the court will stay the proceedings, until security be given for the payment of costs.

The practice of deducting or setting off the Costs, in one action against those in another, however agreeable to natural justice, does not seem to have obtained till lately in the court of *K. B.* 2 *Stra.* 891, 1203: *Bull. N. P.* 336: 4 *Term Rep.* 124. But in *C. P.* it has been frequently allowed; and that not only where the parties have been the same, but also where they have been in some measure, different. *Barnes* 145: 2 *Black. Rep.* 826: *Bull. N. P.* 336.

As between *Attorney and Client*, the former may maintain an action against the latter for the recovery of his costs. *Cro. Car.* 159, 160.—But by the *Stat.* 3 *Jac.* 1. *c.* 7. § 1, attornies and solicitors must deliver a bill to their clients before bringing an action: and by *Stat.* 2 *Geo.* 2. *c.* 23. § 23, (explained by *Stat.* 12 *Geo.* 2. *c.* 13, and made perpetual by *Stat.* 30 *Geo.* 2. *c.* 19. § 75,) no attorney nor solicitor shall commence any action, till the expiration of one month after the delivery of his bill; which is directed by the acts to be in a common legible hand, in *English*, except law-terms, and subscribed with the attorney's hand.

The said *Stat.* 2 *Geo.* 2. *c.* 23, also directs the mode of taxation of attornies' bills by the officers of the several courts; and directs that if the bill taxed be less by a sixth part than the bill delivered, the attorney shall pay the costs of taxation: but if it shall not be less, the costs shall be in the discretion of the court.

If the whole bill be for *conveyancing*, or for business done at the quarter *sessions*, &c. it cannot be taxed. But where an attorney had delivered two separate bills, one of which was for fees and disbursements in causes, and the other for making conveyances, a rule was made for taxing *both*. And so, where it was moved, that the Master might be directed to tax those articles in an attorney's bill, which related to conveyancing and parliamentary business, the rest being for management of causes in the court of King's Bench, Lord *Mansfield* said, there was no doubt but the master might tax the whole. *Barnes C. B.* 141, 2: 4 *Term Rep.* 124: *Say. Rep.* 233: *Say. Costs* 320.

It is not necessary for the *executor* or *administrator* of an attorney, to deliver a bill of costs, for business done by his testator or intestate, before the commencement of an action; (*Cas. Pr. C. B.* 58;) the *Stat.* 2 *Geo.* 2. *c.* 23. § 23, being confined to actions brought by the attorney himself, and not extending to his personal representatives. And, in the court of Common Pleas, they will not suffer such a bill to be taxed: (*Barnes* 119, 122:) but in the court of King's Bench it is otherwise; (2 *Stra.* 1056: *Say. Costs* 324, 5: *Imp. K. B.* 482;) for there, the bill may be referred to be taxed, on the defendant's undertaking to pay what is due.

If an attorney refuse to deliver a bill to his client, the latter may compel him, by taking out a summons before a judge; and if the attorney, on being served therewith, do not attend, an order will be made for delivering it, within a reasonable time. If he still neglect to deliver it, the order should be made a rule of court; and on serving the same, and making affidavit thereof, the court on motion will grant an attachment. *Doug.* 8vo. 199. in *n*: *Imp. K. B.* 479. The bill being delivered, the client may apply for a judge's summons, to shew cause, why it should not be referred to the proper officer to be taxed; upon which an order will be made, the client undertaking to pay what shall appear to be due upon such taxation. *Imp. K. B.* 479, 480. If the attorney do not attend, an order will be made of course. But the client cannot have a summons for delivery of the bill, and taxing it, together. *Id.* 480: *Barnes C. B.* 126.

COSTS IN EQUITY, are allowed for failing to make an answer to a bill exhibited; or making an insufficient answer: and if a first answer be certified by a master to be insufficient, the defendant is to pay 40*s. Costs*; 3*l.* for a second insufficient answer; 4*l.* for a third, &c. But if the answer be reported good, the plaintiff shall pay the defendant 40*s. Costs*. An answer is not to be filed, (till when, it is not reputed an answer,) until *Costs* for contempt in not answering are paid. By *Stat.* 4 & 5 *An. c.* 16, if a plaintiff in Chancery dismisses his own bill, or the defendant dismisses the same for want of prosecution, Costs are allowed to the defendant.

In other cases it seems that the matter of Costs to be given to either party is not in equity held to be a point of right, but merely discretionary, under *Stat.* 17 *R.* 2. *c.* 6, according to the circumstances of the case. Yet the *Stat.* 15 *H.* 6. *c.* 14, which requires surety to satisfy the party grieved his damages, on granting the subpœna, seems expressly to direct that, as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

In case of a great fraud, a person may be obliged to pay such *Costs* as shall be ascertained by the injured party's oath. 2 *Vern.* 123.

COT, In the old *Saxon* signifies *cottage*, and so is still used in many parts of *England*.

COTARIUS, A cottager: the *cotarii*, or cottagers, are mentioned in *Domesday*.

COTE AND COT. The names of places which begin or end with these words or syllables, have the signification of a little house or *cottage*: there are likewise *dove cotes*, which are small houses or places for the keeping of *doves* or pigeons. See title *Pigeon-House*.

COTELLUS, COTERIA, A small cottage, house, or homestall. *Cowel.*

COTERELLUS. *Cotarius* and *coterellus*, according to *Spelman* and *Du Fresne*, are servile tenants: but in *Domesday* and other ancient MSS. there appears a distinction as well in their tenure and quality, as in their name. For the *cotarius* held a free socage tenure, and paid a stated firm or rent in provisions or money, with some occasional customary services; whereas the *coterellus* seems to have held in mere villenage, and his person, issue and goods, were disposable at the pleasure of the lord. *Paroch. Antiq.* 310.

COTESWOLD. Is used for sheep-cotes and sheep feeding on hills: from the *Sax. cote* and *wold*, a place where there is no wood.

COTGARE,

COTGARE, A kind of refuſe wool, ſo clung or clotted together, that it cannot be pulled aſunder. By *Stat.* 13 *R.* 2. *cap.* 9, it is provided, that neither denizen nor foreigner ſhall make any other refuſe of wools but *cotgare* and *villein*.

COTLAND and COTSETHLAND, Land held by a cottager, whether in ſocage or villenage.—*Paroch. Antiq.* 532.

COTSETHLA, COTSETLE, The little ſeat or manſion belonging to a ſmall farm. *Cartular. Malmſbur. MS.*

COTSETHUS, A cottage-holder, who, by ſervile tenure, was bound to work for the lord. *Cowel.*—*Cotſets* are the meaneſt ſort of men, now termed *cottagers*. And *cotſeti* are thoſe who live in cottages. *Leg. Hen.* 1. *c.* 30.

COTTAGE, *cotagium.*] A little houſe for habitation, without lands belonging to it.

By the *ſtat.* 31 *Eliz. c.* 7, cottages were prohibited to be erected without laying at leaſt four acres of land to the ſame; and divers other reſtrictions were thereby injoined. But this was repealed by *ſtat.* 15 *Geo.* 3. *c.* 32, ſetting forth that the ſaid *ſtat.* of 31 *Eliz.* had laid the induſtrious poor under great difficulties to procure habitations, and tended very much to leſſen population; and in divers other reſpects was inconvenient to the labouring part of the nation in general.

COTTON LIBRARY, For better ſettling and preſerving the *library* kept in the houſe at *Weſtminſter*, called *Cotton-houſe*, in the name and family of the *Cottons* for the benefit of the Public, a ſtatute was made 12 *W.* 3. *c.* 7. See *Stats.* 5 *Ann. c.* 30: 26 *Geo.* 2. *c.* 22.

COTTONS, Not within 27 *Hen.* 8, concerning the true making of cloth, 27 *H.* 8. *c.* 12. *ſect.* 3. See title *Callico*: *Manufacturers*; *Navigation-Acts*.—Stealing cotton out of places uſed for whitening or dying it, felony without clergy. *Stat.* 18 *Geo.* 3. *c.* 27.

COTUCA, Coat armour. *Walſing.* 114.

COTUCHANS, Boors or huſbandmen, of which mention is made in *Domeſday*.

COUCHER, or COURCHER, A factor that continues abroad in ſome place or country for traffick; as formerly in *Gaſcoign*, for buying of wines. *Stat.* 37 *Ed.* 3. *c.* 16. This word is alſo uſed for the general book wherein any corporation, &c. regiſter their particular acts. 3 & 4 *Ed.* 6. *c.* 10.

COVENABLE, Fr. *convenable*, Lat. *rationabilis.*] What is convenient or ſuitable.—*Every of the ſame three ſorts of goods*, &c. *ſhall be good and* covenable, *as in old time hath been uſed.* Stat. 31 Ed. 3. cap. 2. *Covenably* indowed, that is, indowed as is fitting. *St.* 4 *H.* 8. *c.* 12. See *Plowd.* 472.

COVENANT,

CONVENTIO.] The agreement or conſent of two or moreby deed in writing, ſealed and delivered; whereby either, or one of the parties doth promiſe to the other that ſomething is done already or ſhall be done afterwards: he that makes the covenant is called the *covenantor*: and he to whom it is made, the *covenantee*. See *Shep. Touchſt.* 160, and on the whole of this ſubject at length.

I. *The ſeveral Kinds of Covenants, and by what Words they are created.*
II. *What Covenants are good and binding, and by whom they may be made.*
III. *Who ſhall take Advantage of Covenants, and who are bound by them.*
IV. *What ſhall be a Performance, and what a Breach of Covenant.—And of Penalties for Non-performance.*

I. A *Covenant* is generally either in fact or in law; in *fact* is that which is expreſsly agreed between the parties, and inſerted in the deed; and *in law*, is that *covenant* which the law intends and implies, though it be not expreſſed in words; as if a leſſor demiſe and grant to his leſſee a houſe or lands, &c. for a certain term, the law will intend a *covenant* on the leſſor's part, that the leſſee ſhall, during the term, *quietly enjoy* the ſame againſt all incumbrances. 1 *Inſt.* 384.

There is alſo a *Covenant real*, and *Covenant perſonal*: a *covenant real* is, that whereby a man ties himſelf to paſs a thing real, as lands or tenements; or to levy a fine of lands, &c. And *covenant perſonal*, is where the ſame is annexed to the perſon and merely perſonal; as if a perſon *covenants* with another by deed to build him a houſe, or to ſerve him, &c. *F. N. B.* 145: 5 *Rep.* 10.

Covenants are likewiſe *inherent*, that tend to the ſupport of the land or thing granted; or are *collateral* to it; and are *affirmative*, where ſomewhat is to be performed; or *negative*; *executed*, of what is already done, or *executory*: a *covenant* being to bind a man, to do ſomething *in futuro*, is for the moſt part *executory*. 1 *Vent.* 176: *Dyer* 112, 271.

A covenant to ſettle or convey particular lands, will not at law create a lien upon the lands; but in equity ſuch a covenant, if for a valuable conſideration, will be deemed a ſpecific lien on the lands, and decreed againſt all perſons claiming under the covenantor, except purchaſers for valuable conſideration, and without notice of ſuch covenant. *Finch* v. *Earl of Winchelſea*, 1 *P. Wms.* 282: *Freemoult* v. *Dedire*, 1 *P. Wms.* 429. *Coventry* v. *Coventry*; beſt reported at the end of *Francis's Maxims*; For Equity conſiders that as done, which being diſtinctly agreed to be done, ought to have been done. *Grounds and Rudiments of Law and Equity, p.* 75.

A general covenant to ſettle lands of a certain value, without mentioning any lands in particular, will not create a ſpecific lien on any of the lands of the covenantor, and therefore cannot be ſpecifically decreed in equity. *Fremoult* v. *Dedire*, 1 *P. Wms.* 430. But if the covenantor expreſsly declare the ſettlement to be in execution of his power, though the particular lands to be charged be not ſpecified, equity will aſcertain them, *Coventry* v. *Coventry*, *Francis's Maxims*: *Gilb. Rep.* 160.

It is held in all caſes where words that begin any ſentence are *conditional*, and give another remedy, they ſhall not be conſtrued a *covenant*; and yet if words of *condition* and covenant are coupled together in the ſame ſentence, as *Provided always, and it is covenanted*, &c. in that caſe they may be adjudged both a *condition* and *covenant*. *March* 103.

The law does not ſeem to have appropriated any ſet form of words, as abſolutely neceſſary to be made uſe of in creating a *covenant*; and therefore it ſeems that any words will be effectual for that purpoſe, which ſhew the party's concurrence to the performance of a future act; as if leſſee for years covenants to repair, &c. *Provided always, and it is agreed, that the leſſor ſhall find great timber*, &c. this makes a *covenant* on the part of the leſſor

to

to find great timber, by the word *agreed*; and it shall not be a qualification of the *covenant* of the lessee. 1 *New Abr.* 527.—See 1 *Burr.* 290.

"The dependence or independence of covenants, is to be collected from the evident sense and meaning of the parties; and however transposed they may be in a deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." *Per Lord Mansfield. Jones* v. *Berkley*, *Dougl.* 665.—See also *Hotham* v. *The East-India Company*, 1 *Term Rep.* 638. Where the participle *doing*, *performing*, *paying*, *repairing*, is prefixed to a covenant, it is clearly a mutual covenant, and not a condition precedent. *Boone* v. *Eyre*, 2 *Black. Rep.* 1312: *Allen* v. *Babington*, *Sid.* 280: *Atkinson* v. *Morrice*, 12 *Mod.* 503. But where the covenant goes to the whole consideration on both sides, there it is a condition precedent. *Duke of St. Alban's* v. *Shore*, 1 *H. Black. Rep.* 270.

If one makes a lease for years, reserving a rent, action of *covenant* lies for non-payment of the rent; for the *reddendum* of the rent is an agreement for payment of it, which will make a *covenant*. 2 *Danv.* 230. A lease is made to two, and one seals the deed, but the other doth not; if he accepts the estate and occupies the land, he is bound to perform the *covenants* for payment of the rent, reparations and the like. 1 *Shep. Abr.* 458.

If one man *covenants* to pay another 20*l.* at a day; although he may have action of debt for the 20*l.* yet it is said he may have *covenant* at his election. 2 *Danv.* 229.

It is agreed that *A. B.* shall pay to *C. D.* 100*l.* for lands in *E.* this is a mutual *covenant*, whereon action of *covenant* may be brought if *C. D.* will not convey. 1 *Sid.* 423. But where there are mutual *covenants*, and the one not to be performed before a precedent *covenant*, in such case one *covenant* is not suable till the other is performed: though if the *covenants* are distinct and mutual, several actions may be brought by and against the parties. 1 *Lil. Abr.* 350: 2 *Mod.* 74. In a covenant to pay another so much money, he making him an estate in such land, &c. it has been adjudged, that if he tender the *covenantor* a feoffment, and offer to make livery, he may have action of *covenant* for the money, as if he had made a title. 3 *Salk.* 107.

Where a man *covenants* that he hath *power to grant*, and that the grantee shall *quietly enjoy* notwithstanding any claiming under him; these are distinct *covenants*, for one goes to the *title*, and the other to the *possession*. 1 *Mod.* 101.

There is this difference however between a *covenant* and *condition*; a *condition* gives entry, and *covenant* gives an action only. *Owen* 54. A person cannot have action of *covenant* upon a verbal agreement, for it cannot be grounded without *writing*, except by special custom. *F. N. B.* 145.

II. ALL *covenants* between persons must be to do what is *lawful*, or they will not be binding; and if the thing to be done be *impossible*, the *covenant* is void. *Dyer* 112. But where the thing is lawful at the time of the *covenant* made, and afterwards the matter agreed to be done is prohibited by act of parliament, yet such *covenant* will be binding. 3 *Mod.* 39. And if a man *covenants* to do a thing *before a certain time*; and it becomes *impossible* by the act of God, this shall not excuse him, inasmuch as he hath bound himself precisely to do it. 2 *Danv. Abr.* 84.

Though a covenant to stand seised of lands to be after purchased be void at law, unless there be some new act to be done; yet it seems, that a covenant to settle lands of such a value, will charge after-purchased lands, though the covenantor had none at the time of executing the covenant. *Took* v. *Hasting*, 2 *Vern.* 97.

If a person *covenants* expressly to repair a house, and it is burnt down by lightning, or any other accident, yet he ought to repair it; for it was in his power to have provided against it by his contract. *Allyn* 26, 27: 1 *Lil. Abr.* 149. But he is not so bound by *covenant* in law. Where houses are blown down by tempest, the law excuses the lessee in an action of waste; though in a covenant to repair and uphold, it will not. 1 *Plowd.* 29. If a lessee for years, rendering rent, *covenants* for him and his assigns to repair the house, and after the lessee assigns over the term, and the lessor accepts the rent from the assignee, and then the *covenant* is broken; notwithstanding acceptance of rent from the assignee, action of covenant lies against the first lessee, on his express *covenant* to repair; and this personal *covenant* cannot be transferred by the acceptance of the rent. 2 *Danv. Abr.* 240. See title *Assignment*, and *post.* III.

Action of *covenant* also lies on *covenant* for payment of rent against such lessee; but not action of *debt* after acceptance. 3 *Rep.* 24. In *covenant* upon a demise, rendering rent, the defendant cannot say, that part of it was to be allowed; for this is a *covenant* against a *covenant*. *Comb.* 21.

An infant within age may bind himself apprentice; but neither at Common law nor by statute may be bound by *covenant* for his apprenticeship, so as to make him liable to an action of *covenant*, if he depart, &c. But by the custom of *London* he may bind himself by his *covenant* at fourteen years old. 1 *Cro.* 129: *Winch.* 63.

III. THERE may be an agreement and *covenant*, only to be performed by the parties themselves; and there are some *covenants* which none but the party and his *heirs* may take advantage of, being such as concern the *inheritance*, and descend to the heir, as knit to the estate: *covenants* in *gross* go to the executors, &c. 1 *Rol. Abr.* 520: 2 *Danv.* 235. Not only parties to deeds, but their executors and administrators, shall take advantage of *inherent covenants*, though not named; and every *assignee* of the land may have the benefit of such *covenants*: likewise *executors* and *assigns* are bound by them, although not named, as a *covenant* to repair, &c. 5 *Rep.* 16, 17: 1 *Cro.* 552. If a man *covenants* with another to do any thing, his *heir* shall not be bound, *unless* he be *expressly named*: and yet where a lessee *covenants* to repair, the *heir* shall have the benefit of the *covenant*, though not named, *because it runs with the land*. 2 *Lev.* 92: 5 *Rep.* 8.

The *executors* and *administrators* of the *covenantor* will be bound by the covenant, though not named, unless the covenant be of such a nature as not to allow of its being performed by any other person but the Covenantor. See *Dyer* 14. *pl.* 69: 1 *Roll. Abr.* 519. *l.* 35: *Hyde* v. *Dean & Canons of Windsor*, *Cro. Eliz.* 553.

All persons to whom the land descended, were by the common law, entitled to the benefit of covenants which run with the land; but grantees of the reversion were not. The *Stat.* 32 *Hen.* 8. *c.* 34, therefore enacted, "That all grantees, &c. of reversions, should have the like advantages against the lessees, their executors, &c. by en-

try for non-payment of the rent, or for doing waſte, or other forfeiture; and the ſame remedy by action only, for not performing other conditions, covenants, or agreements contained in the leaſes, againſt the leſſees; as the leſſors or grantors had." The ſtatute alſo gives the leſſees the ſame remedy againſt the grantees of the reverſion, which they might have had againſt their grantors. It muſt not, however, be underſtood from the general words of the ſtatute, that the grantee of the reverſion can take benefit of every forfeiture by force of a condition, Lord *Coke* conceiving the operation of the ſtatute to be confined to ſuch conditions as are either incident to the reverſion, as rent; or for the benefit of the State, as for not doing of waſte, for keeping the houſes in repair, for making of fences, or ſuch like; and not for the payment of any ſum in groſs, delivery of corn, wood, or the like. See *Co. Lit.* 215, where a variety of reſolutions upon this ſtatute are ſtated, and the authorities referred to. See alſo 6 *Vin. Ab. Covenant*, (K. 3.) *p.* 397: *Webb* v. *Ruſſell*, 3 *T. R.* 393.—See further *Bac. Abr. Covenant*, (E. 6.): *Vin. Ab. Covenant*, (K. 3.)

The liability of the aſſignee does not extend to covenants broken before the aſſignment; as a covenant to build within a certain time, which was paſt before the aſſignment. *Greſcott* v. *Green*, 1 *Salk.* 199: *St. Saviour's Southwark* v. *Smith*, 3 *Burr.* 1271: 1 *Bla. R.* 351. Nor is the aſſignee to be affected by any covenant broken after he has aſſigned over. *Boulton* v. *Canon*, 1 *Freem.* 336.

A collateral covenant to be done upon the land, as to build *de novo*, ſhall bind the aſſignee by expreſs words; in this caſe, the aſſignees are bound by the terms of the covenant, for unleſs named they would not be bound by law; "for the covenant concerns a thing which was not *in eſſe*, at the time of the demiſe made; but to be newly built after, and therefore ſhall bind the covenantor, his executors and adminiſtrators, and not the aſſignee; for the law will not annex the covenant to a thing which hath no being." *Spencer's* Caſe, 5 *Co.* 16 *b.* But as the law would ſuſtain ſuch a covenant againſt the covenantor and his aſſigns, if expreſsly included in the covenant, and give damages for its non-performance, it ſhould ſeem to follow, that the covenantee would be intitled in equity to a decree for the ſpecific performance of ſuch covenant to build; and of this opinion Lord *Hardwicke* appears to have been, in the caſe of the *City of London* v. *Naſh*, 3 *Atk.* 515: 1 *Ves.* 12. But in the caſe of *Lucas* v. *Commerford*, 3 *Bro. C. R.* 166. *Lord Thurlow* C. held, "That there could not be a decree to rebuild in purſuance of a covenant, for that he could no more undertake the conduct of a rebuilding than of a repair."

At law the *Aſſignee* is liable only for the rent actually incurred, or covenants broken during his poſſeſſion. *Boulton* v. *Canon*, 1 *Freem.* 336. If therefore he aſſign the very day before the rent becomes due, the leſſor cannot maintain his action for it. *Tovey* v. *Pitcher*, *Carth.* 177: 4 *Mod.* 71: 3 *Co.* 22: 1 *Salk.* 81: 1 *Freem.* 326. Nor will the circumſtance of ſuch aſſignment being *per fraudem*, as to a beggar, alter the caſe. *Leroux* v. *Naſh*, *Str.* 1221: *Bulker's N. P.* 159. But ſee *Knight* v. *Freeman*, 1 *Vent.* 329, 334: *T. Raym.* 303: *T. Jones* 109; in which the validity of ſuch aſſignment was denied. But whatever may be the rule of law upon this point, it ſeems to be now ſettled, that courts of equity will compel an aſſignee of a term to account for the rent the whole time he enjoyed the land. *Treacle* v. *Coke*, 1 *Vern.* 165. Whether equity will, in order to ſecure the future rents, under any circumſtances, reſtrain an aſſignee from aſſigning to a beggar or inſolvent perſon, was conſidered but not determined, in the caſe of *Philpot* v. *Hoare*, 2 *Atk.* 219. If the aſſignee offer to give up the poſſeſſion to the leſſor on reaſonable terms, and the leſſor refuſe to accept ſuch ſurrender, it were clearly too much for a court of equity, in reſtriction of a legal right, to prevent the aſſignment. *Vaillant* v. *Dodomede*, 2 *Atk.* 546. But ſuppoſing the leſſor to be willing to accept of a ſurrender of the term, and the aſſignee wantonly to inſiſt on his legal right to aſſign, when and to whom he pleaſed, it ſeems that, under certain circumſtances, a court of equity might without impropriety interpoſe to prevent the abuſe of ſuch right; and this Lord *Hardwicke* appears to admit, in *Vaillant* v. *Dodomede*; for having ſtated the legal right and the propriety of courts of equity in general, following the rule of law, he obſerves, "but it is true in ſome ſort of aſſignments, made by tenants, the court has interpoſed;" nor does the difficulty reported to have occurred to Lord *Hardwicke*, in *Philpot* v. *Hoare*, appear, upon examination, to have been intitled to much attention. His Lordſhip is reported to have ſaid, "As to the accruing rents, it is a point of more difficulty; for the covenant in this leaſe not to aſſign, does not run with the land to the aſſignee, becauſe aſſignees are not bound by name in the covenant." Whence it might be inferred, that if aſſigns had been expreſsly included in the covenant, his Lordſhip would have conſidered them bound by the covenant. But whether aſſignees be bound or not by a covenant, does not, (except in the caſe of a collateral covenant to be done upon the land,) depend upon their being named in the covenant; for if the covenant run with the land, aſſignees are bound, whether named or not; and if the covenant do not run with the land, but is a perſonal contract, or reſpect ſomething to be done purely collateral to, and not on the land, they are not bound, though they be expreſsly named. See *Spencer's* caſe, 5 *Co.* 16 *b*: 17 *a.* Therefore, whether the aſſignee was named or not, was immaterial to the queſtion, Whether the aſſignee was bound by the covenant not to aſſign without conſent of the leſſor? Nor does it appear as having been neceſſary in order to determine whether a court of equity ſhould reſtrain an aſſignment to a beggar, previouſly to determine, whether the aſſignee was bound by the covenant not to aſſign; for ſuppoſing the aſſignee to be bound at law by the covenant, equity may reſtrain the wanton and fraudulent breach of a covenant; and ſuppoſing him not to be bound, yet he may be affected in conſcience upon the ſame principle that the aſſignee of a merely perſonal covenant may be affected in conſcience, though not bound at law. See *City of London* v. *Richmond*, 2 *Vern.* 421.—*Treat. of Equity*; 350. *in n.*

The grantee of a reverſion may bring action of *covenant* againſt a leſſee, as well in the county where the demiſe was made, as in the county where the lands lie. *Carthew* 183. A perſon *covenants* with another, to pay him money at a time to come, and doth not ſay to his executors, &c. if the *covenantee* die before the day, yet his executors or adminiſtrators ſhall have the money. *Dyer* 112, 257. And in *every caſe* where the *teſtator* is bound by a *covenant*, the *executor* ſhall be bound by it; if it be not determined by his death. 48 *Ed.* 3. 3: 2 *Danv.* 232.

If a

If *A.* ſeiſed of land in fee, conveys it to *B.* and *covenants* with *B.* his heirs and aſſigns, to make any other aſſurance upon requeſt; and after *B.* conveys it to *C.* who conveys it to *D.* and then *D.* requires *A.* to make another aſſurance, according to the *covenant*; if he refuſes, *D.* ſhall have an action of *covenant* againſt him, as aſſignee to *B.* 2 *Danv.* 236. A leſſor made a leaſe of an houſe for years, excepting two rooms, and free paſſage to them; the leſſee aſſigned the term, and the leſſor brought *covenant* againſt the aſſignee for diſturbing him in his paſſage to thoſe rooms; and adjudged, that the action lies: for the *covenant* as to the paſſage, goes with the tenement, and binds the aſſignee. 1 *Salk.* 196. If a man who leaſes for years, ouſts the leſſee, he ſhall have *covenant* againſt him. 48 *Ed.* 3. 2.—See 2 *Danv.* 234. A man grants a watercourſe, and afterwards ſtops it; for this voluntary mis-feaſance, *covenant* lies. 1 *Saund.* 322. Though where the *uſe* of a thing is demiſed, and it runs to decay, ſo that the leſſee cannot have the benefit of it, for this non-feaſance no action of *covenant* lieth: nor may *covenant* be brought for a thing which was not *in eſſe* at the making of the leaſe. 2 *Danv.* 233.

If a perſon *covenants* that he hath good right to grant, *&c.* and he hath no right, it is a breach of *covenant*, for which action of *covenant* lies. 2 *Bul.* 12.

A *covenant* for the leſſee to enjoy againſt all men; this extends not to *tortious acts* and entries, *&c.* for which the leſſee hath his proper remedy againſt the aggreſſors. *Vaugh.* 111, 120.

Where there is a *covenant* to ſave harmleſs againſt a *certain perſon*, there the *covenantor* muſt ſave the *covenantee* harmleſs againſt the entry of that perſon, be it by wrong or rightful title: but if it be to ſave harmleſs againſt *all perſons*, the entry and eviction muſt be by *lawful title*. *Cro. Eliz.* 213. Where the *covenant* is to do a thing, and no time appointed for performance, it muſt be done in convenient time. 2 *And.* 73: *Dyer* 57, 150: *Hob.* 28.

But a *covenant* muſt wait upon and join with the *grant*; ſo that if it be to make ſuch aſſurance as ſhall be reaſonably deviſed, it muſt be of an aſſurance that differs not from the bargain: and when the eſtate to which a *covenant* is annexed is at an end, the *covenant* is gone. *Hob.* 276: 1 *Leon.* 179. In an indenture, the word *covenant*, is the word both of leſſor and leſſee; and therefore if the leſſee *covenants* to pay the rent, this is a reſervation. Though when there is a *covenant* for a leſſee to repair, and he makes an *under-leaſe* to one who is in poſſeſſion, the under-leſſee is not liable to that *covenant*, in law or equity. 1 *Rol. Rep.* 80: 1 *Vern.* 87.

If a leſſor *covenant* with the leſſee that he ſhall have houſe-bote, *&c.* by aſſignment of his bailiff, this is a good *covenant*: and yet it doth not reſtrain the power that the leſſee hath by law to take thoſe things without aſſignment: but if a leſſee *covenants*, that he will not cut any timber, without the leave or aſſignment of the leſſor; by this he will be reſtrained. *Dyer* 19, 115.

IV. The moſt frequent uſe of a covenant, is to bind a man to do ſomething *in futuro*, and therefore it is for the moſt part executory: and if the covenantor do not perform it, the covenantee may thereupon for his relief have an action or writ of covenant, againſt the covenantor, ſo often as there is any breach of the covenant. *Shep. Touchſt.* 161. *& ſeq.*

Not any duty or cauſe of action ariſes on a *covenant*, till it is broken: and as to breaches of covenant, if a perſon by his own act diſables himſelf to perform a covenant, it is a breach thereof. 5 *Rep.* 21. Though there can be no covenant or breach, where a leaſe, *&c.* is void. *Yelv.* 18, 19. But here, although when a covenant concerns the *intereſt* of the leaſe, as where it is for paying rent, it is void, if the leaſe be ſo: yet where covenants are *collateral* to the leaſe and intereſt, though that be void, the covenants may be good. *Owen* 136. And if a covenant to do a thing is performed in ſubſtance, and according to the intent, it is good, though it differs from the words; and on the other hand, although the covenantor performs the letter of his covenant, if he does any act to defeat the intent and uſe of it, he is guilty of a *breach*. *Mod. Ent. Eng.*

In covenant that a perſon ſhall hold land free from all incumbrances, and be kept indemnified from arrears of rent; there, till an action is brought, or diſtreſs made, he is not damnified; and a ſuit in Chancery is no breach in ſuch caſe; but where a jointure, or dower is recovered, it is. *Skin.* 397: *Moor* 859: *Palm.* 339. When the intention of the parties can be collected out of a deed, for the doing or not doing of the thing, covenant ſhall be had thereupon. *Chanc. Rep.* 294. A covenant, being one part of a deed, is ſubject to the general rules of expoſition of all parts of the deed: and in a covenant the laſt words, that are general, ſhall be expounded by the firſt words, which are ſpecial and particular. *Vent.* 218. Alſo a latter covenant cannot be pleaded in bar to a former.

When a covenant is to *two* perſons *jointly*, one of them may not bring action of covenant, or plead alone, but both muſt join. 1 *Nelſ.* 558. If a man is bound to perform all the covenants in an indenture, and they are all in the *affirmative*, he may plead performance generally. *Co. Lit.* 303. Covenants in the *negative* muſt be pleaded ſpecially. *Ibid.* 330. When *ſome* covenants are in the *negative*, and ſome in the *affirmative*, the defendant is to plead *ſpecially* to the *negative* covenants, that he had not done the thing, and *performance* generally as to the affirmative: (*ſed qu.* and *vide poſt.*) and where the *negative* covenants are *againſt law*, and the *affirmative agreeable to law*, *performance* generally may be pleaded. *Moor* 856. If any of the covenants are in the *diſjunctive*, ſo that it is in the election of the covenantor to perform the one, or the other, the performance ought to be *ſpecially pleaded*, that it may appear *what part* hath been performed. *Cro. Eliz.* 23: 1 *Nelſ.* 573. And commonly where an act is to be done, according to a covenant, he who pleads performance ought to do it ſpecially. 1 *Leon.* 136.

In debt upon bond for performance of covenants, one whereof for peaceable enjoyment, and free from all incumbrances, and another for further aſſurance, *&c.* the defendant ſhould plead ſpecially, that the houſe was free from incumbrances at the time of the conveyance made, and not charged at any time ſince, and that no farther aſſurance had been required, or ſuch an aſſurance which he had executed, *&c.* yet where a defendant pleaded generally, in this caſe it was held good. 1 *Lutw.* 603.

The plaintiff, in equity, if he has not performed his part of the agreement, muſt not only ſhew that he was in no default, in not having performed it, but muſt alſo

alledge that he is ſtill ready to perform it; whereas, at law, if the covenants be not precedent, but diſtinct and independent, the plaintiff need not alledge a performance of his covenants, to entitle him to recover againſt the defendant for the breach of his. *Pordage* v. *Cole*, 1 *Sand.* 320: *Nichols* v. *Raynbred*, *Hob.* 88. But ſee *Calonel* v. *Briggs*, 1 *Salk.* 112: *Goodiſon* v. *Nunn*, 4 *Term Rep.* 761.

Where the covenants are mutual and diſtinct, the defendant cannot plead a breach by the plaintiff, in bar of the plaintiff's action for a breach by the defendant; for the damage may be unequal, and therefore each party muſt recover againſt the other, the damages he ſuſtained. *Cole* v. *Shallett*, 3 *Lev.* 41: *Thompſon* v. *Noel*, 1 *Lev.* 16: *Howlett* v. *Strickland*, *Cowp.* 56: but ſee *Calonel* v. *Briggs*, 1 *Salk.* 122: *Goodiſon* v. *Nunn*, 4 *Term Rep.* 761.

When a *breach* is aſſigned, it muſt not be general, but muſt be particular; as in action of Covenant for not repairing of houſes, the *breach* ought to be aſſigned particularly, what is the want of reparation. *Cro. Jac.* 369.

But on mutual *promiſe* for one to do an act, and in conſideration thereof another to do ſome act, as to ſell goods, *&c.* for ſo much money, a general *breach* that the defendant hath not performed his part, is well aſſigned. 3 *Lev.* 319.

Breaches aſſigned ought to be according to the very words of the condition or covenant: when they may be well enough, though too general. 1 *Lutw.* 326.

Where a thing is to be done by a perſon or his aſſigns, the *breach* is to be, that it was not done either by the one or the other. 5 *Mod.* 133. If a perſon is to tender a conveyance, *&c.* to another, his heirs or aſſigns, *breach* aſſigned that the defendant did not tender a conveyance to the plaintiff, without the words, "his heirs or aſſigns," is good: but if the tender be to be made *by* another man, his heirs, *&c.* and not *to* him, it is otherwiſe. 1 *Salk.* 139.

Where a leſſee for years is to leave all the timber on the land, which was growing there at the time of the leaſe, and he cut down any trees, though he leaves the timber on the land at the end of his leaſe, this is a *breach* of covenant: for in contracts the intention of the parties is chiefly to be conſidered. *Raym.* 464. If ſeveral *breaches* are aſſigned, and the defendant demurs upon the whole declaration, the plaintiff ſhall have judgment for all that are well aſſigned, for they are as ſeveral actions. *Cro. Jac.* 557.

Covenants are generally taken moſt ſtrongly againſt the covenantor, and for the covenantee. *Plowd.* 287. But it is a rule in law, that where one thing may have ſeveral intendments, it ſhall be conſtrued in the moſt favourable manner for the covenantor. 1 *Lut.* 490. The common uſe of covenants is for aſſuring of land; quiet enjoyment free from incumbrances; for payment of rent reſerved; and concerning repairs, *&c.* And in deeds of covenant, ſometimes a clauſe for performance, with a penalty, is inſerted in the body of the deed: at other times and more frequently, bonds for performance, with a ſufficient penalty, are given ſeparate; which laſt being ſued, the jury muſt find the penalty; but on covenant, only the damages. *Wood's Inſt.* 250. Vide the *Stat.* 8 *&* 9 *W.* 3. *c.* 11. And *vide ante & poſt.* and tit. *Bond.*

Covenant for non-payment of rent, was referred to the maſter as to the rent, and on payment thereof proceſs to ſtay as to *that*, but there being another breach as to not repairing, the plaintiff might proceed for *that*. *Anon. Wilſ. Rep. Par.* 1. *p.* 75. In an action of covenant, it is not neceſſary to aver that the plaintiff performed his covenants. *Goddered* v. *Cowell*, *Rep. temp. Hardw.* 343 4.

By *Stat.* 8 *&* 9 *W.* 3. *c.* 11, In actions on bonds, for performance of covenants, plaintiff may aſſign as many breaches as he pleaſes, and the jury on the trial of the action, or on a writ of enquiry, may aſſeſs damages: on defendant's paying damages, execution may be ſtayed, but judgment ſhall remain to anſwer any farther breach, and plaintiff may have a *ſcire facias* againſt the defendant. See title *Bond* VI.

"Where a penalty is intended, merely to ſecure the enjoyment of a collateral object, the enjoyment of the object is conſidered as the principal intent of the deed, and the penalty only as acceſſional, and therefore only to ſecure the damage really incurred." *Per Thurlow*, C. *Sloman* v. *Walter*, 1 *Bro. Rep.* 418. And upon this conſtruction of a penalty, courts of equity will interpoſe, to reſtrain proceedings at law to recover the penalty. But the principles of equal juſtice require, that courts of equity ſhould enforce the ſpecific performance of the act agreed to be done, or reſtrain from the doing of that, which was agreed ſhould not be done. And upon this principle, wherever the primary object of the agreement be the ſecuring of the ſpecific ſubject of the covenant, the party covenanting is not entitled to elect, whether he will perform his covenant, or pay the penalty. See *Hilſon* v. *Trevor*, 2 *P. Wms*, 191: *Parks* v. *Wilſon*, 10 *Mod.* 517: *Chilliner* v. *Chilliner*, 2 *Vez.* 528. But if the covenant be to do, or not to do, ſome particular act, or doing it, or neglecting to do it, to pay a certain ſum, by way of liquidated damages, courts of equity will not relieve againſt the payment of ſuch damages. *Euſt-India Company* v. *Blake*, *Finch's Rep.* 117: *Ponſonby* v. *Adams*, 2 *Bro. P. C.* 431: *Rolfe* v. *Peterſon*, 2 *Bro. P. C.* 436. (8vo. *ed.*) *Lowe* v. *Peers*, 4 *Burr.* 2228.—See alſo *Small* v. *Lord Fitzwilliam*, *Pre. Ch.* 102. And as courts of equity will not relieve againſt ſtipulated damages, they will not, in general, interpoſe to enforce the performance of the covenant, or to reſtrain its violation. Therefore, where the leſſee covenanted not to plough certain land, or if he did, to pay 20*s. per acre, per ann.* the court refuſed to reſtrain the leſſee from ploughing. *Woodward* v. *Gyles*, 2 *Vern.* 119. But there are ſome circumſtances which will induce the court to interfere, though ſtipulated damages be reſerved; as where the *leſſee* had covenanted not to plough *antient* meadow, or if he did, to pay an increaſe of rent, the court, upon his threatening to plough, appears to have granted an injunction. *Webb* v. *Clarke*, 8*th of May*, 1782.—See alſo *Dulwich College* v. *Davis*, *M.* 1787.

It is held an action of *covenant* may be laid in *London*, for non-payment of rent on a leaſe of lands in any other place. 1 *Sid.* 401. And if, in this action, a ſum be miſcaſt, either too little or too much, it is amendable; and not like to the action of debt, which if alledged leſs than it is, without ſhewing the reſt to be ſatisfied, it is ill. 3 *Keb.* 39: 2 *Cro.* 247. In action of covenant, the plaintiff muſt have recourſe to the deeds or writings, and the circumſtances of time, place, *&c.* and take notice what particular covenant in the deed it is beſt to inſiſt upon, to lay a breach right, *&c.* the words of covenanting are,

covenant, *grant*, *promiſe*, and *agree*, *&c.* but there needs no great exactneſs in words to make a covenant. See titles *Bonds*, *Leaſes*, *Agreements*, *Conveyances*, &c. and *ante* I.

What ſhall be a *real* and what a *perſonal* covenant. See *Vin. Abr. Covenant.* (G. 2.): *Bac. Abr. Covenant.* (E.): *Com. Dig. Covenant.* (A. 2.): *Gilb. Law of Covenants* 105.—As to *collateral* Covenants. 4 *Burr.* 2446: 2 *Wilſ.* 27: 1 *Vez.* 56.—As to *affirmative and negative* Covenants. *Vin. Abr. Covenant.* (D. a.): 1 *Wood* 356.—By what words an *expreſs* Covenant may be created. *Vin. Abr. Covenant.* (C.): *Gilb. c.* 2.—As to Covenants created by implication of law, and action thereon. *Vin. Abr. Covenant.* (G.): *Com. Dig. Covenant.* (A.): *Garranty.* (A.): *Bac. Abr. Covenant.* (B.)

How a Covenant ſhall be expounded with regard to the context, or to ſynonimous or other words. See *Com. Dig. Covenant.* (D.): *Vin. Abr. Covenant.* (L. 4.)— as to Covenants for quiet enjoyment. *Shep. Touchſt.* 170: *Vaugh.* 118: *Dy.* 328 *a*: *Gilb.* 187: *Vin. Abr. Condition.* (U. a. *pl.* 6, 7): *Ib. Covenant.* (Z.)—For the conſtruction of the words in a Covenant, "notwithſtanding any act done by the covenantor." *Vin. Abr. Covenant.* (T.): *Cro. Jac.* 233, *Proctor* v. *Johnſon.*—As to Covenants for further aſſurance. *Vin. Abr. Covenant.* (W.) (G. a.): 1 *Wood* 117: *Gilb. Covenant* 209, 226: *Cro. Jac.* 251.—Of Covenants to repair. *Vin. Abr. Covenant.* (L. 5.): *Shep. Touchſt.*: *Finch. Rep.* 86: *Lant.* v. *Norris*, 1 *Burr* 287: 1 *Wiſ. p.* 1. 75. —Of Covenants to convey lands of a certain value; or that lands are of ſuch a value, fully. *Ld. Raym.* 365: *Cro. El.* 43: 1 *Ko. Abr.* 429: *Langton* v. *North*, 2 *Ch. Rep.* 140.—Of Covenants that the grantor is ſeiſed in fee. *Vin. Abr. Covenant.* (Y.): *Paroles.* (D. pl. 4.): *Cro. Jac.* 369: 3 *Lev.* 46.—Of Covenants, to be free from incumbrances. *Vin. Abr. Covenant.* (A. 2.): 1 *Wood* 415: *Gilb. Covenant. c.* 31.

See fully in what caſes and in what manner Covenants ſhall be ſaid to be ſuſpended, defeated, diſcharged, or void. *Bac. Abr. Covenant*, (G.): *Gilb.* 470: 1 *Wood* 397, 429: *Com. Dig. Covenant.* (F.): *Chancery* 2. (X. 3.): *Vin. Abr. Covenant.* (O.)

This word Covenant, is alſo taken for the *Solemn League and Covenant*; which was a ſeditious conſpiracy, invented in *Scotland*, voted illegal by parliament, and againſt which proviſion is made by *Stat.* 14 *Car.* 2. *cap.* 4.

COVENANT TO STAND SEISED TO USES, Is when a man that hath a wife, children, brother, ſiſter, or kindred, doth by covenant in writing under hand and ſeal agree that for their or any of their proviſion or preferment, he and his heirs will ſtand ſeiſed of land to their uſe; either in fee ſimple, fee tail, or for life. The uſe being created by the *Stat.* 27 *H.* 8. *c.* 10, which conveyeth the eſtate as the uſes are directed, this covenant to ſtand ſeiſed is become a conveyance of the land ſince the ſaid ſtatute. The conſiderations of theſe deeds, are natural affection, marriage, *&c.* and the law allows in ſuch caſes conſideration of blood and marriage, to raiſe uſes, as well as money and other valuable conſideration when a uſe is to a ſtranger. *Plowd.* 302. There are no conſiderations now to raiſe uſes upon covenants to ſtand ſeiſed, but natural love and affection, which is for advancement of blood; and conſideration of marriage, which is the joining of the blood and marriage together: other conſiderations, as money, *&c.* for land, though the words in the deed are *ſtand ſeiſed*, yet they are bargains and ſales, and without *inrolment* they raiſe no uſe. *Carter* 138: *Lil. Abr.* 353.

The uſual covenant to ſtand ſeiſed to uſes need not be by deed indented and inrolled. And where a man limits his eſtate to the uſe of his wife for life, this imports a ſufficient conſideration in itſelf: alſo if a perſon covenants to ſtand ſeiſed to the uſe of his wife, ſon, or couſin it will raiſe an uſe without any expreſs words of conſideration; for ſufficient conſideration appears. 7 *Rep.* 40.

In caſe of a covenant to ſtand ſeiſed, ſo much of the uſe as the owner doth not diſpoſe of, remains ſtill in him. 1 *Ventr.* 374. And where an uſe is raiſed by way of covenant, the covenantor continues in poſſeſſion; and there the uſes limited, if they are according to law, ſhall riſe and draw the poſſeſſion out of him: but if they are not, the poſſeſſion ſhall remain in him until a lawful uſe ariſeth. 1 *Leon.* 197: 1 *Mod.* 159, 160.

If on a covenant to ſtand ſeiſed to uſes, no uſe doth ariſe, yet it may be good by way of covenant and give remedy to the covenantee in an action; as if the covenant be future, that, in conſideration of a marriage, lands ſhall deſcend or remain to a ſon and the heirs of his body on the body of his wife; in this caſe the covenantee may have *writ of covenant* upon the covenant againſt the covenantor. But if a covenant be that a man and his heirs, ſhall from henceforth ſtand and be ſeiſed to ſuch and ſuch uſes, and the uſes will not ariſe by law: here no action of covenant lies on the covenant; for this action will never lie upon any covenant but ſuch as is either to do a thing hereafter, or where the thing is already done, and not when it is for a thing preſent. *Plowd.* 307, 398: *Finch's Law.* 49.—See title *Conveyance.*

COVERT BARON, A *feme covert-baron*, is a married woman. See title *Baron and Feme.*

COVERTURE, *Fr.*] Any thing that *covers*; as apparel, a coverlet, *&c.* but it is by our law particularly applied to the ſtate and condition of a *married* woman, who is *ſub poteſtate viri*; and therefore diſabled to contract with any, to the damage of herſelf or huſband, without his conſent and privity, or his allowance and confirmation thereof. *Bract. lib.* 1. *c.* 10. *lib.* 2. *c.* 15, *&c.*: *Bro. Abr.* When a woman is married, ſhe is called a *Feme Covert*; and whatever is done concerning her, during the marriage, is ſaid to be during the *coverture*: all things that are the wife's, are the huſband's; nor hath the wife power over herſelf, but the huſband: and if the huſband alien the wife's land, during the *coverture*, ſhe cannot avoid it during his life; but after his death, ſhe may recover by *cui in vita*. *Terms de Ley.*—See title *Baron* and *Feme*: *Cui in vita.*

COVIN, *Covina.*] A deceitful compact between two or more to deceive or prejudice others; as if tenant for life or in tail, conſpires with another, that he ſhall recover the land which he the tenant holds, in prejudice of him in reverſion. *Plowd.* 546. *Covin* is commonly converſant in and about conveyances of land by fine, feoffment, recovery, *&c.* And then it tends to defeat purchaſers of the lands they purchaſe, and creditors of their juſt debts; and ſo it is uſed in deeds of gift of goods: it may be likewiſe ſometimes in ſuits of law, and judgments had in them. But wherever *covin* is, it ſhall never be intended, unleſs it appears and be particularly found: for *covin* and fraud though proved, yet muſt be found by the jury, or it will not be good. *Brownl.* 188: *Bridgm.* 112.

If one make a leaſe to a perſon by *covin*, and after grant another leaſe to another *bona fide*, but without any fine or rent; in this caſe the ſecond leſſee may not avoid the firſt leaſe, becauſe he is not a purchaſer that comes in for money. 3 *Rep.* 83. On recovery by a good title, there may be *covin*; as where tenant for life by aſſent, *&c.* ſuffers a recovery by *Nil dicit*, without making any defence: and if a man hath a rightful and juſt cauſe of action, and of *covin* and conſent ſhall raiſe up a tenant by wrong againſt whom he may recover; the *covin* doth ſo ſuffocate the right, that the recovery, although it be upon good title, ſhall not bind. *Bro. Covin* 47: *Co. Lit.* 357: 1 *Shep. Abr.* 365. *A.* is tenant for life, remainder in tail to *B.* and a *præcipe* is brought againſt them as jointenants, by *covin* between the demandant and *A.* and an anſwer procured for *B.* as jointenant, and they join the miſe, (or iſſue) and after make default, whereby final judgment is given; this ſhall not defeat the eſtate of *B.* who may bring a writ of diſceit, and ſhall be reſtored to his land. *Rol. Abr.* 621.

If a man that has a right to certain lands, by *covin* cauſes another to ouſt the tenant of the land, to the intent to recover it from him, and he recovers accordingly againſt him by action tried; yet he ſhall not be remitted to his ancient right; but is in of the eſtate of him who made the ouſter; and an aſſiſe lies againſt him. 2 *Danv. Abr.* 309. Land is aliened, pending a writ of debt, by *covin*, to avoid the extent thereof for the debt; the land ſo aliened ſhall be extended, when the *covin* appears upon the return of the *elegit* by the ſheriff. *Ibid.* 311. If a man makes a deed of gift, *&c.* of his goods in his life-time by *covin*, to ouſt his creditors of their debts, after his death the donee or vendee ſhall be charged for them, See the ſeveral ſtatutes of *Frauds*. If goods are ſold in market overt by *covin*, on purpoſe to bar him that hath right, this ſhall not bar him thereof. 2 *Inſt.* 713: See title *Frauds*, &c.

COUNCIL. In the city of *London*, there are *common council-men* choſen in every ward at a court of wardmote held by the aldermen of the reſpective wards on St. *Thomas's* day yearly; they are to be choſen out of the moſt ſufficient men; and ſworn to give true *counſel* for the common profit of the city, *&c. Lex Londinen.* 117. In the court of *common-council*, are made laws for advancement of trade; and committees yearly appointed, *&c.* But acts made by them, are to have the aſſent of the Lord Mayor and Aldermen, by *Stat.* 21 *Geo.* 1. *c.* 11. See this *Dict.* title *London*.

COUNSELLOR, *Conſiliarius.*] A perſon retained by a client to plead his cauſe in a court of judicature. A *Barriſter*: See title *Barraſter*.—To what is there noticed may be added.—That by *Stat.* 5 *Eliz. c.* 14, counſellors ſhall *not* be puniſhed for ſhewing a falſe deed in evidence. No recuſant convict, or non-conformiſt ſhall practice the law, as a *counſellor*, or otherwiſe, under penalties. See *Stat.* 3 *Jac.* 1. *c.* 5: 7 *W.* 3. *c.* 24: 13 & 14 *W.* 3. *c.* 6: 1 *Geo.* 1. *c.* 13. See titles *Oaths*, *Non-conformiſts*.

COUNSEL, for *Priſoners*. See title *Trial* and 4 *Comm.* 355.

COUNT, The original declaration of complaint in a real action. As declaration is applied to perſonal, ſo *Count* is applicable to real cauſes: but *Count* and declaration are oftentimes confounded, and made to ſignify the ſame thing. *F. N. B.* 16, 60. In paſſing a recovery at the common pleas bar, a ſerjeant at law *counts* upon the *præcipe*, *&c.* See titles *Countors*, *Declarations*, *Pleading*.

COUNTEE, Fr. *Comte.*] The moſt eminent dignity of a ſubject, before the conqueſt; and thoſe who in ancient times were created *countees*, were men of great eſtate: for which reaſon, and becauſe the law intends that they aſſiſt the king with their counſel for the public good and preſerve the realm by their valour, they had great privileges; as they might not be arreſted for debt or treſpaſs; or be put on juries, *&c.* Of old the *countee* was *præfectus*, or *præpoſitus comitatûs*, and had the charge and cuſtody of the *county*; but this authority the *ſheriff* now hath. 9 *Rep.* 46. A *countee* or *count*, is an earl, in the law *French*. *Law Fr. Dict.* See titles *Earl*, *Sheriff*.

COUNTENANCE. This word ſeems to be uſed for credit or eſtimation. *Old Nat. Br.* 111. And in the *Stat.* 1 *Ed.* 3. *c.* 4. See *Contenement*.

COUNTER, *Computatorium* from the Lat. *computare.*] The name of two priſons in *London*, the *Poultry counter*, and *Wood-ſtreet-counter*, [now conſolidated into one new-built priſon] for the uſe of the city, to confine debtors, peace-breakers, *&c. Cowel.*

COUNTERFEITS. See title *Cheats*.

Counterfeiting the *King's ſeal*, or money, *&c.* is treaſon, See title *Treaſon*: and *counterfeiting Exchequer bills*, bank-bills, lottery-orders, *&c.* is felony. See titles *Felony*, *Forgery*, *Fraud*.

COUNTERMAND, *Contramandatum.*] Is where a thing formerly executed, is afterwards by ſome act or ceremony made void by the party that firſt did it. And it is either actual, by deed; or implied: *actual*, where a power to execute any authority, *&c.* is by a formal writing, for that very purpoſe put off for a time, or made void: and *implied*, is where a man makes his laſt will and teſtament, and thereby deviſes his land to *A. B.* if he afterwards enfeoffs another of the ſame land, here this feoffment is a *countermand* to the will, without any expreſs words for the ſame, and the will is void as to the diſpoſition of the land: Alſo if a woman ſeiſed of land in fee-ſimple, makes a will and deviſeth the ſame to *C. D.* and his heirs, if he ſurvive her; and after ſhe intermarries with the ſaid *C. D.* there, by taking him to huſband, and coverture at the time of her death, the will is *countermanded*. *Terms de Ley.* But if a woman makes a leaſe at will, and then marries, this marriage is no *countermand* to the leaſe, without expreſs matter done by the huſband to determine the will.

Where land is deviſed, and after a leaſe made thereof for years only; it ſhall not be a *countermand* of the will, which is good notwithſtanding, for the reverſion after the leaſe for years is ended: but in caſe a man have a leaſe for years, and gives it by his will, and after ſurrenders it; it is a *countermand* of the deviſe, and the deviſee ſhall not have his leaſe. *Dyer* 47: *Goldſb.* 93. See title *Deviſe*. If a copyholder, like to die, do ſurrender his eſtate to the uſe of his wife or children, without any conſideration of money, *&c.* and he recover before the preſentment and admittance, it may be *countermanded*: It is otherwiſe if it be to the uſe of a ſtranger. *Kitch.* 82. If there be a feoffment with letter of attorney to make livery and ſeiſin; and before it is made, the feoffor makes a ſeoffment, or bargain and ſale of the land, or leaſe to another, it will be a *countermand* in law of the authority given

given by the letter of attorney. 2 *Brownl.* 291. A perſon may *countermand* his command, authority, licence, &c. before the thing is done; and if he dies, it is *countermanded*. There is alſo a *countermand* of *notice of trial*, &c. in law proceedings. See titles *Trial*, *Proceſs*.

COUNTERPART. When the ſeveral parts of an indenture are interchangeably executed by the ſeveral parties, that part or copy which is executed by the grantor is uſually called the *original*, and the reſt are *counterparts*: though of late it is moſt frequent (and better) for all the parties to execute every part; which renders them all originals. 2 *Comm.* 296. See title *Deeds*.

COUNTERPLEA, Is when the tenant in any real action, tenant by the curteſy, or dower, in his anſwer and plea, vouches any one to warrant his title, or prays in aid of another, who hath a larger eſtate; as of him in reverſion, &c. Or where one that is a ſtranger to the action, comes and prays to be received to ſave his eſtate; then that which the demandant alledgeth againſt it, why he ſhould not be admitted, is called a *counterplea*: In which ſenſe it is uſed, *Stat.* 25 *Ed.* 3. *cap.* 7. So that *counterplea* is in law a replication to *Aid Prier*; and is called *counterplea to the voucher*: But when the voucher is allowed, and the vouchee comes and demands what cauſe the tenant hath to vouch him, and the tenant ſhews his cauſe, whereupon the vouchee pleads any thing to avoid the warranty; that is termed a *counterplea of the warranty*. *Terms de Ley*. *Stat.* 3 *E.* 1. *cap.* 39. If on demurrer to a *counterplea* of the voucher upon a warranty, it be found againſt the vouchee, judgment ſhall not be peremptory, but only *ſtet vocare*: It is otherwiſe upon a plea to the writ tried by the country. 4 *Rep.* 80: 10 *Rep.* 34.—There is alſo a *counterplea* to the plea of clergy; See title *Clergy*, Benefit of; II.

COUNTER-ROLLS. The *rolls* which *ſheriffs* of counties have with the *coroners* of their proceedings, as well of appeals, as of inqueſts, &c. *Stat.* 3 *Ed.* 1. *c.* 10.

COUNTORS, Fr. *Contours.*] Have been taken for ſuch *ſerjeants* at law, which a man retains to defend his cauſe, and ſpeak for him in any court, for their fees. *Horn's Mirror*, *lib.* 2. And as in the court of *C. B.* none but Serjeants at law may plead; they were anciently called *Serjeant Countors*. 1 *Inſt.* 17.

COUNTY,

Comitatus.] Signifies the ſame with *ſhire*, the one coming from the *French*, the other from the *Saxon*. It contains a circuit or portion of the realm, into which the whole land is divided, for the better government of it, and the more eaſy adminiſtration of juſtice: So that there is no part of this kingdom that lies not within ſome county; and every county is governed by a yearly officer, the ſheriff. *Forteſcue*, *cap.* 24. Of theſe *counties*, the numbers have been different at different times, there are now in *England* forty, beſides twelve in *Wales*, making in all fifty-two.—It ſeems that this diviſion of the Kingdom was made by King *Alfred*. See 4 *Comm.* 410. The names of theſe counties are as follows. In ENGLAND; *Bedford*; *Berks*; *Bucks*; *Cambridge*; *Cheſter*; *Cornwall*; *Cumberland*; *Derby*; *Devon*; *Dorſet*; *Durham*; *Eſſex*; *Glouceſter*; *Hereford*; *Hertford*; *Huntingdon*; *Kent*; *Lancaſter*; *Leiceſter*; *Lincoln*; *Middleſex*; *Monmouth*; *Norfolk*; *Northampton*; *Northumberland*; *Nottingham*; *Oxford*; *Rutland*; (the ſmalleſt;) *Salop*; (commonly called *Shropſhire*;) *Somerſet*; *Staffordſ*; *Suffolk*; *Surrey*; *Suſſex*; *Southampton*; (*Hants* or *Hampſhire*;) *Warwick*; *Weſtmorland*; *Worceſter*; *Wilts*; *York*; (the largeſt;) In NORTH WALES *Angleſea*; *Caernarvon*; *Denbigh*; *Flint*; *Merioneth* and *Montgomery*.—In SOUTH WALES; *Brecknock*; *Cardigan*; *Caermarthen*; *Glamorgan*; *Pembroke and Radnor*.

Three of the counties above enumerated, *viz. Cheſter*, *Durham* and *Lancaſter*, are called COUNTIES PALATINE. The two former are ſuch by preſcription, or immemorial cuſtom; or, at leaſt as old as the Norman conqueſt: (*Seld.* tit. *Hon.* 2, 5, 8;) the latter was created by King *Edward* III. in favour of *Henry Plantagent*, firſt Earl, and then Duke of *Lancaſter*: (4 *Inſt.* 204:) whoſe heireſſes being married to *John* of *Gaunt*, the King's ſon, the franchiſe was greatly enlarged and confirmed in parliament to honour *John* of *Gaunt* himſelf, whom, on the death of his father-in-law, the King had alſo created Duke of *Lancaſter*. *Plowd.* 215: *T. Raym.* 138.

COUNTIES PALATINE are ſo called *à palatio*; becauſe the owners thereof, the Earl of *Cheſter*, the Biſhop of *Durham*, and the Duke of *Lancaſter*, had in thoſe counties *jura regalia*, as fully as the King hath in his palace; *regalem poteſtatem in omnibus*, as *Bracton* expreſſes it. *lib.* 3. *c.* 8. § 4. They might pardon treaſons, murders, and felonies; they appointed all judges and juſtices of the peace; all writs and indictments ran in their names, as in other counties in the King's, and all offences were ſaid to be done againſt their peace, and not, as in other places, *contra pacem domini regis*. 4 *Inſt.* 204. And indeed by the ancient law, in all peculiar juriſdictions, offences were ſaid to be done againſt his peace, in whoſe court they were tried; in a court-leet, *contra pacem domini*; in the court of a corporation, *contra pacem ballivorum*; in the ſheriff's courts or towns, *contra pacem vicecomitis*. *Seld. in Heng. Magna*, *c.* 2.

The Palatine privileges, (ſo ſimilar to the regal independent juriſdictions uſurped by the great barons on the continent, during the weak and infant ſtate of the firſt feodal kingdoms in Europe,) were in all probability originally granted to the counties of *Cheſter* and *Durham*, becauſe they bordered upon inimical countries, *Wales* and *Scotland*: in order that the inhabitants, having juſtice adminiſtered at home, might not be obliged to go out of the county, and leave it open to the enemy's incurſions; and the owners, being encouraged by ſo large an authority, might be the more watchful in its defence. And upon this account alſo there were formerly two other counties palatine, *Pembrokeſhire* and *Hexhamſhire*; the latter now united with *Northumberland*; but theſe were aboliſhed by parliament, the former in 27 *Hen.* 8. the latter, in 14 *Eliz.* And in the time of *H.* VIII. likewiſe, the powers beforementioned, of owners of counties palatine were abridged; *Stat.* 27 *H.* 8. *c.* 24. the reaſon for their continuance in a manner ceaſing, though ſtill all writs are witneſſed in their names, and all forfeitures for treaſon by the Common law accrue to them. 4 *Inſt.* 205.

Of theſe three, the county of *Durham* is now the only one remaining in the hands of a ſubject. For the earldom of *Cheſter*, as *Camden* teſtifies, was united to the crown by *Hen.* III. and has ever ſince given title to the King's eldeſt ſon. And the County Palatine, or Duchy of *Lancaſter*, was the property of *Henry Bolingbroke*, the ſon of *John of Gaunt*, at the time when he wreſted the crown from King *Richard* II. and aſſumed the title of King *Henry* IV. But he was too prudent to ſuffer this to be united,

united to the crown; leſt if he loſt one, he ſhould loſe the other alſo. For as *Plowden* (215,) and Sir *Edward Coke* (4 *Inſt.* 245,) obſerve "he knew he had the Duchy of *Lancaſter* by ſure and indefeaſible title, but that his title to the crown was not ſo aſſured; for that after the deceaſe of *Richard* II. the right of the crown was in the heir of *Lionel* Duke of *Clarence*, *ſecond* ſon of *Edward* III; *John of Gaunt*, father to this *Henry* IV, being but the *fourth* ſon," And therefore he procured an act of parliament, in the firſt year of his reign, ordaining that the duchy of *Lancaſter*, and all other his hereditary eſtates, with all their royalties, and franchiſes, ſhould remain to him and his heirs for ever; and ſhould remain, deſcend, be adminiſtred, and governed, in like manner as if he never had attained the regal dignity; and thus they deſcended to his ſon and grandſon, *Henry* V. and *Henry* VI; many new territories, and privileges being annexed to the Duchy by the former. *Parl.* 2 *Hen.* 5. *n.* 30: 3 *Hen.* 5. *n.* 15.—*Henry* VI. being attainted in 1 *Edw.* IV. this duchy was declared in parliament to have become forfeited to the crown; (1 *Ventr.* 155;) and at the ſame time an act was made to incorporate the Duchy of *Lancaſter*, to continue the County Palatine; (which might otherwiſe have determined by the attainder, 1 *Ventr.* 157,) and to make the ſame parcel of the Duchy: and, farther, to veſt the whole in King *Edward* IV. and his heirs, *Kings of England*, for ever; but under a ſeparate guiding and governance from the other inheritances of the crown. And in 1 *Hen.* 7, another act was made, to reſume ſuch part of the Duchy lands as had been diſmembered from it in the reign of *Edward* IV. and to veſt the inheritance of the whole in the King and his heirs for ever; as amply and largely, and in like manner, form, and condition, ſeparate from the crown of *England* and poſſeſſion of the ſame, as the Three *Henries* and *Edward* IV, or any of them, had and held the ſame.

The *Iſle of Ely* is not a County Palatine, though ſometimes erroneouſly called ſo, but only a royal franchiſe, the biſhop having, by grant of King *Henry* the Firſt, *jura regalia* within the *Iſle of Ely*; whereby he exerciſes a juriſdiction over all cauſes, as well criminal as civil. 2 *Inſt.* 220.

The *Counties Palatine* are reckoned among the ſuperior courts: And are privileged as to pleas, ſo as no inhabitant of ſuch *counties* ſhall be compelled by any writ to appear or anſwer out of the ſame; except for error, and in caſes of treaſon, &c. and the *Counties Palatine* of *Cheſter* and *Durham*, are by preſcription, where the King's writ ought not to come, but under the ſeal of the *Counties Palatine*; unleſs it be writs of proclamation. *Cromp. Juriſ.* 137: 1 *Danv. Abr.* 750.

But *certiorari* lies out of *B. R.* to juſtices of a *County Palatine*, &c. to remove indictments, and proceedings before them. 2 *Hawk. P. C. c.* 27. § 23.

There is alſo a court of Chancery in the *Counties* Palatine of *Lancaſter* and *Durham*, over which there are Chancellors; that of *Lancaſter* called Chancellor of the Duchy, &c. See title *Chancellor*.—And there is a court of Exchequer at *Cheſter*, of a mixed nature, for law and equity, of which the *Chamberlain of Cheſter* is judge. There is alſo a Chief Juſtice of *Cheſter*; and other juſtices in the other *Counties Palatine*, to determine civil actions and pleas of the crown.

The Biſhop of *Durham* has that *County Palatine*; and if any erroneous judgment be given in the courts of the biſhoprick of *Durham*, a writ of error ſhall be brought before the Biſhop himſelf; and if he give an erroneous judgment thereon, a writ of error ſhall be ſued out returnable in *B. R.* 4 *Inſt.* 218.

Infants in *Counties Palatine* enabled to convey by order of the reſpective courts belonging to theſe *counties*. 4 *G.* 3. *c.* 16.

The King may make a *County Palatine* by his letters patent without parliament. 4 *Inſt.* 201.

As to further matter relative to the ſeveral Counties Palatine, ſee titles *Cheſter*, *Durham* and *Lancaſter*; and particularly as to *Cheſter*, *Stats.* 43 *Eliz. c.* 15: (and this Dict. title *Fines*:) 22 *Geo.* 2. *c.* 46: 26 *Geo.* 2. *c.* 34: 27 *Geo.* 3. *c.* 43.

COUNTIES CORPORATE, are certain cities and towns, ſome with more, ſome with leſs territory annexed to them, to which out of ſpecial grace and favour, the Kings of *England* have granted the privilege to be Counties of themſelves, and not to be comprized in any other county; but to be governed by their own ſheriffs and other magiſtrates, ſo that no officers of the county at large have any power to intermeddle therein.

The *St.* 3 *Geo.* 1. *c.* 15, for the regulation of the office of ſheriffs, enumerates 12 cities, and 5 towns, which are counties of themſelves, and which have conſequently their own ſheriffs. The Cities are *London* (by grant of *Hen.* 1.) *Cheſter* (42 *Eliz.*) *Briſtol*, *Coventry*, *Canterbury*, *Exeter*, *Glouceſter*, *Litchfield*, *Lincoln*, *Norwich*, *Worceſter*, *York* (32 *Hen.* 8.)—The Towns are *Kingſton-upon-Hull*, *Nottingham*, *Newcaſtle-upon-Tyne*, *Poel*, *Southampton*. 1 *Comm.* 116—119. To theſe *Cirenceſter* is added in *Impey's Sheriff*; but on what authority does not clearly appear.

COUNTY-COURT, *Curia Comitatûs.*] Is by *Lambert* called *Conventus*, in his explication of *Saxon* words, and divided into two ſorts; one retaining the general name, as the *County-court* held every month, by the ſheriff or his deputy: the other called the *turn*, held twice in every year, *viz.* within a month after *Eaſter* and *Michaelmas*; of both which See *Cromp. Juriſd. fol.* 241. All adminiſtration of juſtice was at firſt in the King's hands; but afterwards, when by the increaſe of the people the burden grew too great for him, as the kingdom was divided into counties, hundreds, &c. ſo the adminiſtration of juſtice was diſtributed amongſt divers courts; of which the ſheriff had the *County-court* for government of the county, and lords of liberties had their *leets* and *law-days*, for the ſpeedier and eaſier adminiſtring juſtice therein, &c.

Before the *courts* at *Weſtminſter* were erected, the *County-courts* were the chief courts of the kingdom: And among the laws of King *Edgar* it is ordained, that there be two *County-courts* kept in the year, in which there ſhall be a biſhop and an alderman, or earl, as judges; one to judge according to the Common law, and the other according to the Eccleſiaſtical law; But theſe united powers of a biſhop and earl to try cauſes, were ſeparated by *William* the Firſt, called the *Conqueror*; and ſoon after the buſineſs of *eccleſiaſtical* cogniſance was brought into its proper *courts*, and the Common law buſineſs into the *King's Bench*. *Blount*.

That the *County-court* in ancient times, had the cogniſance of Pleas of the Crown, indictments of felony, &c. appears by *Glanv. lib.* 1. *cap.* 2, 3, 4. by *Bracton*, and *Briton*.

Britton, in divers places, and *Fleta*, *lib.* 2. *c.* 62. But the power of this court was much reduced by *Magn. Chart. c.* 17; and by 1 *Ed.* 4. *cap.* 2; by the former of which it is expreſsly provided, that "no ſheriff ſhall hold pleas of the crown." It had formerly, and now hath the determination of certain debts, &c. under 40*s.* Over ſome of which cauſes the inferior courts have by the expreſs words of the *Stat.* of *Glouceſter* 6 *E.* 1. *c.* 8, a juriſdiction totally excluſive of the King's ſuperior courts.

This Court may alſo hold plea of many real actions, ſuch as dower, right-patent, right of ward. 4 *Inſt.* 266: 3 *Inſt.* 312. And of all perſonal actions to any amount, by virtue of a writ of *juſticies*, which is in nature of a commiſſion to the ſheriff to do it. 4 *Inſt.* 266. Here the plaintiff takes out a ſummons, and if the defendant do not appear, an attachment or *diſtringas* is to be made out againſt him; but if the defendant appears, the plaintiff is to file his declaration, and after the defendant is to put in his anſwer or plea; and the plaintiff having joined iſſue, the trial proceeds, &c. whereupon if verdict is given for the plaintiff, judgment is entered, and a *fieri facias* may be awarded againſt the defendant's goods, which may be taken by virtue thereof, and be appraiſed and ſold to ſatisfy the plaintiff: But if the defendant hath no goods, the plaintiff is without remedy in this *court*; for no *capias* lies therein, but an action may be brought at Common law, upon the judgment entered. *Greenwood of Courts*, *p.* 22: *Finch* 318: *F. N. B.* 152.

No ſheriff is to enter in the *County-court*, any plaint in the abſence of the plaintiff; nor above one plaint for one cauſe, under penalties: The defendant in the *County-court* is to have lawful ſummons; and two juſtices of peace are to view the eſtreats of ſheriffs, before they iſſue them out of the *County-court*, &c. By *Stat.* 11 *H.* 7. *c.* 15, Cauſes are to be removed out of the *County court*, by *recordare*, *pone*, and writ of *falſe judgment*, into *B. R.* &c. The *Stats.* 9 *H.* 3. *c.* 35: 2 *E.* 6. *c.* 25, enact, that no County-court ſhall be adjourned for longer than one month, conſiſting of 28 days.

All popular elections which the freeholders are to make, as formerly of ſheriffs and conſervators of the peace, and ſtill of coroners, verderors and knights of the ſhire muſt ever be made in full County-court.

As this court hath of ancient times belonged to the Sheriff, and is incident to his office, the King cannot grant by letters patent the office of County-clerk nor the fees: but it of right belongs to the ſheriff. 4 *Co. Mitton's* caſe.

See *Stats.* 7 & 8 *W.* 3. *c.* 25, as to the County-courts in *Yorkſhire*: and 27 *H.* 8. *c.* 26: 34 *H.* 8. *c.* 26, as to thoſe in *Wales*. *Blackſtone*, (3 *Comm.* 82,) obſerves, on the late erection of numerous *Courts of Conſcience* (ſee that title *poſt.*) that it is to be wiſhed that the proceedings in the County and Hundred-courts could be again revived and improved; an experiment that has been tried and ſucceeded in *Middleſex*. For by *Stat.* 23 *Geo.* 2. *c.* 33, it is enacted—1. That a ſpecial County-court ſhall be held, at leaſt once a month, in every hundred of the county of *Middleſex*, by the County-clerk.—2. That twelve freeholders of that hundred, qualified to ſerve on juries, and ſtruck by the ſheriff, ſhall be ſummoned to appear at ſuch court by rotation; ſo as none ſhall be ſummoned oftener than once a year.—3. That in all cauſes not exceeding the value of 40*s.* the County-clerk and twelve ſuitors ſhall proceed in a ſummary way, examining the parties and witneſſes, on oath, without the formal proceſs antiently uſed; and ſhall make ſuch order therein as they ſhall judge to be agreeable to conſcience. —4. That no plaints ſhall be removed out of this court, by any proceſs whatſoever, but the determination herein ſhall be final.—5. That if any action be brought in any of the ſuperior courts, againſt a perſon reſident in *Middleſex*, where the jury ſhall find leſs than 40*s.* damages, the plaintiff ſhall not recover, but pay, coſts. (See title *Coſts*).—6. Laſtly, A table of very moderate fees is preſcribed and ſet down in the act, which are not to be exceeded.

It ſeems indeed, as the learned commentator remarks, that this plan wants only to be generally known, to ſecure its univerſal reception.

COUNTY-RATES. By *Stat.* 12 *G.* 2. *c.* 29, Juſtices of peace at their quarter-ſeſſions, [and by *Stat.* 13 *Geo.* II. *c.* 18. Juſtices of liberties and franchiſes not ſubject to the County commiſſioners,] may make one general *rate*, to anſwer all former diſtinct rates, which ſhall be aſſeſſed on every pariſh, &c. and collected and paid by the high conſtables of hundreds to treaſurers appointed by the juſtices; which money ſhall be deemed the public ſtock, and be laid out in repairing of bridges, gaols, or houſes of correction, on preſentment made by the grand jury at the aſſiſes or quarter-ſeſſions, of their wanting reparation; but appeal lies by the church-wardens and overſeers of the poor of the pariſhes to the juſtices at the next ſeſſions, againſt the *rate* on any particular pariſh. And as to this appeal ſee alſo *Stat.* 22 *Geo.* 3. *c.* 17. See titles *Bridges*; *Gaols*.

COUNTING-HOUSE OF THE KING'S HOUSEHOLD, *Domus Computûs Hoſpitii Regis.*] Uſually called the *Board of Green Cloth*; where ſit the Lord Steward, and Treaſurer of the King's Houſe, the Comptroller, Maſter of the *Houſehold*, Cofferer, and two Clerks of the *Green Cloth*, &c. for daily taking the accounts of all expences of the *Houſehold*, making proviſions, and ordering payment for the ſame; and for the good government of *the King's Houſehold* ſervants, and paying the wages of thoſe below ſtairs. *Stat.* 39 *Eliz. cap.* 7.

COURIER, From the Fr. *Courir* to run.] An expreſs meſſenger of haſte.

COURRACIER, *Fr.*] A horſe-courſer. 2 *Inſt.* 719.

COURTS.

A COURT, *Curia.*] The King's palace, or manſion; but more eſpecially the place where juſtice is judicially adminiſtered. *Co. Lit.* 58. The *Superior Courts* are thoſe at *Weſtminſter*; and of *Courts*, *ſome are of record*, and ſome *not*; which are accounted *baſe Courts*, in reſpect of the reſt.

A *Court* of record is that *Court* which hath power to hold plea, according to the courſe of the Common law, of real, perſonal, and mixed actions, where the debt or damage is 40*s.* or above; as the *King's Bench*, *Common Pleas*, &c. A *Court*, not of record, is where it cannot hold plea of debt or damages amounting to 40*s.* but of pleas under that ſum: or where the proceedings are not according to the courſe of the Common law, nor inrolled; as the *County-court*, and the *Court-Baron*, &c. 1 *Inſt.* 117, 260: 4 *Rep.* 52: 2 *Rol. Abr.* 574.

Every *Court* of record is the *King's Court*, in right of his crown and dignity, though his ſubjects have the benefit of it; and therefore no other Court hath authority to fine and impriſon: ſo that the very erection of a new juriſdiction, with power of fine or impriſonment, makes it inſtantly a Court of record. *Salk.* 200: 12 *Mod.* 388: *Finch L.* 231. The free uſe of all *Courts* of record and not of record, is to be granted to the people: The leet and tourn are the King's *Courts*, and of record. 2 *Danv.* 259. The rolls of the ſuperior *Courts* of record are of ſuch authority, that no proof will be admitted againſt them; and theſe records are only triable by themſelves. 3 *Inſt.* 71. But as the County-court, Court-baron, &c. are not *Courts* of record, the proceedings therein may be denied, and tried by a jury; and upon their judgments, a writ of error lies not; but writ of falſe judgment. 1 *Inſt.* 117. See *poſt. Court-baron.*

In the *Courts* at *Weſtminſter*, the plaintiff need not ſhow at large in his declaration, that the cauſe of action ariſes within their juriſdiction, it being general: Inferior *Courts* are to ſhow it at large, becauſe they have particular juriſdictions. 1 *Lil. Abr.* 371. Alſo nothing ſhall be intended to be within the juriſdiction of an inferior *Court*, but what is *expreſsly* ſo alledged: And if part of the cauſe ariſes within the inferior juriſdiction, and part thereof without it, the inferior *Court* ought not to hold plea. 1 *Lev.* 104: 2 *Rep.* 16. See title *Abatement* I. 1.

An inferior *Court*, not of record cannot impoſe a fine, or impriſon: But the courts of record at *Weſtminſter* may fine, impriſon, and amerce. 11 *Rep.* 43.

The King being the ſupreme magiſtrate of the kingdom, and intruſted with the executive power of the law, all *Courts*, ſuperior or inferior, ought to derive their authority from the crown. *Staundf.* 54. Though the King himſelf cannot now, as anciently, ſit in judgment in any *Court* upon civil cauſes, nor upon indictments, becauſe there he is one of the parties to the ſuit. 2 *Hawk. P. C. c.* 1. § 1, 2. The King hath committed all his power judicial to one *Court* or the other. 4 *Inſt.* 71. And by *Stat.* 52 *H.* 3. *c.* 1, it is enacted, that all perſons ſhall receive juſtice in the King's *Courts*, and none take any diſtreſs, &c. of his own authority, without award of the King's *Courts*.

It is ſaid the cuſtoms, precedents, and common judicial proceedings of a *Court*, are a law to that *court*: And the determinations of *courts*, make points to be law. 2 *Rep.* 12: 4 *Rep.* 53: *Hob.* 298. All things determinable in *Courts*, that are *Courts* by the Common law, ſhall be determined by the judges of the ſame *Courts*; and the King's writ cannot alter the juriſdiction of a Court. 6 *Rep.* 11. The Court of *B. R.* regulates all the inferior Courts of law in the kingdom, ſo that they do not exceed their juriſdictions, nor alter their forms, &c. And as the Court of King's Bench hath a general ſuperintendency over all inferior *Courts*, it may award an attachment againſt any ſuch Court, uſurping a juriſdiction not belonging to it: But it is ſometimes uſual firſt to award a writ of prohibition, and afterwards an attachment, upon its continuing to proceed. 2 *Hawk. P. C. c.* 22. § 25.

If a Court, having no juriſdiction of a cauſe depending therein, do nevertheleſs proceed, the judgment in ſuch Court is *coram non judice*, and void; and an action lies againſt the judges who give the judgment, and any officer that executes the proceſs under them: Though where they have authority, and give an ill judgment, there the party who executes the proceſs, &c. upon the judgment, ſhall be excuſed. 1 *Lil. Abr.* 370.

Judges of inferior Courts may be puniſhed for miſbehaviour either by information or attachment. *Moravia's caſe. Hardw.* 135. Any defects in the proceedings of an inferior Court cannot be amended, by the return which is not part of the record. *The King* v. *Holmes*, *Id.* 365. Where an inferior Court returns its proceedings, no diminution can be alledged. *Ibid. Sayer* v. *Curtis*, 367.

Action on the caſe lies againſt the plaintiff for ſuing one in an inferior Court, where the cauſe of action is out of its juriſdiction. 1 *Vent.* 369. And if a plaintiff on a contract for a large ſum, ſplits it into ſeveral actions for ſmall ſums to give an inferior Court juriſdiction, a prohibition ſhall go. *Mod. Caſ.* 90.

Striking, in the Courts at *Weſtminſter*, is puniſhed by cutting off the right hand, and forfeiture of goods, &c. How *contempts* to Courts are puniſhable by fine and impriſonment, &c. See title *Attachment*. See further as to particular Courts, *poſt. Court-Baron*, &c. and under titles *King's Bench*, *Chancery*, *Common Pleas* and *Exchequer*.

COURT OF ADMIRALTY, See title *Admiralty*.

COURT-BARON, *curia baronis*.] A court which every lord of a manor hath within his own precinct; it is an inſeparable incident to the manor: and muſt be held by preſcription, for it cannot be created at this day. 1 *Inſt.* 58: 4 *Inſt.* 268. A Court-baron muſt be kept on ſome part of the manor: and is of two natures;

1. By *Common* law, which is the *barons'* or *freeholders' court*, of which the freeholders being ſuitors are the judges; and this cannot be a Court-baron without two ſuitors at leaſt. The ſteward of this court is rather the regiſter than the judge.

2. By *cuſtom*, which is called the *Cuſtomary court*: and concerns the cuſtomary tenants and copyholders, whereof the lord, or his ſteward, is judge. See title *Copyhold*.

The Court-baron may be of this double nature, or one may be without the other: but as there can be no Court-baron at Common law without freeholders; ſo there cannot be a Cuſtomary court without copyholders or cuſtomary tenants. 4 *Rep.* 26: 6 *Rep.* 11, 12: 2 *Inſt.* 119. See title *Copyhold*.

The Freeholders' court, whoſe moſt important buſineſs is to determine, by writ of right, all controverſies relating to lands within the manor; and which hath alſo juriſdiction for trying actions of debt, treſpaſſes, &c. under 40*s.* may be held every three weeks; and is ſomething like a *County court*, and the proceedings much the ſame: though on recovery of debt, they have not power to make execution, but are to diſtrain the defendant's goods, and retain them till ſatisfaction is made.

The proceedings on a writ of right may be removed into the *County courts* by a precept from the ſheriff called a *tolt* (*quia* tollit *cauſam*,) 3 *Rep. Pref.*—And the proceedings in all other actions, may be removed into the ſuperior courts by the king's writs of *pone*, or *accedas ad curiam*, according to the nature of the ſuit. *F. N. B.* 4, 70: *Finch L.* 444, 5.

After judgment given alſo, a writ of *falſe judgment* lies to the courts at *Weſtminſter* to re-hear and re-view the cauſe; and not a writ of error: for this is not a court of

of record: and therefore in ſome of theſe writs of removal, the firſt direction given is to cauſe the plaint to be recorded; *recordari facias loquelum. F. N. B* 18.

The other Court baron, for taking and paſſing of eſtates, ſurrenders, admittances, &c. is held but once or twice in a year, (uſually with the court-leet) unleſs it be on purpoſe to grant an eſtate; and then it is holden as often as requiſite. In this court the homage jury are to inquire that their lords do not loſe their ſervices, duties, or cuſtoms; but that the tenants make their ſuits of court; pay their rents and heriots, &c. and keep their lands and tenements in repair; they are to preſent all common and private nuſances, which may prejudice the lord's manor; and every public treſpaſs muſt be puniſhed in this court, by amercement, on preſenting the ſame. By *Stat. Extent. Man.* 4 *E.* 1, it ſhall be inquired of cuſtomary tenants, what they hold, by what works, rents, heriots, ſervices, &c. And of the lord's woods, and other profits, fiſhing, &c.

COURT OF CHIVALRY, *curia militaris.*] Otherwiſe called the *Marſhal court*; the judges of it are the *Lord High Conſtable of England*, and the *Earl Marſhal*: this court is ſaid to be the fountain of the *martial law*, and the Earl Marſhal hath both a judicial and miniſterial power; for he is not only one of the judges, but to ſee execution done. 4 *Inſt.* 123. See title *Court-Martial.*

The Court of Chivalry is the only Court Military known to, and eſtabliſhed by the permanent laws of the land; it was formerly held before the *Lord High Conſtable* and *Earl Marſhal of England*, jointly, but ſince the extinguiſhment of the former office, it hath uſually, with reſpect to civil matters, been before the Earl Marſhal only. See title *Conſtable.*—From the ſentence of this court an appeal lies immediately to the King in perſon. 4 *Inſt.* 125. This court was in great reputation in times of pure Chivalry, and afterwards, during our connexions with the Continent, by the territories which our princes held in *France*: but is now grown almoſt entirely out of uſe, on account of the feebleneſs of it's juriſdiction, and want of power to enforce its judgments. 3 *Comm.* 68.

The juriſdiction of this court is declared by *Stat.* 13 *R.* 2. *c.* 2, to be this: "that it hath cognizance of contracts touching deeds of arms, or of war, out of the realm; and alſo of things which touch war within the realm, which cannot be determined or diſcuſſed by the Common law; together with other uſages and cuſtoms to the ſame matters appertaining." So that wherever the Common law can give redreſs, this court hath no juriſdiction: which has thrown it entirely out of uſe, as to matters of contract, all ſuch being uſually cognizable in the courts of *Weſtminſter-hall*, if not directly, at leaſt by fiction of law: as if a contract be made at *Gibraltar*, the plaintiff may ſuppoſe it made at *Weſtminſter*, &c. for the locality, or place of making it, is of no conſequence with regard to the validity of the contract.

The words, "other uſages and cuſtoms," ſupport the claim of this court, 1. To give relief to ſuch of the nobility and gentry as think themſelves aggrieved in matters of honour; and 2. To keep up the diſtinction of degrees and quality. Whence it follows, that the civil juriſdiction of this court of Chivalry is principally in two points; the redreſſing injuries of honour; and correcting encroachments in matters of coat-armour, precedency, and other diſtinctions of families.

As a court of honour, it is to give ſatisfaction to all ſuch as are aggrieved in that point; a point of a nature ſo nice and ſo delicate, that its wrongs and injuries eſcape the notice of the Common law, and yet are fit to be redreſſed ſomewhere; ſuch, for inſtance, as calling a man coward, or giving him the lie; for which, as they are productive of no immediate damage to his perſon or property, no action will lie in the courts of *Weſtminſter.*; and yet they are ſuch injuries as will prompt every man of ſpirit to demand ſome honourable amends, which by the antient law of the land was appointed to be given in the court of Chivalry. *Year Book*, 37 *Hen.* 6. 21: *Selden of Duels*, *c.* 10: *Hal. Hiſt. C. L.* 37. But modern reſolutions have determined, that how much ſoever ſuch a juriſdiction may be expedient, yet no action for words will at preſent lie therein. *Salk.* 533: 7 *Mod.* 125: 2 *Hawk. P. C. c.* 4. § 7, 8. And it hath always been moſt clearly holden, (*Hal. Hiſt. C. L.* 37,) that as this court cannot meddle with any thing determinable by the Common law, it therefore can give no pecuniary ſatisfaction or damages, inaſmuch as the quantity and determination thereof is ever of Common-law cognizance. And therefore this court of Chivalry can at moſt only order reparation in point of honour; to compel the defendant *mendacium ſibi ipſi imponere*, to take the lie he has given upon himſelf, or to make ſuch other ſubmiſſion as the laws of honour may require. 1 *Ro. Ab.* 128: Neither can this court, as to the point of reparation in honour, hold a plea of any ſuch word, or thing wherein the party is relieveable by the courts of Common law. As if a man give another a blow, or calls him thief or murderer; for in both theſe caſes the Common law has pointed out his proper remedy by action.

As to the other point of it's juriſdiction, the redreſſing of encroachments and uſurpations in matters of heraldry and coat-armour; it is the buſineſs of this court, 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 over-ruled by this court,) have not already determined it.

The proceedings in this court are by petition, in a ſummary way; and the trial not by a jury of twelve men, but by witneſſes, or by combat. *Co. Lit.* 261. See title *Battel.* But as it cannot impriſon, not being a court of record, and as by the reſolutions of the ſuperior courts, it is now confined to ſo narrow and reſtrained a juriſdiction, it has fallen into contempt and diſuſe. The marſhalling of coat-armour, which was formerly the pride and ſtudy of all the beſt families in the kingdom, is now greatly diſregarded; and has fallen into the hands of certain officers and attendants upon this court, called heralds, who conſider it only as a matter of lucre and not of juſtice: whereby ſuch falſity and confuſion have crept into their records (which ought to be the ſtanding evidence of families, deſcents, and coat-armour) that, though formerly ſome credit has been paid to their teſtimony, now even their common ſeal will not be received as evidence in any court of juſtice in the kingdom. 2 *Roll. Abr.* 686: 2 *Jon.* 224. But their original viſitation-books, compiled when progreſſes were ſolemnly and regularly made into every part of the kingdom, to enquire into the ſtate of families, and to

regiſter ſuch marriages and deſcents as were verified to them upon oath, are allowed to be good evidence of pedigrees. And it is much to be wiſhed, that this practice of viſitation at certain periods were revived; for the failure of inquiſitions *poſt mortem*, by the abolition of military tenures, combined with the negligence of Heralds in omitting their uſual progreſſes, has rendered the proof a modern deſcent, for the recovery of an eſtate or ſucceſſion to a title of honour, more difficult than that of an antient. This will be indeed remedied for the future, with reſpect to claims of peerage, by a ſtanding order (11 *May* 1767,) of the Houſe of Lords; directing the Heralds to take exact accounts, and preſerve regular entries of all peers and peereſſes of *England*, and their reſpective deſcendants; and that an exact pedigree of each peer, and his family ſhall, on the day of his firſt admiſſion, be delivered to the houſe by Garter, the principal King-at-arms. But the general inconvenience, affecting mere private ſucceſſions, ſtill continues without a remedy. 3 *Comm.* 103—6.

COURT-CHRISTIAN, *curia Chriſtianitatis.*] The eccleſiaſtical judicature, oppoſed to the civil court, or lay tribunal: and as in ſecular courts, human laws are maintained, ſo in the *Court Chriſtian*, the laws of *Chriſt* ſhould be the rule. And therefore the judges are divines; as archbiſhops, biſhops, archdeacons, &c. 2 *Inſt.* 488. See *poſt.* title *Courts Eccleſiaſtical.*

COURTS OF CONSCIENCE, *curia conſcientiæ.*] In the 9th year of King *Hen.* 8. the *Court of Conſcience, or Court of Requeſts*, in *London*, was erected: there was then made an act of common council, that the Lord Mayor and Aldermen ſhould aſſign monthly two Aldermen and four diſcreet Commoners, to be Commiſſioners to ſit in this court twice a week, to hear and determine all matters brought before them between party and party, between citizens and freemen of *London*, in all caſes where the debt or damage was under 40*s.* And this act of Common Council was confirmed by *Stat.* 1 *Jac.* 1. *c.* 14; which impowered the Commiſſioners of this court to make ſuch orders between the parties touching ſuch debts, as they ſhould find ſtand to equity and good conſcience. The *Stat.* 3 *Jac.* 1. *c.* 15, fully eſtabliſhes this court; the courſe and practice whereof is by ſummons, to which if the party appear, the commiſſioners proceed ſummarily; examining the witneſſes of both parties, or the parties themſelves on oath, and as they ſee cauſe give judgment. And if the party ſummoned appear not, the commiſſioners may commit him to the Compter priſon till he does; alſo the commiſſioners have power to commit a perſon refuſing to obey their orders, &c.

By *Stat.* 14 *Geo.* 2. *c.* 10, the proceedings of the Court of Conſcience are regulated; and in caſe any perſon affront or inſult any of the commiſſioners, on their certifying it to the Lord Mayor, he ſhall puniſh the offender by fine, not exceeding 20*s.* or may impriſon him ten days.

There are many other Courts of Conſcience eſtabliſhed of late years by act of parliament. See title *Coſts*, and alſo title *Debtors.*

Courts of Conſcience have been eſtabliſhed at the following places: *Alban's, St.* town of, by 25 *Geo.* 2. *c.* 38; *Bath*, by 6 *Geo.* 3. *c.* 16; *Beverly* in *Yorkſhire*, by 21 *Geo.* 3. *c.* 38; *Birmingham*, by 25 *Geo.* 2. *c.* 34; *Blackheath, Bromley, Beckenham, Rokeſley*, or *Ruxley Little*, and *Leſſneſs*, in *Kent*, by 6 *Geo.* 3. *c.* 6. and 10 *Geo.* 3. *c.* 29: *Bolingbroke*, and *Candleſhoe* in *Linſey*, in *Lincolnſhire*, by 18 *Geo.* 3. *c.* 34: *Boſton*, by 26 *Geo.* 2. *c.* 7: *Bradford, Melkſham*, and *Worleſdown*, in *Wiltſhire*, by 3 *Geo.* 3. *c.* 19; *Buxton hundred*, by 31 *Geo.* 2. *c.* 23; *Broſely*, by 22 *Geo.* 3. *c.* 37; *Canterbury*, by 25 *Geo.* 2. *c.* 45; *Chippenham, Calne, Damerham, North*, and *Corſham*, in *Wilts*, by 5 *Geo.* 3. *c.* 9; *Deal*, &c. by 26 *Geo.* 3. *c.* 18; *Derby borough*, and *liberties of*, by 6 *Geo.* 3. *c.* 20; *Dover*, within the *town* and *port of*, the pariſh of *Charlton*, and other places in *Kent*, by 24 *Geo.* 3. *c.* 8; *Elloe hundred*, in *Lincolnſhire*, by 15 *Geo.* 3. *c.* 64; *Ely*, by 18 *Geo.* 3. *c.* 36; *Exeter*, by 13 *Geo.* 3. *c.* 27; *Folkſtone*, &c. in *Kent*, by 26 *Geo.* 3. *c.* 118: *Faverſham*, and *Boughton* and *Oſpringe*, in *Kent*, by 25 *Geo.* 3. *c.* 7; *Halifax*, in *Yorkſhire*, by 17 *Geo.* 3. *c.* 15; 20 *Geo.* 3. *c.* 65; *Horncaſtle, Soke*, in *Lincolnſhire*, by 19 *Geo.* 3. *c.* 43; *Kidderminſter*, by 12 *Geo.* 3. *c.* 66; *King's Lynn*, by 10 *Geo.* 3. *c.* 20; *Kingſton-upon-Hull*, by 2 *Geo.* 3. *c.* 38; *Kirkby*, in *Weſtmorland*, by 4 *Geo.* 3. *c.* 41: *Lincoln*, by 24 *Geo.* 2. *c.* 16; *Liverpool*, by 25 *Geo.* 2. *c.* 24; *Poulton, Kirkham, Leitham* and *Biſpham, Pruſall* and *Stalmine*, in *Lancaſhire*, by 10 *Geo.* 3. *c.* 21; *Rocheſter* and *Stroud* in *Kent*, by 22 *Geo.* 3. *c.* 37; *Sandwich*, in *Kent*, by 26 *Geo.* 3. *c.* 22; *Shrewſbury*, by 23 *Geo.* 3. *c.* 73; *Soke, Yorkſhire*, by 4 *Geo.* 3. *c.* 40; *Old Swinford, Worceſterſhire*, and *Staffordſhire*, by 17 *Geo.* 3. *c.* 19; *Yarmouth*, by 31 *Geo.* 2. *c.* 24.

COURT OF DELEGATES. See *poſt.* title *Courts Eccleſiaſtical* 6.

COURTS ECCLESIASTICAL, *curiæ eccleſiaſticæ, Spiritual Courts.*] Are thoſe *Courts* which are held by the King's authority as ſupreme governor of the church, for matters which chiefly concern religion, 4 *Inſt.* 321. And the *laws and conſtitutions* whereby the church of *England* is governed, are, 1. Divers immemorial *cuſtoms.* 2. Our own *provincial conſtitutions*; and the *canons* made in convocations, eſpecially thoſe in the year 1603. 3. Statutes or *Acts of Parliament* concerning the affairs of religion, or cauſes of *eccleſiaſtical* cognizance; particularly the *rubricks* in our Common Prayer-Book, founded upon the ſtatutes of uniformity. 4. The *articles of religion*, drawn up in the year 1562, *Articuli Cleri*, 9 *E.* 2. and eſtabliſhed by 33 *Eliz. cap.* 12. And it is ſaid, by the general *Canon law*, where all others fail.

As to *ſuits* in ſpiritual or *Eccleſiaſtical Courts*, they are for the reformation of manners, or for puniſhing of hereſy, defamation, laying violent hands on a clerk, and the like; and ſome of their ſuits are to recover ſomething demanded, as tithes, a legacy, contract of marriage, &c. And in cauſes of this nature the courts may give coſts, but not damages: things that properly belong to theſe juriſdictions are matrimonial and teſtamentary; and ſuch defamatory words, for which no action lies at law; as for calling one adulterer, fornicator, uſurer, or the like: 11 *Rep.* 54: *Dyer* 240.

The *proceedings* in the *Eccleſiaſtical courts* are according to the *Civil* and *Cannon law*, by *citation, libel, anſwer* upon *oath*, proof by *witneſſes*, and *preſumptions*, &c. and after *ſentence*, for contempt, by *excomunication*: and if the ſentence is diſliked, by *appeal.*

The *juriſdiction* of theſe *courts* is *voluntary*, or *contentious*; the voluntary is merely concerned in doing what no one oppoſes, as granting diſpenſations, licences, faculties, &c.

The

The punishments inflicted by these courts are censures, punishments *pro salute animæ*, by way of penance, &c. They are not courts of record. See further title *Prohibition*.

Much oppression having been exercised through the channel of these courts, on persons charged with trifling offences within their spiritual jurisdiction, the *Stat.* 27 *Geo.* 3. *c.* 44, limits the time of commencing suits for defamatory words to six months—and for incontinence and beating in the church-yard to eight months.—See titles *Limitations*, *Fornication*.

In briefly recounting the various species of Ecclesiastical Courts, or as they are often stiled, Courts-Christian, (*curiæ Christianitatis*) we may begin with the lowest, and so ascend gradually to the supreme court of appeal.

1. *The Archdeacon's Court* is the most inferior court in the whole ecclesiastical polity. It is held in the Archdeacon's absence before a judge appointed by himself, and called his official: and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the Bishop's Court of the diocese. From hence however by *Stat.* 24 *Hen.* 8. *c.* 12, an appeal lies to that of the bishop.

2. *The Consistory Court* of every diocesan bishop, is held in their several cathedrals, for the trial of all ecclesiastical causes arising within their respective dioceses. The Bishop's Chancellor, or his Commissary, is the judge; and from his sentence an appeal lies, by virtue of the same statute, to the Archbishop of each province respectively.

3. *As to the Court of Arches*, See title *Arches Court*.

4. *The Court of Peculiars*, is a branch of and annexed to the Court of *Arches*. It has a jurisdiction over all those parishes dispersed through the Province of *Canterbury* in the midst of other dioceses, which are exempt from the Ordinary's jurisdiction, and subject to the Metropolitan only. All ecclesiastical causes, arising within these peculiar or exempt jurisdictions, are, originally, cognizable by this court; from which an appeal lay formerly to the Pope, but now by the *Stat.* 25 *Hen.* 8. *c.* 19, to the King in Chancery.

5. *The Prerogative Court* is established for the trial of all testamentary causes, where the deceased hath left *bona notabilia* within two different dioceses. In which case the probate of wills belongs to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies of such persons, are, originally, cognizable herein, before a judge, appointed by the Archbishop, called the judge of the Prerogative Court, from whom an appeal lies by *Stat.* 25 *Hen.* 8. *c.* 19, to the King in Chancery, instead of the Pope as formerly.

6. *The Great Court of Appeal* in all ecclesiastical causes, *viz.* the *Court of Delegates*, (*judices delegati*) appointed by the King's commission under his Great Seal, and issuing out of Chancery, to represent his royal person, and hear all appeals made to him by virtue of the beforementioned *Stat.* of *Hen.* 8. This commission is frequently filled with Lords, spiritual and temporal, and always with judges of the courts at *Westminster*, and Doctors of the Civil Law. Appeals to *Rome* were always looked upon by the *English* nation, even in the times of popery, with an evil eye; as being contrary to the liberty of the subject, the honour of the crown, and the independence of the whole realm; and were first introduced in very turbulent times in the sixteenth year of King *Stephen* (A. D. 1151); at the same period (Sir *Henry Spelman* observes) that the civil and canon laws were first imported into *England*. *Cod. Vet. Leg.* 315. But, in a few years after, to obviate this growing practice, the constitutions made at *Clarendon*, 11 *Hen.* II. on account of the disturbances raised by Archbishop *Beckett*, and other zealots of the Holy See, expresly declare (*chap.* 8,) that appeals in causes ecclesiastical ought to lie, from the Archdeacon to the Diocesan; from the Diocesan to the Archbishop of the Province; and from the Archbishop to the King; and are not to proceed any farther without special licence from the crown. But the unhappy advantage that was given in the reigns of King *John*, and his son *Henry* III. to the encroaching power of the Pope, who was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length riveted the custom of appealing to *Rome* in causes ecclesiastical so strongly, that it never could be thoroughly broken off, till the grand rupture happened in the reign of *Henry* VIII. when all the jurisdiction usurped by the Pope in matters ecclesiastical was restored to the crown, to which it originally belonged; so that the *Stat.* 25 *Hen.* 8, was but declaratory of the antient law of the realm. 4 *Inst.* 324. But in case the King himself be party in any of these suits, the appeal does not then lie to him in Chancery, which would be absurd; but by the *Stat.* 24 *Hen.* 8. *c.* 12, to all the Bishops of the realm assembled in the upper house of Convocation.

7. *A Commission of Review*, is a commission sometimes granted, in extraordinary cases, to revise the sentence of the Court of Delegates; when it is apprehended they have been led into a material error. This commission the King may grant, although the *Stats.* 24 & 25 *Hen.* 8, before cited, declare the sentence of the delegates definitive; because the Pope as supreme head by the canon law used to grant such commission of review; and such authority as the Pope heretofore exerted, is now annexed to the Crown by *Stats.* 26 *Hen.* 8. *c.* 1, and 1 *Eliz. c.* 1. But it is not matter of right, which the Subject may demand *ex debito justitiæ*; but merely a matter of favour, and which therefore is often denied.

These are now the principal courts of ecclesiastical jurisdiction; none of which are allowed to be Courts of Record; no more than was another much more formidable jurisdiction, but now deservedly annihilated, *viz.* the Court of the King's *High Commission* in causes ecclesiastical. This court was erected and united to the regal power by virtue of the *Stat.* 1 *Eliz. c.* 1, instead of a larger jurisdiction which had before been exercised under the Pope's authority. It was intended to vindicate the dignity and peace of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, offences, contempts and enormities. Under the shelter of which very general words, means were found in that, and the two succeeding reigns, to vest in the High Commissioners extraordinary, and almost despotic powers of fining and imprisoning; which they exerted much beyond the degree of the offence itself, and frequently over offences by no means of spiritual cognizance. For these reasons this Court was justly abolished by *Stat.* 16 *Car.* 1. *c.* 2.—See 3 *Comm.* 64. *&c.*

See further

See further on the general principles, as to the jurisdiction of Ecclesiastical Courts, this Dict. titles *Canon Law*, *Civil Law*.

COURT OF HUSTINGS, *curia hustingi.*] The highest Court of Record, holden at *Guildhall*, for the *City of London*, before the Lord Mayor and Aldermen, the Sheriffs, and Recorder. 4 *Inst.* 247. This *court* determines all pleas *real*, *personal*, and *mixt*: and here all lands, tenements, and hereditaments, rents and services, within the city of *London* and *suburbs* of the same, are pleadable in two *Hustings*; one call *Hustings of plea of lands*, and the other *Hustings of common pleas*. In this court the burgesses to serve for the city in parliament, must be elected by the Livery of the respective companies.

In the *Hustings of plea of lands*, are brought *writs of right patent* directed to the sheriffs of *London*, on which writs the tenant shall have three summonses at the three *hustings* next following; and after the three summons, there shall be three essoins at three other *hustings* next ensuing; and at the next *hustings* after the third essoin, if the tenant makes default, process shall be had against him by *grand cape*, or *petit cape*, &c. If the tenant appears, the demandant is to declare in the nature of what writ he will; without making protestation to sue in nature of any writ: then the tenant shall have the view, &c. and if the parties plead to judgment, the judgment shall be given by the Recorder: but no damages, by the custom of the city, are recoverable in any such writ of right patent.

In the *Hustings of common pleas* are pleadable, writs *ex gravi querela*, writs of *gavelet*, of *dower*, *waste*, &c. also writs of *exigent* are taken out in the *hustings*; and at the fifth *hustings* the outlawries are awarded, and judgment pronounced by the Recorder.

If an erroneous judgment is given in the *hustings*, the party grieved may sue a *commission* out of *Chancery*, directed to certain persons to examine the record, and thereupon do right. 1 *Rol. Abr.* 745.—See further the *Privilegia Londini*; and this Dict. title *London*.

COURT OF THE DUTCHY OF LANCASTER. See title *Chancellor of the Dutchy*, &c.

COURT-LEET; *or* LEET.

The word *Leet* is not to be found either in the *Saxon* law, or in *Glanvil*, *Bracton*, *Britton*, *Fleta*, or the *Mirror*, our most antient law writers; nor in any statute prior to *Stat.* 27 *E.* 3. *c.* 28, though it is allowed to occur in the Conqueror's charter for the foundation of *Battle Abbey*, and not unfrequently in *Domesday Book*, *Spelm.* v. *Leta*. It seems to be derived from the *Saxon*, *leod*, *plebs*; and to mean the *populi curia*, or folk-mote, as the sheriff's tourn or *Leet* of the county (at least) appears to have been once actually called (See *Spelman in verb. Folksmote*;) in contradiction, perhaps, to the Halmote or Court Baron, which consisted of the free tenants only, who, being few in number, might conveniently assemble in the Lord's Hall; whereas the *Leet*, which required the attendance of all the resiants, within the particular hundred, lordship, or manor, and concerned the administration of public justice, was, usually held in the open air. *Spelman in verb. Mallobergium*. According to *Hawkins*, (*Leach's Hawk. P. C.* ii. 112. which see;) a Court-Leet is a Court of Record, having the same jurisdiction within some particular precinct, which the sheriff's tourn hath in the county. See also 4 *Comm.* 273.

The view of Frank-pledge, *visus franciplegii*, means the examination or survey of the free-pledges, of which every man, not particularly privileged, was antiently obliged to have nine, who were bound that he should be always forth-coming to answer any complaint. The better to understand this, we are to be informed, that the kingdom being divided by King *Alfred* into counties or shires, and each county into hundreds, and each hundred into tithings, each tithing containing ten families or households, the heads of these families were reciprocally bound and responsible for each other; so that, in fact, of every ten householders throughout the kingdom, each man had nine pledges or sureties for his good behaviour.

Leet is also a word used for a *Law day* in several of our antient statutes. See *Dyer* 30 *b*.

That the *Leet* is the most antient court in the land, (for *criminal* matters, the Court Baron, being of no less antiquity in *civil*,) has been pronounced by the highest legal authority, 7 *H.* 6. 12 *b*: 1 *Roll. Rep.* 73. For though we do not meet with the *word* among the *Saxons*, there can be no doubt of the existence of the *thing*.

Lord *Mansfield* states that this court was co-eval with the establishment of the *Saxons* here, and its activity "marked very visibly both amongst the *Saxons* and the *Danes*." 3 *Burr.* 1860. In those times whoever possessed a vill or territory, with the liberties of *soc*, *sac*, &c. (a long string of barbarous words) was the lord of a manor, had a court-leet, court-baron, and in a word, every privilege which it seems to have been possible for the monarch to bestow, or for the subject to acquire. See *Spelman in verb. Manerium*.

The Leet is a Court of Record for the cognisance of criminal matters, or pleas of the crown, and necessarily belongs to the King; though a Subject, usually the Lord of a Manor, may be and is entitled to the profits, consisting of the essoign-pence, fines and amerciaments.

It is held before the steward, (or was, in antient times, before the bailiff) of the Lord; *Mirror*, *passim*: *Finch's Law* 248.—See also *Kennet's P. A.* 319.—This officer who should be a barrister of learning and ability, is a judge of record, may take recognizance of the peace, may fine, imprison, and in a word, as to things to which his power extends, hath equal power with the justices of the Bench.—By *Stat.* 1 *Jac.* 1. *c.* 5, he is prohibited from taking to the value of 12*d.* for his own use, by colour of any grant of the profits of this court.

This court is held sometimes once, sometimes thrice, but most commonly twice in the year; that is, within a month after *Easter*, and a month after *Michaelmas*; and cannot, unless by adjournment, be held at any time not warranted by antient usage. See *Mag. Char. c.* 35, and *Spelman* in v. *Leta*; according to whom this court should be held regularly only *once* a year; though sometimes by custom twice, when it is called *residuum letæ*. As to the place in which it is held, that, it has been said, may be any where within the precinct, 8 *H.* 7. 3: *Owen* 35; but more strictly speaking, ought to be certain and accustomed. *Rastall's Entries* 151.

All persons above the age of twelve years, and under sixty, except peers, clerks, women, and aliens, resiant within the district, whether masters or servants, owe personal suit and attendance to this court, and ought to be here sworn to their fealty and allegiance. 2 *Inst.* 120, 121.

121. And here alſo, by immemorial uſage and of common right, that moſt ancient conſtitutional officer the conſtable, (4 *Inſt.* 265,) and ſometimes by preſcription the mayor of a borough, (See *Stat.* 2 *Geo.* 1. *c.* 4,) are elected and ſworn.

The general juriſdiction of the court extends to all crimes, offences, and miſdemeanors at the Common law, as well as to ſeveral others which have been ſubjected to it by act of parliament. Theſe are enquired after by a body of the ſuitors, elected, ſworn and charged for that purpoſe, who muſt not be leſs than twelve, nor more than twenty-three; and who, in ſome manors, continue in office for a whole year; while, in others, they are ſworn and diſcharged in the courſe of a day. Whatever they find they preſent to the ſteward; who if the offence be treaſon or felony, muſt return the preſentment, (in theſe caſes called an indictment), to the King's juſtices of oyer and terminer, and gaol-delivery. See *Stats. W.* 2. *c.* 13: 1 *E.* 3. *ſt.* 2. *c.* 17. In all other caſes he has power, upon the complaint of any party grieved, or upon ſuſpicion of the concealment of any offence, to cauſe an immediate enquiry into the truth of the matter by another jury. See *Stats.* 33 *H.* 8. *c.* 6, and 1 *Eliz. c.* 17. § 10. But the preſentment, being received, and the day paſſed, ſhall be held true, and unleſs it concern the party's freehold, ſhall not be ſhaken or queſtioned by any tribunal whatever. *Hale P. C.* 153, 5: *Leach's Hawk. P. C.* ii. 111, 112: and 11 *Co.* 44. Upon every preſentment of the jury retained by the court, an amerciament follows of courſe, which is afterwards aſſeſſed, in open court agreeable to *Magna Charta*, *c.* 14, by the *pares curiæ*, that is, the peers, or equals of the delinquent; and *affeered* or reduced to a preciſe ſum, by two or more ſuitors ſworn to be impartial. 8 *Rep.* 39. See alſo *Stat. W.* 1. *c.* 6. And that theſe ſtatutes were in this particular but in affirmation of the Common law, See 8 *Rep.* 39 *b*: 2 *Inſt.* 27. The amerciaments thus aſcertained are then eſtreated (or extracted) from the roll or book in which the proceedings are recorded and levied by the bailiff, by diſtreſs and ſale of the party's goods, (8 *Rep.* 41;) by virtue of a warrant from the ſteward to that effect, or may be recovered by other means as by proceſs of *levari facias*, (*Hardr.* 471,) or action of debt, (*Bull. N. P.* 167.) No crime in thoſe remote ages appears to have been puniſhed by death; unleſs it were that of open theft, where the offender was taken with the *mainour*, that is, with the thing ſtolen upon him: and of this crime, and this only, the cognizance did not belong to the Leet. All other offences of what nature or degree ſoever, ſubjected the party to mulct or pecuniary fine, which was, in many caſes determined and fixed. This pecuniary compoſition, with reſpect to certain capital offences, was abrogated, and the puniſhment of death ſubſtituted in its place by King *Henry* I. *Spelman* in v. *Felo*, *Wilkinſ. LL. Sax.* 304.

It is not improbable that the diſtinction of *indictments* for felonies, and *preſentments* of inferior offences, owes its origin to the above meaſure.

It has been ſaid, that by the clauſe *nullus vicecomes*, &c. in the *Great Charter*, *c.* 17, the juriſdiction of the Leet was abridged, and its power to hear and determine taken away; but this has been ſaid and repeated without due attention either to the nature and conſtitution of the court, or to the law of the time. No offence, it is well known, is at this day, or, for aught that appears, ever was, heard and determined in the Leet, (nor before the period referred to, by any other criminal-court in the kingdom), otherwiſe than upon the preſentment of twelve men, or what we now in moſt courts call the Grand Jury. This preſentment, as has been already obſerved, found and eſtabliſhed the fact; and judgment, whether of *miſericordia*, mutilation or death, followed as an incident or matter of courſe; preciſely, indeed, as the puniſhment does at this day on the verdict for the king of the petty jury. In fact, therefore, the juriſdiction of the Leet was not in the leaſt abridged or affected by that charter; nor is it at all probable that the barons would either ſeek or ſuffer the diminution of their own privileges, of which on the contrary, there is an expreſs ſaving.

That this court has no power to enquire of the death of a man, or of rape, is a more ancient, but not leſs erroneous opinion. The contrary is moſt directly and expreſsly held in the *Statutum Walliæ*, in *Briton*, *Fleta*, the *Mirror*, and the *Stat. of* 18 *E.* 2. (which ſtatute, though it enumerates certain particulars of the juriſdiction of the Leet does not confine it to them only); all much older and better authorities than the book of Aſſiſes, 41 *E.* 3. *p.* 40, in which that opinion firſt appears.

The ſteward of a Leet may award to priſon, perſons either indicted or accuſed of felony before him, or guilty of any contempt in the face of the court. *Stat. Weſtm.* 2. *c.* 13. which however ſeems to apply *only* to the ſheriff's tourn. See *Cromp. J. P.* 92 *b*: *Ow.* 113.

See further for the whole of this ſubject, *Com. Dig.* title *Leet*.

The Court-Leet has now been for a long time in a declining way; its buſineſs as well as that of the tourn having for the moſt part gradually devolved on the quarter ſeſſions. See 4 *Comm.* 274: 3 *Burr.* 1864.

This laſt circumſtance is very pathetically lamented by the ingenious author, from whom the above account of the Court-Leet is principally drawn; and to whom the editor of the preſent work is indebted for much of the information under title *Conſtable*. How far the reſtoration of the powers of the Court-Leet in the preſent extenſive deluge of crimes is adviſeable or not, is a queſtion not to be determined in the compaſs here allotted to the ſubject. Every one deſirous of being accurately informed of the foundations of the *Engliſh* law, will wiſh that the learned author from whom the above extracts have been made, would ſpend his time rather in examining the ancient, than condemning the preſent ſtate of our juriſprudence. For the former taſk he is eminently qualified; the latter is only worthy of inferior talents.

COURT OF MARSHALSEA, *Curia palatii.*] A court of record to hear and determine cauſes between the ſervants of the King's houſehold and others within the verge; and hath juriſdiction of all matters within the verge of the court, and of pleas of treſpaſs, where either party is of the King's family and of all other actions perſonal, wherein both parties are the king's ſervants; and this is the original juriſdiction of the *court of marſhalſea*. 1 *Bulſt.* 211. But the *curia palatii*, erected by King *Charles* I, by letters-patent, in the 6th year of his reign, and made a court of record, hath power to try all perſonal actions, as debt, treſpaſs, ſlander, trover, actions on the caſe, &c. between party and party, the liberty whereof extends

tends twelve miles about *Whitehall*; *Stat.* 13 *R.* 2. *ſt.* 1. *c.* 3. Which juriſdiction was confirmed by King *Charles* II.

The judges of this court are the ſteward of the King's houſehold, and knight-marſhal for the time being, and the ſteward of the court, or his deputy, being always a lawyer. *Crompt. Juriſd.* 102: *Kitch.* 199, *&c.* 2 *Inſt.* 548.

This court is kept once a week, in *Southwark*: and the proceedings here are either by *capias* or attachment; which is to be ſerved on the defendant by one of the knight-marſhal's men, who takes bond with ſureties for his appearance at the next court; upon which appearance, he muſt give bail, to anſwer the determination of the court; and the next court after the bail is taken, the plaintiff is to declare, and ſet forth the cauſe of his action, and afterwards proceed to iſſue and trial by a jury, according to the cuſtom of the Common law courts. If a cauſe is of importance, it is uſually removed into *B. R.* or *C. B.* by an *habeas corpus cum cauſa*: otherwiſe cauſes are here brought to trial in four or five court-days. The inferior buſineſs of this court hath of late years been much reduced, by the new courts of conſcience in and near *London*; for which the four counſel belonging to the court were indemnified by ſalaries during their lives, by *Stat.* 23 *Geo.* 2. *c.* 27.

By *Stat.* 28 *E.* 1. *c.* 3, the ſteward and marſhal of the King's houſe are not to hold plea of freehold, *&c.* Error in the *Marſhalſea court* may be removed into the *King's Bench*. *Stats.* 5 *E.* 3. *c.* 2: 10 *E.* 3. *ſt.* 2. *c.* 3. And the fees of the *Marſhalſea* are limited by the *Stat.* 2 *H.* 4. *c.* 23 —This *Marſhalſea* is that of the houſhold; not the *King's Marſhalſea*, which belongs to the King's Bench. See *Court of the Lord Steward*, *&c.*

COURT-MARTIAL.

Curia Martialis.] A Court for trying and puniſhing the military offences of Officers and Soldiers.

I. *Of the Origin,*
II. *Of the Juriſdiction,* } *Of Courts-Martial.*

I. THOUGH the authority of the *Court of Chivalry*, with regard to matters of war, *&c.* both within and without the realm, not determinable by the general municipal law, was firſt eſtabliſhed by the Common law, and afterwards confirmed by ſeveral ſtatutes; and was never objected to, even in criminal caſes, till the poſt of High Conſtable was laid aſide; (See titles *Conſtable*; *Court of Chivalry*;) yet we find its juriſdiction encroached upon much earlier; for by the *Stat.* 18 *H.* 6. *c.* 19. deſertion from the King's army was made felony, and by *Stats.* 7 *H.* 7. *c.* 1: 3 *H.* 8. *c.* 5, benefit of Clergy is taken away, and authority given to juſtices of peace to enquire thereof, and hear and determine the ſame. And *Rapin* quotes an inſtance of *H.* VII, having ordered thoſe accuſed of holding intelligence with the enemy after the battle of *Stoke*, 1487, to be tried by commiſſioners of his own appointing, or by Courts-martial, according to the Martial law; inſtead of the uſual court of juſtice, which was not ſo favourable to his deſign of puniſhing them only by fines. This however ſeems to have been an avaricious, arbitrary and illegal exertion of power, not authoriſed by any law of the land.

From the time the Court of Chivalry was abridged of its criminal juriſdiction, by the ſuppreſſion of the poſt of High Conſtable until the Revolution, there appears to to have been no regular eſtabliſhed court for the adminiſtration of Martial law. For although the Court of Chivalry ſtill continued to be held from time to time by the Earl Marſhal, its authority extended only to civil matters; and notwithſtanding deſertion was by *Stat.* 2 *&* 3 *E.* 6. *c.* 2, made felony without benefit of clergy, and other military crimes were made puniſhable by fines, impriſonment, *&c.* and by *Stat.* 39 *Eliz. c.* 17, idle and wandering ſoldiers and mariners were to be reputed as felons, and to ſuffer as in caſes of felony, without benefit of clergy (with ſome exceptions); and the juſtices of aſſiſe and gaol-delivery were to hear and determine theſe offences; yet there are inſtances during this period, of other courts being erected for the adminiſtration of Martial law; and not only military perſons made ſubject to it, but many others puniſhed thereby; ſome entirely at the diſcretion of the crown, and others by appointment of the parliament only; and it was a circumſtance of nearly a ſimilar nature, that occaſioned the enacting the *Petition of Right* 3 *C.* 1. *c.* 1; one clauſe of which was, that the commiſſions for proceeding by Martial law ſhould be diſſolved and annulled; and no ſuch commiſſion be iſſued for the future.

Though undoubtedly theſe commiſſions were illegal, yet the neceſſity of ſubordination in the army, and the impoſſibility of eſtabliſhing that ſubordination without Martial law, ſoon became apparent; and the two Houſes of Parliament, in the beginning of their rebellion againſt *Charles* I, paſſed an *Ordinance*, appointing commiſſioners to execute Martial law; which was certainly at leaſt as un-conſtitutional an act without the aſſent of the King, as any proceedings of his had been without conſent of Parliament. So true is it that Neceſſity has no law; and that uſurped power is always obliged to have recourſe to means to ſupport itſelf, at leaſt as ſevere as, and generally more violent than, thoſe which it previouſly condemns in a lawful government; which it may for a while ſucceed in overturning on falſe and ſpecious pretexts of undefined liberty.

This ordinance was paſſed in 1644, and afterwards renewed by the Parliament; and in proceſs of time adopted as a model for the Mutiny act paſſed after the Revolution: as many other regulations made during the powerful but tyrannical uſurpation of ſovereign authority, were afterwards modified to the true genius of the Britiſh conſtitution.

At the Reſtoration, one of the firſt ſteps taken by the parliament was, to diſband the army, and to regulate the militia, among whom a military ſubordination was eſtabliſhed, whenever they were drawn out; and fines and impriſonments impoſed on them for particular delinquencies. See title *Militia*.

Charles II. however kept up 5000 regular troops, for guards and garriſons, by his own authority; which his ſucceſſor, *Jac.* II. by degrees increaſed to 30,000 and more numerous armies were occaſionally raiſed by authority of parliament; yet we find no ſtatute for the government of theſe troops; nor was it till after the Revolution that a regular act of the whole Legiſlature paſſed for puniſhing mutiny and deſertion, *&c.* by Courts-martial.

This act was firſt occaſioned by a mutiny, in a body of *Engliſh* and *Scots* troops, upon their being ordered to *Holland*, to replace ſome of the *Dutch* troops which

Will. III, had brought over with him and intended to keep in *England*. The King immediately communicated this event to the Parliament, who readily agreed to give their ſanction to puniſh the offenders, and on the 3d *April* 1689, (1 *W. & M.*) paſſed an act for puniſhing Mutiny and Deſertion, *&c.* which was to continue in force only until *November* following.—It was however renewed again in *January*, and has with the interruption of about three years only, from *April* 1698 to *February* 1701, been *annually* renewed ever ſince, with ſome occaſional alterations and amendments, as well in times of peace as war.

II. MARTIAL LAW, as formerly exerciſed at the diſcretion of the Crown, and too often made ſubſervient to bad purpoſes, juſtly became obnoxious to the people; and not only the propriety but the legality of its being executed in times of peace, has been abſolutely denied. It is laid down (3 *Inſt.* 52,) that if a lieutenant or other, that hath commiſſion of Martial-law, doth in time of peace, hang or otherwiſe execute any man by colour of Martial-law, this is murder, for it is againſt *Magna Charta*.—And *Hale*, (*Hiſt. C. L. c.* 2,) declares Martial law to be in reality no law, but ſomething indulged rather than allowed as law: that the neceſſity of order and diſcipline is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the King's courts are open for all perſons to receive juſtice according to the laws of the land: and if a Court-martial put a man to death in time of peace, the officers are guilty of murder. See *H. P. C.* 46.

As future exigencies however have ariſen in the State, it has become neceſſary to alter and amend the old laws and enact new ones; and ſince the cuſtom of keeping up ſtanding armies in time of peace as well as war has become prevalent and general throughout *Europe*, (a cuſtom as it ſeems originally introduced by *Charles* VII. of *France* about 1445,) the Legiſlature of *Great Britain* has alſo judged it neceſſary, for the ſafety of the kingdom, the defence of its poſſeſſions, and the balance of power in *Europe*, (as the preamble to the Mutiny-act expreſſes it,) to maintain, even in times of peace, a ſtanding body of troops; and to authoriſe the exerciſe of Martial law among them.

A proper diſtinction then ſhould be made between Martial-law, as formerly executed, entirely at the diſcretion of the Crown, and unbounded in its authority, either as to perſons or crimes, and that at preſent eſtabliſhed, which is limited with regard to both.—Courts-Martial are at preſent held by the ſame authority as the other courts of judicature of this kingdom: and the King, (or his Generals, when empowered to appoint them) has the ſame prerogative of moderating the rigor of the law, and pardoning and remitting puniſhments, as in other caſes; but he can no more add to, nor alter the ſentence of a Court-martial, than he can a judgment given in the courts of law. Martial-law is now exerciſed within its proper limits, by the advice and concurrence of parliament, and the condemnation of criminals by Courts-martial acting under ſuch authority, cannot be regarded as illegal or contrary to *Magna Charta*; ſince during the exiſtence of the ſtatute by which theſe Courts are held, Martial-law, ſo modified and reſtrained, is as much part of the law of the land as *Magna Charta* itſelf.

Courts-Martial cannot ſit before 8 in the morning, or after 3 in the afternoon, except in caſes which require an immediate example: the attendance therefore of the members does not exceed 7 hours at a time: and they are at liberty to adjourn from day to day till they have fully conſidered the matter before them: and when they come to give their opinions, they are not under the neceſſity of being unanimous, but the priſoner is condemned or acquitted by a majority of voices; except in caſes of death, where 9 out of 13 or two thirds, if there be more than 13 preſent, muſt concur in opinion. *Articles of War*, § 15, *a.* 8, 9.

As to general Courts-martial, the Mutiny-act and Articles of War are very explicit, both as to the number they ſhall conſiſt of, and the rank of the officers who are to compoſe them: it being expreſsly directed, that no General Court-martial ſhall conſiſt of leſs than 13 members, whereof none are to be under the degree of a commiſſioned officer.—That the Preſident ſhall not be under the degree of a field officer, unleſs ſuch an one cannot be had, in which caſe the next in ſeniority to the commander, not being under the degree of a captain, ſhall preſide: and no field officer is to be tried by any perſon under the degree of a captain.—And it is a general cuſtom not to put ſubaltern officers, particularly thoſe but of ſhort ſtanding in the army, on General Courts-martial, provided a ſufficiency of field-officers and captains can be conveniently aſſembled. See *Art. of War*, § 15 *a.* 8, 9. 12: *Mutiny-act*, § 12.

Although a Preſident and 12 members are ſufficient to conſtitute a legal court, yet it is frequently judged neceſſary to aſſemble and ſwear in more; in order as far as poſſible to guard againſt accidents ariſing from ſickneſs, or other cauſes the non-attendance of ſome of the court. Whilſt there is a *quorum* of 13, the preſident included, of thoſe originally ſworn in, the court may proceed to buſineſs, although others of the court do not attend; but if it become neceſſary to call in a new member, the court muſt proceed *de novo*.

The Crimes that are cogniſable by a Court-martial, as repugnant to military diſcipline, are pointed out by the Mutiny-act and Articles of War; which every military man is or ought to be fully acquainted with, and therefore not neceſſary to be recited here: and as to other crimes which officers and ſoldiers being guilty of, are to be tried for in the ordinary courſe of law, it is needleſs to enter into a detail of them.

By the laſt article in the code of Military-laws, Courts-martial are authoriſed to take cogniſance of all crimes *not capital*, and all *diſorders* and *neglects*, which officers and ſoldiers may be guilty of, to the prejudice of good order and military diſcipline, which are not enumerated in the preceding articles, and puniſh them at their diſcretion. *Art. of War*, § 20 *a.* 3. Upon the authority of this article it has been too much the cuſtom in the army to try ſoldiers by Courts-martial, for thefts and other crimes cogniſable before the courts of law. But it ſeems queſtionable, whether an exception might not in many ſuch caſes be made to their juriſdiction: for the Mutiny-act, § 62, and Articles of War, § 11 *a.* 1, expreſsly direct, that any officer, non-commiſſioned officer or ſoldier who ſhall be accuſed of any capital crime, violence or offence, againſt the perſon, eſtate or property of any of his Majeſty's ſubjects, puniſhable by the laws of the land,

ſhall be delivered over to the civil magiſtrate by the commanding officer, under penalty of his being caſhiered in caſe of refuſal.—There was formerly an article, of late omitted, particularly authoriſing Courts-martial to take cogniſance of all ſoldiers accuſed of ſtealing from their comrades.

The Perſons liable to Martial-law are likewiſe enumerated in the Act and the Articles. The latter mention only Officers, Soldiers and perſons ſerving with the armies in the field. But *Hale* and others are of opinion, that *aliens* who in a hoſtile manner invade the kingdom, whether their King were at war or peace with ours, and whether they come by themſelves or in company with *Engliſh* traitors, cannot be puniſhed as traitors, but muſt be dealt with by Martial-law. *H. P. C. cc.* 10, 15: 3 *Inſt.* 11.—This however means *Martial-law* in the ſtrict ſenſe of the word, in which it cannot be applied to proceedings under the Mutiny-act; and which kind of Martial law is unknown in this kingdom.—The *receiving pay* as a ſoldier, ſubjects the receiver to military juriſdiction. The court of *C. P.* therefore refuſed to grant a prohibition to prevent the execution of the ſentence of a Court-martial, paſſed againſt one who *received pay* as a ſoldier; but who aſſumed the military character merely for the purpoſe of recruiting, in the uſual courſe of that ſervice—and this though the proceedings of the Court-martial, appeared, in ſome inſtances, to be erroneous. *Grant* v. Sir *Charles Gould*, 2 *H. Black. Rep.* 69.

The Articles of War, in a few caſes, point out the expreſs *Sentence* to be paſſed on criminals, without any alternative: in ſome an optional power is given, of puniſhing with death or otherwiſe, and in others, offenders are puniſhed at the diſcretion of the Court, omitting the word *death*; evidently meaning thereby to exclude the power of puniſhing capitally in ſuch caſes.

In caſes where an optional power is veſted in the Court to puniſh with death or otherwiſe, the queſtion to follow that of *guilty* or *not guilty*, (upon the Court or the majority of it declaring for the former,) is, whether or not the priſoner ſhall ſuffer death? If *two-thirds* of the Court do not concur in the affirmative, the votes of the affirmants are conſidered as void. A leſſer number than two-thirds being, as was before ſaid, incompetent to give judgment of death, another queſtion becomes neceſſary to be propoſed to every member, what puniſhment, *other than death*, ſhall the priſoner undergo? And each member gives his voice, *de novo*, on this queſtion, wherein a majority is competent to determine.

The crimes cogniſable by a Court-martial may be divided into *felonies* and *miſdemeanors*; or more properly, into capital offences, and offences only criminal and not capital; and if on the evidence a priſoner does not appear guilty of a crime of ſo capital a nature, as is ſet forth in the charge, the Court may find him guilty in a leſs degree; but they cannot declare him guilty of a mutiny, or any other *diſtinct* crime or offence, unleſs it be likewiſe in the charge given againſt him, before the trial commences.

The judgments of Courts-martial, beſides being open to the diſapprobation of the King, or his commanders in chief, are liable like thoſe of other courts, to be taken cogniſance of, and the members puniſhed for illegal proceedings; for the Court of King's Bench being the ſupreme court of Common law, hath not only power to reverſe erroneous judgments given by inferior courts, but alſo to puniſh all inferior magiſtrates, and all officers of juſtice, for all wilful and corrupt abuſes of authority againſt the known, obvious, and common principles of juſtice. 2 *Hawk. P. C. c.* 3. § 10: *c.* 27. § 22.—The Mutiny-act directs, that every action againſt any member or miniſter of a Court-martial, in reſpect to any ſentence, ſhall be brought in ſome of the courts of record at *Weſtminſter*, &c. § 63. And there have been many inſtances of proſecutions of this nature in *Weſtminſter-hall*.—An officer on a Court martial however is not liable to be puniſhed for mere miſtakes which an honeſt well-meaning man may innocently fall into. And if the plaintiff or proſecutor becomes nonſuited, or the defendant has a verdict, he ſhall recover treble coſts. *Mutiny-act*, § 62.—There is alſo another tribunal before which the proceedings of Courts-martial are liable to *cenſure* at leaſt, namely, the *Houſe of Commons*.

It is enacted by § 12 of the *Mutiny-act*, that no officer or ſoldier being acquitted or convicted of any offence, ſhall be liable to be tried a ſecond time by the ſame or any other Court-martial, for the ſame offence, unleſs in the caſe of an *appeal* from a regimental to a general Court-martial; and by the Articles of War "If upon a ſecond hearing the appeal ſhall appear to be vexatious and groundleſs, the perſon ſo appealing ſhall be puniſhed at the diſcretion of the General Court-martial."—No ſentence given by any Court-martial, and ſigned by the Preſident, is liable to be reviſed more than once. And this may be rather deemed an appeal to the ſame court than a new trial; ſince in this caſe the ſame perſons only are to re-conſider what they have already done, without any new judges being added to them, or any new witneſſes produced.

A diſtinction is made in the *Oath* taken by the *Preſident and Members* of a Court-martial, and that of the *Judge-Advocate*. The former are ſworn, not only to conceal the vote or opinion of each particular member, but alſo the ſentence of the Court, until it ſhall be approved by his Majeſty, or by ſome perſon duly authoriſed by him; the latter is only ſworn not to divulge the opinion of any particular member of the Court-martial.

For further particulars, See *Adye's Treatiſe on Courts-Martial*; from whence moſt of the above is abridged.—See alſo this Dict. title *Soldiers*.—And as to Naval Courts-martial, title *Navy*.

COURT OF PIEPOWDERS, *curia pedis pulveriſati*.] Is a court held in fairs, to do juſtice to buyers and ſellers, and for redreſs of diſorders committed in them: ſo called, becauſe they are moſt uſual in Summer, when the ſuitors to the court have *duſty feet*; and from the expedition in hearing cauſes proper thereunto, before the duſt goes off the feet of the plaintiffs and defendants. 4 *Inſt.* 272: or from *Pied pouldreaux* a pedlar. *Barrington, Anc. Stats.* 337. It is a *court of record* incident to every *Fair*; and to be held only *during the time* that the *Fair* is kept. *Doct. & Stud. c.* 5. As to the juriſdiction, the cauſe of action for contract, ſlander, &c. muſt ariſe *in* the fair or market, and not before at any former fair, nor after the fair: it is to be for ſome *matter concerning* the ſame *fair* or *market*; and muſt be done, complained of, heard and determined the ſame day. Alſo the plaintiff muſt make oath that the contract, &c. was *within the juriſdiction* and *time* of the *fair*. *Stat.* 17 *Ed.* 4. *c.* 2: 2 *Inſt.* 220.

The Court of *Piepowders* may hold a plea of a ſum above 40*s.* and it is ſaid, judgment may be given at another

other fair, at a court held there, and a writ of error lies upon a judgment given. *Dyer* 133: *F. N. B.* 18. This court may not meddle with any thing done in a *market*, without a *ſpecial cuſtom* for it; but for what is done in a *fair* only: and not there for *ſlanderous words*, unleſs they concern *matters of contract in* the *fair*; as where it is for ſlandering the *wares* of another, and not of his *perſon* in the ſame fair. *Moor*, *Ca.* 854. The ſteward before whom the court is held, is the judge: and the trial is by merchants and traders in the fair; and the judgment againſt the defendant ſhall be *quod amercietur*. If the ſteward proceeds contrary to the *Stat.* 17 *Ed.* 4. *c.* 2, he ſhall forfeit 5 *l.*

From this court a writ of error lies in the nature of an appeal to the courts at *Weſtminſter*. *Cro. Eliz.* 773.—And thoſe courts are now bound by the *Stat.* 19 *Geo.* 3. *c.* 70. to iſſue writs of execution in aid of its proceſs, after judgment, where the perſon or effects of the defendant are not within the limits of this inferior juriſdiction.

COURT OF REQUESTS, *curia requiſitionum.*] Was a court of equity, of the ſame nature with the court of *Chancery*, but inferior to it; principally inſtituted for the relief of ſuch petitioners, as in conſcionable caſes addreſſed themſelves by ſupplication to his majeſty. Of this court, the *Lord Privy Seal* was Chief Judge, aſſiſted by the *Maſters of Requeſts*; and it had beginning about the 9 *H.* 7, according to Sir *Julius Cæſar*'s Tractate on this ſubject: though Mr. *Gwyn*, in his *Preface to his Readings*, ſaith it began from a commiſſion firſt granted by King *Hen.* VIII.

This court having aſſumed great power to itſelf, ſo that it became burdenſome, *Mich. anno* 40 & 41 *Eliz.* in the court of Common Pleas it was adjudged, upon ſolemn argument, that the *Court of Requeſts*, was no court of judicature, *&c.* And by the *Stat.* 16 & 17 *Car.* 1. *c.* 10. it was taken away. 4 *Inſt.* 97.—See title *Courts of Conſcience.*

COURT OF THE LORD STEWARD OF THE KING'S HOUSE. The Lord Steward, or, in his abſence, the treaſurer and controller of the King's houſe, and Steward of the Marſhalſea, may inquire of, hear and determine in this court, all treaſons, murders, manſlaughter, bloodſheds, and other malicious ſtrikings, whereby blood ſhall be ſhed, *in any of the palaces* and *houſes of the King*; [or within the limits *i. e.* 200 feet from the gate. 4 *Comm.* 276;] or in *any other houſe* where his *royal perſon ſhall abide*. And this juriſdiction was given by the *Stat.* 33 *H.* 8. *c.* 12: 3 *Inſt.* 140. But this court was at firſt intended only to inquire of and puniſh felonies, *&c.* by the King's ſervants againſt any lord or other perſon of the King's council. 3 *H.* 7. *c.* 14.

COURT OF STAR-CHAMBER, *Curia cameræ ſtellatæ.*] A Court of very antient original, but new-modelled by *Stats.* 3 *H.* 7. *c.* 1: 21 *H.* 8. *c.* 20; which ordained, That the Lord Chancellor, Treaſurer, and Lord Privy Seal, calling a Biſhop, and Lord of the King's Council, and the two Chief Juſtices to their aſſiſtance, on bill or information might make proceſs againſt maintainors, rioters, perſons unlawfully aſſembling, and for other miſdemeanors, which, through the power and countenance of ſuch as did commit them, lifted up their heads above their faults, and puniſh them as if the offenders had been convicted at law, by a jury, *&c.* But this act was repealed, and the Court diſſolved by *Stat.* 16 & 17 *Car.* 1. *c.* 10; having been uſed to oppreſs the Subject, particularly in matters of ſtate.

COURTS OF UNIVERSITIES.] Theſe are the Chancellor's courts in the two Univerſities of *England*; *Oxford* and *Cambridge*. Which two learned bodies enjoy the ſole juriſdiction, in excluſion of the King's courts, over all civil actions and ſuits whatſoever, when a ſcholar or privileged perſon is one of the parties; excepting in ſuch caſes where the right of freehold is concerned. And theſe, by the Univerſity charter, they are at liberty to try and determine, either according to the Common law of the land, or according to their own local cuſtoms, at their diſcretion; which has generally led them to carry on their proceſs in a courſe much conformed to the civil law.

Theſe privileges were granted, that the ſtudents might not be diſtracted from their ſtudies by legal proceſs from diſtant courts, and other forenſic avocations.—The oldeſt charter, it appears, containing this grant to the Univerſity of *Oxford*, was 28 *Hen.* 3. *A D.* 1244. And the ſame privileges were confirmed and enlarged by almoſt every ſucceeding prince, down to King *Henry* VIII, in the fourteenth year of whoſe reign the largeſt and moſt extenſive charter of all was granted. One ſimilar to which was afterwards granted to *Cambridge* in the third year of Queen *Elizabeth*. But yet, notwithſtanding theſe charters, the privileges granted therein, of proceeding in a courſe different from the law of the land, were of ſo high a nature, that they were held to be invalid; for though the King might erect new courts, yet he could not alter the courſe of law by his letters patent. Therefore in the reign of Queen *Elizabeth* a ſtatute was paſſed, (13 *Eliz. c.* 29,) confirming *all* the charters of the two Univerſities, and thoſe of 14 *Hen.* 8: and 3 *Eliz.* by name. Which ſtatute eſtabliſhed this high privilege without any doubt or oppoſition. *Jenk. Cent.* 2. *pl.* 88: *Cent.* 3. *pl.* 33: *Hard.* 504: *Godb.* 201: *Hiſt. C. L.* 33.

This privilege, ſo far as it relates to civil cauſes, is exerciſed at *Oxford* in the Chancellor's court; the judge of which is the Vice-chancellor, his deputy, or aſſeſſor. From his ſentence an appeal lies to delegates appointed by the congregation; from thence to other delegates of the houſe of Convocation; and if they all three concur in the ſame ſentence it is final: at leaſt by the ſtatutes of the Univerſity (*Tit.* 21. § 18,) according to the rule of the civil law (*Cod.* 7. 70, 1). But, if there be any diſcordance or variation in any of the three ſentences, an appeal lies in the laſt reſort to judges delegates, appointed by the Crown under the great ſeal in Chancery. 3 *Comm.* 83—5.

COURTS OF WALES, *Curiæ principalitatis Walliæ.*] The Courts of the principality of *Wales*.

Theſe Courts upon the thorough reduction of that kingdom, and the ſettling of its polity in the reign of *Hen.* VIII. were erected all over the country; principally by the *Stat.* 34 & 35 *Hen.* 8. *c.* 26, though much had before been done, and the way prepared by the *Stat.* of *Wales*, 12 *Ed.* 1, and other ſtatutes. By the *Stat.* of *Hen.* 8. before-mentioned, courts-baron, hundred, and county-courts are there eſtabliſhed as in *England*. A Seſſion is alſo to be held twice in every year in each county, by judges, (See *Stat.* 18 *Eliz. c.* 8,) appointed by the King. This Seſſion is to be called the *Great Seſſions* of the ſeveral counties in *Wales*; in which all pleas of real and perſonal actions ſhall be held, with the ſame form of proceſs, and in as ſimple a manner, as in the courts of King's Bench and Common Pleas, at *Weſtminſter*. See, *for farther regulation of the practice of theſe*

courts, *Stat.* 5 *Eliz. c.* 25: 8 *Eliz. c.* 20: 8 *Geo.* 1. *c.* 25. § 6: 6 *Geo.* 2. *c.* 14: 13 *Geo.* 3. *c.* 51. Writs of error ſhall lie from judgments in this great ſeſſions, it being a court of record, to the Court of King's Bench at *Weſtminſter*. But the ordinary original writs of proceſs from the King's courts at *Weſtminſter*, do not run into the principality of *Wales*, (2 *Rol. Rep.* 141;) though proceſs of execution does; (2 *Bulſt.* 156: 2 *Sand.* 193: *Raym.* 206;) as do alſo prerogative writs, as writs of *certiorari*, *quo minus*, *mandamus*, and the like. *Cro. Jac.* 484.—And even in cauſes, between ſubject and ſubject, to prevent injuſtice through family factions or prejudices, it is held lawful (in cauſes of freehold at leaſt, and it is uſual in all others) to bring an action in the *Engliſh* courts, and try the ſame in the next *Engliſh* county, adjoining to that part of *Wales* where the cauſe ariſes, and wherein the venue is laid. *Vaugh.* 413: *Hardr.* 66. But, on the other hand, to prevent trifling and frivolous ſuits, it is enacted by *Stat.* 13 *Geo.* 3. *c.* 51, that in *perſonal* actions, *tried* in any *Engliſh* county, where the cauſe of action aroſe, and the defendant reſides in *Wales*, if the plaintiff ſhall not recover a verdict for 10*l.* he ſhall be nonſuited, and pay the defendant's coſts, unleſs it be certified by the judge that the freehold or title came principally in queſtion, or that the cauſe was proper to be tried in ſuch *Engliſh* county. And if any *tranſitory* action, the cauſe whereof aroſe, and the defendant is reſident in *Wales*, ſhall be *brought* in any *Engliſh* county, and the plaintiff ſhall not recover a verdict for 10*l.* the plaintiff ſhall be nonſuited, and ſhall pay the defendant's coſts, deducting thereout the ſum recovered by the verdict.

By *Stat.* 11 & 12 *W.* 3. *c.* 9, it is enacted, that ſheriffs in *Wales*, ſhall not hold to bail, on proceſs, iſſuing out of *any of his Majeſty's courts of record at Weſtminſter*, unleſs the debt be ſworn to be 20*l.*

For further ſatisfaction, as to the ſeveral Courts within this kingdom, ſee 4 *Inſt.* and the *Commentaries*.

COURT-LANDS, Demains, or lands kept in the lord's hands, to ſerve his family, See *Curtiles Terræ*.

COUSENAGE, See *Coſenage*.

COUTHUTLAUGH, from the Sax. *couth*, i. e. *ſciens*, and *utlaugh*, exlex.] A perſon that willingly and knowingly receives a man *outlawed*, and cheriſhes or conceals him: for which offence he was, in ancient times, to undergo the ſame puniſhment as the outlaw himſelf. *Bract. lib.* 3. *tract.* 2. *cap.* 13.

COWS, See title *Cattle*.

CRAIERA, *crayer*.] A ſmall veſſel of lading; a hoy or ſmack. *Pat.* 2 *R.* 2: *Stat.* 14 *Car.* 2. *c.* 27.

CRAIL, An engine made uſe of to catch fiſh. *Blount*.

CRANAGE, *cranagium*.] A liberty to uſe a *crane* for drawing up of goods and wares of burden from ſhips and veſſels, at any creek of the ſea or wharf, unto the land, and to make profit of it: it alſo ſignifies the money paid and taken for the ſame. *Stat.* 22 *Car.* 2. *c.* 11.

CRANNOCK, An ancient meaſure of corn. *Cartular. Abbat. Glaſton MS. f.* 39.

CRASPICIS, A whale, *viz. piſcis craſſus*. *Blount*.

CRASTINO SANCTI VINCENTII, The *morrow* after the feaſt of St. *Vincent* the Martyr, *i. e.* the 22d of *January*; which is the date of the *ſtatutes* made at *Merton*, *anno* 20 *Hen.* 3. There are likewiſe certain *return days* of *writs* in terms, in the courts at *Weſtminſter*, beginning with *Craſtino*, &c. as *Craſtino animarum*, the *Morrow of All Souls*, in *Michaelmas* term; *Craſtino Purificationis beatæ Mariæ Virginis*, in *Hilary* term; *Craſtino Aſcenſionis Domini*, in *Eaſter* term; and *Craſtino Sanctæ Trinitatis*, in *Trinity* term. See *Stats.* 51 *H.* 3. *ſt.* 2 & 3: 32 *H.* 8. *c.* 21: 16 *Car.* 1. *c.* 6: 24 *Geo.* 2. *c.* 48.—See *Days in Bank*; *Terms*.

CRATES, *Lat.*] An iron grate before a *priſon*, uſed in the time of the *Romans*. 1 *Vent.* 304.

CRAVARE, To impeach. *Si homicida divadietur ibi vel* cravetur, &c. *Leg. H.* 1. *c.* 30.

CRAVEN, or CRAVENT, The word of obloquy, where in the ancient trial by battel, the victory ſhould be proclaimed, and the vanquiſhed acknowledge his fault, or pronounce the word *cravent*, in the name of *Recreantiſſe*, &c. and thereupon judgment was given forthwith; after which the *recreant* ſhould become infamous, &c. 2 *Inſt.* 248. If the *appellant* joined battel, and cried *cravent*, he ſhould loſe *liberam legem*; but if the *appellee* cried out *cravent*, he was to be hanged. 3 *Inſt.* 221.—See titles *Battel*, *Champion*.

CREAMER, A foreign merchant; but generally taken for one who hath a ſtall in a fair or market. *Blount*.

CREANSOR, *creditor*, from Fr. *croyance*.] Signifies him that truſts another with any debt, money, or wares: in which ſenſe it is uſed in *Old Nat. Br.* 66. and 38 *Ed.* 3. *c.* 5.

CREAST, or CREST, *criſta*.] Any imagery, or carved work, to adorn the head of wainſcot, &c. like our modern *cornice*: but this word is now applied by the *heralds* to their devices ſet over a coat of arms. *Kennet's Paroch. Antiq.* 573.

CREATION-MONEY, This is mentioned in *Stat.* 12 *Car.* 2. *c.* 1. See title *Peers*.

CRECHE, A drinking-cup. *Mon. Angl. tom.* 1. *p.* 104.

CREDITORS, Shall recover their debts of executors or adminiſtrators, who in their own wrong, waſte, or convert to their uſe the eſtate of the deceaſed, &c. *Stat.* 30 *Car.* 2. *c.* 7. Wills and deviſes of lands, &c. as to *creditors* on bonds or other ſpecialties, are declared void; and the *creditors* may have actions of debt againſt the *heir* at law and *deviſees*. 3 & 4 *W.* & *M. c.* 14. And in favour of *creditors*, whenever it appears to be the teſtator's intent, in a will, that his *lands* ſhould be liable for paying his debts; in ſuch caſe equity will make them ſubject, though there are not expreſs words; but there muſt be more than a bare declaration, or it ſhall be intended out of the *perſonal eſtate*. 2 *Vern. Rep.* 708. Where one deviſes *that all his debts*, &c. ſhall be firſt paid; if his *perſonal eſtate* is not ſufficient to pay the *creditors*, it ſhall amount to a *charge on his real eſtate* for that purpoſe. *Preced. Canc.* 430.—See titles *Aſſets*, *Copyhold*, *Executor*.

CREEK, *creca*, *crecca*.] A part of a haven where any thing is landed from the ſea: ſo that it is obſerved, if when you are out of the main ſea within the haven, you look round and ſee how many landing places there are, ſo many creeks may be ſaid to belong to that haven. *Cromp. Juriſd. fol.* 110. It is alſo ſaid to be a ſhore or bank whereon the water beats, running in a ſmall channel from any part of the ſea; from the Lat. *crepido*. This word is uſed in the *Stats.* 4 *H.* 4. *c.* 20: 5 *Eliz. c.* 5.—See title *Navigation Acts*.

CREMENTUM COMITATUS, The ſheriffs of counties anciently anſwered in their accounts for the *improvement* of the King's rents above the ancient *vicontiel* rents,

rents, under the title of *Crementum* [*incrementum*, increaſe] *Comitatus*, or *Firma de* Cremento Comitatus. *Hales's Sher. Acco. p.* 36.

CREPARE OCULUM, To put out an eye; which had a pecuniary puniſhment of 60*s.* annexed to it. *Leg. H.* 1. *c.* 78.

CREST, See *Creaſt.*

CRETINUS, *cretena.*] A ſudden ſtream or torrent. *Hiſtor. Croyland contin.* 485, 617.

CRIMINAL CONVERSATION. See titles *Adultery*; *Baron and Feme.*

CROCARDS, A ſort of old baſe money. See *Pollards*, and title *Coin.*

CROCIA, The *croſier* or paſtoral ſtaff, ſo called *a ſimilitudine crucis*, which biſhops, *&c.* had the privilege to carry as the common enſign of their religious office; being inveſted in their prelacies, by the delivery of ſuch a *croſier*: hence the word *crocia* did ſometimes denote the collation to, or diſpoſal of biſhopricks and abbies, by the donation of ſuch paſtoral ſtaff; ſo as when the King granted large juriſdictions, *exceptis crociis*, it is meant, except the collation or inveſtiture of epiſcopal ſees, *&c. Addit. to Cowel.*—See title *Biſhops.*

CROCIARIUS, The *crociary* or croſs-bearer, who like our verger, went before the prelate, and bore his croſs. *Liber de Miraculis Tho. Epiſc. Heref. MS. anno* 1290.

CROFT, Sax. *croftum* and *crofta.*] A little cloſe adjoining to a dwelling-houſe; and encloſed for paſture or arable, or any particular uſe. In ſome old deeds *crufta* occurs as the *Latin* word for a *croft*; but *cum toftis & croftis*, is moſt frequent. *Ingulph.* It ſeems to be derived from the old *Engliſh* word *creaft*, ſignifying *handy craft*; becauſe ſuch grounds are uſually manured and extraordinarily dreſt by the hand and ſkill of the owner.—See *Toft.*

CROISES, and *croiſado.* See *Croyſes.*

CROK, *crocus.*] Turning up the hair into curls or *croks*; whence comes *crook*, *crooked*, &c. *Pat.* 21 *H.* 3.

CROP, *croppa.*] The ſeeds or products of the harveſt in corn, *&c. Fleta, lib.* 2. *cap.* 82.

CROSS-BOWS, None ſhall ſhoot in, or keep any croſs-bow, hand-gun, hagbut, *&c.* but thoſe who have lands of the value of 100*l. per annum*: and no perſon ſhall travel with a croſs-bow bent, or gun charged, except in time of war; or ſhoot within a quarter of a mile of any city, or market-town, unleſs for defence of himſelf or his houſe, or at a dead mark, under the penalty of 10*l. Stat.* 33 *H.* 8. *cap.* 6.—See title *Arms*, *Game.*

CROSSES, By *Stat.* 13 *Eliz. c.* 2, Croſſes, beads, *&c.* uſed by the Roman Catholicks, are prohibited to be brought into this kingdom, on pain of a *præmunire*, *&c.* In ancient times it was uſual for men to erect croſſes on their houſes, by which they would claim the privileges of the *Templars* to defend themſelves againſt their rightful lords; but this was condemned by the *Stat. Weſtm.* 2. *c.* 37. It was likewiſe cuſtomary in thoſe days to ſet up croſſes in places where the *corps* of any of the nobility reſted, as it was carried to be buried, that *à tranſeuntibus pro ejus anima deprecetur. Walſing. anno* 1291. There were ſeveral of theſe croſſes erected over *England*, eſpecially in honour of the reſting-places of our Kings, on their bodies being tranſmitted to any diſtant place for burial: but theſe ſuperſtitions ſunk in this kingdom with the *Romiſh religion.*

CROY, Marſh land. *Ingulphus, p.* 853.—*Blount.*

CROYSES, *cruce ſignati.*] Is uſed by *Britton* for *pilgrims*, becauſe they wear the ſign of the croſs upon their garments. Of theſe and their privileges, *Bracton* hath treated, *lib.* 5. *part* 2. *cap.* 2: *part* 5. *cap.* 9. Under this word are alſo ſignified the *Knights of St. John of Jeruſalem*, created for the defence of pilgrims; and likewiſe all thoſe perſons who in the reigns of K. *Hen.* II.: *Ric.* I.: *Hen.* III.: and *Ed.* I. *cruce ſignati* took upon them the *croiſado*, dedicating and liſting themſelves to the wars, for the recovery of *Jeruſalem* and the *Holy Land. Greg. Syntag. lib.* 15. *cap.* 13, 14. See a general account of the *croiſades* in *Robertſon's Hiſt. Emp. C. V. vol.* 1. *p.* 22, &c.

CROWN, See title KING.

CROWN-OFFICE. An Office belonging to the court of King's Bench, of which the King's Coroner or Attorney there is commonly Maſter. The Attorney General, and Clerk of the Crown exhibit informations in this office, for crimes and miſdemeanors; the one *ex officio*, and the other uſually by order of court; and here informations may be laid for offences and miſdemeanors at Common law, as for *batteries*, *conſpiracies*, *libelling*, *nuiſances*, *contempt*, *ſeditious words*, *&c.* wherein the offender is liable to pay a fine to the King. *Finch* 340: *Show.* 109.

By *Stat.* 4 & 5 *W. & M. c.* 18, The Clerk of the Crown in *B. R.* is not to receive or file any information for *treſpaſs*, *battery*, *&c.* without expreſs order of court; nor to iſſue any proceſs without taking a recogniſance in 20*l.* penalty to proſecute with effect; and if the party appear, and the plaintiff do not procure a trial in a year, or if verdict paſs for the defendant, *&c.* the court ſhall award the defendant coſts: but this act doth not extend to informations in the name of the King's Coroner or Attorney, *&c.*

When a *battery* is committed privately, ſo that the perſon injured can make no proof thereof by witneſſes at law; it is uſual to bring an information in this office, or to prefer an indictment, the moſt legal method, where the party may be a witneſs for the King, it being his ſuit. See title *Indictment*, *Information*, *King's Bench*, *Quo Warranto*, *&c.*

CRUSTUM, Was a garment of purple, mixed with many colours. *Mon. Ang. tom.* 1. *pag.* 210.

CRY DE PAIS, On a robbery or other felony done, *hue and cry* may be raiſed by the country in the abſence of the conſtable, which is called *cry de pais.* 2 *Hale's Hiſt. P. C.* 100.—See title *Hue and Cry.*

CRYPTA, A chapel or oratory under ground. *Du Cange.*

CUCKING STOOL, See title *Caſtigatory.*

CUDE, A *cude cloth* is a chryſom or face-cloth for a child baptized. Vide *Chriſmale.*

CUI ANTE DIVORTIUM, A writ for a woman divorced from her huſband to recover her lands and tenements which ſhe had in fee-ſimple, or in tail, or for life, from him to whom her huſband did alienate them during the marriage, when ſhe could not gainſay it. *Reg. Orig.* 233: *F. N. B.* 240. And the heir ſhall have a *ſur cui ante divortium*, where the wife dieth before the action brought; as well as he ſhall have a *ſur cui in vita. F. N. B.* 193. But of an eſtate-tail, the heir ſhall not have *ſur cui in vita*, or *ante divortium*, but ſhall be put to his *formedon* in the deſcender. *New Nat. Br.* 454.—See title *Entry.*

CUI IN VITA, A writ of entry, for a widow againſt him to whom her huſband aliened her lands or tenements in his life-time; which muſt contain in it, that during his life ſhe could not withſtand it. *Reg. Orig.* 232: *F. N. B.* 193. If huſband and wife be *jointenants* before the coverture, and the huſband alieneth all the land, and dieth, ſhe ſhall have a *cui in vita* for a moiety, and no more: but if they are *joint purchaſers, during the coverture*, and he alien all the land, and dieth, his wife ſhall have a *cui in vita* of the whole land; becauſe that during the coverture, as to *purchaſe*, they are but one perſon in law. *F. N. B.* 187. And for this reaſon, if huſband and wife, and a third perſon, *purchaſe jointly*, and the huſband alieneth all in fee, and dieth, the wife ſhall have a *cui in vita* of a moiety. *Ibid.*

Where the huſband and wife exchange the lands of the wife for other lands, if the wife agree unto the exchange after the huſband's death, ſhe ſhall not have a *cui in vita*. Alſo if the wife do accept of parcel of the land in dower, of which ſhe hath a *cui in vita*, by that acceptance ſhe ſhall be barred of the reſidue. *New Nat. Br.* 430. If the huſband and wife loſe by default the wife's lands, after the death of her huſband, ſhe ſhall have a *cui in vita* to recover thoſe lands ſo loſt by default. *F. N. B.* 187. By *Stat.* 13 *Ed.* 1. *c.* 3, *Cui in vita* is given to the wife where the deceaſed huſband loſt her lands by default in his life-time: and ſhe ſhall be admitted to defend her right during his life, if ſhe come in before judgment. Likewiſe if tenant in dower, by the curteſy, or for life, do make default, *&c.* the heirs and they to whom the reverſion belongeth, ſhall be admitted to their anſwer, if they come before judgment: and if on default judgment happen to be given, ſuch heirs, *&c.* ſhall have a writ of *entry* for recovery of the ſame, after the death of ſuch tenants. See *Booth* on real actions, and *F. N. B.*— See the preceding article.

CULAGIUM, The laying up of a ſhip in the dock to be repaired. *MS. Arth. Trevor. Arm. de Plac. Edw.* 3.

CULM, See *Coal.*

CULPRIT, A priſoner accuſed for trial. The word aroſe originally from the *reply* of the proper officer *in behalf of the King*, affirming a criminal to be *guilty*, after he hath pleaded Not guilty, without which the iſſue to be tried is not joined: it is compounded of two words, *viz. Cul* and *prit*; the one an abbreviation of *culpabilis*, and the other derived from the *French* word *preſt*, *i. e.* ready; and it is as much as to ſay that he is ready to prove the offender guilty. See 4 *Comm.* 339.

CULTURA, A parcel of arable land. *Blount.*

CULVERTAGE, *Culvertagium.*] Is ſaid by ſome perſons to be derived from *Culum & Vertere*, to turn tail: and in this ſenſe, *ſub nomine culvertagii*, was taken to be on pain of cowardice, or being accounted cowards. And in this ſenſe *Spelman in voc. Niderling* derives it from *Culver* a dove. But in the opinion of others, it rather ſignifies ſome baſe ſlavery, or the confiſcation of an eſtate; being a *feudal* term for the lands of the vaſſal forfeited and eſcheating to the lord: and *ſub nomine culvertagii*, in this ſignification, was under pain of confiſcation. *Matt. Paris. anno* 1212.

CULWARD and CULVERD, A coward, or cowardice. *Chart. Temp. E.* 1.—See the preceding word.

CUNA CERVISIÆ, A tub of ale. *Domeſday.* But this word is truly *Cuva.*

CUNEUS, A mint or place to coin money: *Cuneum monetum* ſignifies the King's ſtamp for coinage; and from the word *cune*, is derived coin. See *Coin.*

CUNTEY-CUNTEY, A kind of trial, as appears by *Bracton. Bract. lib.* 4. *tract.* 3. *c.* 18, where it ſeems to intend the ordinary jury.

CURAGULUS, One who taketh care of a thing. *Mon. Ang. tom.* 2.

CURATE, *Curator.*] He who repreſents the incumbent of a church, parſon or vicar, and takes *care* of divine ſervice in his ſtead: in caſe of pluralities of livings, or where a clergyman is old and infirm, it is requiſite there ſhould be a *Curate* to perform the cure of the church. He is to be licenſed and admitted by the biſhop of the dioceſe, or, by an Ordinary, having epiſcopal juriſdiction: and when a *Curate* hath the approbation of the biſhop, he uſually appoints the ſalary too; and in ſuch caſe, if he be not paid, the *Curate* hath a proper remedy in the eccleſiaſtical court, by a ſequeſtration of the profits of the benefice; but if he hath no licence from the biſhop, he is put to his remedy at common law, where he muſt prove the agreement, *&c. Right Clerg.* 127.

By *Stat.* 28 *H.* 8. *c.* 11, ſuch as ſerve a church during its vacancy, ſhall be paid ſuch ſtipend as the Ordinary thinks reaſonable out of the profits of the vacancy; or if that be not ſufficient, by the ſucceſſor, within fourteen days after he takes poſſeſſion.

By *Stat.* 12 *An. c.* 12, where *Curates* are licenſed by the biſhop, they are to be appointed by him a ſtipend not exceeding 50*l. per ann.* nor leſs than 20*l.* a year, according to the value of the livings, to be paid by the rector or vicar: and the ſame may be done on any complaint made. One perſon cannot be *Curate* in two churches, unleſs ſuch may ſatisfy the law, by reading both morning and evening prayers at each place: nor can he ſerve one cure on one *Sunday*, and another cure on the next; for he muſt not neglect to read morning and evening prayer in his church every Lord's day; if he doth he is liable to puniſhment. *Comp. Incumb.* 572. But it is otherwiſe where a church or chapel is a member of the pariſh-church; and where one church is not able to maintain a *curate*. *Can.* 48.

A *Curate* having no fixed eſtate in his curacy, not being inſtituted and inducted, may be removed at pleaſure by the biſhop or incumbent. *Noy.* But there are *perpetual curates*, as well as temporary, who are appointed where tithes are impropriate, and no vicarage endowed: theſe are not removeable; and the impropriators are obliged to find them, ſome whereof have certain portions of the tithes ſettled on them. *Stat.* 29 *Car.* 2. *c.* 8.

It was provided in 1603 by *Can.* 33, that if a biſhop ordains any perſon not provided with ſome eccleſiaſtical preferment, except a fellow or chaplain of a College, or a Maſter of Arts of five years ſtanding, who lives in the Univerſity at his own expence, the biſhop ſhall ſupport him till he prefer him to a living. 3 *Burn. Eccl. L.* 28.—The biſhops before they confer orders require either proof of ſuch a *title* as is deſcribed by the canon, or a certificate from ſome Rector or Vicar, promiſing to employ the candidate for orders *bonâ fide* as a curate, and to grant him a certain allowance till he obtains ſome eccleſiaſtical preferment, or ſhall be removed for ſome fault. In a caſe where the Rector of *St. Anne Weſtminſter* gave ſuch a title, and afterwards diſmiſſed his

Curate

Curate without aſſigning any cauſe, the Curate recovered in an action of *aſſumpſit* the ſame ſalary for the time after his diſmiſſion which he had received before. *Comp.* 437.—When the Rector had vacated *St. Anne's* by accepting the living of *Rochdale*, the Curate brought another action to recover his ſalary after the Rector left *St. Anne's*; but the Court of *K. B.* held that that action could not be maintained: as theſe titles are only binding upon thoſe who give them, while they continue incumbents in the church for which ſuch Curate is appointed. *Doug.* 137.

No Curate (or Miniſter) ought to perform the duties of any church, before he has obtained a licence from the Biſhop. 2 *Burn*, 58.

The Biſhop cannot increaſe the ſalary of the Curate, where there is a ſpecific agreement between the Incumbent and the Curate. *Freem.* 70.

Every clergyman that officiates in a church, (whether incumbent or ſubſtitute) is in our liturgy called a *curate*: *Curates* muſt ſubſcribe the declaration, according to the act of Uniformity, or are liable to impriſonment, &c. See title *Clergyman*, *Parſon*, *Advowſon*, *Chaplain*, &c.

CURFEU, Fr. *Couvrir*, to *cover*; *Feu*, *fire*.] A *bell* which rang at eight o'clock in the evening, in the time of *William the Conqueror*; by which every perſon was commanded to rake up or *cover over his fire*, and put out his light: and in many places of *England* at this day, where a bell is cuſtomarily rung towards bed-time, it is ſaid to ring *curfew*. *Stowe's Annals.*

In the *Welch* language, *curfa*, ſignifies a *beating*; alſo, a *ſtroke*. *Richards's Antiquæ Linguæ Britannicæ Theſaurus.*

CURIA, This word was ſometimes taken for the perſons, as feudatory and other cuſtomary tenants, who did their ſuit and ſervice at the court of the lord. *Kennet's Paroch. Antiq.* 139. And it was uſual for the Kings of *England*, in ancient times, to aſſemble the Biſhops, Peers, and great men of the kingdom to ſome particular place, at the chief feſtivals in the year; and this aſſembly is called by our hiſtorians *curia*; becauſe there they conſulted about the weighty affairs of the nation. And it was therefore called *Solemnis Curia*, *Auguſtalis Curia*, *Curia Publica*, &c. See title *Court*, *Witenagemote*.

CURIA ADVISARE VULT, Is a deliberation which a Court of judicature ſometimes takes, where there is any point of difficulty, before they give judgment in a cauſe. *New Book Entr.* And when judgment is ſtaid, upon motion to arreſt it, then it is entered by the judges *curia adviſare vult*. *Shep. Epit.* 682.—See title *Judgment*.

CURIA CURSUS AQUÆ, A court held by the lord of the manor of *Graveſend* for the better management of barges and boats uſing the paſſage on the river *Thames* from thence to *London*, and plying at *Græveſend* bridge, &c. mentioned in *Stat.* 2 *Geo.* 2. *c.* 26.

CURIA CLAUDENDA, A writ to compel another to make a fence or wall, which he ought to make between his land and the plaintiff's, on his refuſing or deferring to do the ſame. *Reg. Orig.* 155. This writ doth not lie but againſt him who hath a *cloſe* adjoining to the plaintiff's land, who is obliged to *incloſe* it; and it lieth not but for him who hath a freehold, &c. It may be ſued before the ſheriff in the county-court, or in the common pleas: and the judgment is to recover the incloſure and damages. *New Nat. Br.* 282, 283. But, if the occupier of a cloſe adjoining to mine, ought to repair the fence between the cloſes, and do not, and his cattle ſtray into my cloſe and do damage, I may diſtrain them damage feaſant, or drive them out, and bring an action of treſpaſs. If my cattle ſtray into his cloſe and do damage, he has not a right to diſtrain them, nor can he ſupport treſpaſs againſt me for the ſame. Should my cattle after ſtraying into his cloſe, ſtray out of the ſame into any highway, or other place, and be loſt, or treſpaſs in the ground of a third perſon, and be by him diſtrained damage feaſant, and kept till replevied, or I have made ſatisfaction, I may maintain an action againſt the defaulter, *i. e.* againſt the occupier of the adjoining cloſe, for not repairing his fence, whereby ſuch damage hath happened to me. The writ of *curia claudenda* therefore is grown out of uſe. See title *Treſpaſs*.

CURIA DOMINI, The lord's houſe, hall or court, where all the tenants attend at the time of keeping courts.

CURIA PENTICIARUM, Is a court held by the ſheriff of *Cheſter*, in a place there called the *Pendice* or *Pentice*: and it is probable its being originally kept under a *pent-houſe*, or open ſhed covered with boards, gave it this denomination. *Blount.*

CURNOCK, A meaſure containing four buſhels, or half a quarter. *Fleta*, *lib.* 2. *c.* 12.

CURRICULUS, The year, or courſe of a year: *Actum eſt hoc annorum Dominicæ incarnationis quatuor quinquagenis & quinquies, quinis luſtris, & tribus* curriculis. This is the year 1028; for four times 50 make 200, and five times 200 make 1000. Then five *luſtra* are twenty-five years, and three *Curriculi*, three years; making in all the very year. *Blount.*

CURRIERS, Perſons that curry and dreſs leather. No currier ſhall uſe the trade of a butcher, tanner, &c. or ſhall curry ſkins inſufficiently tanned, or gaſh any hides of leather, on pain of forfeiting for every hide or ſkin 6*s.* 8*d.* And perſons in *London* putting leather to be curried to any but freemen of the Curriers' Company; and ſuch curriers not currying the leather ſufficiently, ſhall forfeit the ware or the value, &c. *Stat.* 1 *Jac.* 1. *c.* 22. The clauſe relating to freemen is repealed; but if any currier do not curry leather ſent him, within ſixteen days between *Michaelmas* and *Lady-Day*, and in eight days at other times, on conviction before a juſtice, he ſhall forfeit 5*l.* to be levied by diſtreſs, &c. yet ſubject to mitigation. 12 *Geo.* 2. *c.* 25. Curriers and ſuch as deal in leather, may cut and ſell it in ſmall pieces in their ſhops to any perſons whatſoever. *Stat. Ibid.*—See titles *Leather*, *Skins*, &c.

CURSING, See *Swearing*.

CURSITORS, *Clerici de Curſu.*] Clerks belonging to the *Chancery*, who make out original writs; and are called *Clerks of Courſe*, in their oath appointed 18 *Ed.* 3. *ſtat.* 5. There are of theſe clerks twenty-four in number, which make a corporation of themſelves; and to each clerk is allotted a diviſion of certain counties, in which they exerciſe their functions. 2 *Inſt.* 670.—See title *Proceſs*.

CURSONES TERRÆ, Ridges of land. *Stat.* 14 *Ed.* 2.

CURSORIÆ, A ſort of light ſhips or ſwift ſailors. *Hoveden R.* 1.

CURTESY OF ENGLAND, *Jus Curialitatis Angliæ.*] Is where a man taketh a wife ſeiſed in fee-ſimple, or fee-tail general, or as heireſs in ſpecial tail, and hath iſſue by her, male or female, born alive, which by any poſſi-

bility

bility may inherit, and the wife dies; the husband holds the lands during his life; and is called *Tenens per legem Angliæ*, or *Tenant by the curtesy of England*. See title *Tenures* III. 9.—Though this is called the *Curtesy of England*, it appears to have been the established law of *Scotland*, where it was called *Curialitas*.—It is likewise used in *Ireland* by virtue of an ordinance of *H.* III.—So that probably the word *curtesy* is in this sense understood rather to signify an attendance upon the lord's *courts*, than to denote any peculiar favour. See 2 *Comm.* 126.

Four things are requisite to give an estate by the *curtesy*, *viz.* Marriage, seisin of the wife, issue, and death of the wife. *Co. Lit.* 30. If land descend to the wife after the husband hath issue by her; or if the issue be dead at the time of her death, being born alive; the husband shall be tenant by the *curtesy*. Also if a child is *born alive*, it is not material whether it is baptised, or ever heard to cry, to make the husband tenant by the *curtesy*; for if it is born alive, it is enough. *Dy.* 25: 8 *Rep.* 34.

The words in the general editions of *Littleton*, 1 *Inst.* 29, are *oyes ou vife*, but in *Letton* and *Machlinia*'s edition they are *neez vif*, and are translated by Lord *Coke*, *born alive*. May not the word *vife* in the first instance have been an error for *vife*, meaning thereby that the issue must be *heard*, or *seen*; so as to ascertain its being alive?

But the child must be such as by possibility may inherit; and therefore if land be given to a woman, and the heirs *male* of her body, and she takes husband and hath issue a daughter, and dies; as this issue cannot possibly inherit, the husband shall not be tenant by the *curtesy*. *Terms de Ley.*

If the child is rip'd forth of the mother's belly, after her death, though it be alive, it will not cause tenancy by the curtesy; for this ought to begin by the issue, and be consummate by the death of the wife, and the estate of tenant by the curtesy should *avoid* the *immediate* descent. *Ibid.* A man shall not be tenant by the curtesy of a bare right, title, use, reversion, &c. expectant upon an estate of freehold, unless the particular estate is determined during the coverture; nor of a seisin in law: but if a wife dies before a rent becomes due; or in the case of an advowson, before the church becomes void; the husband shall be tenant by the curtesy, though the wife had only a seisin in law; for in this case no other seisin could be attained. *F. N. B.* 149: *Co. Lit.* 29, 30, 40.

Though in strictness of law there cannot be curtesy of *Trusts*, yet since Lord *Coke*'s time our courts of equity have allowed curtesy, both of trusts and other interests which though in law mere rights and titles, are deemed estates in equity; and made to conform to many of the rules and consequences incident to estates in law. See in 1 *Atk.* 603, the case of *Cashborn* v. *English*, in which *Hardwicke* C. decreed curtesy of an equity of redemption. See S. C. more fully reported in *Vin.* tit. *Curtesy*, E. pl. 23. However, a wife may in point of benefit have a trust of inheritance, which may be so declared as to prevent curtesy; as by directing the profits during the wife's life to be paid for her separate use; for in such case the intention to exclude the husband from curtesy is manifest, and he cannot have an equitable seisin. 3 *Atk.* 715. It is also proper to remark that though *curtesy* out of a trust is allowed, yet dower has been refused; a distinction not easily reconcilable with reason, however settled by the current of authorities. See 1 *Inst.* 29 *a*; *n.* 6.

As to *Curtesy* in *Titles* and *Offices of honour*, See 1 *Inst.* 29 *b*; and Mr. *Hargrave*'s learned notes there, by which it seems that no such curtesy can take place; though the question appears not to be settled, a decision having been repeatedly avoided thereon.

There is no tenancy by the curtesy of *copyhold* lands, except there be a *special custom* for it. But in gavelkind lands, a husband may be tenant by the curtesy without having issue. 1 *Inst.* 30. But it is only of a *moiety* of the wife's land, and ceases if the husband marries again. *Robinf. Gavelk. l.* 2. *c.* 1. Where a husband is entitled to this tenancy, if after the wife is an *idiot*, and her estate in the land found: when she dies, he shall not be tenant by the curtesy, for the King's title by relation prevents it. *Plowd.* 263. If the wife be seised in fee of lands, and attaint of felony, but have issue by her husband, and she is hanged, &c. it is said the husband shall be a tenant by the curtesy: but yet the land will be forfeited; according to *Kitch.* 159: 21 *Ed.* 3. 49.

A woman seised of land had two daughters, and covenanted to stand seised to the use of *E.* her eldest daughter in tail; on condition that she should pay to her other daughter within a certain time 300*l.* And if *E.* made default, or died without issue before such payment, then the land to go to the second daughter; the mother dying, *E.* took a husband, and had issue, and died afterwards without any issue living, before the day of payment: it was here held, that her husband should be tenant by the curtesy. 1 *Leon. ca.* 233.—See *Kitch.* 159.

CURTEYN, *Curtana.*] The name of King *Edward* the *Confessor's sword*; which is the first sword carried before the Kings of *England* at their coronation: and it is said the point of it is broken as an emblem of mercy. *Mat. Paris. in Hen.* III.

CURTILAGE, *Curtilagium*, from the Fr. *Cour*, *Court*, and *Sax. Leagh* locus.] A court-yard, back-side, or piece of ground lying near and belonging to a dwelling house. See *Stats.* 4 *Ed.* 1. *c.* 1: 35 *H.* 8. *c.* 4: 39 *Eliz. c.* 10: 6 *Rep.* 64. and *Spelm.* And though it is said to be a yard or garden, belonging to a house; it seems to differ from a garden, for we find, *cum quodam* gardino & curtilagio. 15 *Ed.* 1. *n.* 34.

CURTILES TERRÆ, Court lands. It is recorded, that among our *Saxon* ancestors, that the *Thanes* or nobles who possessed *Bockland*, or hereditary lands, divided them into *Inland* and *Outland*: the *Inland* was that which lay most convenient for the lord's mansion-house; and therefore the lords kept that part in their own hands, for the support of their families, and for hospitality: afterwards the *Normans* called these lands *Terras Dominicales*, the demains, *demesnes*, or lord's lands: the *Germans* termed them *Terras Indominicatas*, lands in the lord's own use: and the *Feudists*, *Terras Curtiles*, lands appropriate to the court or house of the lord. *Spelm. of Feuds*, *c.* 5.

CUSTANTIA, *Custagium*, costs.

CUSTODE ADMITTENDO, AND CUSTODE AMOVENDO, writs for the admitting or removing of *Guardians*. *Reg. Orig.*

CUSTODES LIBERTATIS ANGLIÆ AUTHORITATE PARLIAMENTI, The stile in which writs and all judicial process did run during the grand rebellion, from the murder of King *Charles* I. till the Usurper *Oliver* was declared Protector, &c. mentioned and declared traiterous, by *Stat.* 12 *Car.* 2. *c.* 3.

CUSTODIAM

CUSTODIAM DARE, Was taken for a gift or grant for life. *Du Cange.*

CUSTOM, *consuetudo.*] Is a law not written, established by long usage, and the consent of our ancestors. No law can oblige a free people without their consent: so wherever they consent and use a certain rule or method as a law, such rule, &c. gives it the power of a law; and if it is *universal*, then it is *common-law*: if *particular* to this or that place, then it is *custom.* 3 *Salk.* 112. As to the rise of customs, when a reasonable act once done was found to be good and beneficial to the people, then they did use it often; and by frequent repetition of the act, it became a custom; which being continued without interruption time out of mind, it obtained the force of a law, to bind the particular places, persons, and things concerned therein. Thus a custom had beginning and grew to perfection.

To make a particular custom good, the following are necessary requisites.

1. *Antiquity.*—That it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can show the beginning of it, within legal memory, that is within any time since the first year of *Richard* I. it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist. *Co. Lit.* 113. Therefore a custom that every pound of butter sold in a certain market, should weigh eighteen ounces, is bad; being directly contrary to *Stat.* 13 & 14 *Car.* 2. *c.* 26, which directs it to contain 16 *oz.* 3 *Term Rep.* 271.

2. It must have been *continued.* Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*; for an interruption of the possession only, for ten or twenty years, will not destroy the custom. *Co. Lit.* 114. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

3. It must have been *peaceable*, and acquiesced in; not subject to contention and dispute. *Co. Lit.* 114. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be *reasonable*; (*Litt.* § 212;) or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir *Edward Coke* says, (1 *Inst.* 62,) to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of *October*, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits. *Co. Copyh.* § 33.

5. Customs ought to be *certain.* A custom, that lands shall descend to the most worthy of the owner's blood, is void: for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. 1 *Ro. Abr.* 565. A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain; for the value may be ascertained at any time; and the maxim of law is, *id certum est, quod certum reddi potest.*—A custom that poor house-keepers shall carry away rotten wood in a chase is bad; being too vague and uncertain. 2 *Term Rep.* 758.

6. Customs, though established by consent, must be (when established) *compulsory*; and not left to the option of every man, whether he will use them or no. Therefore a custom that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure is idle and absurd; and indeed no custom at all.

7. Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore if one man prescribes that by custom he has a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom. 9 *Rep.* 58: See *Doug.* 190.

As to the *Allowance* of special customs. Customs in derogation of the Common law must be construed strictly. This rule is founded upon the consideration that a variety of customs in different places upon the same subject is a general inconvenience: the courts therefore will not admit such customs but upon the clearest proofs. 1 *Term Rep.* 466. Thus by the custom of gavelkind, an infant of fifteen years may by one species of conveyance (called a deed of feoffment) convey away his lands in fee-simple. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years, for the custom must be strictly pursued. *Co. Cop.* § 33.—And moreover all special customs must yield to the King's prerogative. Therefore if the King purchases land of the nature of gavelkind, where all the sons inherit equally; yet on the King's demise, his eldest son shall succeed to those lands alone. *Co. Litt.* 15.

A custom contrary to the public good, or injurious to a multitude, and beneficial only to some particular persons, is repugnant to the law of reason, and consequently void. 2 *Danv.* 424, 427. Customs ought to be beneficial to all, but may be good where against the interest of a particular person, if for the public good. *Dyer* 60. A custom is not unreasonable for being injurious to private persons or interests, so as it tends to the *general advantage* of the *people.* 3 *Salk.* 112.

A *custom* may be good in some cases where a *prescription* is not: But *customs* that are good for the substance and

matter of them, may yet be bad for the manner; if they are uncertain, or mixed with any other cuſtom that is unreaſonable, &c. 2 *Bulſt.* 166: 2 *Brownl.* 198.

A *Cuſtom* extends over ſome *place* or *vill*: A *preſcription* extends only to *particular perſons*. *Hardw.* 293. A *preſcription* muſt always be had by way of *que eſtate*. Ibid. See title *Preſcription*.

Cuſtom that every one who paſſeth over ſuch a bridge, within the lord's manor, and which the lord doth repair, ſhall pay him one penny, is a good cuſtom; but if it be to pay the lord 12*d.* it will be naught, for it is unreaſonable. *Calth. Cop.* 35: 1 *Bulſt.* 203.

A cuſtom that a lord ſhall have within his manor *liberam faldam*, or *free-fold* throughout the village; and that no other ſhall have it but by agreement with him, and if any take it, the lord may abate the ſame; this hath been held a good cuſtom. 1 *Rol.* 560. Cuſtom for *inhabitants*, as ſuch, to have *common* adjudged void. *Gatewood's caſe.* 6 *Co.* 60. A cuſtom, that tenants of a manor ſhall grind all the corn they ſpend in their own houſes, in the lord's mill, &c. is good: But a cuſtom that every inhabitant of a houſe held of the lord, ſhall grind the corn that he ſpends, or ſhall ſell, at his mill, is void. *Moor, ca.* 1217: *Hob.* 149. Cuſtom to have a common bakehouſe in a manor or pariſh, for all the tenants or inhabitants, is a good cuſtom. 2 *Bulſt.* 198.

Cuſtom is and muſt always be alledged to be in many perſons; and ſo it may be claimed by copyholders, or the inhabitants of a place, and when it is claimed, it muſt be as within ſuch a county, hundred, city, borough, manor, pariſh, hamlet, &c. *Co. Lit.* 110, 113: 4 *Rep.* 31. A good cuſtom or preſcription hath the force of a grant; as where one and his anceſtors have had a rent time out of mind, and uſed to diſtrain, &c. But a cuſtom that begins by extortion of lords of manors, is judged wanting a lawful commencement, and therefore void: and where cuſtom is amongſt many, and they are all dead but one, the cuſtom is gone. *Plowd.* 322: *Dyer* 199.

Cuſtoms for an eldeſt daughter to inherit, or a youngeſt ſon, may be good: For theſe, though contrary to a particular rule of law, may have a reaſonable beginning. *Nelſ. Abr.* 579. And by cuſtom a woman may be endowed of a moiety of the huſband's lands, &c. Alſo by cuſtom, infants may bind themſelves apprentices, &c. 2 *Danv. Abr.* 438.

Regularly a man cannot alledge a cuſtom againſt a ſtatute, becauſe that is the higheſt matter of record in law: But a cuſtom may be alledged againſt a *negative* ſtatute, which is made in affirmance of the Common law, 1 *Inſt.* 115. Acts of parliament do not always take away the force of cuſtoms. 2 *Danv. Abr.* 436. A cuſtom is to be poſitively alledged, by uſage in fact. *Lutw.* 1319.

General cuſtoms which are uſed throughout *England*, and are the Common law, are to be determined by the judges: But *particular cuſtoms*, ſuch as are uſed in ſome certain town, borough, city, &c. ſhall be determined by a jury. *Doct. & Stud. c.* 7, 10: 1 *Inſt.* 110. *Conſuetudo pro lege ſervatur*, &c. ſaith *Bracton*, *lib.* 3. *c.* 3. And cuſtom is ſaid to be *altera lex*: But the judges of the court of *B. R.* or *C. B.* can over-rule a cuſtom though it be one of the cuſtoms of *London*, if it be againſt *natural reaſon*, &c. 1 *Mod.* 212.

The law takes particular notice of the cuſtom of *Gavelkind* and *Borough-Engliſh*; (*Co. Litt.* 175;) and there is no occaſion to prove that ſuch cuſtoms actually exiſt, but only that the lands in queſtion are ſubject thereto. All other private cuſtoms muſt be particularly pleaded; (*Lit.* § 265;) and as well the exiſtence of the cuſtom muſt be ſhewn, as that the thing in diſpute is within the cuſtom alleged. The trial in both caſes is by a jury of 12 men, and not by the judges; except the ſame particular cuſtom has been before tried, determined and recorded in the ſame court. *Doct. & Stud.* 1, 10: 1 *Comm.* 76.

As to the manner of laying a *cuſtom*, and the difference between alledging a thing by way of *cuſtom*, or by way of *preſcription*, See 6 *Co.* 60: *Hob.* 113: *Cro. Eliz.* 441: *Poph.* 201: *Style* 479: 1 *Lev.* 176: 1 *Vent.* 386: 3 *Lev.* 160: *Carth.* 192. See further title *Preſcription*, and as to particular cuſtoms relative to *Inheritance*, *Dower*, &c. See titles *Copyhold*; *Gavelkind*, &c.

THE CUSTOMS OF LONDON, differ from all others in point of trial, for if the exiſtence of the cuſtom be brought in queſtion, it ſhall not be tried by a jury, but by certificate of the Lord-Mayor and Aldermen, by the mouth of the Recorder. *Cro. Car.* 516.—Unleſs it be ſuch a cuſtom as the Corporation itſelf is intereſted in, as a right of taking toll, &c. for then the law permits them not to certify in their own behalf. *Hob.* 85.—And when a cuſtom has once been certified by the Recorder, the judges will take notice of it, and will not ſuffer it to be certified a ſecond time. *Dougl.* 365.—As to the *form* in which the recorder ſhall certify a cuſtom, See 1 *Burr.* 248.

Theſe *Cuſtoms of London* relate to divers particulars, with regard to trade, apprentices, widows, orphans, &c. As to the cuſtom relative to the diſtribution of a freeman's eſtate, and which now in conſequence of *Stat.* 11 *Geo.* 2. *c.* 18. § 17, extends only to caſes of inteſtacy, or expreſs agreements made in conſideration of marriage, See title *Executor*, V. 9.—As to the cuſtom of Foreign *Attachment*, See title *Attachment Foreign*.—As to the cuſtom of a feme covert being a ſole trader, See titles *Baron & Feme*; *Bankrupt*.—And further in more particular detail, as to the general and local cuſtoms of *London*, See this Dict. under title *London*.

It is ſaid, 1 *Ro. Rep.* 106, that the courts at *Weſtminſter* of courſe take notice of the cuſtoms of *London*, but not of any other place.—But this is only where they have been certified; See *ante* title *Cuſtom*.

The cuſtoms of *London* are confirmed by act of parliament. 8 *Rep.* 126: *Cro. Car.* 347.

THE CUSTOM OF MERCHANTS, *Lex Mercatoria.*] A particular ſyſtem of cuſtoms uſed only among one ſet of the King's ſubjects; which however different from the rules of the Common law, is yet ingrafted into it, and made part of it; being allowed for the benefit of Trade, to be of the utmoſt validity in all commercial tranſactions; for it is a maxim in law that *cuilibet in arte ſuâ credendum eſt.* 1 *Comm.* 75.

It ſeems that this *Cuſtom of Merchants*, is only ſo far conſidered as law, that it affords the rule of conſtruction in caſes of *contracts*, *agreements*, &c. and other tranſactions in Trade and Commerce. Mr. *Chriſtian* in his note on the above paſſage of the Commentaries, truely remarks, that the *lex mercatoria* like the *lex & conſuetudo parliamenti*, deſcribes only a great diviſion of the laws of *England*. The laws relating to bills of exchange, inſurance, and all mercantile contracts are as much the general law of the land, as the laws relating to marriage

or

or murder.—And the opinion of Mr. Juſtice *Foſter* is, that the Cuſtom of Merchants is the general law of the kingdom, and therefore ought not to be left to a jury after it has been ſettled by judicial determinations. 2 *Burr.* 1226.

See further more particularly as to the effect and influence of this Cuſtom of Merchants, under *Bankrupt*; *Bill of Exchange*; *Factor*; *Inſurance*; *Partnerſhip*, and other titles in this Dictionary.

CUSTOMS ON MERCHANDISE. Theſe are enumerated, (1 *Comm.* 313.) among the perpetual taxes; and are there explained to be the *Duties, Toll, Tribute* or *Tariff* payable upon merchandize exported and imported.

The conſiderations, ſays the Commentator, upon which this revenue, or the more antient part of it which aroſe only from exports, was inveſted in the King, were ſaid to be two.—1. Becauſe he gave the ſubject leave to depart the kingdom, and to carry his goods along with him.—2. Becauſe the King was bound of common right to maintain and keep up the ports and havens, and to protect the merchants from pirates. *Dyer* 165.—Some have imagined they were called with us cuſtoms, becauſe they were the inheritance of the King, by immemorial uſage, and the common-law, and not granted him by any *Stat. Dy.* 43. *pl.* 24.—But Sir *Edward Coke*, 2 *Inſt.* 58, 9, hath clearly ſhewn that the King's firſt claim to them was, by grant of parliament. 3 *E.* 1. And indeed this is in expreſs words confeſſed by *Stat.* 25 *E.* 1. *c.* 7; wherein the King promiſes to take no cuſtoms from merchants without the common aſſent of the realm "ſaving, to us and our heirs, the cuſtoms on *wool*, *ſkins* and *leather* formerly granted to us by the commonalty aforeſaid." Theſe were formerly called the hereditary *Cuſtoms of the Crown*, and were due on the exportation only of the ſaid three commodities, and of none other: which were ſtiled the *ſtaple* commodities of the kingdom, becauſe they were obliged to be brought to thoſe ports where the King's ſtaple was eſtabliſhed, in order to be there firſt rated and then exported. *Danv.* 9. They were denominated in the barbarous *Latin* of our antient records, *cuſtuma*; not *conſuetudines*, which is the language of our law, whenever it means merely uſages. The duties on wool, ſheep-ſkins, or wool-fells, and leather, exported, were called *cuſtuma antiqua ſive magna*; and were payable by every merchant, as well native as ſtranger; with this difference, that merchant-ſtrangers paid an additional toll, *viz.* half as much again as was paid by natives. The *cuſtuma parva et nova* were an impoſt of 3 *d.* in the pound, due from merchant ſtrangers only, for all commodities as well imported as exported; which was uſually called the aliens' duty, and was granted in 31 *Edw.* 1: 4 *Inſt.* 29. But theſe antient hereditary cuſtoms, eſpecially thoſe on wool and wool-fells, came to be of little account, when the nation became ſenſible of the advantages of a home manufacture, and prohibited the exportation of wool by *St.* 11 *Ed.* III. *c.* 1.

There is alſo another very antient hereditary duty belonging to the crown, called the *priſage* or *butlerage* of wines: which is conſiderably older than the cuſtoms, being taken notice of in the great roll of the Exchequer, 8 *Ric.* 1. ſtill extant. *Madox. Hiſt. Exch.* 526, 532. Priſage was a right of *taking* two tons of wine from every ſhip (*Engliſh* or Foreign) importing into *England* twenty tons or more; one before, and one behind, the maſt: which by charter of *Edw.* 1, was exchanged into a duty of 2 *s.* for every ton imported by merchant ſtrangers, and called butlerage, becauſe paid to the King's butler. *Dav.* 8: 2 *Bulſt.* 254: *Stat. Eſta.* 16 *Edw.* 2: *Com. Journ.* 27, *Apr.* 1689.

Other Cuſtoms payable upon exports and imports were diſtinguiſhed into *ſubſidies, tonnage, poundage* and other impoſts. Subſidies were ſuch as were impoſed by parliament upon any of the ſtaple commodities before mentioned over and above the *cuſtuma antiqua et magna*: tonnage was a duty upon all wines imported, over and above the priſage and butlerage aforeſaid: poundage was a duty impoſed *ad valorem*, at the rate of 12 *d.* in the pound on all other merchandiſe whatſoever, and the other impoſts were ſuch as were occaſionally laid on by parliament, as circumſtances and times required. *Dav.* 11. 12.

Theſe diſtinctions are now in a manner forgotten, except by the officers immediately concerned in this department; their produce being in effect all blended together, under the one denomination of The Cuſtoms.

By theſe we underſtand, at preſent, a duty or ſubſidy paid by the merchant, at the quay, upon imported as well as exported, commodities, by authority of parliament; unleſs where, for particular national reaſons, certain rewards, bounties or drawbacks, are allowed for particular exports or imports. Thoſe of tonnage and poundage, in particular, were at firſt granted, as the old ſtatutes (and particularly 1 *Eliz.* 19,) expreſs it, for the defence of the realm, and the keeping and ſafeguard of the ſeas, and for the intercourſe of merchandiſe ſafely to come into and paſs out of the ſame. They were at firſt uſually granted only for a ſtated term of years, as, for two years in 5 *Ric.* II. *Dav.* 12. but in *Henry* the Sixth's time, they were granted him for life by a ſtatute in the thirty-firſt year of his reign; and again to *Edward* IV, for the term of his life alſo: ſince which time they were regularly granted to all his ſucceſſors for life, ſometimes at the firſt, ſometimes at other ſubſequent parliaments, till the reign of *Charles* the Firſt.

Upon the Reſtoration, this duty was granted to King *Charles* the Second for life, and ſo it was to his two immediate ſucceſſors; and by three ſeveral *Stats.* 9 *Ann.* *c.* 6: 1 *Geo.* 1. *c.* 12: 3 *Geo.* 1. *c.* 7, it was made perpetual and mortgaged for the debt of the Public. The cuſtoms thus impoſed by parliament were, till the *Stat.* 27 *Geo.* 3. *c.* 13. contained in two books of rates, ſet forth by parliamentary authority; *Stat.* 12 *Car.* II. *c.* 4: 11 *Geo.* 1. *c.* 7. Aliens uſed to pay a larger proportion than natural ſubjects, generally called the aliens' duty; now repealed by *Stat.* 24 *Geo.* III. *ſeſſ.* 2. *c.* 16. except as to ſcavage duties granted to the city of *London*.

By *Stat.* 27 *Geo.* 3. *c.* 13, called the *Conſolidation-act*, all the former ſtatutes *impoſing duties* of cuſtoms and exciſe, were repealed with regard to the *quantum* of the duty; and the two books of rates above-mentioned were declared to be of no avail for the future; but all the former duties were conſolidated, and were ordered to be paid according to a new book of rates annexed to that ſtatute. Before this act was paſſed it could not be ſuppoſed that many perſons beſides Exciſe-men and Cuſtom-houſe-officers could be acquainted with the various duties payable upon the different articles of commerce, which, in many inſtances, were numerous on the ſame article, and lay diſperſed among many acts of parliament. But

now by this excellent improvement, may be found the duty upon the importation or exportation of any article; or what exciſe duty any commodity is ſubject to, in an alphabetical table.

Bullion, *Wool*, and ſome few other commodities may be imported duty-free. All the articles enumerated in the tables or book of rates pay upon importation or exportation, the ſum therein ſpecified, according to their weight, number or meaſure. And all other goods and merchandize, not being particularly enumerated or deſcribed, and permitted to be imported and uſed in *Great Britain*, ſhall pay upon importation 27 *l.* 10 *s.* *per cent. ad valorem*, or for every 100 *l.* of the value thereof; but ſubject to a draw-back of 25 *l.* *per cent.* upon exportation. Very few commodities pay a duty upon exportation; but where that duty is not ſpecified in the tables, and the exportation is not prohibited, all articles may be exported without payment of duty, provided they are regularly entered and ſhipped; but on failure thereof, they are ſubject to a duty of 5 *l.* 10 *s.* *per cent. ad valorem*. And to prevent frauds, in the repreſentation of the value, a very ſimple and equitable regulation is preſcribed by the act, *viz.* the proprietor ſhall himſelf declare the value, and if this ſhould appear not to be a fair and true eſtimate, the goods may be ſeized by the proper officer; and four of the commiſſioners of the cuſtoms may direct that the owner ſhall be paid the price, which he himſelf fixed upon them with an advance of 10 *l.* *per cent.* beſides all the duty which he may have paid; and they may then order the goods to be publickly ſold, and if they raiſe any ſum beyond what was paid to the owner, and the ſubſequent expences, one half of the overplus ſhall be paid to the officer who made the ſeizure, and the other half to the publick revenue.—This ſtatute (ſays Mr. *Chriſtian* in his note on 1 *Comm.* 316, from whence the above is extracted) is of infinite conſequence to the commercial part of the world; it has reduced an important ſubject from a perfect chaos, to ſuch a plain and ſimple form, as to induce every friend to his country to wiſh that ſimilar experiments were made upon other confuſed and entangled branches of our Statute law.

For further matter relating to, or at leaſt intimately connected with, the above ſubject, See titles *Navigation-act*; *Smugglers*.

If goods and merchandize are brought by a merchant to a port or haven, and there part thereof ſold, but never put on land, they muſt pay the cuſtoms; and diſcharging them out of the ſhip into another upon the ſale, amounts in law to a putting them upon the land, ſo that if the cuſtom duties are not paid, the goods will be forfeited. *Hill.* 24 *Eliz.* 12 *Co.* 18.

A very great number of Acts of Parliament have been paſſed to prevent frauds in this branch of the revenue, as well as in the Exciſe; and it is more to be wiſhed than hoped, that the meaſure, purſued reſpecting the *quantum* of the duties, by the Conſolidation act, could be followed by a general act reſtraining every fraud, and containing every regulation, with a preciſe ſtatement of the puniſhment for each offence. But while the diſhoneſt are ingenious to find out means of evading the moſt explicit laws, the honeſt part of the Community muſt forgive the length and intricacy of ſtatutes which ultimately ſecure their liberty and property.

The following are ſhort extracts of ſuch ſtatutes as ſeem moſt material to the preſent purpoſe; beſides thoſe already mentioned.

By *Stat.* 14 *R.* 2. *c.* 10, no Cuſtomer or comptroller of the cuſtoms, ſhall have any ſhips of his own, or meddle with the freight of ſhips. And by *Stat.* 20 *H.* 6. *c.* 5, no ſearcher, ſurveyor, *&c.* or their clerks, deputies, or ſervants, may have any ſuch ſhips of their own; nor ſhall uſe merchandize, keep a wharf, inn or tavern, or be factor, attorney, *&c.* to a merchant, under the penalty of 40 *l.*—By *Stat.* 3 *H.* 6. *c.* 3, Cuſtomers, collectors, or comptrollers, ſhall not conceal cuſtoms duly entered and paid, on pain to forfeit the treble value of merchandize ſo cuſtomed, and to make fine and ranſom to the king. By *Stat.* 13 & 14 *Car.* 2. *c.* 11. § 19. If any perſons employed about the cuſtoms and ſubſidies *take a bribe*, or connive at any falſe entry, they ſhall forfeit 100 *l.* and be incapable of any employment under the king; and the perſon *giving* the bribe ſhall forfeit 50 *l.*—By *Stat.* 5 *Geo.* 1. *c.* 11 § 24, *&c.* if an officer of the revenue, ſhall make any colluſive ſeizure of foreign goods, to the intent the ſame may eſcape payment of the duties, he is to forfeit 500 *l.* and be incapable of ſerving his Majeſty: and the importer and owner ſhall forfeit treble the value of the goods ſo colluſively ſeized, *&c.*—By *Stat.* 12 *Geo.* 1. *c.* 28. § 7, officers of the cuſtoms, *&c.* are not to trade in brandy, coffee, *&c.* or any exciſeable liquor, on pain of 50 *l.* and forfeiture of offices.

Officers of the cuſtoms may ſearch ſhips. 13 & 14 *Car.* 2. *c.* 11. § 4. Having writ of *aſſiſtance*, may ſearch houſes, § 4. The penalty of abuſing officers, § 6. keepers of wharfs, quays, *&c.* landing or ſhipping goods, without the preſence of ſome officer of the cuſtoms, ſhall forfeit 100 *l.*

By *Stat.* 6 *Geo.* 1. *c.* 21, Where officers of the Cuſtoms are hindered in the execution of their duty, by perſons armed to the number of eight, the offenders are to be tranſported for ſeven years.

By *Stat.* 8 *Geo.* 1. *c.* 18, If any goods are put into any veſſel to be carried beyond ſea: or be brought from beyond ſea, and unſhipped to be landed, the duties not being paid, nor agreed-for at the Cuſtom houſe; the ſame ſhall be forfeited, one moiety to the king, the other to the ſeizer, *&c.* And by ſubſequent ſtatutes, foreign goods taken in at ſea, by any coaſting veſſel, *&c.* ſhall be forfeited, and treble value.

By *Stat.* 9 *Geo.* 2. *c.* 35, Where three perſons are aſſembled and armed with fire-arms, *&c.* to be aſſiſting in the running of goods, they ſhall be guilty of felony and tranſported, and 50 *l.* be paid for apprehending ſuch offenders: alſo the like reward to any of them for diſcovering others. All perſons two or more in company, found paſſing within five miles from the ſea-coaſts, with any horſes, cart, *&c.* wherein are put above ſix pounds of tea, or five gallons of brandy, or other foreign goods of 30 *l.* value, landed without entry, and not having permits, and who ſhall carry offenſive weapons, *&c.* or aſſault any of the officers, of the Cuſtoms, ſhall be adjudged runners of goods, and be tranſported as felons, and all the goods to be ſeized and forfeited: and ſuſpected perſons lurking near the coaſts, not giving a good account of themſelves, may be ſent by a juſtice to the houſe of correction for a month; and informers to have 20 *s.* for every offender ſo taken.

If

If any perſon offers any tea, brandy, &c. to ſale, without a permit, the perſons to whom offered may ſeize and carry it to the next warehouſe belonging to the Cuſtoms or Exciſe; and the ſeizers ſhall have a third part, &c. And watermen, carmen, porters, &c. in whoſe cuſtody run goods are found, ſhall forfeit treble value, or be committed for three months.

Ships and veſſels from foreign parts, having on board tea, or brandy, rum, &c. in caſks under ſixty gallons, (except for the uſe of ſeamen) found at anchor or hovering near any port, or within two leagues of the ſhore, and not proceeding in their voyages, unleſs in caſes of unavoidable neceſſity, all ſuch tea, &c. ſhall be forfeited.

Perſons *offering* any *bribe* to officers of the Cuſtoms, to connive at the running of goods, to forfeit 50 *l.* and obſtructing ſuch officers in entering or ſearching ſhips, incurs a forfeiture of 100 *l.* And if an officer be wounded or beaten on board a ſhip, the offenders to be tranſported, &c.

By *Stat.* 19 *Geo.* 2. *c.* 34, If any perſons, to the number of three, or more, armed with offenſive weapons, ſhall be aſſembled in order to be aiding in the illegal exportation of goods prohibited to be exported, or the running uncuſtomed goods, or the illegal relanding any goods, or reſcuing the ſame, after ſeizure, from any officer, or from the place where they ſhall be lodged, or in the reſcuing any perſon apprehended for any offence made felony by any act relating to the Cuſtoms or Exciſe, or preventing the apprehending any perſon guilty of any ſuch offence; or in caſe any perſons to the number of three, or more, ſo armed, ſhall be ſo aſſiſting, or, if any perſon ſhall have his face blacked, or wear any maſk, or other diſguiſe, when paſſing with ſuch goods, or ſhall forcibly hinder, obſtruct, aſſault, oppoſe, or reſiſt any officer of his majeſty's revenue, in ſeizing ſuch goods, or ſhall maim or dangerouſly wound any ſuch officer in his attempting to go on board any veſſel, or ſhoot at or dangerouſly wound any ſuch perſon when on board and in the execution of his office, every ſuch perſon ſhall be guilty of felony, and ſuffer death. § 1.

On information on oath of any perſon's being guilty of any of the above offences, the juſtice may certify the information to one of the Secretaries of State, who is to lay it before his Majeſty; whereupon his Majeſty may make an order, requiring the offender to ſurrender himſelf in forty days after publication thereof in the *Gazette*; and in default thereof, the order being publiſhed twice in the *Gazette*, and proclaimed in two markets near where the offence was committed, and a copy thereof affixed in ſome public place there, the offender ſhall be attainted of felony, and ſuffer death. § 2. Any perſon harbouring or aiding any ſuch offender after the time for his ſurrender expired, knowing him to have been ſo required to ſurrender, being proſecuted within a year, ſhall be tranſported for ſeven years. § 3. Offences made felony by this act, may be ſued in any county. § 5.

If any officer, &c. in the ſeizing, &c. ſuch goods, or in the endeavouring to apprehend any ſuch offender, ſhall be beat, wounded, maimed, or killed, or the goods be reſcued, the inhabitants of the rape, lath or hundred, unleſs the offender be convicted within ſix months, ſhall forfeit 100 *l.* to the executors of any officer killed; and pay damages to any officer beat, &c. not exceeding 40 *l.* and for any goods reſcued, not exceeding 200 *l.* § 6. A reward of 500 *l.* for apprehending any offender; a perſon wounded in apprehending an offender to have 50 *l.* extraordinary, and the executors of a perſon killed, to have 100 *l.* § 10.

By *Stat.* 13 & 14. *Car.* 2. *c.* 11, Ships and veſſels outward-bound, are not to take in any goods, till the veſſel, &c. is entred with the collectors of the Cuſtoms; and before departure, the contents of the lading are to be brought in under the hands of the laders, &c. Alſo when ſhips arrive from beyond ſea, the maſters are to make a true entry upon oath, of the lading, goods, ſhip, &c. under the penalty of 100 *l.* And if any concealed goods are found after clearing, for which the duties have not been paid, the maſter of the veſſel ſhall be ſubject to the like penalty.

CUSTOMS AND SERVICES, belonging to the tenure of lands, are ſuch as tenants owe unto their lords; which being with-held from the lord, he may have a writ of *cuſtoms and ſervices*. See titles *Conſuetudinibus & Servitiis*.

CUSTOMARY FREEHOLD See title *Copyhold*.

CUSTOS BREVIUM, A principal clerk belonging to the court of *Common Pleas*, whoſe office is to receive and keep all the writs returnable in that court, and put them upon files, every return by itſelf; and to receive of the *prothonotaries* all the records of *niſi prius*, called the *Poſteas*; for they are firſt brought in by the clerk of aſſiſe of every circuit to the prothonotary, who enters the iſſue in the cauſes, to enter the judgment: and four days after the return thereof, the prothonotary enters the verdict and judgment thereupon, into the rolls of the court; whereupon he afterwards delivers them over to the *cuſtos brevium* who binds them into a bundle. He makes entry likewiſe of all writs of covenant, and the concord upon every fine; and maketh forth exemplifications, and copies of all writs and records in his office, and of all fines levied.

The *fines* after they are egroſſed, are divided between the *cuſtos brevium* and the *chirographer*; the chirographer always keeps the writ of covenant and the note, and the *cuſtos brevium* the concord and the foot of the fine; upon which foot of the fine the chirographer cauſeth the proclamations to be indorſed, when they are proclaimed. This officer is made by the king's letters patent: and in the court of *King's Bench*, there is alſo a *cuſtos brevium & rotulorum*, who fileth ſuch writs as are in that court filed, and all warrants of attorney, &c. and whoſe buſineſs it is to make out the records of *niſi prius*, &c. See titles *Chirographer*; *Common Pleas*.

CUSTOS PLACITORUM CORONÆ, An officer which ſeems to be the ſame with him we now call *cuſtos rotulorum*. *Bract. lib.* 2. *c.* 5.

CUSTOS ROTULORUM, *Keeper of the Rolls* or records of the county. The officer who hath the cuſtody of the rolls or records of the ſeſſions of the peace, and alſo of the commiſſion of the peace itſelf. He is always a juſtice of the peace of the *quorum* in the county where appointed, and uſually ſome perſon of quality: but he is rather termed an officer or miniſter, than a judge. *Lamb. Eiren lib.* 4. *cap.* 3. *p.* 373. By *Stat.* 37 *H.* 8. *c.* 1, (altered by *Stat.* 3 & 4 *E.* 6. *c.* 1, but reſtored by 1 *W.* & *M. c.* 21,) the *Cuſtos rotulorum* in every county, is appointed by a writing ſigned by the King's hand, which ſhall be a warrant to the Lord

Lord Chancellor to put him in commiſſion: and he may execute his office by deputy; and hath power to appoint the clerk of the peace, &c. See title *Clerk of the Peace.* The *Cuſtos rotulorum*, two juſtices of the peace, and the clerk of the peace, are to inroll deeds of bargain and ſale of lands of papiſts, &c. by 3 *Geo.* 1. *cap.* 18. See title *Papiſts.*

CUSTOS OF THE SPIRITUALTIES, See *Guardian.*

CUSTOS OF THE TEMPORALTIES, See *Guardian.*

CUT-PURSE. If any perſon *clam & ſecretè*, and without the knowledge of another, cut his purſe or pick his pocket, and ſteal from thence to the value of 12*d.* it is felony without benefit of clergy. *Stat.* 8 *Eliz. c.* 4. See title *Felony.*

CUTTS. Flat-bottomed boats, built low and commodiouſly, uſed in the channel for tranſporting of horſes. *Stow. Annal. p.* 412.

CUTTER OF THE TALLIES, An officer in the Exchequer, to whom it belonged to provide wood for the *tallies*, and to cut the ſum paid upon them, &c. See title *Exchequer.*

CUVE, Is a *French* word, in Engliſh *keeve*, from whence comes *keever*, a tub or vat for *brewing. Cowel.*

CYCLAS, A long garment cloſe upwards, and open or large below. See *Matt. Paris Anno* 1236.

CYDER, is one of the many articles liable to Exciſe-duties.—See title *Exciſe.*

CYNEBOTE. This words ſignifies the ſame with *Cenegild. Blount.*

CYRICBRYCE, (Sax.) *Irruptio in eccleſiam. Leg. Eccl. Canuti Regis.* See title *Sacrilege.*

D.

DA, *Fr.*] A word affirmative for yes. *Law. French Dictionary.*

DAG, A gun; *un dagg*, a ſmall gun, or hand-gun. See *Haque.*

DAGENHAM-BREACH, A duty is granted on coals imported into *London* to repair the walls, and banks thereof; to be collected and diſpoſed by truſtees, *&c. Stats.* 12 *Ann. St.* 2. *c.* 17: 7 *Geo.* 1. *c.* 20. *ſec.* 32.

DAGUS or DAIS, The chief or upper table in a monaſtery; from a cloth called *dais*, with which the tables of kings were covered.

DAKIR, See *Dicker.*

DALMATICA, A garment with large open ſleeves, at firſt worn only by biſhops, though ſince made a diſtinction of degrees; ſo called, becauſe it came originally from *Dalmatia.*

DALUS, DAILUS, DAILIA, A certain meaſure of land.—*Et totam* Dailiam *mariſci tam de roſſa quam de prato, &c. Mon. Ang. tom.* 2. *p.* 211. In ſome places it is taken for a ditch or *vale*, whence comes *dale.* The *dali prati* have been eſteemed ſuch narrow ſlips of paſture, as are left between the ploughed furrows in arable land: which in ſome parts of *England* are called *doles:* the preſent *Welch* uſe this word for low meadow by the river ſide. And this ſeems to be the original name and nature of *Deal* in *Kent*, where *Cæſar* landed, and fought the *Britons*: Cæſar *ad* Dole *bellum pugnavit.*—*Cowel.*

DAMAGES.

DAMNA.] This term ſignifies generally any hurt or hindrance that a man receives in his eſtate: but particularly, a part of what the jurors are to enquire of and bring in, when an action paſſeth for the plaintiff: for after verdict given of the principal cauſe, the jury are aſked touching *coſts* and *damages*, which comprehend a recompence for what the plaintiff hath ſuffered, by means of the wrong done him by the defendant. *Co. Lit.* 257. This word *damage* is taken in law, in two ſeveral ſignifications, the one *properly* and *generally*, the other *relatively*: *properly*, as it is in caſes wherein *damages* are founded upon the ſtatutes where *coſts* are included within the word *damages*, and taken as *damages.*

But when the plaintiff declares for the wrong done to him, to the *damage* of ſuch a ſum, this is to be taken *relatively* for the *wrong* which paſſed before the writ brought, and is aſſeſſed by reaſon of the foregoing treſpaſs, and cannot extend to *coſts* of ſuit, which are future, and of another nature. 10 *Rep.* 116, 117. See title *Coſts.*

I. *In what Actions Damages may be recovered, and againſt whom.*
II. *How Damages are to be aſſeſſed, increaſed, and mitigated.*

I. In *perſonal* and *mixed* actions, *damages* were recovered at Common law: But in *real* actions, no *damages* were recoverable, becauſe none were *demanded* by the count or writ: Whereas in actions *perſonal*, the plaintiff counts *ad dampnum* for the injury; and if he recovers no *damages*, he hath no coſts. 10 *Rep.* 111, 117. In a *perſonal* action, the plaintiff ſhall recover *damages* only for the tort done *before* the action brought; and therein he counts for his *damages*: In a *real* action, he *recovers* his *damages* pending the writ; and therefore *never counts* for his *damages.* 10 *Rep.* 117. By the *Stat.* of *Glouc.* 6 *Ed.* 1. *cap.* 1, *damages* are given in real actions, aſſiſes of *novel diſſeiſin, mort d' anceſtor, &c.* and ſhall be recovered againſt the alienee of a diſſeiſor, as well as againſt the diſſeiſor himſelf; and the demandant ſhall have of the tenant likewiſe coſts of ſuit; but not expences for trouble and loſs of time. 2 *Inſt.* 288. See further the ſaid *Stat.* 6 *Ed.* 1. *c.* 1: *Stat.* 3 *H.* 7. *c.* 10: 2 *Inſt.* 284, 286: 2 *Danv. Abr.* 448.

No *damages* could be recovered at the Common law, but againſt the wrong-doer, and by him to whom the wrong was done. 2 *Inſt.* 284. *Damages* ſhall be recovered in writ of admeaſurement of dower; but not in a writ of admeaſurement of paſture. 2 *Danv.* 457. In writ of partition, by one co-parcener againſt another, it is ſaid no *damages* ſhall be had. In a formedon, no *damages* ſhall be recovered: ſo in a *nuper obiit*, writ of account, writ of execution, *&c. Ibid.* 455, 456. *Damages* and coſts are due in a writ of annuity; and if the jury find for the plaintiff, and do not aſſeſs *damages*, it will be error; though he may after verdict releaſe the *damages*, and take judgment for the annuity. 11 *Rep.* 56: *Dyer* 320, 369.

In battery, impriſonment, and taking of goods, againſt three perſons; one commits the battery, another the impriſonment, the third takes the goods, all at one time, all are guilty of the whole, and to be charged in *damages.* 3 *Lev.* 324. See 10 *Rep.* 66, 69.

II. In real actions, *damages* are aſſeſſed by writ of inquiry: When the jury find the iſſue for the plaintiff, they are to aſſeſs the *damages.* And in actions upon the caſe, *&c.* where *damages* are uncertain, it is left to the jury to inquire of them: In debt, which appears certain to the court what it is, the *damages* aſſeſſed by the jury are ſmall, in fact only nominal, as one ſhilling; and the maſter in *B. R.* taxeth the coſts; which are added thereto, and called *damages.* 1 *Lill.* 390. When judgment is given by default, in action of debt, the court is to aſſeſs the *damages*, and not the jury; So if judgment by *nil dicit*, in action of debt.

Where exceſſive *damages* have been given, or there hath been any miſdemeanor in executing a writ of inquiry; the court hath ſometimes relieved the defendant by a new writ of inquiry. 2 *Danv.* 464. And where *damages* are exceſſive, on motion, the defendant may have a new trial. *Sytle* 465: 1 *Nelſ. Abr.* 587. In treſpaſs againſt two, one comes and pleads Not guilty, and it is found againſt him; and afterwards another comes and pleads the like, and is found Guilty by another inqueſt; in

In this caſe, the firſt jury ſhall aſſeſs all the *damages* for the treſpaſs. *New Nat. Br.* 236. Treſpaſs againſt divers defendants, they plead Not guilty ſeverally, and the jury finds them all Guilty: The jury muſt aſſeſs the *damages jointly*, for it is but *one entire treſpaſs*, and made *joint* by the declaration. 11 *Rep.* 5.

If action is brought for two ſeveral cauſes of action, one of which is not actionable, if intire *damages* are given, the verdict is void: *Contra* if the *damages* are ſevered. And where *damages* are intirely aſſeſſed, and they ought not to be given for ſome part; no judgment can be given on the verdict. 10 *Rep.* 130. Where damages are awarded for delay of execution, and being kept out of the money, they are uſually aſſeſſed by allowing the party what lawful intereſt he might have. 1 *Salk.* 208.

For money lent, intereſt ſhall be given from the time the money was payable, to the time of liquidating the debt, by the court's giving judgment. 2 *Burr.* 1081, 6.—So on a bill of exchange, it is uſual to calculate the intereſt up to the time when judgment may be entered up. And it is now ſettled as a general rule, that where a new action may be brought, and a new ſatisfaction obtained on that, for duties or demands ariſen ſince the commencement of the depending ſuit, theſe ſhall not be included in the judgment on the former action. But where the intereſt is an acceſſory to the principal, and the plaintiff cannot bring a new action for intereſt grown due between the commencement of the action and judgment it ſhall be included. *Id.* 1086, 7.—As to intereſt from the time of the original judgment to the affirmance, in caſe of a writ of error. See *Doug.* 752 *in n*: 2 *Term Rep.* 57, 59, 78, and the *Stat.* 3 *H.* 7. *c.* 10.—A jury may, and now frequently do, give intereſt on book-debts in the name of damages, See *Doug.* 676.

Where the plaintiff ſhall have no more coſts than *damages*, unleſs the jury finds more than 40*s.* See title *Coſts*.

In action upon the caſe the jury may find leſs *damages* than the plaintiff lays in his declaration; but ought not to find more, though coſts may be increaſed beyond the ſum mentioned in the declaration for *damages*: The plaintiff may releaſe part of the *damages*, upon entering up his judgment. 10 *Rep.* 115. If he does not, but takes judgment for damages (excluſive of coſts) to a larger amount, than laid in the declaration, it is error, and not within any of the ſtatutes of amendment or jeofails, *Sandiford* v. *Been. MSS.* In debt againſt a ſheriff or gaoler for an eſcape, the jury cannot give a leſs ſum than the creditor would have recovered againſt the priſoner, *viz.* the ſum indorſed on the writ and the legal fees of execution. 2 *Term Rep.* 126.

In actions upon any bond, *&c.* for non-performance of covenants, the jury ſhall aſſeſs *damages* for thoſe the plaintiff proves broken; and the plaintiff may aſſign as many breaches as he thinks fit. 8 & 9 *W.* 3. *c.* 11. See titles *Bond*; *Covenants*. In debt for a penalty in articles the jury ought to aſſeſs damages on the breach aſſigned, under this *ſtatute*, and ſhall not find the debt. 2 *Wilſ.* 377.

Damages are not to be given for that which is not contained in the plaintiff's declaration; and only for what is materially alleged. 1 *Lill.* 381.

When *damages* double or treble are given in an action newly created by ſtatute; if no *damages* were formerly recoverable, there the demandant or plaintiff ſhall recover thoſe *damages* only, and ſhall not have coſts, being a new creation in recompence where there was none before: As upon *Stat.* 1 & 2 *P.* & *M. c.* 12, for driving of diſtreſſes out of the hundred, *&c.* whereby *damages* are given, the plaintiff ſhall recover no coſts, only his *damages*, becauſe this action is newly given. But in an action upon the *Stat.* 8 *H.* 6. *c.* 9, of forcible entry, which giveth treble *damages*, the plaintiff ſhall recover his *damages* and his coſts to the treble amount, by reaſon he was entitled to ſingle *damages* before by the Common law; and the ſtatute, as part of the *damages*, increaſes the coſts to treble; and when a ſtatute increaſes *damages*, coſts ſhall likewiſe be increaſed. 2 *Inſt.* 289: 10 *Rep.* 116.

Double, treble *damages*, *&c.* are allowed, in ſeveral caſes, by a very great variety of ſtatutes; as, for not ſetting forth tithes; diſtreſſes wrongfully taken; reſcous, though if it be not found by the jury, that the plaintiff hath ſuſtained ſome *damage*, in caſes where treble *damages*, *&c.* are inflicted by law, no *damages* can be awarded. 2 *Danv. Abr.* 449.

How *damages* given to a perſon ſued for an act done in the execution of his office, are to be aſſeſſed and recovered, See *Valentine* and *Faweet*, *Hardw.* 138, 139.

Plaintiff may take judgment *de melioribus damnis* where ſeveral damages are given, or enter a *remittitur*. *Sabin* v. *Long*, 1 *Wilſ. par.* 1. *fo.* 30.

The court in their diſcretion may increaſe the *damages* in *mayhem*. *Brown* v. *Seymour*, *Wilſ. par.* 1. *fo.* 5. and *vide* 3 *Salk.* 115: 2 *Inſt.* 200: 2 *Danv.* 449, 452.

In what caſes double, treble, and quadruple *damages* are given, ſee the ſeveral ſtatutes, and further as to *Damages* in general, *Com. Dig.* in title *Damages*.

DAMAGE-CLEER, *damna clericorum.*] Was a fee aſſeſſed of the tenth part in the *Common Pleas*, and the twentieth part in the *King's Bench* and *Exchequer*, out of all *damages* exceeding five marks, recovered in thoſe courts, in actions upon the caſe, covenant, treſpaſs, battery, *&c.* wherein the *damages* were uncertain; which the plaintiff was obliged to pay to the *prothonotary*, or the chief officer of the court wherein recovered, before he could have execution for the *damages*: this was originally a gratuity given to the *prothonotaries* and their clerks, for drawing ſpecial writs and pleadings; but it is taken away by ſtatute, and if any officer in the King's courts, take any money in the name of *damage-cleer*, or any thing in lieu thereof, he ſhall forfeit treble the value. *Stat.* 17 *Car.* 2. *c.* 6.

DAMAGE-FEASANT, or *faiſant.*] Is when a ſtranger's beaſts are found in another perſon's ground without his leave or licence, (and without the fault of the poſſeſſor of the cloſe, which may happen from his not repairing his fences,) and there doing *damage*, by feeding, or otherwiſe, to the graſs, corn, woods, *&c.* In which caſe, the tenant whom they *damage*, may diſtrain and impound them, as well by night as in the day, leſt the beaſts eſcape before taken; which may not be done for rent, ſervices, *&c.* only in the day-time. *Stat.* 51 *H.* 3. *ſtat.* 4: 1 *Inſt.* 142. If a man take my cattle, and put them into the land of another, the tenant of the land may take theſe cattle *damage-feaſant*, though I who am the owner, was not privy to the cattle's being there *damage-feaſant*; and he may keep them againſt me till ſatisfaction of the *damages*. 2 *Danv. Abr.* 364.

But

But if one comes to diſtrain *damage-feaſant*, and to ſeize the cattle, and the owner drives them out before they are taken, he cannot diſtrain them *damage-feaſant*, but is put to his action of treſpaſs; for the cattle ought to be actually upon the land *damage feaſant*, at the time of the diſtreſs. 1 *Inſt.* 161: 9 *Rep.* 22. He that hath but the *poſſeſſion* of, and no title to the land, may juſtify taking a diſtreſs *damage-feaſant*. *Plowd.* 431. If a man puts cattle to paſture at ſo much a week with another, who after gives notice that he will not have them there any longer; in this caſe the owner of the ground may diſtrain them *damage-feaſant*, though the cattle be in lawfully at firſt: ſo where a leſſee holds after his eſtate is ended. 43 *Ed.* 3: *Keilw.* 69. But the owner of the cattle ſhould have proper notice and reaſonable time allowed for taking away his cattle.

Beaſts belonging to the plough, or beaſts of huſbandry, ſheep, horſes joined to a cart, and it is ſaid a horſe with a rider on it, may be diſtrained *damage-feaſant*, though not for rent. 1 *Sid.* 422, 440. But the owner may tender amends, before the cattle are impounded; and then the detainer is unlawful: alſo if when impounded the pound door is open, the owner may take them out. 5 *Rep.* 76.

A greyhound may be taken *damage-feaſant*, running after conies in a warren: ſo a man may take a ferret that another hath brought into his warren, and taken conies with. If a perſon bring nets and gins through my warren, I cannot take them out of his hands. 2 *Danv.* 633. But if men are rowing up my water, and endeavouring with nets to catch fiſh in my *ſeveral* piſcary, I may take their oars and nets, and detain them as *damage-feaſant*, to ſtop their further fiſhing; though I cannot cut their nets. *Cro. Car.* 228. See titles *Diſtreſs*; *Treſpaſs*.

DAM, A boundary, or confinement; as to *dam* up, or *dam* out: *infra damnum ſuum*, within the bounds or limits of his own property or juriſdiction. *Bract. lib.* 2. *c.* 37.

DAMISELLA, A light damoſell or miſs. *Stat.* 12 *Ed.* 1. See *Pimp-Tenure*.

DAMNUM ABSQUE INJURIA. If one man keeps a ſchool in ſuch a place, another may do ſo likewiſe in the ſame place, though he draw away the ſcholars from the other ſchool; and this is *damnum abſque injuria*, a loſs without an injury; but he muſt not do any thing to diſturb the other ſchool. 3 *Salk.* 10.

DAN. Anciently the better ſort of men in this kingdom had the title of *Dan*; as the *Spaniards Don*, from the Lat. *Dominus*.

DANEGELT, or DANE-GELD, *danegildum.*] Is compounded of the words *dane* and *gelt*, money or tribute, and was a tax of 1 *s.* and after of 2 *s.* upon every hide of land through the realm, laid upon our anceſtors the *Saxons* by the *Danes*, when they lorded it here. *Camd. Brit.* 83, 142. According to ſome accounts, this tax was levied for clearing the ſeas of *Daniſh* pirates; which heretofore greatly annoyed our coaſts: but King *Ethelred* being much diſtreſſed by the continual invaſions of the *Danes*, to procure peace, was compelled to charge his people with very heavy payments called *danegelt*, which he paid to the *Danes* at ſeveral times. *Hoveden par. poſt. Annal.* 344: *Ingulph.* 510: *Selden's Mare Clauſ.* 190. This *danegelt* was releaſed by *Edward the Confeſſor*; but levied again by *William* the Firſt and Second: then it was releaſed again by King *Henry* the Firſt, and finally by King *Stephen*.

DANELAGE, The law of the *Danes*, when they governed a third part of this kingdom. See further, title *Merchenlage*; *Common-law*.

DANGERIA, A payment in money made by foreſt tenants, that they might have liberty to plough and ſow in time of *pannage* or maſt-feeding. *Manw. For. Laws.*

DAPIFER, *à dapes ferendo.*] Was at firſt a domeſtick officer, like unto our *Steward of the Houſehold*; or rather *Clerk of the Kitchen*: but by degrees it was uſed for any fiduciary ſervant, eſpecially the chief ſteward or head bailiff of an honour or manor. There is mention made in our ancient records of *dapifer regis*; which is taken for Steward of the King's Houſehold. *Cowel.*

DARDUS, *i. e.* A dart: In *Wales* an oak is called a *dar*.

DARE AD REMANENTIAM, To give away in fee, or for ever. *Glanv. lib.* 7. *cap.* 1. This ſeems to be only of a *remainder*.

DARREIN, Is a corruption from the Fr. *dernier*, viz. *ultimus*, the laſt; in which ſenſe we uſe it: as *darrein continuance*, &c.

DARREIN PRESENTMENT, Laſt Preſentation.] See title *Advowſon* III. An aſſiſe of *Darrein Preſentment* lies when a man, or his anceſtors, under whom he claims, having preſented a clerk to a benefice, who is inſtituted; afterwards upon the next avoidance a ſtranger preſents a clerk, and thereby diſturbs him that is real patron; in which caſe the patron ſhall have this writ, (*F. N. B.* 31,) directed to the ſheriff to ſummon an aſſiſe or jury, to inquire who was the laſt patron that preſented to the church now vacant, of which the plaintiff complains that he is deforced by the defendant: and, according as the aſſiſe determines that queſtion, a writ ſhall iſſue to the Biſhop; to inſtitute the clerk of that patron, in whoſe favour the determination is made, and alſo to give damages, in purſuance of *Stat. Weſt.* 2. (13 *E.* 2.) *c.* 5. This queſtion, it is to be obſerved, was, before the *Stat.* 7 *Ann. c.* 18, entirely concluſive, as between the patron or his heirs and a ſtranger: for, till then, the full poſſeſſion of the advowſon was in him who preſented laſt, and his heirs; unleſs, ſince that preſentation, the clerk had been evicted within ſix months, or the rightful patron had recovered the advowſon in a writ of right; which is a title ſuperior to all others. But that ſtatute having given a right to any perſon to bring a *quare impedit*, and to recover (if his title be good) notwithſtanding the laſt preſentation by whomſoever made; aſſiſes of *darrein preſentment*, now not being in any-wiſe concluſive, have been totally diſuſed; as indeed they began to be before; a *quare impedit* being a more general, and therefore a more uſual, action. For the aſſiſe of *darrein preſentment* lies only where a man has an advowſon by deſcent from his anceſtors; but the writ of *quare impedit* is equally remedial, whether a man claims title by deſcent or by purchaſe. 2 *Inſt.* 355.

DATE OF A DEED. Is the deſcription of the time, *viz.* the day, month, year of our Lord, year of the reign, &c. in which the deed was made. 1 *Inſt.* 6. But the *ancient* deeds had no *dates*, only of the month and the year; to ſignify that they were not made in haſte, or in the ſpace of a day; but upon longer and more mature deliberation. *Blount.* If in the *date* of a deed, the year of our Lord is right, though the year of the King's reign be miſtaken, it ſhall not hurt it. *Cro. Jac.* 261. A deed was *dated* 30th *March* 1701, without *anno Domini* and *anno Regni*; and it

was adjudged that both the year of the Lord and of the King were implicitly in the deed. 2 *Salk.* 658. A deed is good, though it hath no *date* of the day or place, or if the *date* be miſtaken, or though it hath an impoſſible *date*, as the 30th of *February*, &c. But he that doth plead ſuch a deed, without any *date*, or with an impoſſible *date*, muſt ſet forth the time when it was delivered. 2 *Rep.* 5: 1 *Inſt.* 46. If no *date* of a deed be ſet forth, it ſhall be intended that it had none; and in ſuch caſe it is good from the delivery; for every deed or writing hath a *date* in law, and that is the day in which it is delivered: and a deed is no deed till the delivery, and that is the *date* of it. *Mod. Ca.* 244: 1 *Nelſ. Abr.* 525.

An impoſſible date of a bond, &c. is no date at all; but the plaintiff muſt declare on the bond as made at a certain time: and if the expreſs *date* be inſenſible, the real *date* is the delivery. 2 *Salk.* 463. Where there is none, or an impoſſible *date*, the plaintiff may count of any *date*. 1 *Lill. Abr.* 393. If there be a miſtaken *date*, or a *date* be impoſſible, &c. the plaintiff may ſurmiſe a legal *date* in the declaration, whereupon the defendant is to anſwer to the deed, and not to the *date*. *Yelv.* 194. If a deed bears *date* at a place out of the realm, it may be averred that the place mentioned in the deed is in ſome county in *England*; and here the place is not traverſable; without this the deed cannot be tried. 1 *Inſt.* 261. A deed may be *dated* at one time, and ſealed and delivered at another: but every deed ſhall be intended to be delivered on the ſame day it bears *date*, unleſs the contrary is proved. 2 *Inſt.* 674. Though there can be no delivery of a deed before the day of the *date*; yet after, there may. *Yelv.* 138. So that a deed may be *dated* back on a time paſt, but not at a day to come. See title *Deed*.

DATIVE, or DATIF, *dativus.*] Signifies that which may be given or diſpoſed of at will and pleaſure. *Stat.* 9 *R.* 2. *c.* 4,

DAVATA TERRÆ, DAWACH, A portion of land ſo called in *Scotland*. *Skene*.

DAY, *dies.*] A certain ſpace of time, containing twenty-four hours; and if a fact be done in the night, you muſt ſtate it in law-proceedings, in the night of the ſame day. The *natural day* conſiſts of twenty-four hours, and contains the ſolar *day* and the night: and the *artificial day* begins from the riſing of the ſun, and ends when it ſets. See 1 *Inſt.* 135. *Day*, in legal underſtanding, is the *day of appearance* of the parties, or continuance of the ſuit where a *day* is given, &c. And there is a *day* of appearance in court by the *writ*, and by the *roll*; by *writ*, when the ſheriff returns the writ; by *roll*, when he hath a day by the roll, and the ſheriff returns not the writ, there the defendant, to ſave his freehold, and prevent loſs of iſſues, impriſonment, &c. may appear by the *day* he hath by the roll. *Co. Lit.* 135.

In *real* actions there are *dies communes*, common *days*; and in all ſummonſes there muſt be fifteen *days* after the ſummons before the appearance: and before the ſtatute of *articuli ſuper chartas*, in all ſummons and attachment in plea of land, there ſhould be contained fifteen *days*. *Co. Lit.* 134.

As to offences in *B. R.* if the offence be committed in another county than where the court ſits, and the indictment be removed by *certiorari*, there muſt be fifteen *days* between every proceſs and the return thereof; but if it be committed in the ſame county where the bench ſits, they may ſit *de die in diem*; but this they will very rarely do. *Ibid.* There is a *day* called *dies ſpecialis*, as in an aſſiſe in the King's Bench or Common Pleas, the attachment need not be fifteen *days* before the appearance; otherwiſe it is before juſtices aſſigned; but generally in aſſiſes the judges may give a ſpecial day at their pleaſure, and are not bound to the common *days*; and theſe days they may give as well out of term as within.

There is alſo a *day* of grace, *dies gratiæ*; and generally this is granted by the court at the prayer of the demandant or plaintiff, in whoſe delay it is; but it is never granted where the King is party, by *aid prier* of the tenant or defendant; nor where any lord of parliament, or peer of the realm is tenant or defendant.

And ſometimes the *day* that is *quarto die poſt*, is called *dies gratiæ*, for the very *day* of return is the *day* in law, and to that *day* the judgment hath relation, but no default ſhall be recorded till the fourth *day* be paſt; unleſs it be in a writ of right, where the law alloweth no *day* but the *day* of the return. *Co. Lit.* 135.—See titles *Judgment*; *Term*.

There are ſeveral *return-days* in the terms; and if either of them happen upon a *Sunday*, the *day* following is taken inſtead of it; for *Sunday* is *dies non juridicus*; and ſo is *Aſcenſion day* in *Eaſter* term, *St. John Baptiſt* in *Trinity* term, *All Saints* and *All Souls* in *Michaelmas* term, and the *Purification of the Virgin Mary* in *Hilary* term. 2 *Inſt.* 264.—See title *Term*.

Days in Bank are *days* ſet down by ſtatute, or order of the court, when writs ſhall be returned, or when the party ſhall appear upon the writ ſerved. See *Stat.* 51 *H.* 3. *ſtat.* 2. & 3: 32 *Hen.* 8. *cap.* 21: 16 *Car.* 1. *c.* 6: and 24 *Geo.* 2. *c.* 48. And by the ſtatute *de anno biſſextili*, 21 *H.* 3, the *day* increaſing in the leap-year, and the day next going before are to be accounted but one *day*.

It is commonly ſaid that the *day* of *Niſi prius*, and the *day in the Bank*, is all one *day*; but this is to be underſtood as to pleading, not to other purpoſes. 1 *Inſt.* 135. But after iſſue found for the plaintiff at the *Niſi prius*, if a day be given *in Bank*, and the defendant makes default, judgment ſhall be given againſt him. 2 *Danv. Ab.* 477. and *vide Id.* 476.

To be diſmiſſed *without day*, is to be finally diſmiſſed the court: and when the juſtices before whom cauſes were depending, do not come on the *day* to which they were continued, whether ſuch abſence be occaſioned by death, or otherwiſe, they are ſaid to be *put without day*: but may be revived, or recontinued by re-ſummons, re-attachment, &c. See *Stat.* 1 *E.* 6. *c.* 7. Alſo by the Common law, all proceedings upon any indictment, &c. whereon no judgment had been given, were determined by the demiſe of the King, and nothing remained but the indictment, original writ, &c. which were *put without day*, till re-continued by re-attachment to bring in the defendants to plead *de novo*: though this is remedied by *Stats.* 4 & 5 *W.* 3. *c.* 18: 1 *An. c.* 8; by which ſuch proceſs, &c. are to continue in the ſame force after the King's demiſe, as they would have done if he had lived. See titles *Diſcontinuance*, *Proceſs*, *King*.

In action of treſpaſs, if the *day* laid in the declaration be either *before* or *after* the actual *day* on which the treſpaſs is committed, it is not material, if a treſpaſs be proved. *Co. Lit.* 283 *a.* But *N. B.* The *day* laid muſt be before

before the firſt *day* of that term of which the declaration is intituled, or if the treſpaſs be committed within the term, there muſt be a ſpecial memorandum of ſome particular day, (if by bill) or of ſome general return day, (if in *C. P.* or *B. R.* by original writ) *ſubſequent* to the day whereon the trepaſs was committed: and ſo as to other actions, where the cauſe of action ariſes *within* the term. See title *Declaration, Pleading.*

DAY-LIGHT, See titles *Burglary, Robbery.*

DAY-RULE, See *Day writ.*

DAYWERE or LAND, *Diurnalis, Diuturna.*] As much arable land as could be ploughed up in one day's work; or one *journey*, as the farmers ſtill call it.

DAY-WRIT, or DAY-RULE; a rule or order of court, permitting a priſoner in cuſtody in the King's Bench priſon, *&c.* to go without the bounds of his priſon for *one day*. By a rule of the Court of *K. B. Euſter* 30 *Geo.* 3, a priſoner ſhall not have day rules above *three days* in each term; and to return to priſon before nine in the Evening. The King may grant *writ of warrantia diei* to any perſon, which ſhall ſave his default *for one day*, be it *in plea of land or other action*, and be the cauſe true, or not; and this by his prerogative, *quod nota. Br. Prerogative, pl.* 142. cites *F. N. B.* 7.

It is againſt law to grant liberty to *priſoners in execution*, by other writs than *day-writs*, (or rules) *Chan. Rep.* 67.

No priſoner *committed by B. R.* ought to have the benefit of the *day-rule* of going abroad in term-time; for their impriſonment is their puniſhment for their contempt, or miſbehaviour. 2 *Show.* 88. *pl.* 80.

One in execution had a *habeas corpus from the Lord Keeper* (which they call a day-writ) *returnable three or four days after its teſte.* By virtue of this writ, he went to the wine-licence office, but never to any inn of court or Chancery, or to the Lord Keeper's, and this in the vacation. *Per Pemberton* Ch. J. This is a *habeas* out of Chancery, which they may ſend at any time, and by virtue of the King's writ, the party was brought out of the priſon-houſe, and that is juſtifiable. Then all the day, *ſo long as there was a keeper with him*, he was in cuſtody ſtill, and returning to priſon at night, it is well enough, and no eſcape; though Chancery may examine the contempt, that is nothing to *B. R.* 2 *Show.* 298. *pl.* 229.

A priſoner taken on an *eſcape-warrant before the ſitting of the court* the ſame day, ſhall be diſcharged, if his name was entered with the clerk the night before; but not if it was entered the ſame morning only. 8 *Mod.* 80.

DAYERIA, *Dairy*, from *day, deie*, Sax. *dag.*] Was at firſt the *daily* yield of milch-cows, or profit made of them. In *Lorrain* and *Champaign* they uſe the word *dayer*, for the meeting of the *day*-labouring people to give an account of their daily work, and receive the wages of it. A *dairy* in the *North* is called *milkneſs*; as the *dairy-maid* is in all parts a *milk-maid*: ſhe is termed *androchia* by *Fleta, lib.* 2. *cap.* 87. and See *Paroch. Antiq.* 548.

DAYS-MAN; In the North of *England*, an arbitrator, or elected judge, is uſually termed a *dies-man*, or *days-man*: and Dr. *Hammond* ſays, that the word *day* in all idioms ſignifies judgment.

DEADLY FEUD, Is a profeſſion of an irreconcileable hatred, till a perſon is revenged even by the death of his enemy. It is mentioned in *Stat.* 43 *El. c.* 13. And ſuch enmity and revenge were allowed by the old *Saxon* laws; for where any man was killed, if a pecuniary ſatisfaction was not made to the kindred of the ſlain, it was lawful for them to take up arms againſt the murderer, and revenge themſelves on him: and this is called *deadly feud*; which it is conjectured was the original of an *appeal. Blount.*—See *Stat.* 43 *Eliz. c.* 13; and this Dict. title *Feud, Malicious Miſchief, Felony.*

DEAD PLEDGE, *mortuum vadium.*] A pledge of lands or goods. See *Mortgage.*

DEAF, DUMB, and BLIND. A man who is born *deaf, dumb and blind*, is looked upon by the law in the ſame ſtate as an idiot: he being ſuppoſed incapable of any underſtanding; as wanting all thoſe ſenſes which furniſh the human mind with ideas. 4 *Comm.* 304: See *F. N. B.* 233.—See titles *Idiot, Lunatic.*

A man who *could neither ſpeak nor hear* committed felony, and was arraigned and therefore was commanded to priſon. *Br. Corone, pl.* 216. cites 26 *Edw.* 3. See *Thel. Dig.* 6. *lib.* 1. *c.* 7.

One who had made his will, and became ill, and (as it ſeems) had *loſt his ſpeech*; the ſame will was delivered into his hands, and *it was ſaid to him, that he ſhould deliver it to the vicar, if it ſhould be his laſt will, otherwiſe he ſhould retain it; and he delivered it to the vicar, and this was held a good will.* Thel. Dig. 6. lib. 1. cap. 7. ſ. 8. *cites* 44 Aſſ. 36.—See title *Will.*

It appearing by oath, that the defendant was both *ſenſeleſs and dumb*, and therefore could not inſtruct his counſel to draw his anſwer; it was ordered that *no attachment*, or other proceſs of contempt, ſhould be awarded againſt the defendant for not anſwering, without ſpecial order of the court. *Cary's Rep.* 132, cites 22 *Eliz. Altham* v. *Smith.*

One that is *deaf* and wholly deprived of his hearing cannot *give*, and ſo one that is *dumb* and cannot ſpeak. Yet (according to the opinion of ſome) they may *conſent by ſigns*: but it is generally held, that he that is *dumb* cannot make a gift, becauſe he cannot conſent to it. 1 *Inſt.* 107.

If however, a blind man has underſtanding, he may *deliver a deed* ſealed by him. *Jenk.* 222. *pl.* 75.

The lord ſhall have the *cuſtody of a copyholder* that is deaf and dumb; for elſe he ſhall be prejudiced in his rents and ſervices; and adjudged for the grantee of the lord againſt the prochein amy of the copyholder. *Cro. Jac.* 105.

One born *deaf* and *dumb*, who ſignified by ſigns that ſhe underſtood what ſhe was about to do, was allowed to *levy a fine* of lands; by *Bridgman* Ch. J. *& al'* juſtices. *Cart.* 53.

DEAFFORESTED, *Deafforeſtatus.*] *Diſcharged* from being *foreſt*; or freed and exempted from the foreſt laws. 17 *Car.* 1. *c.* 16. There is likewiſe *dewarrenata*, as well as *deafforeſtata*; which is when a *warren* is *diſwarrened*, or broke up and laid in common.

DEAN, *Decanus*; from the *Greek* Δέκα, *decem.*] An eccleſiaſtical governor or Dignitary, ſo called, as he preſides over ten Canons or Prebendaries at the leaſt. And we call him a *Dean*, that is next under the biſhop, and chief of the chapter, ordinarily in a cathedral church; the reſt of the ſociety being called *capitulum*, the chapter. As there are two foundations of cathedral churches in *England*, the *old* and the *new*, the new erected by King *Hen.* VIII. ſo there are two means of creating theſe *Deans*: for thoſe of the *old* foundation, as the *Dean of St. Paul's, York, &c.* are exalted to their dignity much like biſhops;

the King firſt ſending out his *congé d'eſire* to the chapter to chooſe ſuch *Dean*, and the chapter then chooſing, the King afterwards yielding his royal aſſent, and the biſhop confirming him, and giving his mandate to inſtall him.

Thoſe of the *new* foundation, whoſe deaneries were tranſlated from priories and convents, to *Dean* and Chapter, are donative, and inſtalled by a ſhorter courſe, by virtue of the King's letters-patent, without either election or confirmation; and are viſitable only by the Lord Chancellor, or by ſpecial commiſſion from the King: but the letters-patent are preſented to the biſhop for inſtitution, and a mandate for inſtallment goes forth. 1 *Inſt.* 95: *Davis* 46, 47.

The *new* Deaneries and chapters to *old* biſhopricks are *eight*, viz. *Canterbury*, *Norwich*, *Wincheſter*, *Durham*, *Ely*, *Rocheſter*, *Worceſter* and *Carliſle*. The new Deaneries and chapters to new biſhopricks are *five*, *Peterborough*, *Cheſter*, *Glouceſter*, *Briſtol* and *Oxford*. 1 *Inſt.* 95 *a. n.* 3.

Of the four *Welſh* Cathedrals, *two* are without Deans; or rather the dignities of Biſhop and Dean unite in the ſame perſon, the biſhop being deemed *quaſi decanus*; and having, it is ſaid, both an epiſcopal throne, and a decanal ſtall allotted to him in the choir. Of this kind are the Cathedrals of *St. David's* and *Llandaff*.—*St. Aſaph* and *Bangor*, the two other *Welſh* Cathedrals, have the dignity of Dean diſtinct from that of Biſhop, but the patronage of both deaneries is in the reſpective biſhops, they being neither elective by the Chapter, nor donative in the Crown. 1 *Inſt.* 95 *a. n.* 4.

In *Ireland* it ſeems that the King appoints to deaneries, as to biſhopricks by letters-patent. *Id. ib.*

Various kinds of *Deans*, beſides Deans of Chapters, are known to our law; and ſeveral diviſions ſeem neceſſary to diſtinguiſh them properly.

Conſidered in reſpect of the difference of office, Deans are of ſix kinds. 1. *Deans of Chapters*, who are either of cathedral or collegiate churches; though the members of churches of the latter ſort may more properly be denominated *colleges* than chapters. See title *Chapters*.—2. *Deans of Peculiars*; who have ſometimes both juriſdiction and cure of ſouls, as the Dean of *Battel* in *Suſſex*; and ſometimes juriſdiction only, as the Dean of the *Arches* in *London*; (See title *Arches Court*) and the Deans of *Bocking* in *Eſſex*, and of *Croydon* in *Surrey*.—3. *Rural Deans*, who had firſt juriſdiction over deaneries, as every dioceſe is divided into archdeaconries and deaneries; but afterwards their power was diminiſhed, and they were only the biſhops' ſubſtitutes to grant letters of adminiſtration, probate of wills, *&c.* And now their office is wholly extinguiſhed, for the archdeacons and chancellors of biſhops execute the authority which *Rural Deans* had through all the dioceſes of *England*. 1 *Nelſ. Abr.* 596, 597. and See 1 *Comm.* 383.—4. *Deans* in the *Colleges* of our *Univerſities*; who are officers appointed to ſuperintend the behaviour of the members, and to enforce diſcipline.—5. *Honorary Deans*; as the Dean of the Chapel-Royal at *St. James's*, who is ſo ſtiled on account of the dignity of the perſon over whoſe chapel he preſides. As to the chapel of *St. George*, *Windſor*, there being Canons as well as a Dean, it is ſomething more than a mere chapel, and except in name, reſembles a collegiate church.—6. *Deans of Provinces*; or as they are ſometimes called Deans of Biſhops. Thus the Biſhop of *London*, is Dean of the Province of *Canterbury*; and to him as ſuch, the Archbiſhop ſends his mandate for ſummoning the Biſhops of his Province, when a Convocation is to be aſſembled; which may perhaps account for calling him Dean of the Biſhops; what the other parts of his office are, the books do not explain, nor do they mention whether there is a Dean for the Province of *York*. See *Lyndw.*: *Gibſ.*: 1 *Inſt.* 95 (*a*) in *n.*

Another diviſion of Deans, ariſing from the nature of their office, is into Deans of *Spiritual* promotions, and Deans of *Lay* promotions. Of the former kind are Deans of Peculiars, with cure of ſouls, Deans of the Royal Chapels, and Deans of Chapters; though as to theſe laſt, a contrary opinion formerly prevailed. Perhaps too, Rural Deans might be added to the number. Of the latter kind are Deans of Peculiars, without cure of ſouls, who therefore may be, and frequently are, perſons not in holy orders.

In reſpect of the *manner of appointment*, Deans are —1. *Elective*; as Deans of Chapters of the old foundation; though they are only ſo (like Biſhops) nominally, and in form; the King, being in fact the real patron.—2. *Donative*, as thoſe Deans of Chapters of the New Foundation, who are appointed by the King's letters-patent, and are inſtalled, under his command to the Chapter, without reſorting to the Biſhop either for admiſſion, or for a mandate of inſtallment; if that mode of promoting *ſtill* prevails in reſpect to any of the new deaneries. Deans of the Royal Chapels are alſo donative, the King appointing to them in the ſame way. So too may Deans of Peculiars, without cure of ſouls, be called; as the Dean of the Arches, who is appointed by commiſſion from the Archbiſhop of *Canterbury*; but this muſt be underſtood in a large ſenſe of the word *donative*, it being moſt uſually reſtrained to ſpiritual promotions.—3. *Preſentative*; as ſome Deans of Peculiars with cure of ſouls, and the Deans of *ſome* chapters of the New Foundation, if not *all*. Thus the Dean of *Battel* is preſented by the patron to the Biſhop of *Chicheſter* and from him receives inſtitution. This Deanery was founded by *William* the Conqueror. He hath eccleſiaſtical juriſdiction within the liberty of *Battel*, and is preſentable by the Duke of *Montagu*, and though inſtituted and inducted by the Biſhop of *Chicheſter*, is not ſubject to his viſitation. 1 *Nelſ. Ab.* Thus too the Dean of *Glouceſter* is preſented by the King to the Biſhop, with a mandate to admit him, and to give orders for his inſtallment.—4. *By virtue of another office*; as the Biſhop of *London* is Dean of the Province of *Canterbury*; and the Biſhop of St. *David's*, is Dean of his own Chapter.

As to further particulars relative to the manner of coming to the poſſeſſion of Deaneries, ſee a long and learned hiſtorical account in 1 *Inſt.* 95 (*a.*) *n.* 4; from which it appears that the right to appoint Deans of Cathedral and Collegiate Churches, and the mode of appointing them, muſt generally depend, almoſt wholly, upon *charters*, *uſage*, or *acts of parliament*; and if a caſe ſhould, by bare poſſibility, ariſe, where neither of thoſe rules could be had recourſe to, *founderſhip* ſeems the only true criterion of patronage.

In reſpect of the manner of holding, Deans are either abſolute, or in *commendam*. But this applies only to Spiritual Deaneries. It is ſaid there are alſo *Deputy* Deans. A commendatory *Dean* may, with the Chapter, chooſe a biſhop.

biſhop. And if a *Dean* be elected biſhop, and before conſecration doth obtain diſpenſation to hold his deanery *in commendam*, ſuch *Dean* may well confirm, &c. for his old title remains, and therefore confirmations, and other acts done by him, as *Dean*, are good in law. *Latch* 237, 250: *Palm. Rep.* 460.

A *Dean* and Chapter are the biſhop's council, to aſſiſt him in the affairs of religion, &c. to conſult in deciding difficult controverſies, and conſent to every grant which the biſhop ſhall make to bind his ſucceſſors, &c.

A *Dean* that is ſolely ſeiſed of a diſtinct poſſeſſion, hath an abſolute fee in him as well as a biſhop. 1 *Inſt.* 325. A Deanery is a ſpiritual promotion, and not a temporal one, though the *Dean* be appointed by the King; and the *Dean* and Chapter may be in part ſecular, and in part regular. *Dyer* 10: *Palm.* 500. As a deanery is a ſpiritual dignity, a man cannot be *Dean* and Prebendary in the ſame church. *Dyer* 273.

DEATH OF PERSONS. There is a *natural* death of a man, and a *civil* death: natural, where nature itſelf expires, and extinguiſhes; and civil, is where a man is not actually dead, but is adjudged ſo by law; as where he enters into religion, &c. By *Stat.* 19 *C.* 2. *c.* 6, If any perſon for whoſe life any eſtate hath been granted, remain beyond ſea, or is otherwiſe abſent *ſeven* years, and no proof made of his being living, ſuch perſon ſhall be accounted naturally dead; though if the party be after proved living at the time of eviction of any perſon, then the tenant, &c. may re-enter, and recover the profits. And by *Stat.* 6 *An. c.* 18, perſons in reverſion or remainder, after the death of another, upon affidavit that they have cauſe to believe ſuch other dead, may move the Lord Chancellor to order the perſon to be produced; and if he be not produced, he ſhall be taken as dead; and thoſe claiming may enter, &c. See further titles *Occupancy*, *Life-Eſtate*.

A man ſeiſed in fee of lands, made a leaſe in reverſion to *L. D.* for ninety-nine years, to commence after the *deaths* of *J. D.* and *E. D.* who had then a leaſe in poſſeſſion for the like term, if they or either of them ſo long lived: the plaintiff poſitively proved the *death* of *J. D.* but as to the *death* of *E. D.* the proof was that he had been reputed dead, and no body had heard of him for fifteen years paſt; and the defendant not being able to prove that he was alive at any time within ſeven years, this caſe was adjudged within the *Stat.* 19 *Car.* 2. *c.* 6. *Carthew* 246.

In law proceedings, the death of either party, between the verdict and judgment, ſhall not be error; ſo as judgment be entered in two terms. 16 & 17 *Car.* 2. *c.* 8. See titles *Amendment*, *Error*.

A Corporation never dies. 1 *Wilſ.* 184.

Where the plaintiff dies after a verdict and before the day in bank, though the entry of the judgment be right, yet a *ſcire facias* muſt be ſued out before execution iſſue. 1 *Wilſ.* 302.—See titles *Judgment*, *Execution*.

Where, on the death of parties to a ſuit, the writ, &c. ſhall abate, See title *Abatement*.

DEBATING SOCIETIES. See this Dict. titles *Holidays*, *Advertiſements*.

DE BENE ESSE. To take or do any thing *de bene eſſe*, is to accept or allow it as well done for the preſent; but when it comes to be more fully examined or tried, to ſtand or fall according to the merit of the thing in its own nature. As in *Chancery*, upon motion to have one of the leſs principal defendants in a cauſe examined as a witneſs, the Court (not then thoroughly examining the juſtice of it, or not hearing what may be objected on the other ſide) will often order ſuch a defendant to be examined *de bene eſſe*, *viz.* That his depoſitions ſhall be taken, and allowed or ſuppreſſed at the hearing of the cauſe, upon the full debate of the matter, as the Court ſhall think fit; but in the interim they have a *well-being*, or conditional allowance. 3 *Cro.* 68.

Where a complainant's witneſſes are aged, or ſick, or going beyond ſea, whereby the plaintiff thinks he is in danger of loſing their teſtimony, the Court will order them to be examined *de bene eſſe*; ſo as to be valid, if the plaintiff hath not an opportunity of examining them afterwards; as if they die before anſwer, or do not return, &c. In either of which caſes, the depoſitions may be made uſe of in the court of *Chancery*, or at law: but if parties are alive and well, or do return, &c. after anſwer, theſe depoſitions are not to be of force, for the witneſſes muſt be re-examined.

So alſo at Common law, the judges frequently take bail *de bene eſſe*, that is, to be allowed or diſallowed upon the exception, or approbation of the plaintiff's attorney; however, in the interim, they are good, or have a conditional allowance. *Cowel.* Declarations likewiſe are ſometimes delivered *de bene eſſe*. See titles *Declaration*, *Practice*, *Proceſs*, &c.

DEBENTURE. A ſoldier's debenture, (*ſtipendia debita*) is in the nature of a bond or bill, to charge the Government to pay the *ſoldier creditor*, or his aſſigns, the ſum due upon the auditing the account of his arrears: it was firſt ordained by an act made during the Uſurpation, *anno* 1649, and is mentioned in the act of oblivion, 12 *Car.* 2. *c.* 8. They uſe debentures likewiſe in the *Exchequer*; and debentures are given to the *King's ſervants*, for the payment of their wages, board-wages, &c. Alſo there are cuſtom-houſe debentures, &c.

DEBET ET DETINET, *He oweth and detaineth.*] An action ſhall be always in the *debet et detinet*, when he who makes a bargain or contract, or lends money to another, or he to whom a bond is made, bringeth the action againſt him who is bounden, or party to the contract and bargain, or unto the lending of the money, &c. See *New Nat. Br.* 119.—See *poſt.* title *Debt* II.

DEBET ET SOLET, If a perſon ſues to recover any right, whereof his anceſtor was diſſeiſed by the tenant of his anceſtor, then he uſeth the word *debet* alone in his writ, becauſe his anceſtor only was diſſeiſed, and the eſtate diſcontinued: but if he ſue for any thing that is now firſt of all denied him, then he uſeth *debet et ſolet*, by reaſon his anceſtor before him, and he himſelf uſually enjoyed the thing ſued for, until the preſent refuſal of the tenant. *Reg. Orig.* 140. The writ of *fecta ad molendinum* is a writ of right, in the *debet et ſolet*, &c. *F. N. B.* 98.

DEBT.

DEBITUM.] In common parlance is a ſum of money due from one perſon to another. And if an action be brought, and the plaintiff recovers judgment, he may by law take either the perſon, or his real or perſonal eſtate in execution, *i. e.* the moiety of his real eſtate, or the whole of the perſonal, if not more than ſufficient for payment of the ſum recovered and charges.

In

DEBT I.

In the legal ſenſe of the word, *debt* is ſaid to be an action which lieth where a man *oweth* another a certain ſum of money, either by a debt of *record*, by *ſpecialty* or by *ſimple contract*; as on a judgment, obligation, or bargain for a thing ſold, or by contract, *&c.* and the debtor will not pay the debt at the day agreed; then the creditor ſhall have action of debt againſt him for the ſame. See 2 *Comm.* 464. If a man contract to pay money for a thing which he hath bought; and the ſeller takes bond for the money, the contract is diſcharged, ſo that he ſhall not have action of debt upon the *contract*, but on the *bond*. *New Nat. Br.* 268.

I. *In what Caſes Action of Debt will lie; and by whom, and againſt whom it may be brought.*
II. *In what Manner it may be brought; as where in the* debet *and* detinet, *and where in the* detinet *only.*
III. *How it may be extinguiſhed.*

I. The legal acceptation of *debt*, is a ſum of money due by certain and expreſs agreement: as, by a bond for a determinate ſum; a bill, or note; a ſpecial bargain; or rent reſerved on a leaſe; where the quantity is fixed and ſpecific, and does not depend upon any ſubſequent valuation to ſettle it. The non-payment of theſe is an injury, for which the proper remedy is by action of *debt*, (*F. N. B.* 119,) to compel the performance of the contract, and recover the ſpecific ſum due. This is the ſhorteſt and ſureſt remedy; particularly where the debt ariſes upon a ſpecialty, that is, upon a deed or inſtrument under ſeal. So alſo, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies againſt me; for this is alſo a *determinate* contract: but if I agree for no ſettled price, I am not liable to an action of debt, but a ſpecial action on the caſe, according to the nature of my contract. And indeed actions of debt are now ſeldom brought but upon ſpecial contracts under ſeal; wherein the ſum due is clearly and preciſely expreſſed; for, in caſe of ſuch an action upon a ſimple contract, the plaintiff labours under two difficulties; Firſt, the defendant has here the ſame advantage, as in an action of *detinue*, that of waging his law, or purging himſelf of the debt by oath, if he thinks proper. 4 *Rep.* 94. Secondly, in an action of debt, the plaintiff muſt prove the whole debt he claims, or recover nothing at all. For the debt is one ſingle cauſe of action, fixed and determined; and which therefore, if the proof varies from the claim, cannot be looked upon as the ſame contract, whereof the performance is ſued for.—But in actions of debt, where the contract is proved or admitted, if the defendant can ſhew that he has diſcharged any part of it, the plaintiff ſhall recover the reſidue. 1 *Rol. Rep.* 257: *Salk.* 664: 3 *Comm.* 154.

When alſo the damages can be reduced by the averment to a certainty, *debt* will lie; as on a covenant to pay ſo much *per* load for wood, *&c.* So if in an action, in which the plaintiff can only recover damages, there be judgment for him, he can afterwards bring *debt* for thoſe damages. *Bull. N. P.* (8vo.) 167.—And as to caſes in which on actions of debt it is not neceſſary to prove the exact ſum laid in the declaration, See at large *Doug.* 6, 732. *in n.*

If one binds himſelf in a ſingle obligation, or with condition, to pay money at a day; or to deliver corn, or the like, and do not perform it accordingly, the obligee may bring action of *debt* for it. *F. N. B.* 120. A man acknowledges by deed, that he hath ſo much of the money of *J. S.* due to him in his hands; here debt may be brought: and debt will lie on a tally ſealed. *F. N. B.* 122: 1 *H.* 6. 55. *A.* delivers 20*l* to *B.* to buy goods, and *B.* gives a receipt to *A.* teſtifying the delivery and receipt of the 20*l.* but doth not promiſe to deliver the goods, *&c. A.* may maintain debt upon this receipt. *Dyer* 20: 2 *Bulſt.* 256. If one binds himſelf to pay *A. B.* 10*l.* at one day, and 10*l.* at another, after the firſt day action of debt lies for 10*l.* being a ſeveral duty. 2 *Danv. Abr.* 501. The nature of the bond, and of the condition, (if there is any) muſt be carefully attended to, to ſee if by non-payment of the firſt ſum the bond is forfeited. *Vide Co. Lit.* 292 *b.*

Action of *debt* lies upon a *parol contract*, and ſo doth *action on the caſe*. 1 *Lil.* 403. And *vide* 9 *Rep.* 87. If goods or money are delivered to a third perſon for my uſe, I may have action of debt or account for them. 2 *Danv.* 404. Where money is delivered to a perſon, to be re-delivered again, the property is altered, and debt lies: but where a horſe, or any goods are thus delivered, there *detinue* lies, becauſe the property is not altered; and the thing is known, whereas money is not. *Owen*, 86: 1 *Nelſ. Abr.* 603.

Action of debt lies againſt the huſband, for goods which were delivered or ſold to the wife, if they come to the uſe of the huſband. 1 *Lil.* 400. If one delivers meat, drink, or clothes, to an infant, and he promiſes to pay for them, action of debt, or on the caſe, will lie againſt the infant. Though debt may not be brought on an *account ſtated* with an infant: and what is delivered muſt be averred to be for the neceſſary uſe of the infant. 1 *Lil. Abr.* 401.—See title *Infant*. An attorney ſhall have action of debt againſt his client, for money, which he hath paid to any perſon for the client, for coſts of ſuit, or unto his counſel, *&c.*

An heir mediate may be ſued in debt as if he were immediate heir, *&c.* The heir may not bring action of debt for a debt due to his anceſtor; though it be by ſpecialty, by which the party is bound to pay it to him and his heirs: the executor ſhall nevertheleſs have the action. *Dyer* 368: *F. N. B.* 120. Action of debt lies not againſt executors, upon a ſimple contract made with the teſtator. 9 *Rep.* 87.

Before the *Stat.* 32 *H.* 8. *c.* 37, the heirs or executors of a man ſeiſed of a rent-ſervice, rent-charge, *&c.* in fee-ſimple, or fee-tail, had no remedy for the arrearages incurred in the life-time of the owner of ſuch rents: but by that ſtatute, the executors and adminiſtrators of tenants in fee-ſimple, fee-tail, or for life, of any rent, ſhall have *action of debt* for all arrearages of rent due in the life of the teſtator. 1 *Inſt.* 162: 2 *Danv.* 492.

A feme ſole ſeiſed of a rent in fee, *&c.* which is behind and unpaid, takes huſband, and the rent is behind again, and then the wife dieth, by the ſaid *Stat.* 32 *H.* 8. *c.* 37, the huſband ſhall have the arrears due before marriage, and he hath a double remedy for the ſame. 1 *Inſt.* 162.

But by *Stat.* 8 *An. c.* 17, Any perſon having rent in arrear upon any leaſe for life or lives, may bring *action of*

of debt for such rent, as where rent is due on a lease for years. Action of *debt* will lie against a lessee, for rent due after the assignment of the lease; for the personal privity of contract remains, notwithstanding the privity of estate is gone. 3 *Rep.* 22. But after the death of the lessee, it is then a real contract, and runs with the land. *Cro. Eliz.* 555. When a lease is ended, the duty in respect of the rent remains, and debt lieth by reason of the privity of contract between lessor and lessee. 2 *Cro.* 227: 1 *Nelf. Abr.* 604. If debt be brought by an executor for arrears of rent ended, it is local still, and must be laid where the land lies. *Hob.* 37. Action of *debt* may be had against the *lessee* in any place; but if it be brought against an *assignee*, it must be where the land lieth: and upon the *privity* of *contract*, it is to be brought against the lessee where the land is. *Latch* 197, 271: 2 *Leon.* c. 28.

Debt for rent on a lease against *assignee* is local. *Barker* v. *Dormer*, 1 *Show.* 191.

In some cases action of *debt* will lie, although there be no contract betwixt the party that brings the action, and him against whom brought; for there may be a duty created by law, for which action will lie. 2 *Saund.* 343, 366. *Debt* lieth against a sheriff, for money levied in execution. 1 *Lil. Abr.* 403. Action of *debt* lies against a gaoler for permitting a prisoner committed in execution to escape; because thereupon the law makes the gaoler debtor: but where the party is not in execution, there action on the case only lies for damages suffered by the escape. 1 *Saund.* 218: 1 *Lil. Abr.* 402.

A person may have debt upon an arbitrament: also debt lies for money recovered upon a judgment, &c. And upon a recovery in the superior courts at *Westminster*, the plaintiff must bring the action in *Middlesex*, the record being there; but a *sci. fac.* to execute judgment, must be where the original was, and follow it. *New Nat. Br.* 267, 268, &c.

When judgment is had in the *King's Bench*, and a writ of error brought in the *Exchequer* chamber, or in Parliament; yet an action of debt will lie on the judgment: in this case, if the plaintiff levies part of his money, by *elegit*, he may likewise bring debt for the residue. 1 *Sid.* 184, 236.

Whatever the laws order any one to pay, that becomes instantly a debt, which he hath before-hand contracted to discharge. And this implied agreement it is, that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages or sum of money, as are assessed by the jury, and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon this judgment; (1 *Rol. Abr.* 600, 1;) and shall not be put upon the proof of the original cause of action; but upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies, that by the original contract of society the defendant hath contracted a debt, and is bound to pay. This method seems to have been invented, when *real* actions were more in use than at present, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of *capias*, to take the defendant's body in execution for those damages; which process was allowable in an action of debt, (in consequence of the *Stat.* 25 *Ed.* 3. c. 17,) but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the Courts, as being generally vexatious and oppressive, by harrassing the defendant with the costs of two actions instead of one. 3 *Comm.* 160.

Debt will lie upon the judgment of a Foreign Court, and the plaintiff need not show the ground of the judgment; but it is not to be declared on as a matter of record, for it is here but of the nature of a simple-contract debt: therefore in such case the judgment is sufficient only to establish a demand, and put the defendant to impeach the justice of it, or show the same to have been unduly or irregularly obtained. And as it is but a simple contract, *assumpsit* will also lie on it.—*Walker* v. *Witter*, *Doug.* 1—6; in which several other cases on the same point are also cited and reported.

If a man recovers debt or damages in *London*, on action brought there by the custom of the city, which lies not at Common law; when it is become a debt by the judgment, action of debt lies in the courts at *Westminster* upon this judgment. 2 *Danv.* 449.

Action of debt will lie for breach of a by-law; or, for amercement in a court-leet, &c. 1 *Lil.* 400: 5 *Rep.* 64: *Hob.* 259. And action of debt is sometimes grounded on an act of parliament; as upon *Stat.* 2 *Ed.* 6. c. 13, for not setting out tithes: *Stat.* 27 *El.* c. 13, against the hundred for a robbery, &c. Against physicians in *London*, for practising without licence, by *Stat.* 14 & 15 *H.* 8. c. 5.—By assignees of a commission of bankrupt, *Stat.* 1 *Jac.* 1. c. 15, &c.—A college shall have action of debt for commons of any student; adjudged, *Pasch.* 9 *Jac.* *B. R.*—And in general, all the cases show that wherever *indebitatus assumsit* is maintainable, debt also is. *Doug.* 6. *per Buller* J.

For debt to a bishop, or parson, after his death, his executors shall have the action: but of a dean and chapter, mayor and commonalty, &c. the successors are intitled to the action of debt. *F. N. B.* 120. Action of debt lies on a recognisance; so upon a statute-merchant, it being in nature of a bond or obligation: but it is otherwise in case of a statute-staple. 2 *Danv.* 497.

In bringing this action, it is a general rule, that the party himself, to whom the debt is originally due, whilst he doth live, must bring the action; and after his death, his executors, &c. And the action must be brought against the party himself that doth originally owe the debt, whilst he is living; and after his death, it may be brought against the executor, if he make any; or otherwise against the administrator; and if the Ordinary appoint none, against the Ordinary himself; and if he die possessed of the goods, against his executor, &c. And also against executors of executors *in infinitum*. *Dyer* 24, 471: 3 *Rep.* 9: 2 *Brownl.* 207.

II. The form of the writ of *debt* is sometimes in the *debet & detinet*, and sometimes in the *detinet* only; that is, the writ states, either that the defendant *owes*, and unjustly *detains* the debt or thing in question, or only that he unjustly *detains* it. It is brought in the *debet*, as well as *detinet*, when sued by one of the original contracting parties who personally gave the credit, against the

the other who perſonally incurred the debt, or againſt his heirs, if they are bound to the payment; as by the obligee againſt the obligor, the landlord againſt the tenant, &c. But, if it be brought by, or againſt an executor for a debt due to or from the teſtator, this, not being his own debt, ſhall be ſued for in the *detinet* only. *F. N. B.* 119. So alſo if the action be for goods, for corn, or an horſe, the writ ſhall be in the *detinet* only; for nothing but a ſum of money, for which I (or my anceſtors in my name) have perſonally contracted, is properly conſidered as my *debt*. And indeed a writ of *debt* in the *detinet* only, for goods and chattels, is neither more nor leſs, than a mere writ of *detinue*; and is followed by the very ſame judgment. *Raſt. Entr.* 174: 3 *Comm.* 156.

In debt, if it be demanded by original, the proceſs is ſummons, attachment and diſtreſs; and upon a default of ſufficiency, on a *nihil* returned, proceſs to the outlawry, &c. And the judgment in debt, where the demand is in the *debet & detinet*, is to recover the debt, damages and coſts of ſuit; and the defendant *in miſericordia*. 1 *Shep. Abr.* 523. Where the plaintiff in debt declares on ſome ſpecialty, or contract for a ſum of money, it muſt be certainly demanded, and no other; and the demand cannot be of a leſſer ſum, but it muſt be ſhown how the remainder was ſatisfied: but in an action upon a ſtatute, that gives a certain ſum for the penalty, though leſs be recovered than the plaintiff lays, it will be good. *Cro. Jac.* 498. If action of debt is brought on a ſpecialty, bill, bond, leaſe, &c. the ſeveral writings muſt be well conſidered by which the plaintiff warrants his action, and the ſum due is to be rightly ſet forth; and if it be debt for rent, the time of commencement, and ending, &c. In debt on ſingle bill or upon judgment, the defendant may plead payment (before the action brought) in bar; and pending an action, on bond, &c. the defendant may bring in principal, intereſt and coſts: and the court ſhall give judgment to diſcharge the defendant. *Stat.* 4 & 5 *An. c.* 16. See title *Bond*.

If the action be brought for money, it muſt be in the *debet & detinet*; but if goods or chattels, it muſt be in the *detinet* only. 50 *Ed.* 3. 16: 1 *Roll. Abr.*—If an *executor* brings debt for any thing in right of his teſtator, it muſt be in the *detinet* only. *Moor* 566: 1 *Rol. Abr.* 602, 603.

If an *executor* brings an action upon an obligation made to the teſtator, where the day of payment incurred after the death of the teſtator, yet the writ ſhall be in the *detinet* only, for he brings the action as *executor*. *Lane* 80: *S. P.* 20 *H.* 6. 5: 1 *Rol. Abr.* 602. *S. C.*

So if a man binds himſelf to the teſtator to pay him 100 *l.* when ſuch a thing ſhall happen; if it happens after the death of the teſtator, yet the writ by the *executor* ſhall be in the *detinet* only. 20 *H.* 6. 6: 1 *Rol. Abr.* 602.

If in an *account* an *executor* recovers a debt due to his teſtator, in action for the arrearages thereupon, the writ ſhall be in the *detinet* only, for though the action is converted into a debt by the *account*, yet it is the ſame thing which was received in the life of the teſtator, *Cro. Eliz.* 326: *Cro. Jac.* 545: 5 *Co.* 31.

If the *executor* ſells the goods of the teſtator for a certain ſum, he ſhall have action for this in the *debet & detinet*. 1 *Rol. Abr.* 602.

If an *executor* having lands by an *extent* upon a ſtatute made to the teſtator, and naming himſelf *executor*, by deed leaſes them for three years, rendering rent, &c. if an action is afterwards brought by him for his rent, it muſt be in the *debet & detinet*, becauſe it is founded upon his *own* contract. *Lane* 80: *Cro. Jac.* 685: *Winch* 80, *S. C*: *Brown*, 205: 1 *Mod.* 185. *S. P.*

So an executor, being leſſee for years of a rectory in the right of the teſtator, may have action upon 2 *Ed.* 6. *c.* 13, for not ſetting out tithes in the *debet & detinet*, becauſe founded upon a wrong in his *own* time, and by the ſtatute it is given to the party *grieved*. *Cro. Jac.* 545.

Alſo action againſt an *executor* ſhall be in the *detinet* only, for he is chargeable no farther than he has aſſets. 11 *H.* 4. 16: 1 *Rol. Abr.* 603.

In an action againſt an executor for rent, incurred in the life of the teſtator, the writ ſhall be in the *detinet* only. 11 *H.* 6. 36: 1 *Rol. Abr.* 603.

But if an action be brought againſt an executor for the arrearages of a rent, reſerved upon a leaſe for years, and incurred *after* the death of the teſtator, the writ ſhall be in the *debet & detinet*, becauſe the executor is charged of his *own* poſſeſſion. 1 *Rol. Abr.* 603: *Cro. Eliz.* 711: *Moor* 566: 1 *Brownl.* 56: *Cro. Jac.* 411. And the declaration is againſt him as *aſſignee*, not as *executor*.

If an action is brought againſt *baron* and *feme*, upon an *obligation* entered into by the *feme before* marriage, it ſhall be in the *debet et detinet*; for by the marriage all the perſonal goods and power of diſpoſing of the real eſtate are by law given the huſband, which he has to his *own* uſe, and not as *executors*, who have them only to the uſe of another. 5 *Co.* 36: 3 *Leon.* 206, *S. C.*

So if an action is brought upon a *bond* againſt the *heir* of the obligor, it ſhall be in the *debet et detinet*, becauſe he hath the aſſets in his own right. 5 *Co.* 36.

III. If a man accepts an *obligation* for a debt due by ſimple contract, this extinguiſhes the *contract*, but the acceptance of an *obligation*, for a debt due by another *obligation*, is no bar of the firſt obligation. 13 *H.* 4. *c.* 1: 1 *Roll. Abr.* 604. *i. e.* if between the ſame parties. See title *Bond* V: *Acceptance*: *Payment*.

In *debt* upon 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 ligatum eſt*. Hard. 332.

But if the debt be due by *ſimple contract*, then he may plead *nil debet*, for it does not appear that there is any *debt* continuing. *Hob.* 218.

In *debt* for *rent*, if it be by *deed*, the proper plea is *non eſt factum*; but if it be *without deed*, the defendant may plead *non demiſit*, nothing in arrear, or that he never entered. 2 *Inſt.* 651: *Hard.* 332.

In *debt* for the arrears of an *annuity* granted for life, *nil debet* is no good plea, for the action is merely founded upon the *deed*, for without it no action can be maintained, and though by the death of the grantee the nature of the action is changed, the annuity being determined; yet this proves not but that the action is founded upon the deed. *Keilw.* 147.

But in *debt* for the arrears of a *rent-charge*, by will deviſed to the plaintiff's wife for life, againſt the *adminiſtrator* of the occupier of the land, *nil detinet* is a good plea, for the will is no deed, nor wants any delivery; adjudged, and ſaid the action was not ſo much grounded upon the *will* itſelf as upon the *ſtatute*, by which men are enabled

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by will to diſpoſe of their lands and rents iſſuing out thereof. *Hard.* 322.

In debt upon *St.* 2 & 3 *E.* 6. *c.* 13, for not ſetting forth tithes, Not guilty, or *nil debet* are good iſſues; 2 *Inſt.* 651: *Cro. Eliz.* 621. S. P; becauſe by the action the defendant is charged with a *tort*, and if he is not guilty of the *tort*, he does not *owe* the *debt*.

In *debt* upon a *contract*, the defendant cannot plead the contract was for a leſs ſum, or otherwiſe than the plaintiff has declared, and traverſe the contract in the declaration laid, but may wage his law. *Moor* 49. See further *Com. Dig.* title *Debt*, and this Dictionary titles *Action*; *Aſſumpſit*; *Information*, &c. And as to ſetting off mutual debts, See title *Set-off*.

DEBT TO THE KING. Under this word *debitum* all things due to the King are comprehended; as all rents, fines, iſſues, and amercements, and other duties received or levied by the ſheriff; for debt in the larger ſenſe ſignifies whatever any man owes. 2 *Inſt.* 198. The *King's debt* is to be ſatisfied before that of a ſubject, and until his *debt* be paid, he may protect the *debtor* from the arreſt of others. And by *Stat.* 33 *H.* 3. *c.* 39, all obligations made to the King ſhall have the ſame force as a Statute-Staple: 1 *Inſt.* 130. But by *Stat.* 25 *E.* 3. *ſt.* 5. *c.* 19, notwithſtanding the King's protection, creditors may proceed to judgment againſt their *debtors*, with a *ceſſet executio* till the *King's debts* be paid. Lands, &c. of the *King's debtor* and accountant, may be ſold as well after his death, as in his life-time: But if the accountant or *debtor to the King* had a *quietus* during his life, his heir ſhall be diſcharged of the *debt*. *Stat.* 27 *Eliz. cap.* 3. A perſon being in *debt* to the King, purchaſes a leaſe to him and his wife, and dies: the term in the wife's hands is liable to the *debt*. 2 *Rol. Abr.* 157. Though it is ſaid if he purchaſe lands to him and his wife for life, and to their heirs: ſuch lands in the hands of the wife, are not extendible after the huſband's death, for the *King's debt*. *Dyer* 255.

If a tenant in tail, becomes *indebted* to the King, by receipt of the *King's money*, or otherwiſe: unleſs it be by *judgment*, *recogniſance*, *obligation*, or other *ſpecialty* originally due to the King, or ſome other to his uſe; and then dies, the land in the hands of the iſſue in tail ſhall not be extended: But it may, in either of thoſe four caſes. 7 *Rep.* 21, 22. By the Common law, the *King* for his *debt* had execution of the body, lands and goods of the *debtor*: By *Magna Charta*, 9 *H.* 3. *c.* 8. the *King's debt* ſhall not be levied on lands, where the goods and chattels of the *debtor* are ſufficient to levy the *debt*; for in ſuch caſe, the ſheriff ought not to extend the lands and tenements of the *King's debtor*, or of his heir, &c. 2 *Inſt.* 19. Alſo pledges ſhall not be diſtrained, when the principal is ſufficient: Though in both caſes it muſt be made appear to the ſheriff; in the one, that there are goods and chattels enough, and in the other, that the ſheriff may levy the *King's debt* on the principal. *Ibid.* Sheriffs having received the *King's debt*, upon their next account are to diſcharge the *debtors*, on pain to forfeit treble value; and the ſheriffs are to give tallies to the *King's debtors* on payment. *Stat.* 3 *Ed.* 1. *c.* 19. See *Stat.* 25 *Geo.* 3. *c.* 35, regulating the ſale of extended eſtates, on motion to the Court of Exchequer, by the Attorney General. See further alſo titles *Execution*; *King*; *Prerogative*, and *Com. Dig.* title *Debt*, *ad fin.*

The King's debtor committed by the Court of Exchequer to the *Fleet*, brought into *B. R.* by *habeas corpus*, and ſurrendered in diſcharge of his bail, may be removed again to the *Fleet* by an *habeas corpus* from the Exchequer. 1 *Wilſ.* 248.

DEBTEE-EXECUTOR. If a perſon indebted to another makes his creditor or debtee his executor; or if ſuch creditor obtains letter of adminiſtration to his debtor; he may retain ſufficient to pay himſelf before any other creditors whoſe debts are of equal degree. *Plowd.* 543. See title *Executor*.

DEBTORS. A work of the nature of this Dictionary is by no means adapted to political diſquiſitions on the propriety of *impriſonment for debt*—nor to hiſtorical details of the proceedings of *foreign nations* on the ſubject. The Legiſlature, who are the proper, and indeed the *only legal* judges, of what regulations on the ſubject are neceſſary, have repeatedly interfered for the relief of *honeſt*, *unfortunate debtors*, (too generally a ſmall part of the number confined,) by *inſolvent acts*; and the liberty of the ſubject, in this particular, has in the preſent reign been much favoured by the laws relative to *arreſts*.—See title *Arreſts*; *Priſoners*. What further, in a Commercial State like *Great Britain* may be ſafe and neceſſary, will no doubt be done without any hints or ſuggeſtions of private perſons; whoſe opinions, however reſpectable, can be of very little publick weight.

By *Stat.* 25 *Geo.* 3. *c.* 45, for the Courts of Conſcience in *London*, *Middleſex* and *Southwark*, the proviſions of which are extended by *Stat.* 26 *Geo.* 3. *c.* 38, nearly *totidem verbis*, to ALL Courts for the recovery of ſmall debts;—No debtor committed to gaol for a debt not exceeding 20*s.* ſhall be kept in cuſtody *on any pretence whatſoever*, more than *twenty-days*—nor for a debt between that and 40 *s.* more than *forty* days—then to be diſcharged without payment of fees, on forfeiture by the gaoler of 5 *l.*—In caſe only of fraudulent concealment of money or goods by the debtor, the time of confinement may be enlarged, in the firſt inſtance to 30 days, and in the latter to 60.

DEBTS, PRIORITY OF, See titles *Aſſets*; *Executor*; *Mortgage*.

DECEIT, *Deceptio.*] A ſubtle trick or device, whereunto may be referred all manner of craft and colluſion, uſed to deceive and defraud another, by any means whatſoever, which hath no other or more proper name than *deceit* to diſtinguiſh the offence. *Weſt. Symb. ſect.* 68.

There is a writ called a WRIT OF DECEIT that lies for one that receives injury or damage from him that doth any thing *deceitfully* in the name of another perſon; by which he is deceived or injured; which writ is either original or judicial. *Reg. Orig.* 112: *Old Nat. Br.* 50.

Deceit is an offence at common law, and by ſtatute: and all practices of defrauding or endeavouring to defraud another of his right, are puniſhable by fine and impriſonment; and if for cheating, by pillory, &c. See title *Cheats*. Serjeants, counſellors, attornies, and others doing any manner of *deceit*, are to be impriſoned a year and a day; alſo pleaders by *deceit* ſhall be expelled the court. *Stat.* 3 *Ed.* 1. *cap.* 29.

If a fine be levied by *deceit*, or if one recover land by *deceit*, the fine, and the recovery, ſhall be void. 3 *Rep.* 77. and if a man be attorney for another in a real action againſt the demandant, and afterwards by covin between ſuch attorney and the demandant, the attorney makes default, by which the land is loſt, the tenant who loſt the land ſhall have a writ of *deceit* againſt the attorney.

F. N. B. 96. So writ of deceit lies to ſet aſide a fine and recovery in *C. B.* of lands in ancient demeſne. 2 *Wilſ.* 17.

In a *præcipe quod reddat*, if the ſheriff return the tenant ſummoned, where he was not ſummoned, by which the defendant loſeth his land by default at the grand *cape* returned; the tenant ſhall have a writ of *deceit* againſt him who recovered, and againſt the ſheriff for his falſe return; and by that writ the tenant ſhall be reſtored unto his land again: and the ſheriff ſhall be puniſhed for his falſity. *F. N. B.* 97. If a man bring a writ of *deceit* againſt him that recovers in the firſt action, and the ſheriff return him ſummoned, upon which for non-ſummons in that action on finding the ſame the recovery is reverſed; in this caſe the defendant ſhall not have writ of *deceit* to recover the land again, if he were not ſummoned: but he ſhall have his remedy againſt the ſheriff. *Rol. Abr.* 621. And where *debt* was brought, and the defendant pleaded in abatement, and the plea was over-ruled, the attornies on both ſides by *deceit* between them, to the end the plaintiff might recover his debt, entered another judgment when it ſhould have been a *reſpondeas ouſter*; and it was held that the writ of *deceit* would not lie to reverſe the record, but only to recover damages. *Ibid.* 622.

If in a ſuit or action, another perſon ſhall come into court and pretend he is party to the ſuit, and ſo let judgment be had, or ſome other damage done to the party himſelf; or if one have cauſe to have an action, and another brings it in his name, and lets judgment go by non-ſuit, or the like; the injured party may have this writ of *deceit*. *F. N. B.* 96: *March* 48.

If any one forge a ſtatute, *&c.* in my name, and ſueth a *capias* thereupon, for which I am arreſted; I ſhall have a writ of *deceit* againſt him that forged it, and againſt him who ſued forth the writ of *capias*, *&c.* And if a perſon procure another to ſue an action againſt me to trouble me, I ſhall have a writ of *deceit*. *F. N. B.* 96.

There are many frauds and *deceits* provided againſt by ſtatute, relating to artificers, bakers, brewers, victuallers, falſe weights and meaſures, *&c.* which are liable to penalties and puniſhment in proportion to the offence committed. And writ of *deceit* lies in various caſes, for not performing a bargain; or not ſelling good commodities, *&c.* 1 *Inſt.* 357.

On almoſt all occaſions, where a perſon is deceived or injured, and where anciently remedy was ſought by the *writ of deceit*, an action on the caſe for damages, in nature of a writ of deceit is now more uſually brought. And indeed it is the only remedy for a lord of a manour in or out of ancient demeſne, to reverſe a fine or recovery had in the king's court, of lands lying within his juriſdiction, which would otherwiſe be thereby turned into frank-fee. And this may be brought by the lord againſt the parties and *ceſtui que uſe* of ſuch fine and recovery; and thereby he ſhall obtain judgment not only for damages (which are uſually remitted) but alſo to recover his court and juriſdiction over the lands, and to annul the former proceedings. 3 *Lev.* 415, 419: *Raſt. Ent.* 100 *b*: *Lutw.* 711, 749.

DECENNARY, A town or tithing conſiſting (originally) of ten families of freeholders. Ten tithings compoſed an *hundred*. The inſtitution of *decennaries* (or *frank-pledges*) is imputed to *Alfred*. In theſe decennaries the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. 1 *Comm.* 114. See poſt *Deciners*.

DECEM TALES. When a full *jury* doth not appear at a trial at bar; then a writ goes to the ſheriff *apponere decem tales*, *&c.* whereby a ſupply is made of jurymen to proceed in the trial. See title *Jury*.

DECIES TANTUM, A writ that lies on *Stat.* 38 *E.* 3. *c.* 12, againſt a *juror*, who hath taken money of either party for giving his verdict to recover *ten times* the ſum taken. See title *Jury*. This writ alſo lies againſt *embraceors* that procure ſuch an inqueſt; who ſhall be further puniſhed by impriſonment for a year. *Reg. Orig.* 188: *F. N. B.* 171: *Stat.* 38 *Ed.* 3. *cap.* 12.

DECIMATION, *Decimatio.*] The puniſhing every *tenth ſoldier* by lot, was termed *decimatio legionis*: it likewiſe ſignifies tithing, or paying a tenth part. There was a *decimation* during the time of the *Uſurper* 1655.

DECINERS, DECENNIERS, or DOZINERS, *Decennarii.*] In our ancient law, ſuch as were wont to have the overſight of the *Friburghs*, or views of *frank-pledge*, for the maintenance of the King's peace; and the limits or compaſs of their juriſdiction was called *Decenna*, becauſe it commonly conſiſted of ten houſholds; as every perſon, bound for himſelf and his neighbours to keep the peace, was ſtiled *Decennier*. *Bract. lib.* 3. *tract.* 2. *c.* 15.

Theſe ſeem to have had large authority in the time of the *Saxons*, taking knowledge of cauſes within their circuits, and redreſſing wrongs by way of judgment, and compelling men thereunto, as appears in the laws of King *Edward the Confeſſor*, *Lambard*, *Numb.* 32. But of late *decennier* is not uſed for the chief man of a *dizein*, or *dozein*; but he that is ſworn to the king's peace, and by oath of loyalty to the prince, is ſettled in the ſociety of a *dozein*.

A *dozein* ſeemed to extend ſo far as a leet extendeth; becauſe in leets the oath of loyalty is adminiſtered by the ſteward, and taken by all ſuch as are *twelve* years old, and upwards, dwelling within the precinct of the leet where they are ſworn. *F. N. B.* 161. There are now no other *dozeins* but leets; and there is a great diverſity between ancient and modern times, in this point of law and government. 2 *Inſt.* 73. See 1 *Comm.* 114: 4 *Comm.* 252: and ante *Decennary*.

DECLARATION,

Declaratio, *Narratio.*] A legal ſpecification, on record, of the cauſe of action, by a plaintiff againſt a defendant.

In the King's Bench, when the defendant is brought into court by bill of *Middleſex*, upon a ſuppoſed treſpaſs, in order to give the court a juriſdiction, the plaintiff may declare in whatever action, or charge the defendant with whatever injury he thinks proper, unleſs he has held him to bail by a ſpecial *ac etiam*; which the plaintiff is then bound to purſue. And ſo alſo, in order to have the benefit of a *capias* to ſecure the defendant's perſon, it was the antient practice, and is therefore ſtill warrantable, in the Common Pleas, to ſue out a writ of treſpaſs *quare clauſum fregit*, for breaking the plaintiff's cloſe: and when the defendant is once brought in upon this writ, the plaintiff declares in what action the nature of his true injury may require; as in an action of covenant, or on the caſe for breach of contract, or other leſs forcible tranſgreſſion: (2 *Ventr.* 159:) unleſs, by holding the defendant to bail on a ſpecial *ac etiam*, he has bound himſelf to declare accordingly. 3 *Comm.* 293. See titles *Ac etiam*; *Capias*; *Common-Pleas*.

In

In either caſe, the declaration ſhould correſpond with the proceſs, in the names and deſcriptions of the parties: for if there be a material variance, the court will ſet aſide the proceedings: unleſs where the proceſs is taken out againſt the defendant by a wrong name, and he appears by his right name, there the plaintiff may declare againſt him by the name in which he appears, ſtating that he was arreſted by the other name: for by appearing, the defendant admits himſelf to be the perſon ſued; and ſo the variance is immaterial. 3 *Term Rep.* 611.

The ſubſtantial rules of pleading according to which declarations are to be drawn are founded in ſtrong ſenſe and the ſoundeſt and cloſeſt logic, and ſo appear when well underſtood and explained; though by being miſunderſtood and miſapplied, they are often made uſe of as inſtruments of chicane. 1 *Burr.* 319.

Rules reſpecting the form of the Declaration.—The parties plaintiff or demandant, defendant or tenant, ought to be well named.—The time of a matter charged in the declaration ought to be certainly alledged: and therefore in *aſſumpſit*, the day being omitted on which the promiſe is made, it is bad. *Yel.* 94: *Pl. Com.* 24.—A certain place ought to be alledged where every fact material and traverſable was done. *Kitch.* 226:—The giſt, and every thing, that is of the eſſence of the plaintiff's action, muſt be ſet forth in the declaration. That ſeems properly to be the eſſence of the action without which the court could have no ſufficient grounds to give judgment. *Doct. Pl.* 85.—If the declaration be not ſufficient on which to found a judgment, this may be moved in arreſt of judgment after verdict. *Ibid.*—The declaration muſt ſhew a title in the plaintiff, See *Cro. Eliz.* 325: *Moor* 598.—In all caſes where an intereſt or eſtate commences upon condition, the plaintiff ought to ſhew it in his declaration, and aver the performance of it; but when the intereſt of the eſtate paſſes preſently, and veſts in the grantee, and is to be defeated by condition; there the plaintiff may count generally, and the condition ſhall be pleaded by him who is to take advantage of it. 7 *Co.* 10: *Lil. Reg.* 418.

The declaration muſt contain ſuch certain affirmation that it may be traverſed; for if there be no certain affirmation to make the declaration itſelf traverſable, it will not be cured after a verdict, becauſe it is a defect in ſubſtance. *Co. Lit.* 303: *Cro. Jac.* 361: 2 *Bulſt.* 214: *Cro. Eliz.* 33, 441: 2 *Saund.* 319.—If a declaration be good in part, though bad as to another part, the plaintiff is entitled to judgment for ſo much as is well alledged, eſpecially if it be not of an entire demand. 10 *Co.* 115: *Rol. Abr.* 784, 5; 2 *Show.* 103: 1 *Salk.* 133: Vide 3 *Burr.* 1235.

For preventing unneceſſary length of declarations, it has been ſpecially ordered, that in actions of covenant, the declaration is not to repeat more of the deed than is neceſſary for the aſſignment of the breach, and not to repeat the covenant in the concluſion.—In actions of ſlander, long preambles to be forbor'n, and no more inducement than what is neceſſary for the maintenance of the action; but when it requires a ſpecial inducement, or *colloquium*.—In actions upon general ſtatutes, the declaration not to repeat the ſtatute, but to conclude 'againſt the form of the ſtatute in ſuch caſe made and provided.'—In actions of debt upon judgment had in the Courts at *Weſtminſter*, to recite only the judgment; but if on a judgment had by, or againſt an executor or adminiſtrator, then the action of debt upon that judgment, to repeat the declaration and judgment. *R. M.* 1654. § 13.—In a declaration on action founded on a deed, the plaintiff need not ſet forth more than that part which is neceſſary to entitle him to recover. *Cowp.* 665. And it will be ſufficient to ſtate the ſubſtance and legal effect even of ſuch part; which is ſhorter, and not liable to miſ-recitals and literal miſtakes. The diſtinction is between that which may be rejected as ſurpluſage (which might have been ſtruck out on motion) and what cannot: where the declaration contains impertinent matter, foreign to the cauſe, and which the Maſter on a reference to him would ſtrike out (irrelevant covenants for inſtance), that will be rejected by the Court and need not be proved. But if the very ground of the action is miſſtated, as where the plaintiff undertakes to recite that part of a deed on which the action is founded, and it is miſ-recited, that will be fatal: for then the caſe declared on is different from that which is proved, and he muſt recover *ſecundum allegata et probata*. *Doug.* 665. *Briſtow* v. *Wright and another*; and the notes there.

Of Declarations, in Chief, De bene eſſe, and By-the-by.—There are two ways in which the plaintiff may declare, the one on the return-day of the writ, which is called, *de bene eſſe*, conditionally, until ſpecial, or common bail be filed; the other after the day for filing common bail, or when the defendant has juſtified his bail, which is called in chief. If to ſpeed the cauſe, the former is the beſt way of proceeding. And a rule to plead may be given on the ſame day.—When a Declaration is filed *de bene eſſe*, till common bail or appearance entered, or till ſpecial bail be filed, notice that it is ſo filed muſt be given to the defendant in writing. *Impey K. B.*

The plaintiff cannot declare in chief, unleſs common bail be filed by the defendant, or plaintiff has done it for him. *Smith* v. *Painter*, 2 *Term Rep.* 719: 1 *Term. Rep.* 635: *Cooke* v. *Raven*. And it muſt be filed the term the writ is returnable. *Hardw.* 138.

When the defendant has filed common or ſpecial bail for himſelf, any perſon may deliver or file a Declaration againſt him by-the-by, at any time during the term wherein the proceſs againſt the defendant is returnable, *ſedente curiâ*; and the practice hath 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. K. B.* 177. See 4 *Burr.* 2180.

Of the time of declaring.—The plaintiff muſt declare before the end of the term next after the return of the proceſs; or the defendant may ſign a *non-pros* (except in replevin) without entering any rule to declare, and the defendant ſhall have coſts taxed as uſual. *Stat.* 13 *Car.* 2. *c.* 2. § 5. And no rule to declare need be given in *K. B.* either by bill or original.

By the general rules of law, a plaintiff muſt declare againſt a defendant within twelve month after the return of the writ. But by the rules of the court, if he do not deliver his Declaration within two terms, the defendant may ſign judgment of *non-pros*. Though unleſs he takes ſuch advantage of the plaintiff's neglect, the plaintiff may ſtill deliver a Declaration within the year. 2 *Term Rep.* 112: 3 *Term Rep.* 123. The defendant cannot ſign a *non-pros*, unleſs he enter his appearance within the term the writ is returnable. *Hardw.* 138: 2 *Term*

Rep. 719. To prevent a *non-pros* being ſigned, the plaintiff may get a Side-bar rule, if the defendant is not in cuſtody, the laſt day of the ſecond term, for time to declare, until the firſt day of the next term; and he may have as many rules as he likes, from term to term, but there muſt be two in a term, *viz.* one from the firſt day of the term to the laſt day, and the other from the laſt day to the firſt day of the next term. But the defendant may, if he thinks proper, move the court, that the laſt rule may be peremptory. *Impey, K. B.*

In all *Notices of Declarations*, care is to be taken that the cauſe be properly named, as well as the court in which the ſuit is inſtituted; and in notices of Declaration, the nature of the action is to be expreſſed, and at whoſe ſuit proſecuted, and the time limited to plead to ſuch Declaration. *R. T.* 1 *Geo.* 2.

Of entitling, and laying the day and place in Declarations.— It is uſual when the cauſe of action will admit of it, to entitle the Declaration generally, of the term in which the writ is returnable; but it ſhould always be entitled, after the time when the cauſe of action is ſtated to have accrued: therefore where the cauſe of action is ſtated to have accrued after the firſt day of the term in which the writ is returnable, the Declaration ſhould be entitled of a ſubſequent day in that term, and not of the term generally; for as a general title refers to the firſt day of the term, upon ſuch a title it would appear, that the action was commenced before the cauſe of it accrued. Yet where the cauſe of action was ſtated to have accrued on the firſt day of the term, the court on demurrer held, that the declaration might be entitled of the term generally, for the delivery of the declaration is the act of the party, and in antient times it could not have been delivered till the ſitting of the court; ſo that the cauſe of action might well have accrued, before the actual delivery of the Declaration. 1 *Term Rep.* 116: *Vide* 2 *Lev.* 176: and 3 *Term Rep.* 624.

If the cauſe of action ariſes within the term the Declaration is of, then do not entitle it as of the term generally, but make a ſpecial day after the cauſe of action accrued, as, "*Thurſday* next after the *Morrow of All Souls*, in *Michaelmas* Term, in the 32d year of the reign of King *George* 3." inſtead of "*Michaelmas* Term" generally.

If the plaintiff declares on a note, the day is material, and an eſſential part of the agreement, from which he cannot vary; ſo on a bond or other writing; but in the caſe of a common *aſſumpſit*, the day is alledged only for form, and therefore the defendant cannot confine the plaintiff to the day alledged in the Declaration. *Str.* 21: *Vide Co. Lit.* 283: *Plowd. Com.* 24 *a.*

In other caſes, as in treſpaſs, aſſault, battery, &c. the day is immaterial, but is in general laid after the cauſe of action accrued, and before the term or time of which the Declaration is intitled.

In local actions, where poſſeſſion of land is to be recovered, or damages for an actual treſpaſs, or for waſte, &c. affecting land, the plaintiff muſt lay his Declaration, or declare his injury to have happened in the very county and place where it really did happen; but in tranſitory actions, for injuries that might have happened any where, as debt, detinue, ſlander, and the like, the plaintiff may declare in what county he pleaſes, and then the trial muſt be had in that county in which the Declaration is laid. 3 *Comm.* 294. See titles *Action*; *Venue.*

In action of debt, upon a bond, the plaintiff in his *declaration* muſt alledge a place where the bond was made, becauſe the jury ſhould come from that place; and if this be omitted, the *declaration* is ill. *Dyer* 15, 39: 1 *Nelſ. Abr.* 619.

It is good to lay large and ſufficient damages in *declarations*: and damages ſhall not be given for that which is not contained in the *declaration*, and only for what is materially alledged. 10 *Rep.* 115: 1 *Lill. Abr.* 381.

Where a *declaration* is defective, it is ſometimes aided by the ſtatutes of amendment and *jeofails*, &c. but they help only matters of form, not matters of ſubſtance. 5 *Rep.* 35. See titles *Amendment*: *Practice.*

On filing Declarations, copies thereof are ſerved on the defendants or their attornies, &c. And by an order of all the judges, (12 *W.* 3.) the plaintiff's attorney is not obliged to deliver the defendant's attorney the original *Declaration*; but inſtead of it, is to deliver a true copy of the *Declaration*; upon delivery or tender whereof, the defendant's attorney ſhall pay for ſuch copy after the rate of 4*d. per* ſheet, &c. and if any perſon refuſe to pay for the copy tendered, the ſaid copy is to be left in the office, with the clerk that keeps the files of *Declarations*, and thereupon the plaintiff's attorney giving rule to plead, may, for want of a plea, ſign judgment; and before any plea ſhall be received, the defendant's attorney is to pay for the copy of the *declaration*.

And by another order, (*Trin* 2 *Geo.* 2,) in every cauſe, where ſpecial or common bail is filed, and notice given to the plaintiff, a copy of the *Declaration* ſhall be delivered to the attorney for the defendant, who ſhall pay for it according to the uſual rate; but if the defendant's attorney, or his clerk in his abſence, refuſes to pay for ſuch copy; or if it happens the habitation of the attorney for the defendant, be unknown to the attorney for the plaintiff; then it ſhall be lawful to leave the copy with the officer of the court appointed for filing *Declarations*, which ſhall be good, giving notice, &c.— There are ſeveral other rules of Court as to the filing and delivering Declarations, &c. for which ſee the ſeveral books of Practice, and further this Dict. titles *Practice*: *Proceſs*, *Priſoner*, &c.

DECREE. The judgment of a court of equity on any bill preferred. See title *Chancery.*

A decree in Chancery is of the like nature with a judgment at Common-law. *Chan. Rep.* 234.

Where there is but one witneſs againſt the defendant's anſwer, the plaintiff can have no decree. 1 *Vern.* 161.

Where no ordinary proceſs upon the firſt decree will ſerve for the execution thereof, there muſt be a new bill to pray execution of the firſt decree by a ſecond decree. 2 *Chan. Rep.* 127, 128. See title *Chancery.*

Verbal agreement, though ſubſequent to the decree, yet ſhall not ſtay the execution of it, but the remedy muſt be by original bill. 2 *Chan. Caſes* 8.

Whenever a decree is entered by conſent, the merits of it ſhall never after be enquired into, unleſs there be an objection, that the word conſent be ſtruck out of the order. MS. *Norcot* v. *Norcot.*

Several queſtions and diſputes were heretofore warmly agitated, as to the authority of the Maſter of the Rolls to hear and determine cauſes; and as to his general power

power in the Court of Chancery: to quiet which, it was declared by *Stat.* 3 *Geo.* 2. *c.* 30, that all orders and decrees by him made, except ſuch as by the courſe of the court were appropriated to the great ſeal alone, ſhould be deemed to be valid, ſubject nevertheleſs to be diſcharged or allowed by the Lord Chancellor; and ſo as they ſhall not be inrolled till the ſame are ſigned by his Lordſhip.

If either party to the ſuit thinks himſelf aggrieved by a decree, he may petition the Chancellor for a *re-hearing*, whether it was heard before the Chancellor himſelf or any of the Judges ſitting for him, or before the Maſter of the Rolls. For in all caſes it is the Chancellor's decree and muſt be ſigned by him before it is enrolled; which is done of courſe, unleſs a re-hearing be deſired. Every petition for a re-hearing muſt be ſigned by two counſel, uſually ſuch as have been concerned in the cauſe; certifying that they apprehend the cauſe is proper to be re-heard. And upon the re-hearing, all the evidence taken in the cauſe, whether read before or not, is then admitted to be read; becauſe it is the decree of the Chancellor himſelf, who only ſits to hear reaſons why it ſhould not be enrolled and perfected, at which time all omiſſions of either evidence or argument may be ſupplied. *Gilb. Rep.* 151, 2.—But after the decree is once ſigned and enrolled, it cannot be re-heard or reſtified but by Bill of Review, or by appeal to the Houſe of Lords.

A Bill of Review, may be had upon apparent error in judgment, appearing upon the face of the decree; or by ſpecial leave of the court, upon oath made, of the diſcovery of new matter or evidence, which could not poſſibly be had or uſed at the time when the decree paſſed. But no new evidence or matter then in the knowledge of the parties, and which might have been uſed before, ſhall be a ſufficient ground for a Bill of Review. 3 *Comm.* 454. See further this Dict. title *Chancery*; and *Vin.* title *Decree*.

On a new bill to carry a decree into execution, the Court may vary and alter what is thought proper; but on a re-hearing, no father than the petition extends; but if the petition be againſt the decree in general, though particular reaſons are given, the whole is open; but otherwiſe it is, if the petition be only againſt one or two particulars. *Sel. Caſes in Chan.* 13, 14.

The rule of court is, that on appeal the whole cauſe is open; but on a re-hearing, only ſo much as is petitioned againſt; if all do not petition, it is open only to the petitioners. *S. C. C.* 24.

Decree may be altered upon proper application, the ſame term it is pronounced, without a re-hearing.—No original bill can be to vacate a decree ſigned and enrolled.—Matters, proper to be excepted to upon the Maſter's report, ſhall never be objected to a decree after the report confirmed. 7 *Vin. Abr.* 400.

A decree gained by fraud, may be ſet aſide by petition, as well as a judgment at law by motion: *à fortiori* may ſuch decree be ſet aſide by bill. 3 *P. Wms.* 111. If a decree be obtained and enrolled, ſo that the cauſe cannot be re-heard, then there is no remedy but by bill of review, which muſt be on error appearing on the face of the decree, or on matters ſubſequent thereto, as a releaſe, or a receipt diſcovered ſince. 3 *P. Wms.* 371.

DECRETALS, *Decretales.*] A volume of the *Canon-Law*, ſo called, containing the *decrees* of ſundry *Popes*; or a Digeſt of the canons of all the councils that pertained to one matter under one head. See title *Canon-Law*.

DECURIARE. To bring into order. *Mon. Ang. tom.* 1. *p.* 243.

DEDBANA, *Ded-bane Sax.*] An actual homicide, or manſlaughter. *Leg. H.* 1. *c.* 85.

DEDI, This word amounts to a warranty in law; as if it be ſaid in a *deed* or conveyance, That *A. B.* hath *Given, &c.* to *C. D.* it is a warranty to him and his heirs. *Co. Lit.* 304. Alſo *dedi* imports a power of giving any thing. *Hob.* 12. See titles *Conveyance*: *Deed*.

DEDICATION-DAY, *Feſtum Dedicationis.*] The feaſt of *dedication* of *churches*, or rather the feaſt-*day* of the Saint and Patron of a church; which was celebrated not only by the inhabitants of the place, but by thoſe of all the neighbouring villages, who uſually came thither; and ſuch aſſemblies were allowed as lawful: It was uſual for the people to feaſt and drink on thoſe days; and in many parts of *England*, they ſtill meet every year in villages for this purpoſe, which days are called *Feaſts* or *Wakes*. *Cowel*.

DEDIMUS POTESTATEM. Is a writ or commiſſion given to one or more private perſons, for the ſpeeding ſome act appertaining to a judge, or ſome court: And it is granted moſt commonly upon ſuggeſtion, that the party who is to do ſomething before a judge, or in court, is ſo weak that he cannot travel; as where a perſon lives in the country, to take an anſwer in *Chancery*; to examine witneſſes in a cauſe depending in that court; to levy a fine in the *Common Pleas*, *&c.*—On renewing the commiſſion of the peace, there cometh a writ of *dedimus poteſtatem* out of *Chancery*, directed to ſome ancient juſtice, to take the oath of him, which is newly inſerted. See title *Juſtices*.

DEDIMUS POTESTATEM DE ATTORNATO FACIENDO. As the words of writs do command the defendant to appear, *&c.* anciently the judges would not ſuffer the parties to make attornies in any action or ſuit, without the King's writ of *Dedimus Poteſtatem*, to receive their attornies: But now by ſtatutes, the plaintiff or defendant may make attornies in ſuits without ſuch writs. *New Nat. Br.* 55, 56. See title *Attornies*.

DEED,

FACTUM.] An inſtrument in parchment, or paper, but chiefly in parchment, comprehending a contract or bargain between party and party; or an agreement of the parties thereto, for the matters therein contained: And it conſiſts of three principal points, *writing*, *ſealing* and *delivery*; writing, to expreſs the contents; ſealing, to teſtify the conſent of the parties; and delivery, to make it binding and perfect. *Terms de Ley*.

I. *What a Deed is.*
II. *The Requiſites to make a good Deed.*
III. *How a Deed may be avoided.*
IV. *Shortly, of the inrolling, expoſition and pleading of Deeds.*

I. A DEED is a Writing ſealed and delivered by the parties. 1 *Inſt.* 171. It is ſometimes called a charter, *carta*, from

from its materials; but moſt uſually, when applied to the tranſaction of private ſubjects, it is called a deed, in Latin *factum*, becauſe it is the moſt ſolemn and authentic *act* that a man can poſſibly perform, with relation to the diſpoſal of his property; and therefore a man ſhall always be *eſtopped* by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once ſo ſolemnly and deliberately avowed. *Plowd.* 434. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each ſhould be cut or indented (formerly in acute angles, *inſtar dentium*, like the teeth of a ſaw, but at preſent in a waving line) on the top or ſides to tally, or correſpond with the other; which deed, ſo made, is called an *Indenture*. Formerly, when deeds were more conciſe than at preſent, it was uſual to write both parts on the ſame piece of parchment, beginning at the middle and continuing to the contrary ends, with ſome word or letters of the alphabet written between them; through which the parchment was cut, either in a ſtrait or indented line, in ſuch a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *ſyngrapha* by the canoniſts, and with us *chirographa*, or hand-writings. *Mirror*, *c.* 2. § 27; the word *cirographum* or *cyrographum* being uſually that which is divided in making the indentures of a fine. See title *Chirograph.*—But at length indenting only has come into uſe, without cutting through any letters at all; and it ſeems at preſent to ſerve for little other purpoſe, than to give name to the ſpecies of the deed. See further 1 *Inſt.* 229 (*a*) *in n.*—When the ſeveral parts of an indenture are interchangeably executed by the ſeveral parties, that part or copy which is executed by the grantor is uſually called the *Original*, and the reſt are *Counterparts*; though of late it is moſt frequent for all the parties to execute every part, which renders them all originals. A deed made by one party only is not indented, but *polled* or ſhaved quite even; and therefore called a *deed-poll*, or a ſingle deed. *Litt.* § 371, 2.

A *deed poll* is ſaid to be a *deed* teſtifying that only one of the parties to the agreement hath put his ſeal to the ſame, where ſuch party is the principal or only perſon, whoſe conſent or act is neceſſary to the *deed*: and it is therefore a plain *deed*, without indenting, and is uſed when the vendor, for example, only ſeals, and there is no need of the vendee's ſealing a counterpart, becauſe the nature of the contract is ſuch, as to require no covenant from the vendee, *&c. Co. Lit.* 55.

The ſeveral parts of deeds by indenture, are belonging to the feoffor, grantor, or leſſor, who have one; the feoffee, grantee, or leſſee, who have another; and ſome other perſons, as truſtees, a third, *&c.* and the deed-poll which is ſingle, and of but one part, is delivered to the feoffee, or grantee, *&c.*

All the parts of a deed *indented*, in judgment of law, make but one intire deed; but every part is of as great force as all the parts together, and they are eſteemed the mutual acts of either party, who may be bound by either part of the ſame, and the words of the indenture are the words of either party, *&c.* But a *deed poll* is the ſole deed of him that makes it, and the words thereof ſhall be ſaid to be his words, and bind him only. *Plowd.* 134, 421: *Lit. ſ.* 370.

II. 1. THE FIRST REQUISITE of a deed is, that there be perſons able to contract and be contracted with, for the purpoſes intended by the deed; and alſo a thing, or ſubject matter to be contracted for; all which muſt be expreſſed by ſufficient names. *Co. Lit.* 35. So as in every grant, there muſt be a grantor, a grantee, and a thing granted; in every leaſe, a leſſor, a leſſee, and a thing demiſed.

Some perſons are *diſabled* to contract by Common-law, and ſome by ſtatute; ſome abſolutely, and ſome *ſecundum quid* only; as in caſe of infants, feme coverts, ideots, perſons *non compos mentis*, aliens, tenants in tail, eccleſiaſtical perſons, and others; ſome of which may not make any deeds or eſtates by them at all, others but ſo and ſo limited and qualified. *Stat.* 32 *Hen.* 8. *cap.* 28.—See tit. *Leaſes.*

Diſabilities to make deeds, *&c.* are chiefly amongſt perſons of non-ſane memory, infants, aliens, women who have huſbands, men who have wives, *&c.* perſons born deaf and dumb, perſons attaint of treaſon or felony, or, in a *præmunire*, clerks convict, tenant in tail, eccleſiaſtical perſons, as biſhops, parſons, and the like, with reſpect to lands, *&c.* which they hold as ſuch; joint-tenants, tenants in common, coparceners, diſſeiſors, diſſeiſſees, *&c.* See theſe ſeveral titles.

He who has only an eſtate for his own or another's life, or a leaſe for years of land, may give, grant, or charge it at his pleaſure for ſo long as his eſtate laſts; and it will be good to all purpoſes, and againſt all perſons for that time.

And a man who has an eſtate in land to him and his wife, and his heirs, may make what eſtate he will of it, and this will be good againſt all but his wife, and that for her life only. 7 *Co.* 12: *Co. Lit.* 42: *Perk.* § 182.

The King for the greatneſs of his perſon, is diſabled to take by deed *in pais*; and therefore if a feoffment be made to him there, and livery of ſeiſin be made upon it, this will be void; but *he is to take by matter of record*, which is of an higher nature than a deed. *Fitz. Fait and Feoffment* 21.

Leaſes made to the King by colleges, deans and chapters, or any other, having a ſpiritual or eccleſiaſtical living, againſt the *Stat.* 13 *Eliz. c.* 10, are reſtrained by the ſame act, as well as leaſes made to common perſons. 5 *Co.* 14.

The *names* of the parties to deeds ſerve to diſtinguiſh perſons, and to make the perſon intended certain; yet miſtakes in this, unleſs they be very groſs, will not hurt, *nihil facit error nominis cum de corpore conſtat. Bulſt.* 21, 22: 2 *Bulſt.* 302, 303: *Co. Lit.* 3: *Perk.* § 36.

But if the name of baptiſm or ſurname be miſtaken, as *John* for *Thomas*, *&c.* this is dangerous. *Moor* 407, 897. And ſee 2 *Bulſt.* 70: *Perk.* § 39.

It is alſo prudent to add the addition of each party, as the place of *reſidence*, with his or her *degree*, *profeſſion*, or *myſtery*.

There are many deſcriptions of grantors and grantees; as (1) Proper names of baptiſm and ſurnames, and the names of corporations, or bodies politic or corporate. (2) Names of dignities, office, and the like. And theſe (of both ſorts) will admit a deſcription made good by reputation. And ſo land will paſs to one, by the name of a *ſon*, who is a *baſtard*; ſo to one by the name of a *wife*, who

who is *not a wife*, 27 *Ed.* 3. 85: *Bulſt.* 3; if they be reputed or known by that name. *Hob.* 32.

There muſt be ſuch a perſon *in eſſe* at the time of the deed made as is named, and the parties muſt be able to give, and capable to receive that which is given or granted by the deed. *Plowd.* 345: *Co. Lit.* 2, 3: *Perk.* 43. 52.

And therefore if an annuity be granted to the right heirs of *J. S.* he being then living, this is void; for there is none ſuch, nor can be whilſt he lives. *Perk.* § 52. See *Cro. Car.* 22.

If a man gets another name by common eſteem than his right name, and he is known by his other name, his deed made by this other name may be good. 6 *Co.* 36: *Co. Lit.* 3: *Perk.* § 41.

The miſtake is leſs dangerous where any other part of the deed, or ſome other addition, ſhall make the perſon intended certain. 6 *Co.* 36: *Co. Lit.* 3: *Perk.* § 40.

As to the ſubject-matter of Contracts, Grants, *&c.* See this Dict. title *Grant*, and other proper titles.

2. The deed muſt be founded upon good and ſufficient *conſideration*. Not upon an uſurious contract, (*Stat.* 13 *Eliz. c.* 8,) nor upon fraud or colluſion, either to deceive purchaſors *bona fide*, (*Stat.* 27 *Eliz. c.* 4,) or juſt and lawful creditors; (*Stat.* 13 *Eliz. c.* 5;) any of which bad conſiderations will vacate the deed, and ſubject ſuch perſons, as put the ſame in ure, to forfeitures, and often to impriſonment. A deed alſo or other grant, made without any conſideration, is as it were, of no effect; for it is conſtrued to inure, or to be effectual only to the uſe of the grantor himſelf. *Perk.* § 533. The conſideration may be either a *good* or a *valuable* one. See further title *Conſideration*, and *poſt.* III.

In deeds, the *conſideration* is a principal thing to give them effect: and the foundation of deeds ought always to be honeſt. That a deed was executed upon a corrupt agreement, *dehors* the deed, may be averred in pleading. See the caſe of *Collins* and *Blantern*, a new and very peculiar caſe. 2 *Wilſ.* 341, *&c.*

3. The deed muſt be *written*, or (as is the caſe at preſent with many inſtruments, ſuch as *Bonds*, *Policies of Inſurance*, &c.) *printed*; for it may be in any character, or any language; but it muſt be upon paper or parchment. For if it be written on ſtone, board, linen, leather, or the like, it is no deed. *Co. Litt.* 229: *F. N. B.* 122.

All the matter and form of a deed, muſt be written *before* the ſealing and delivery of it; for if a man ſeals and delivers an empty piece of parchment or paper, although he therewithal gives commandment that an obligation or other matter ſhall be written in it, which is done accordingly, yet this will not make it a good deed. *Co. Lit.* 171: *Perk.* §. 118, 119: See *Moor* 28: *Hetley* 136, 7.

A deed may be written in any hand, as in text, court or Roman hand; or in any language, as in *Latin* or *French*, and is as good as a deed written in *Engliſh*, and in a ſecretary hand. 2 *Co.* 3.

It may be written either in a piece of looſe paper or parchment, or in a paper or parchment ſewed in a book. *Bro. Oblig.* 67: *Co. Lit.* 137, 139.

A deed muſt alſo have the regular *Stamps*, impoſed on it by the ſeveral ſtatutes, for the increaſe of the public revenue; elſe it cannot be given in evidence.

Formerly many conveyances were made by *parol*, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the *Stat.* 29 *Car.* 2. *c.* 3, enacts, that no leaſe, eſtate, or intereſt in lands, tenements, or hereditaments, made by livery of ſeiſin, or by parol only, (except leaſes not exceeding three years from the making, and whereupon the reſerved rent is at leaſt two-thirds of the real value) ſhall be looked upon as of greater force than a leaſe or eſtate at will; nor ſhall any aſſignment, grant, or ſurrender of any intereſt in any freehold hereditaments be valid; unleſs in both caſes the ſame be put in writing, and ſigned by the party granting, or his agent, lawfully authoriſed in writing. See title *Frauds*.

4. The matter written muſt be *legally* and *orderly* ſet forth; that is, there muſt be words ſufficient to ſpecify the agreement, and bind the parties; which ſufficiency muſt be left to the courts of law to determine. *Co. Lit.* 225. For it is not abſolutely neceſſary in law, to have all the formal parts that are uſually drawn out in *Deeds*, ſo as there be ſufficient words to declare clearly and legally the party's meaning. But, as theſe formal and orderly parts are calculated to convey that meaning in the cleareſt, diſtincteſt, and moſt effectual manner, and have been well conſidered and ſettled by the wiſdom of ſucceſſive ages, it is prudent not to depart from them without good reaſon or urgent neceſſity; therefore they ſhall be recapitulated in their uſual order. See 1 *Inſt.* 6.

It may in the firſt place be generally obſerved with regard to the words requiſite in a deed; that they depend upon the eſtate intended to be conveyed. If a man would purchaſe *lands* or tenements in *fee-ſimple*, it behoves him to have theſe words in his purchaſe, *To have and to hold to him and to his heirs*; for theſe words, *his heirs*, (*only*) make the eſtate of inheritance, in all feoffments and grants. But this is to be underſtood of natural bodies: for if lands be given to a ſole body politic or corporate, (as to a biſhop, parſon, vicar, maſter of an hoſpital, *&c.*) there, to give him an eſtate of inheritance in his politic or corporate capacity, he muſt uſe theſe words, *To have and to hold to him and his ſucceſſors.* *Co. Lit.* 8, *&c.*

If an eſtate-*tail* is intended to be created, the words muſt be, *To have and to hold to him and to the heirs of his body*. See title *Fee*.

The inſertion of the word *heirs* or *ſucceſſors*, as the caſe requires, is therefore abſolutely neceſſary in conveyances of eſtates of inheritance; for if a man purchaſe lands by theſe words, *To have and to hold to him for ever*, he has but an eſtate for term of life. See *Co. Lit.* 8 *b. &c.*

We may now proceed more particularly to obſerve on the formal and orderly parts of a Deed.

The *Premiſes* are uſed to ſet forth the number and names of the parties, with their additions or titles. They alſo contain the recital, if any, of ſuch deeds, agreements, or matters of fact, as are neceſſary to explain the reaſons upon which the preſent tranſaction is founded; and herein alſo is ſet down the conſideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted.

Next come the *Habendum* and *Tenendum*. The office of the *habendum*, is properly to determine what eſtate or intereſt is granted by the deed; though this may be performed, and ſometimes is performed in the premiſes.

In

In which caſe the *habendum* may leſſen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, the eſtate granted in the premiſes. As if a grant be "to *A.* and the heirs of his body," in the premiſes, *habendum* "to him and his heirs for ever," or *vice verſa*, here *A.* has an eſtate tail, and a fee-ſimple expectant thereon. *Co. Litt.* 21: 2 *Roll. Rep.* 19, 23: *Cro. Jac.* 476. But, had it been in the premiſes, "to him and his heirs," *habendum*, "to him for life," the *habendum* would be utterly void. 2 *Rep.* 23: 8 *Rep.* 56; for an eſtate of inheritance is veſted in him before the *habendum* comes, and ſhall not afterwards be taken away, or deveſted, by it. The *tenendum*, "and to hold," is now of very little uſe, and is only kept in by cuſtom. It was ſometimes formerly uſed to ſignify the tenure, by which the eſtate granted was to be holden; *viz.* "*tenendum per ſervitium militare, in burgagio, in libero ſocagio*, &c." But, all theſe being now reduced to free and common ſocage, the tenure is never ſpecified. Before the ſtatute of *quia emptores*, 18 *Ed.* 1. *ſt.* 1, it was alſo ſometimes uſed to denote the lord of whom the land ſhould be holden; but that ſtatute directing all future purchaſers to hold, not of the immediate grantor, but of the chief lord of the fee; this uſe of the *tenendum* hath been alſo antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements ſhall be holden *de capitalibus dominis feodi*, but, as this expreſſed nothing more than the ſtatute had already provided for, it gradually grew out of uſe. See title *Tenure*.

Next follow *the Terms of ſtipulation*, if any, upon which the grant is made: the firſt of which is the *reddendum*, or reſervation, whereby the grantor doth create or reſerve ſome new thing to himſelf out of what he had before granted. As "rendering therefore yearly the ſum of ten ſhillings, or a pepper corn, or two days' ploughing, or the like." Under the pure feodal ſyſtem, this render, *reditus*, return, or rent, conſiſted in chivalry, principally of military ſervices; in villenage, of the moſt ſlaviſh offices; and in ſocage it uſually conſiſts of money, though it may ſtill conſiſt of ſervices, or of any other certain profit. To make a *reddendum* good, if it be of any thing newly created by the deed, the reſervation muſt be to the grantors, or ſome, or one of them, and not to any ſtranger to the deed. *Plowd.* 13: 8 *Rep.* 71. But if it be of ancient ſervices or the like, annexed to the land, then the reſervation may be to the lord of the fee.

Another of the terms upon which a grant may be made is a *Condition*; as to which ſee fully title *Condition*.

Next may follow the clauſe of *Warranty*.

This was anciently inſerted in deeds to ſecure the eſtate to the grantee and his heirs, &c. and was a *covenant real*, annexed to the land granted, by which the grantor and his heirs were bound to warrant the ſame to the grantee and his heirs, and that they ſhould quietly hold and enjoy it; or upon voucher, &c. the grantor ſhould yield other lands, to the value of what ſhould be evicted. See further title *Warranty*.

After warranty uſually follow *Covenants*, or conventions; which are clauſes of agreement contained in a deed, whereby either party may ſtipulate for the truth of certain facts, or may bind himſelf to perform, or give, ſomething to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like; the grantee may covenant to pay his rent, or keep the premiſes in repair, &c. If the covenantor covenants for himſelf and his *heirs*, it is then a covenant real, and deſcends upon the heirs, who are bound to perform it, provided they have aſſets by deſcent, but not otherwiſe: if he covenants alſo for his *executors* and *adminiſtrators*, his perſonal aſſets, as well as his real, are likewiſe pledged for the performance of the covenant; which makes ſuch covenant a better ſecurity than any *warranty*. It is alſo in ſome reſpects a leſs ſecurity, and therefore more beneficial to the grantor; who uſually covenants only for the acts of himſelf, and his anceſtors, whereas a general *warranty* extended to all mankind. For which reaſons the covenant has in modern practice totally ſuperſeded the other. See fully this *Dict.* titles *Aſſets*, *Covenant*, *Aſſignment*, *Heir*.

Laſtly, comes the *Concluſion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expreſsly, or by reference to ſome day or year before-mentioned. Not but a deed is good, although it mention no date: or hath a falſe date, or even if it hath an impoſſible date, as the 30th of *February*, provided the real day of its being dated or given, that is delivered, can be proved. *Co. Lit.* 46: *Dyer* 28 —See further title *Date*.

5. A *fifth* requiſite for making a good deed is the *reading* of it. This is neceſſary, wherever any of the parties deſire it, and, if it be not done on his requeſt, the deed is void as to him. If he can, he ſhould read it himſelf; if he be blind or illiterate, another muſt read it to him. If it be read falſly, it will be void; at leaſt for ſo much as is miſ-recited: unleſs it be agreed by colluſion, that the deed ſhall be read falſe, on purpoſe to make it void; for in ſuch caſe it ſhall bind the fraudulent party. 2 *Rep.* 3, 9: 11 *Rep.* 27.

6. It is requiſite that the party or parties, whoſe deed it is, ſhould *ſeal*, and now in moſt caſes ſhould *ſign* it alſo. The uſe of ſeals, as a mark of authenticity to letters and other inſtruments in writing, is extremely ancient. We read of it among the *Jews* and *Perſians* in the earlieſt and moſt ſacred records of hiſtory. But in the times of our *Saxon* anceſtors, they were not much in uſe in *England*. The method of the *Saxons* was for ſuch as could write to ſubſcribe their names, and, whether they could write or not, to affix the ſign of the croſs; which cuſtom our illiterate vulgar do, for the moſt part, to this day keep up; by ſigning a croſs for their mark, when unable to write their names. In like manner, the *Normans*, at their firſt ſettlement in *France*, uſed the practice of ſealing only, without writing their names: which cuſtom continued, when learning made its way among them, though the reaſon for doing it had ceaſed; and hence the charter of *Edward the Confeſſor* to *Weſtminſter-Abbey*, himſelf being brought up in *Normandy*, was witneſſed only by his ſeal, and is generally thought to be the oldeſt ſealed charter of any authenticity in *England*. *Lamb. Archeion* 51.—At the Conqueſt, the *Norman* lords brought over into this Kingdom their own faſhions; and introduced waxen ſeals only, inſtead of the *Engliſh* methods of writing their names, and ſigning with the ſign of the croſs. *Ingulph.* And in the reign of *Edward* I. every freeman, and even ſuch of the more ſubſtantial villeins as were fit to be put upon juries, had their diſtinct par-

ticular

ticular ſeals. *Stat. Exon.* 14 *Ed.* 1. Coats of Arms were not introduced into ſeals, nor indeed into any other uſe, till about the reign of *Richard* I. who brought them from the Croiſade in the Holy Land.

This neglect of ſigning, and reſting only upon the authenticity of ſeals, remained very long among us; for it was held in all our books that ſealing alone was ſufficient to authenticate a deed: and ſo the common form of atteſting deeds, "*ſealed* and delivered," continues to this day; notwithſtanding the *Stat.* 29 *Car.* 2. *c.* 3, before-mentioned, revives the *Saxon* cuſtom, and expreſsly directs the *ſigning*, in all grants of lands, and many other ſpecies of deeds: in which therefore ſigning ſeems to be now as neceſſary as ſealing, though it hath been ſometimes held that the one includes the other. 3 *Lev.* 1: *Stra.* 764.

7. A ſeventh requiſite to a good deed is, that it be *delivered*, by the party himſelf or his certain attorney: which therefore is alſo expreſſed in the atteſtation; "ſealed and *delivered*." A deed takes effect only from this tradition or delivery; for if the date be falſe or impoſſible, the delivery aſcertains the time of it. And if another perſon ſeals the deed, yet if the party delivers it himſelf, he thereby adopts the ſealing; *Perk.* § 130; and by a parity of reaſon the ſigning alſo, and makes them both his own. A delivery may be either abſolute, that is, to the party or grantee himſelf; or to a third perſon, to hold till ſome condition be performed on the part of the grantee; in which laſt caſe it is not delivered as a *deed*, but as an *eſcrow*; that is, as a ſcrowl or writing, which is not to take effect as a deed, till the condition be performed, and then it is a deed to all intents and purpoſes. *Co. Lit.* 36.

The *ſigning* is of great uſe, for the ſubſcribing witneſſes to the *deed* may be dead, when proving their death, and the hand-writing of the party executing the *deed*, will be ſufficient to eſtabliſh the ſame. If a writing is not ſealed, it cannot be a *deed*. 3 *Inſt.* 169: 5 *Rep.* 23. See farther, 2 *Rep.* 3: 2 *Rol. Abr.* 28: 12 *Rep.* 90: *Hob.* 96.

If two make a *deed*, and one of them ſeals it at one time, and the other at another time; this is as good as if they ſealed it together. *Lane* 32.

If I have ſealed my *deed*, and after I deliver it to him to whom it is made, or to ſome other by his appointment, and ſay nothing, this is a good delivery.

So if I take the *deed* in my hand, and uſe theſe, or the like words, *here take him*; or, *this will ſerve*; or, *I deliver this as my deed*; or *I deliver him you*; theſe are deliveries.

So if I make a *deed* of land to another, and being upon the land, I deliver the *deed* to him in the name of ſeiſin of the land; this is a good delivery.

So if the *deed* be ſealed, or lying in a window, or on a table, and I uſe theſe, or the like words, *There he is*, take it as my *deed*: This is a good delivery, and perfects the *deed*; for, as a *deed* may be delivered by words without acts, ſo may it alſo be delivered by acts without words. 9 *Co.* 137: *Dyer* 167, 192: *Co. Lit.* 36, 49: 35 *Aſſ. pl.* 6. *Contra*, if the party to whom made takes it without any act done purporting to be a delivery. But where parties have come for the purpoſe, and done every thing but delivery, it has been adjudged a good delivery. *Cro. Eliz.* 7: 1 *Leon.* 140.

Regularly there may not be two deliveries of a *deed*, for where the firſt doth take effect, the ſecond is void: *Unleſs* it be where the *deed* is delivered to a ſtranger as an *eſcrow*; as when a *deed*, good at firſt, becomes void afterwards; *or*, a feme covert ſeals a *deed*, and after being ſole, delivers it again, *&c. Perk. ſect.* 154: *Co. Lit.* 48: 5 *Rep.* 119.

The delivery of a *deed* may be alledged at any time *after* the date; but not before. *Dyer* 315. A *deed* may be good without all the orderly and formal parts; but without *delivery*, it is no *deed*. 1 *Inſt.* 35: 2 *Rep.* 5.

8. The laſt requiſite to the validity of a deed is, the *atteſtation*, or *execution of it in the preſence of witneſſes*: this however is neceſſary, rather for preſerving the evidence, than for conſtituting the eſſence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia teſtata* mentioned by the feodal writers; (*Feud. l.* 1. *t.* 4;) which were written memorandums, introduced to perpetuate the tenor of the conveyance and inveſtiture, when grants by parol only became the foundation of frequent diſpute and uncertainty. To this end they regiſtered in the deed the perſons who attended as witneſſes, which was formerly done without their ſigning their names, (that not being always in their power) but they only heard the deed read; and then the clerk or ſcribe added their names, in a ſort of memorandum, "*hiis teſtibus*, &c. This like all other ſolemn tranſactions, was originally done only *coram paribus*, (*Feud. l.* 2. *t.* 32,) and frequently when aſſembled in the court-baron, hundred, or county-court, which was then expreſſed in the atteſtation, *teſte comitatu, hundredo*, &c. *Spelm. Gloſs.* 228: *Madox Formul. N.* 221, 322, 660.—Afterwards the atteſtation of other witneſſes was allowed, the trial in caſe of a diſpute being ſtill reſerved to the *pares*; with whom the witneſſes (if more than one) were aſſociated and joined in the verdict; (*Co. Lit.* 6;) till that alſo was abrogated by the *Stat.* of *York*, 12 *Edw.* 2. *ſt.* 1. *c.* 2. And in this manner, with ſome ſuch clauſe of *hiis teſtibus*, are all old deeds and charters, particularly *Magna Charta* witneſſed. And in the time of Sir *Edward Coke*, creations of nobility were ſtill witneſſed in the ſame manner. 2 *Inſt.* 77. But in the King's common charters, writs, or letters-patent, the ſtile is now altered: for at preſent the King is his own witneſs, and atteſts his letters patent thus, "witneſs ourſelf at *Weſtminſter*, &c." a form which was introduced by *Richard* I. but not commonly uſed till about the beginning of the fifteenth century; nor the clauſe of *hiis teſtibus* entirely diſcontinued till the reign of *Henry* VIII; which was alſo the æra of diſcontinuing it, in the deeds of ſubjects, learning being then revived, and the faculty of writing more general; and therefore ever ſince that time the witneſſes have uſually ſubſcribed their atteſtation, either at the bottom, or on the back of the deed. 2 *Inſt.* 78.

III. From what has been before laid down, it will follow, that if a deed wants any of the eſſential requiſites beforementioned; either, 1. Proper parties, and a proper ſubject matter.—2. A good and ſufficient conſideration.—3. Writing on paper or parchment, duly ſtamped.—4. Sufficient and legal words, properly diſpoſed.—5. Reading if deſired before the execution.—6. Sealing; and, by the ſtatute, in moſt caſes ſigning alſo;—or 7. Delivery, it is a void deed *ab initio*. It may alſo be avoided by matter *ex poſt facto*, as 1. By raſure, interlining,

or other alteration in any material part; unleſs a memorandum be made thereof at the time of execution and atteſtation. 11 *Rep.* 27.—2. By breaking off, or defacing the ſeal. 5 *Rep.* 23.—3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of a lattice-work or *cancelli*; though the phraſe is now uſed figuratively for any manner of obliteration or defacing it.—4. By the diſagreement of ſuch, whoſe concurrence is neceſſary, in order for the deed to ſtand; as a huſband where a feme-covert is concerned; an infant, or perſon under dureſs, when thoſe diſabilities are removed; and the like.—5. By the judgment or decree of a court of judicature. This was anciently the province of the court of *Star-chamber*, and now of the Chancery: when it appears that the deed was obtained by fraud, force, or other foul practice: or is proved to be an abſolute forgery. *Toth.* 24: 1 *Ventr.* 348. In any of theſe caſes the deed may be avoided, either in part or totally, according as the cauſe of avoidance is more or leſs extenſive.

More particularly.—If there be any alteration, raſure, or interlining made in any part of the deed *before the delivery* of it, this will not hurt the deed.

But in ſuch caſes it is policy to make a memorandum of it upon the back of the deed, and to give the witneſſes notice of it, (this is now uſually done in the atteſtation of the deed thus: *Sealed and delivered, the word— being firſt interlined,* &c.) For otherwiſe, if it be in any place material, as in the name of the grantor, grantee, in the limiting of the eſtate, or the like, and it cannot be proved to be done before the ſealing and delivery of it, eſpecially if it be a deed poll, it is very ſuſpicious. *Co. Lit.* 37, 225: *Perk.* § 125, 126, 127, 128, 155.

Where an eſtate cannot have its eſſence without a deed, there, if the deed is raſed in any material part, after the delivery, it makes the eſtate void: but if the eſtate may have eſſence without a deed, then, notwithſtanding it is created by deed, and that deed is raſed, it ſhall not deſtroy the eſtate, but the deed. 1 *Nelſ. Abr.* 625.

When a choſe in action is created by deed, the deſtruction of ſuch deed is the deſtruction of the duty itſelf; as in caſe of a bond, bill, *&c.* though it is not ſo, where an eſtate or intereſt is created by a deed. 3 *Salk.* 120.

If a deed be ſuppreſſed, on proof made that it came to the party's hands, and of its contents, the perſon injured, will have the ſame benefit to hold the eſtate, as if the deed could be produced. 2 *Vern.* 280. A perſon committed for burning a deed, ſee 2 *Vern.* 561: *Abr. Caſ. Eq.* 169. An indorſement on a deed, at the time of the ſealing and delivery, is a part of the ſame: but if an indorſement be after the delivery, it is a new deed. *Mod. Caſ.* 237.

Deeds, if *fraudulently* made; when got by *corrupt agreement*, as on uſurious contract; and when made by *force* or *dureſs*, *&c.* are void: ſo they are for uncertainty, and by reaſon of infancy, coverture, or other diſability in the makers, *&c.* 2 *Rol. Abr.* 28: 1 *Inſt.* 253: 11 *Rep.* 27.

A deed may be good in part, and void in part; or good againſt one perſon, and void as to another: if all the parts of a deed may by law ſtand together, no one part ſhall make the whole void. And if a deed by any *conſtruction* of law be conſtrued to have *legal operation*, the law will not make it utterly void, though it may not operate according to the purport of the deed: alſo the law will tranſpoſe and marſhal clauſes in deeds, to come at their true meaning; but not to confound them. Where the words of a deed may have a double intendment, one ſtanding with law, and the other contrary to it, the intendment that ſtandeth with law ſhall be taken. 1 *Lil. Abr.* 421: 1 *Inſt.* 42, 217: 1 *Shep. Abr.* 540.

IV. DEEDS of *Bargain and Sale* are to be *inrolled*, by *Stat.* 27 *Hen.* 8. *c.* 16. A copy of a bargain and ſale inrolled, ſhall be as ſufficient as the original deed, by *Stat.* 10 *An. c.* 18. *ſect.* 3. But eſtates in fee are now generally granted and conveyed by indentures of *leaſe* and *releaſe*. *All deeds* are to be *regiſtered* in the counties of *York* and *Middleſex*. *Stat.* 2 & 3 *An. c.* 4: 5 *An. c.* 18: 6 *An. c.* 35: 7 *An. c.* 20: 8 *Geo.* 2. *c.* 6: 25 *Geo.* 2. *c.* 4. And it is much to be wiſhed that regiſters were univerſally eſtabliſhed throughout the kingdom. See further titles *Bargain and Sale*, *Conveyance*, *Inrollment*, &c.

It may here be curſorily obſerved, that of conveyances by the Common law, ſome may be called *original*, or *primary* conveyances; which are ſuch by means whereof the benefit or eſtate is created, or firſt ariſes: others are *derivative*, or *ſecondary*; whereby the benefit or eſtate, originally created, is enlarged, reſtrained, transferred, or extinguiſhed.

Original conveyances are,—1. Feoffment;—2. Gift; 3. Grant;—4. Leaſe;—5. Exchange;—6. Partition. *Derivative*, are,—7. Releaſe;—8. Confirmation;—9. Surrender;—10. Aſſignment:—11. Defeaſance.—See thoſe titles, and alſo particularly title *Conveyance*, and 2 *Comm.* 295,—310.

There are four grounds for the *expoſition of deeds*. 1. That they may be beneficial to the taker. 2. That where the words may be employed to ſome intent, they ſhall never be void. 3. That the words be conſtrued according to the intention of the parties, and not otherwiſe; and the intent of the parties ſhall take effect, if it may poſſibly ſtand with law. 4. That they are to be conſonant to the rules of the law. And deeds ſhall have a reaſonable expoſition, without injury againſt the grantor, to the greateſt advantage of the grantee. They are to be expounded upon the whole, and if the ſecond part contradicts the firſt, ſuch ſecond part ſhall be void; but if the latter part expounds or explains the former, which it may do, both of them ſhall ſtand. *Plowd.* 160: *Raym.* 142: 6 *Rep.* 36: 1 *Inſt.* 313: 1 *Rol. Rep.* 375.

The firſt *deed* of a perſon, and laſt *will*, ſtand in force. In deeds indented, all parties are eſtopped, or concluded, to ſay any thing againſt what is contained in the deed. 1 *Inſt.* 45. And where a deed is by indenture between parties, none can have an action upon that deed, but he who is a party to it; but where it is a deed-poll, one may covenant with another who is not a party to it, to do certain acts, for the non-performance whereof he may bring an action. 2 *Lev.* 74.

Where a man juſtifies title under a deed, he is to produce the deed: if a deed is alledged in pleading, it muſt be ſhewed to the court, that the court may judge of the validity of it, and whether there are ſufficient words to make a good contract; and when it is ſhewn to the court, the deed ſhall remain in court all the term, in the hands of the *cuſtos brevium*; but at the end of the term, it ſhall be delivered to the party. If the deed is denied, it muſt remain

remain in court till the plea is determined. 10 *Rep.* 88: *Wood* 235. A deed, ſet forth with a *profert hic in curia*, remains in court in judgment of law all that term; and any perſon may, during that term, have benefit by it, though he hath it not ready to ſhew: the adverſe party may take any advantage by the deed that it will afford him. 5 *Rep.* 74: 1 *Nelſ.* 625.

But now the deed is not actually brought into court, but generally remains in the hands of the party's attorney, who gives oyer and copy of it to the attorney of the other party, if demanded.

DEEDS, *ſtealing of.* At Common-law, bonds, bills, and notes, which concern mere *choſes in action*, were held not to be ſuch goods whereof *larceny* might be committed: but by *Stat.* 2 *Geo.* 2. *c.* 25, they are put upon the ſame footing, with reſpect to *larcenies*, as the money they were meant to ſecure. See titles *Felony*; *Robbery*.

DEEMSTERS, from the Sax. *dema*, a judge or umpire.] Are a kind of judges in the *Iſle of Man*, who, without proceſs, or any charge tothe parties decide all controverſies in that iſland; and they are choſen from among themſelves. *Cam. Brit.*

DEER-FALD, A park, or *deer-fold*; Sax. *deer*, *fera*, and *fald*, *ſtabulum*. *Cowel.*

DEER-HAYES, Are engines, or great nets made of cords to catch deer; and no perſon not having a park, &c. ſhall keep any of theſe nets, under the penalty of 40*s.* a month. *Stat.* 19 *H.* 7. *c.* 11. See title *Game*.

DEER-STEALERS. Much of the law relating to theſe offenders is implicated in the general rules relative to hunting in foreſts, &c. for which ſee this Dict. title *Game*, more at large.

Several ancient ſtatutes have been made to puniſh *Deer-ſtealers*; and a very ſevere one 9 *Geo.* 1. *c.* 22, known by the name of the *Black Act* againſt thoſe and other offenders.—See title *Black Act*.

See the ſtatutes 3 *E.* 1. *c.* 20, againſt treſpaſſers in parks: 21 *Ed.* 1. *ſt.* 2, *de maleſactoribus in parcis*: 1 *H.* 7. *c.* 7, of unlawful hunting in parks by night: 1 *Jac.* 1. *c.* 27, againſt ſellers and buyers of deer who are to forfeit 40*s.* *Stat.* 5 *Geo.* 1. *c.* 28, by which wounding or killing deer in a park is puniſhable with tranſportation.

The above (except the laſt ſtatute 5 *Geo.* 1. *c.* 28.) are at leaſt ſuperſeded in uſe if not repealed by *Stat.* 16 *Geo.* 3. *c.* 30; which though like ſome others of the game laws inaccurately penned, or copied on record, is now generally purſued for the puniſhment of *Deer-ſtealers*.

By this *Stat.* 16 *Geo.* 3. *c.* 30, If any perſons ſhall hunt, or take in a ſnare, or kill or wound any red or fallow deer in any foreſt, chaſe, &c. whether incloſed or not; or in any incloſed park, paddock, &c. or be aiding in ſuch offence, they ſhall forfeit 20*l.* for the firſt *offence*; and alſo 30*l.* for each deer wounded, killed or taken. A game-keeper offending to forfeit double.—For a ſecond offence offenders ſhall be tranſported for 7 years § 1. Juſtices to tranſmit convictions to the ſeſſions. § 2.—Juſtices may grant warrants to ſearch for heads, ſkins, &c. of ſtolen deer and for toils, ſnares, &c. and perſons having ſuch in their poſſeſſion to forfeit from 30*l.* to 10*l.* at the diſcretion of the juſtices. §§ 4, 5, 6.—Perſons unlawfully ſetting nets or ſnares, to forfeit for the firſt offence from 10*l.* to 5*l.*—and for every other offence from 20*l.* to 10*l.* § 7.—Perſons pulling down pales or fences of any foreſt, chaſe, park, paddock, wood, &c. ſubject to the penalties annexed to the firſt offence for killing deer, § 8.—Dogs, guns and engines may be ſeized by park-keepers; and perſons reſiſting ſhall be tranſported for ſeven years. § 9.—Penalties may be levied by diſtreſs; in default of which offenders to be committed for twelve months. § 11. &c.—No *certiorari* to be allowed, unleſs the party convicted become bound to the proſecutor in 100*l.* to pay him all coſts and damages and to the Juſtice in 60*l.* to proſecute the *certiorari* with effect. § 19, 20: and ſee § 23, by which latter § it ſeems that convictions are not removeable by *certiorari* on mere points of informality, in caſe the facts alledged are ſufficient to ſupport the conviction.—See *Burn's Juſt.* tit. *Game* V. 1. *ii.*—1 *Hawk. P.C. c.* 27. § 60: and this Dict. title *Certiorari*.—Appeal given to the ſeſſions § 21, &c.—Proſecutions limited to 12 months from the time of the offence committed. § 25.

By *Stat.* 28 *Geo.* 2. *c.* 19. deſtroying goſs, furze and fern in foreſts and chaſes, being the covert for deer, ſubjects the offenders to a penalty from 5*l.* to 40*s.* or to 3 months' impriſonment.

DE ESSENDO QUIETUM DE TOLONIO, Is a writ that lies for thoſe who are by privilege free from the payment of *toll*; on their being moleſted therein. *F. N. B.* 226. See titles *Corporation*; *Toll*.

DE EXPENSIS MILITUM, A writ commanding the ſheriff to levy the expences of a *knight of the ſhire* for attendance in *parliament*, being 4*s.* *per diem* by ſtatute; and there is a like writ *de expenſis civium & burgenſium*, to levy 2*s.* *per diem*, for the expences of every *citizen* and *burgeſs* of *parliament*. See *Stat.* 23 *Hen.* 6. *cap.* 14: 4 *Inſt.* 46: and further title *Parliament*.

DE FACTO, Signifies a thing actually done; that is done in deed. A king *de facto* (in fact) is one that is in actual poſſeſſion of a crown, and hath no lawful right to the ſame; in which ſenſe it is oppoſed to a king *de jure*, (of right,) who hath right to a crown, but is out of poſſeſſion. 3 *Inſt.* 7.

DEFAMATION, *defamatio.*] Is when a perſon *ſpeaks* ſcandalous words of another, as of a magiſtrate, &c. whereby they are injured in their reputation; for which the party offending ſhall be puniſhed according to the nature and quality of his offence; ſometimes by action on the caſe at common law, ſometimes by ſtatute, and ſometimes by the eccleſiaſtical laws.

Defamation is alſo puniſhable by the ſpiritual courts; in which courts it ought to have three incidents. *viz. Firſt*, It is to concern matters ſpiritual, and determinable in the eccleſiaſtical courts; as for calling a man heretick, ſchiſmatick, adulterer, fornicator, &c. *Secondly*, that it be a matter ſpiritual only; for if the *defamation* concern any thing determinable at the common law, the eccleſiaſtical judges ſhall not have conuſance thereof. And *Thirdly*, although ſuch *defamation* be merely ſpiritual, yet he that is defamed cannot ſue for damages in the eccleſiaſtical courts; but the ſuit ought to be only for puniſhment of the fault, by way of penance. *Terms de Ley*. See titles *Action*; *Courts-Eccleſiaſtical*; *Prohibition*.

DEFAULT, Fr. *defaut.*] Is commonly taken for *non-appearance* in court, at a day aſſigned; though it extends to any omiſſion of that which we ought to do. *Bract. lib.* 5. *tract.* 3; *Co. Lit.* 259. If a plaintiff makes *default* in

appearance in a trial at law, he will be non-suited; and where a defendant makes *default*, judgment shall be had against him by *default*. See titles, *Judgment*; *Nonsuit*.

Tenant in tail, tenant in dower, by the curtesy, or for life, losing their lands by *default*, in a *præcipe quod reddat* brought against them; they are to have remedy by the writ *quod ei deforciat*, &c. Stat. Westm. 2. c. 4. And in a *quod ei deforciat*, where the tenant joined issue upon the mere right, and the jury appearing, the defendant made *default*; it was adjudged, that in such case final judgment shall be given: but if the tenant had made *default*, it would be otherwise, for then a *petit cape* must issue against him, because it may so happen that he may save his *default*. 1 *Nelf. Abr.* 627.

By *default* of a defendant, he is said to be generally out of court to all purposes, but only that judgment may be given against him: and no judgment can be afterwards given for the defendant. *Ibid.* 628.

When two are to recover a personal thing, the *default* of one is the default of the other: *contra*, where they are to discharge themselves of a personalty; where the *default* of the one is not the *default* of the other. 6 *Rep.* 25: 1 *Lill. Abr.* 425. In an action against two, if the process be determined against one, and the other appears; he shall be put to answer, notwithstanding the default of his companion. 2 *Danv. Abr.* 480. Where the baron is to have a corporal punishment for a *default*, there the *default* of the wife shall not be the *default* of the husband: but otherwise it is where the husband is not to have any corporal punishment by the *default*. *Ibid.* 472, 473.

If a defendant imparl to another day in the same term, and make *default* at the day, this is a departure in despite of the court: and when the defendant after appearance, and being present in court, upon demand makes departure, it is in despite of the court. *Co. Lit.* 139.

Suffering judgment to go by *default*, is an admission of the contract declared on. *Stra.* 612. After the inquest is taken by *default*, the defendant can make no suggestion on the roll. *Str.* 46.

Default, and saver of *default*, made a large title in the old books of law. See *Stats.* 52 *H.* 3. *cc.* 9, 13, 18, 24: 3 *E.* 1. *c.* 1: 42, &c.

DEFAULT IN CRIMINAL CASES. An offender indicted appears at the *capias*, and pleads to issue, and is let to bail to attend his trial, and then makes *default*; here the inquest in case of felony shall never be taken by *default*, but a *capias ad audiendam juratam* shall issue, and if the party is not taken, an *exigent*; and if he appear on that writ, and then make *default*, an *exigi facias de novo* may be granted: but where upon the *capias* or *exigent* the sheriff returns *cepi corpus*, and at the day hath not his body, the sheriff shall be punished, but no new *exigent* awarded, because in custody of record. 2 *Hale's Hist. P. C.* 202.

DEFAULT OF JURORS. If *jurors* make *default* in their appearance for trying of causes, they shall lose and forfeit *issues*, unless they have any reasonable excuse proved by witnesses, in which case the justices may discharge the issue for *default*. *Stat.* 35 *H.* 8. *c.* 6. See title *Jury*.

DEFEASANCE, From the Fr. *defaire*, to defeat or undo.] Is of two sorts. 1. A collateral deed made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. In this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void, on re-payment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law; and therefore only indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though when *uses* were afterwards introduced, a revocation of such uses was permitted by courts of Equity. But things that were merely executory or to be compleated by matter subsequent, (as rents of which no seisin could be had till time of payment; annuities, conditions, warranties and the like,) were always liable to be recalled by defeasances made subsequent to the time of their creation.—2. A Defeasance on a bond, recognisance, or judgment recovered, is a condition which when performed defeats that, in the same manner as the foregoing Defeasance of an estate.—It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently by a subsequent deed. This like the condition of a bond when performed, discharges and disincumbers the estate of the obligor. 2 *Comm.* 327; 342: See 1 *Inst.* 236, 7: 2 *Sand.* 47.

The *Defeasance* may generally (as in the case of a bond, &c.) be indorsed on the back of the deed.

To make a good *Defeasance* it must be, 1. By deed; (in the case of indorsement by a *deed-poll*;) for there cannot be a *Defeasance* of a deed without deed; and a writing under hand doth not imply it to be a deed. 2. It must recite the deed it relates to, or at least the most material part thereof; or in case of indorsement refer thereto. 3. It is to be made between the same persons that were parties to the first deed. 4. It must be made at the time, or after the first deed, and not before. 5. It ought to be made of a thing *defeasible*. 1 *Inst.* 236: 3 *Lev.* 234.

Inheritances executed by livery, such as estates in fee, or for life, cannot be subject to *Defeasance* afterwards, but at the time of making the feoffment, &c. only: but executory inheritances, such as leases for years, rents, annuities, conditions, covenants, &c. may be defeated by *Defeasance* made after the things granted. And it is the same of obligations, recognisances, statutes, judgments, &c. which are most commonly the subject of *Defeasance*, and usually made after the deed whereto they have relation. *Plowd.* 137: 1 *Rep.* 113.

If a man acknowledge a statute to another, and enters into a *Defeasance*, that if his lands in such a county should be extended, the statute should be void; the *Defeasance*, will be good and not repugnant, because it is by another deed: but the condition of a bond not to sue the obligation is void for repugnancy, being in the same deed. *Moor* 1035. Although the condition of an obligation, where it is repugnant to it, be void; it is otherwise in case of a *Defeasance*, made after the bond, for this shall be good notwithstanding: as where the obligee afterwards grants by deed to the obligor, that he will not sue thereon at all; or not till such a time, or that it shall be discharged, &c. 20 *H.* 7. 24; *Fitz. Bar.* 71.

Where a *proviſo* goes by way of *Defeaſance* of a *covenant*, it muſt be *pleaded* on the other ſide, otherwiſe, where by way of *explanation*, or *reſtriction* of the covenant. 2 *Salk.* 574.

If *A.* be bound in bond to *B.* in 20*l.* and he makes a *Defeaſance* to *C.* that if he pay him the like ſum, the obligation made by *A.* ſhall be void; this is no good *Defeaſance*, becauſe it is not made between the ſame parties: though if a ſtatute be entered into, to huſband and wife, and the huſband alone make a *Defeaſance*, it may be good. 14 *H.* 8. 101: 2 *Shep. Abr.* 488.

A ſtatute, *&c.* may be *defeaſanced* on condition of performing a will, and paying legacies to other perſons. 1 *Cro.* 837. If a *Defeaſance* of a ſtatute be made, and after another *Defeaſance* is made by the *ſame parties*, the firſt *Defeaſance* becomes void thereby; and the ſecond only is in force, as in caſe of a will. 2 *Danv. Abr.* 481. Where a ſtatute is acknowledged to two perſons, and one of them makes a *Defeaſance*, it is ſaid to be a good diſcharge. *Ibid.* 480. If execution be ſued out before the time in a *Defeaſance* is paſt, it ſhall be ſet aſide. 1 *Lil.* 426.

In a *Defeaſance* of a *deed of lands*, the perſon to whom made *covenants* that on payment of a certain ſum, on ſuch a day, he will transfer and re-convey the eſtate back again; and that the maker ſhall enjoy, till default, *&c.* If the *defeaſance* be of a judgment, he covenants that on payment of the money, he will enter ſatisfaction on the record; if of a *ſtatute* or *bond*, that on payment it ſhall be void, *&c.* See titles *Conveyance*; *Deed*; *Mortgage*.

DEFENCE, in its true legal ſenſe, ſignifies, not a juſtification, protection, or guard, which is now its popular ſignification; but merely an *oppoſing* or *denial* [from the French *defendre*,] by the defendant of the truth or validity of the plaintiff's complaint. It is a general aſſertion that the plaintiff hath no ground of action, which aſſertion is afterwards extended and maintained in the defendant's plea. For it would be ridiculous to ſuppoſe that the defendant comes and *defends* (or in the vulgar acceptation, juſtifies) the force and injury, in one line, and pleads that he is *not guilty* of the treſpaſs complained of, in the next. And therefore in actions of dower, where the demandant does not count of any injury done, but merely demands her endowment, (*Raſtal. Entr.* 234,) and in aſſiſes of land, where alſo there is no injury alledged, but merely a queſtion of right ſtated for the determination of the recognitors or jury, the tenant makes no ſuch defence. *Booth of Real Actions*, 118. In writs of entry, where no injury is ſtated in the count, but merely the right of the demandant and the defective title of the tenant, the tenant comes and defends or denies *his* right, *jus ſuum*, that is (as it ſeems though with a ſmall grammatical inaccuracy) the right of the demandant, the only one expreſsly mentioned in the pleadings; or elſe denies his own right to be ſuch, as is ſuggeſted by the count of the demandant. And in writs of right the tenant always comes and defends the right of the demandant and his ſeiſin, *jus prædicti* S. *et ſeiſinam ipſius*, (*Co. Entr.* 182,) or elſe the ſeiſin of his anceſtor, upon which he counts, as the caſe may be, and the demandant may reply, that the tenant unjuſtly *defends* [*i. e. denies*] his, the demandant's right, and the ſeiſin on which he counts. *Nov. Narr.* 230. *edit.* 1534. All which is extremely clear, if we underſtand by *defence* an *oppoſition* or *denial*, but it is otherwiſe inexplicably difficult. The true reaſon of this, ſays *Booth*, unaccountably, I could never yet find. *Booth on Real Act.* 94, 112.

The Courts were formerly very nice and curious with reſpect to the nature of the defence, ſo that if no defence was made, though a ſufficient plea was pleaded, the plaintiff ſhould recover judgment: *Co. Lit.* 127. And therefore the book entitled *Novæ Narrationes* or *The New Talys*, [*edit.* 1534,] at the end of almoſt every count, *narratio*, or tale, ſubjoins ſuch defence as is proper for the defendant to make. For a general defence or denial was not prudent in every ſituation, ſince thereby the propriety of the writ, the competency of the plaintiff, and the cognizance of the court, were allowed. By defending the force and injury the defendant waved all pleas of miſnomer; by defending the damages, all exceptions to the perſon of the plaintiff; and by defending either one or the other *when and where* it ſhould behove him, he acknowledged the juriſdiction of the court. But of late years theſe niceties have been very deſervedly diſcountenanced; though they ſtill ſeem to be law, if inſiſted on. 3 *Comm.* 296—8.

A defendant cannot plead any plea, before he hath made a *defence*; though this muſt not be intended abſolutely, for in a *ſcire facias*, a *defence* is never made. 3 *Lev.* 182.

See further titles *Pleading*; *Abatement*, *&c.*

DEFEND, *defendere.*] In our ancient laws and ſtatutes ſignifies to forbid; and there is a ſtatute intitled, *Statutum de* defenſione *portandi arma &c.* 7 *Ed.* 1. In divers parts of *England* we commonly ſay, *God defend*, inſtead of *God forbid. Blount.*

DEFENDANT, *defendens.*] The party that is ſued in a *perſonal action*; as *tenant* is he that is ſued in an *action real.*

DEFENDEMUS, An ordinary word uſed in grants and donations; and hath this force, that it binds the donor and his heirs to defend the donee, if any one go about to lay any incumbrance on the thing given, other than what is contained in the deed of donation. *Bract. lib.* 2. *c.* 16. See title *Warranty.*

DEFENDER OF THE FAITH, *fidei defenſor.*] A peculiar title belonging to the *King of England*, as *Catholick*, to the *King of Spain*; and Moſt *Chriſtian* to the *King of France*, *&c.* Theſe titles were given by the *Popes of Rome*; and that of *Defenſor Fidei* was firſt conferred by *Pope Leo* the Tenth on King *Henry* the Eighth, for writing againſt *Martin Luther*, and the bull for it bears date *quinto Idus Octob.* 1521. Lord *Herbert's Hiſt. Hen.* VIII. 105. But the Pope, on King *Henry's* ſuppreſſing the houſes of religion, at the time of the *Reformation*, futilely ſentenced him to be deprived of his title, and depoſed from his crown; though in the 35th year of his reign this title, *&c.* was confirmed by parliament; which hath continued to be uſed by all ſucceeding Kings to this day. *Lex Conſtitutionis*, 47, 48.

DEFENDERE SE *per Corpus ſuum*, To offer duel or combat as a legal trial and appeal. *Bract. lib.* 3. *cap.* 26. See title *Battel.*

DEFENDERE UNICA MANU. Words ſignifying to wage law, and a denial of the accuſation upon oath. See *Manus*, *Wager of Law.*

DEFENSA. A park or place fenced in for deer, and *defended* as a property for that uſe and ſervice. *H. Knighton*, *ſub. ann.* 1352.

DEFENSIVA,

DEFENSIVA, A Lord or *Earl*, of the *Marches*; who were the wardens or *defenders* of their country. *Cowel.*

DEFENSO. That part of any open field or place that was allotted for corn and hay, and upon which there was no common or feeding, was anciently ſaid to be *in defenſo*: ſo of any meadow ground, that was laid in for hay only. It was likewiſe the ſame of a wood, where part was incloſed and fenced up, to ſecure the growth of the underwood from the injury of cattle. *Mon Angl. Tom.* 3. *p.* 306.—*Cowel.*

DEFENSUM, An incloſure of land, or any fenced ground. *Mon. Angl. Tom.* 2. *p.* 114.

DEFORCEMENT. *Deforciamentum.*] A ſpecies of injury by ouſter or privation of the freehold, where the entry of the preſent tenant or poſſeſſor was originally lawful, but his detainer is now become unlawful. 3 *Comm.* 172.

For that at firſt the with-holding was with *force* and violence, it was called a *deforcement* of the lands or tenements: but now it is generally extended to all kind of wrongful with-holding of lands or tenements from the right owner.—There is a writ called a *quod ei deforciat*, which lieth where tenant in tail, or tenant for life, loſeth by default, by the *Stat. Weſtm.* 2. *c.* 4, he ſhall have a *quod ei deforciat* againſt the recoveror; and yet he cometh in by courſe of law. 1 *Inſt.* 331, *b.* See title *Quod ei deforceat*—and as to entries with actual force, tit. *Forcible Entry.*

Deforcement in its moſt extenſive ſenſe, is *nomen generaliſſimum* ſignifying the holding of any lands or tenement to which another perſon hath a right. *Co. Litt.* 277. So that this includes as well an *abatement*, an *intruſion*, a *diſſeiſin*, or a *diſcontinuance*, as any other ſpecies of wrong whatſoever, whereby he that hath right to the freehold is kept out of poſſeſſion. But, as contradiſtinguiſhed from theſe, it is only ſuch a detainer of the freehold, from him that hath the right of property, but never had any poſſeſſion under that right, as falls not within any of thoſe terms. As in caſe where a lord has a ſeignory, and lands eſcheat to him *propter defectum ſanguinis*, but the ſeiſin of the lands is with-held from him; here the injury is not *abatement*, for the right veſts not in the lord as heir or deviſee; nor is it *intruſion*, for it veſts not in him who hath the remainder or reverſion; nor is it *diſſeiſin*, for the lord was never ſeiſed; nor does it at all bear the nature of any ſpecies of *diſcontinuance*; but being neither of theſe four, it is therefore a *deforcement*. *F. N. B.* 143. If a man marries a woman, and during the coverture is ſeiſed of lands, and aliens, and dies; is diſſeiſed, and dies; or dies in poſſeſſion: and the *alienee*, diſſeiſor, or heir, enters on the tenements, and doth not aſſign the widow her dower; this is alſo a Deforcement to the widow, by with-holding lands to which ſhe hath a right. *F. N. B.* 147. In like manner, if a man leaſe lands to another for term of years, or for the life of a third perſon, and the term expires by ſurrender, efflux of time, or death of the *ceſtuy que vie*; and the leſſee or any ſtranger, who, was at the expiration of the term in poſſeſſion, holds over, and refuſes to deliver the poſſeſſion to him in remainder, or reverſion, this is likewiſe a Deforcement. *Finch L.* 263: *F. N. B.* 201, 5, 6, 7.

Deforcements may alſo ariſe upon the breach of condition in law; as if a woman gives lands to a man by deed, to the intent that he marry her, and he will not when thereunto required, but continues to hold the lands: this is ſuch a fraud on the man's part, that the law will not allow it to deveſt the woman's right of poſſeſſion, though his entry being lawful, it does deveſt the actual poſſeſſion, and thereby becomes a Deforcement. *F. N. B.* 205.

Deforcements may alſo be grounded on the diſability of the party deforced: as if an infant do make an alienation of his lands, and the alienee enters and keeps poſſeſſion; now, as the alienation is voidable, this poſſeſſion as againſt the infant (or, in caſe of his deceaſe, as againſt his heir) is after avoidance wrongful, and therefore a Deforcement. *Finch L.* 264: *F. N. B.* 192. The ſame happens, when one of non-ſane memory aliens his lands or tenements, and the alienee enters and takes poſſeſſion, this may alſo be a Deforcement. *Finch L.* 264: *F. N. B.* 202.

Another ſpecies of Deforcement is, where two perſons have the ſame title to land, and one of them enters and keeps poſſeſſion againſt the other, as where the anceſtor dies ſeiſed of an eſtate in fee-ſimple, which deſcends to two ſiſters as coparceners, and one of them enters before the other, and will not ſuffer her ſiſter to enter and enjoy her moiety; this is alſo a *Deforcement*. *Finch L.* 293, 4: *F. N. B.* 197.

Deforcement may alſo be grounded on the non-performance of a covenant real; as if a man ſeiſed of lands, covenants to convey them to another, and neglects or refuſes ſo to do, but continues poſſeſſion againſt him; this poſſeſſion being wrongful, is a Deforcement. *F. N. B.* 146. In levying a fine of lands, the perſon, againſt whom the fictitious action is brought, upon a ſuppoſed breach of covenant, is called the *deforciant*. And, laſtly, by way of analogy, keeping a man by any means out of a freehold Office is conſtrued to be a Deforcement; though, being an incorporeal hereditament the deforciant has no corporal poſſeſſion. So that whatever injurious with-holding the poſſeſſion of a freehold is not included under *abatement*, *intruſion*, *diſſeiſin*, or *diſcontinuance*, (See thoſe titles) is compriſed under *Deforcement*. 3 *Comm.* 172, 4.

DEFORCEOR, *deforciator*, from the French *forceur*, *expugnator*.] One that overcometh, and caſteth out by *force*. *Britton, cap.* 53: *Old Nat. Brev. fol.* 118: *Bract. lib.* 4. *cap.* 1. See title *Deforcement*.

DEFORCIANT, Mentioned in the *Stat.* 23 *El. c.* 3. is the ſame with a *deforceor*. See title *Deforcement*.

DEFORCIATIO, Is uſed for a diſtreſs, or holding of goods for ſatisfaction of a debt. *Paroch. Antiq.* 293.

DEGRADATION, *degradatio.*] An eccleſiaſtical cenſure, whereby a clergyman is diveſted of his holy orders. There are two ſorts of *degrading*, by the *Canon law*; one *ſummary*, by word only; the other *ſolemn*, by ſtripping the party *degraded* of thoſe ornaments and rights which are the enſigns of his order or degree. *Selden's Titles of Hon.* 787.

Degradation is otherwiſe called *depoſition*; and in former times the *degrading* of a clerk was no more than a diſplacing or ſuſpenſion from his office: but the *Canoniſts* have ſince diſtinguiſhed between a depoſition and a *degradation*; the one being now uſed as a greater puniſhment than the other, becauſe the biſhop takes from the criminal all the badges of his order, and afterwards delivers him to the ſecular judge, where he cannot purge himſelf of the offence whereof he is convicted, *&c.*

There

There is likewiſe a *degradation* of a *Lord*, or a *Knight*, &c. at *Common law*; when they are attainted of treaſon; as *Hil.* 18 *Ed.* 2. *Andrew Harcla*, *Earl of Carliſle*, who was alſo a Knight, was *degraded*, and when judgment of treaſon was pronounced againſt him, his ſword was broken over his head, and his ſpurs hewn of his heels, &c. And there is a *degrading* by *act of parliament*; for by *Stat.* 13 *Car.* 2. *cap.* 16, *William* Lord *Monſon*, Sir *Henry Mildmay*, and others, were *degraded* from all titles of honour, dignities, and preheminences, and none of them to bear or uſe the title of Lord, Knight, Eſquire, or Gentleman, or any coat of arms for ever after. See title *Peers*.

DEHORS, Fr. *without*.] A word uſed in ancient pleading, when a thing is *without* the land, &c. or *out of* the point in queſtion. Vide *Hors de ſon fee*.

DE INJURIA SUA PROPRIA, *abſque tali cauſa*, Are words uſed in replications, in actions of treſpaſs. 1 *Lil. Abr.* 427. When one juſtifies by command or authority derived from another, or if a defendant juſtifies by authority at Common law, as a conſtable by arreſt for breach of the peace; or if he juſtifies by act of parliament, &c. the plaintiff may reply, that he did it *of his own wrong, without any ſuch cauſe as the defendant has alleged*. *Cro. Eliz.* 539: 2 *Salk.* 628. See and this Dict. titles *Treſpaſs*; *Pleading*.

DEI JUDICIUM. The old *Saxon* trial by *ordeal* was ſo called: becauſe they thought it an *appeal to God*, for the juſtice of a cauſe, and verily believed that the deciſion was according to the will and pleaſure of Divine Providence. *Domeſd.* See title *Ordeal*.

DEIS. The high table of a monaſtry. See *Dagus*.

DELATURA, *Saxon*.] An accuſation: and ſometimes it hath been taken for the reward of an informer. *Leges H.* 1. *c.* 46: *Leges Inæ* 20, *apud Brompton*.

DEL CREDERE. A commiſſion *del credere* is an undertaking by an inſurance-broker, for an additional premium, to inſure his principal againſt the contingency of the failure of the under-writer. See *Grove & al*ª v. *Dubois*, 1 *Term Rep.* 112.

DELEGATES, Commiſſioners of appeal appointed by the King under the Great Seal, in caſes of appeals from the Eccleſiaſtical Court, &c. by *Stat.* 25 *Hen.* 8. *c.* 19. See title *Court-Eccleſiaſtical*, 6.

DELF. From the Sax. *delfan*, to dig, or delve.] A quarry or mine, where ſtone or coal, &c. are dug. *Stat.* 31 *Eliz.* 7. The word *delve* for dig, is ſtill retained in ſome parts of this kingdom.

DELIVERANCE. When a criminal is brought to trial, and the clerk in court aſks him whether he is *Guilty*, or *Not guilty*, to which he replies Not guilty, and puts himſelf on God and his country, the clerk wiſhes him a *good deliverance*.

DELIVERY OF DEEDS, See titles *Date*; *Deed*.

DEMAND, Fr. *demande*, Lat. *poſtulatum*.] A calling upon a man for any thing due. There are two manner of *demands*, the one in *deed*, the other in *law*: in deed, as in a *precipe quod reddat*, there is an expreſs *demand*. Every entry on land, diſtreſs for rent, taking of goods, &c. which may be done without words, is a *demand* in law. 8 *Rep.* 153.

It is alſo ſaid there are three ſorts of *demands*: writing without ſpeaking, that is [illegible] one without writing [illegible] for [illegible]

made without either word or writing, which is a *demand* in law, in caſes of entries on lands, &c. As an entry on land, and taking a diſtreſs, are a *demand* in law of the land and rent, ſo the bringing an action of debt for money due on an obligation is a *demand* in law of the debt. 1 *Lill.* 432: 1 *Nelſ. Abr.* Debts, claims, &c. are to be *demanded* and made in time, by the ſtatute of Limitations, 21 *Jac.* 1. *c.* 16, and other ſtatutes; or they will be loſt by law. See title *Limitation of Actions*.

Where there is a duty, which the law makes payable on *demand*, no *demand* need be made; but if there is no duty till *demand*, in ſuch caſe there muſt be a *demand*, to make the duty. 1 *Lil.* 432: *Cro. Eliz.* 548. Upon a penalty the party need not make a *demand*, as he muſt in the caſe of a *nomine pœnæ*; for if a man be bound to pay 20 *l.* on ſuch a day, and in default thereof to pay 40 *l.* the 40 *l.* muſt be paid without demand. 1 *Mod.* 89. If a man leaſes land by indenture for years, reſerving a rent payable at certain days, and the leſſee covenants to pay the ſaid rent at the days limited; the leſſor is intitled to his rent, without *demand*, for the leſſee is obliged to pay it at the days, by force of his covenant. 2 *Danv. Abr.* 101. But if a leſſor makes a leaſe rendering rent, and the leſſee covenant to pay the rent, being lawfully *demanded*, the leſſee is not bound to pay the rent, without a *demand*, *Ibid.* 102.

A perſon makes a leaſe for life, or years, reſerving a rent upon condition, that if the leſſee doth not pay the rent at the day, that then without any *demand* it ſhall be lawful for the leſſor to re-enter; by this ſpecial agreement of the parties, the leſſor may enter on non-payment of the rent, without any *demand*. 2 *Danv. Abr.* 100. A leaſe for years, with condition to be void, on non-payment of the rent, is not void unleſs the rent be *demanded*; and an intereſt ſhall not be determined, without an actual *demand*. *Hob.* 67, 331: 2 *Mod.* 264. But now by the ſtatutes relative to rents an ejectment may be maintained without an actual entry. See *Stats.* 4 *Geo.* 2. *c.* 28. § 2: 11 *Geo* 2. *c.* 19. § 16: and this Dict. titles *Ejectment*; *Leaſe*; *Rent*.

A *demand* is to be legal, and made in ſuch manner as the law requires: if it be for rent of a meſſuage and lands, it ought to be made at the meſſuage, at the fore door of the houſe, the moſt notorious place: where lands and woods are let together, the rent is to be *demanded* on the land, as the moſt worthy thing, and on the moſt public part thereof: if wood only be leaſed, the *demand* muſt be made at the gate of the wood, &c. 1 *Inſt.* 201: *Poph.* 58: Vide *Dyer* 51: 1 *Leon.* 425: *Cro. Eliz.* 209.

He that would *enter* for a condition broken, which tends to the deſtruction of an eſtate, muſt,—1. *Demand* the rent.—2. Upon the land, if there is no houſe.—3. If there is a houſe, at the fore door; though it is not material whether any perſon be in the houſe or no.—4. If the appointment is at any other place off the land, the *demand* muſt be at that place.—5. The time of the *demand* is to be certain, that the tenant may be there, if he will, to pay the rent: and the laſt time of *demand* [illegible] ent, muſt be ſuch a convenient time before the [illegible] ſetting of the laſt day of payment, as the money [illegible] be numbered. The leſſor or his ſufficient atterney [illegible] upon the land, the laſt day on which the [illegible] to ſuch that he cannot,

cannot ſee to tell the money: and if the money thus *demanded* is not paid, this is a denial in law, though there are no words of denial; upon which a re-entry may be made, *&c.* 1 *Inſt.* 201, 202: 4 *Rep.* 73.—See further title *Entry*. As to demand of lands, See title *Fine*.

As a releaſe of *ſuits* is more large than of quarrels or actions; ſo a releaſe of *demands* is more large and beneficial than either of them. By a releaſe of all *demands*, all executions, and all freeholds, and inheritances, executory, are releaſed: by a releaſe of *demands* to the diſſeiſor, the right of entry in the land, and all that is contained therein, is releaſed. And he that releaſeth all *demands*, excludes himſelf from all actions, entries, and ſeizures; but a releaſe of all *demands*, is no bar in a writ of error to reverſe an outlawry. 8 *Co.* 153, 154.—See title *Releaſe*.

DEMANDANT, *petens.*] All civil actions are proſecuted either by *demands* or *plaints*, and the purſuer is called *demandant*, in actions real; and *plaintiff*, in perſonal actions: in a real action, lands, *&c.* are *demanded*. *Co. Lit.* 127.

DEMEINE, DEMAIN, DEMESNE, Fr.—Lat. *dominicum*, *domanium*; alſo written *domaine*, and ſignifieth *patrimonium domini.*] *Demains* according to common ſpeech, are the lord's chief manor-place, with the lands thereto belonging; *terræ dominicales*, which he and his anceſtors have from time to time kept in their own manual occupation, for the maintenance of themſelves and their families: and all the parts of a manor, except what is in the hands of freeholders, are ſaid to be *demains*. Copyhold lands have been accounted *demains*, becauſe they that are the tenants hereof are judged in law to have no other eſtate but at the will of the lord; ſo that it is ſtill reputed to be, in a manner, in the lord's hands: but this word is oftentimes uſed for a diſtinction between thoſe lands that the lord of the manor hath in his own hands, or in the hands of his leſſee demiſed at a rack-rent, and ſuch other land appertaining to the manor, which belongeth to free or copy-holders. *Bract. lib.* 4. *tract.* 3. *c.* 9: *Fleta, lib.* 5. *cap.* 5. As *demains* are lands in the lord's hands manually occupied, ſome have thought this word derived from *de manu*; but it is from the Fr. *demaine*, which is uſed for an inheritance, and that comes from *dominium*, becauſe a man has a more abſolute dominion over that which he keeps in his hands, than of that which he lets to his tenants. *Blount*.

Domanium properly ſignifies the King's lands in *France*, appertaining to him in property: and in like manner do we in ſome ſort uſe it here in *England*; for all lands, it is ſaid, are either mediately or immediately held of the Crown; and when a man in pleading would ſignify his land to be his own, he ſaith, that he is ſeiſed thereof in his *demain*, (or rather *demeſne*) *as of fee*; whereby is meant, that although his land be to him and his heirs, it depends upon a ſuperior lord, and is held by rent or ſervice, *&c. Lit. lib.* 1. *cap.* 1. From this it hath been obſerved, that lands in the hands of a common perſon cannot be *true demeſnes*: and certain it is, that lands in the poſſeſſion of a ſubject, are called *demains* in a different ſenſe from the *demain* lands of the Crown. For *demains*, or *domains*, in the hands of a ſubject, have their derivation *à domo*, becauſe they are lands in his poſſeſſion for the maintaining of his houſe: but the *domains* of the Crown are held of the King, who is abſolute lord, having proper *dominion*; and not by any feudal tenure of a ſuperior lord, as of fee. *Wood's Inſt.* 139.

Demain is ſometimes taken in a *ſpecial* ſignification, as oppoſite to frank-fee: for example, Thoſe lands which were in the poſſeſſion of *King Edward the Confeſſor* are called *ancient demains*, or *ancient demeſne*, and all others *frank-free*; and the tenants which hold any of thoſe lands are called *tenants in ancient demain*, or *ancient demeſne*, and the others *tenants in frank-fee*, *&c. Kitch.* 98. See title *Ancient Demeſne*.

DEMISE, *demiſſio.*] Is applied to an eſtate either in fee, for term of life, or years, but moſt commonly the latter: it is uſed in writs for any eſtate. 2 *Inſt.* 483. The word *demiſi*, in a leaſe for years, implies a warranty to the leſſee and his aſſignee; and upon this word action of covenant lies againſt the heir of the leſſor, if he ouſt the leſſee: it binds the executors of the leſſor, who has fee-ſimple, or fee-tail, where any leſſee is evicted, and the executor hath aſſets; but not the leſſor for life's executors, without expreſs words, that the leſſee ſhall hold his whole term. *Dyer* 257: *Jenk. Cent.* 35.—See titles *Leaſe*; *Covenant*.

The King's death is in law termed, the *demiſe of the King*, to his royal ſucceſſor, of his crown and dignity, *&c.* See *King*.

DEMISE AND REDEMISE, The conveyance by *demiſe* and *redemiſe* is where there are mutual *leaſes* made from one to another on each ſide, of the ſame land, or ſomething out of it; and is proper upon the grant of a rent-charge, *&c.*

DEMURRER, from the Lat. *demorare*, Fr. *demeurer.*] A pauſe or ſtop, put to any action upon a point of difficulty, which muſt be determined by the Court, before any farther proceedings can be had therein: for in every action the point of controverſy conſiſts either in *fact* or in *law*; if in *fact*, that is tried by the *jury*; but if in *law*, that is determined by the Court.

A *demurrer* therefore, is an iſſue upon matter of law. It confeſſes the facts to be true, as ſtated by the oppoſite party; but denies that by the law ariſing upon thoſe facts, any injury is done to the plaintiff; or that the defendant has made out a lawful excuſe; according to the party which firſt demurs, (*demoratur, moratur in lege,*) reſts or abides in law upon the point in queſtion. As, if the matter of the declaration be inſufficient in law, (as by not aſſigning any ſufficient treſpaſs, *&c.*) then the defendant demurs to the declaration.—If on the other hand the defendant's excuſe or plea be invalid, (as if he pleads that he committed the treſpaſs by authority from a ſtranger, without making out the ſtranger's right,) here the plaintiff may demur to the plea: and ſo in every other part of the proceedings.

The form of ſuch demurrer is by averring the declaration or plea, the replication or rejoinder, to be inſufficient in law to maintain the action or the defence; and therefore praying judgment for want of ſufficient matter alledged. Sometimes demurrers are merely for want of ſufficient *form* in the writ or declaration. But in caſe of exception to the form or manner of pleading, the party demurring, muſt by *Stats.* 27 *Eliz. c.* 5: 4 & 5 *An. c.* 16, ſet forth the *cauſes* of his demurrer. See titles *Amendment*, *Pleading*.—And upon either a *general* or ſuch *ſpecial* demurrer, the oppoſite party muſt aver it to be ſufficient, which is called a joinder in demurrer; and then the

the parties are at iſſue in point of law; which iſſue, as above mentioned, the judges of the court before which the action is brought muſt determine. 3 *Comm.* 314: *Finch L. lib.* 4. *c.* 40: 1 *Inſt.* 71.

A *demurrer* may be to the writ, (*i. e.* the original, where the proceedings are by original,) to the count, or declaration, or to any part of the pleadings.

A demurrer is admitting the matter of fact, ſince it *refers the law ariſing on the fact, to the judgment of the Court*; and therefore the fact is taken to be true on ſuch *demurrer*, or otherwiſe the Court has no foundation on which to make any judgment. *Gilb. Hiſt. of C. P.* 55.

As a demurrer *at Common law did confeſs all matters formally pleaded*; ſo now by *the ſtatutes a* general *demurrer does confeſs all matters pleaded, though informally. Hob.* 233. But a *ſpecial demurrer* admits only facts *well* pleaded.

Demurrers are *general*, without ſhewing any particular cauſes; or *ſpecial*, where the cauſes of *demurrer* are particularly ſet down: and the judgment of the court is not to be prayed upon an inſufficient declaration or plea, otherwiſe than by a *demurrer*; when the matter comes judicially before the court. If in pleadings, &c. a matter is inſufficiently alledged, that the court cannot give certain judgment upon it, a general *demurrer* will ſuffice; and for want of ſubſtance, a general *demurrer* is good: but for want of form, there muſt be a ſpecial *demurrer*, and the cauſes ſpecially aſſigned. The practice is now, on a ſpecial *demurrer*, to take advantage of any real error, though not expreſſed, in the cauſes aſſigned.

A man who demurs generally, ſhall take advantage of all matters which are requiſite to ſhew a good right or title in the plaintiff. *Plowd. Com.* 66 *a*: *Hob.* 301.

If a man demurs for form, he muſt ſhew ſpecially the cauſes of demurrer. 2 *Rol.* 330: *Stats. ubi ſupra*: *R. M.* 1654. § 17.

If there be a general demurrer to the declaration, the plaintiff may apply to a judge for a ſummons for leave to amend; if not, he may proceed to join in demurrer, and make up the demurrer-book himſelf, a copy of which he is to deliver to defendant's attorney, and if not paid for on demand, ſign judgment. *R. Tr.* 12 *W.* 3. In caſe of a demurrer to a plea, &c. by a plaintiff, the demurrer-book cannot be made up by the defendant, until default made by the plaintiff. *R. E.* 11 *W.* 3.

Demurrers likewiſe, are either in actions at law, or in ſuits in equity.

A Demurrer in Equity, is nearly of the ſame nature with a demurrer in law; being an appeal to the judgment of the court, whether the defendant ſhall be bound to anſwer the plaintiff's bill: as for want of ſufficient matter of equity therein contained: or where the plaintiff upon his own ſhewing appears to have no right; or where the bill ſeeks a diſcovery of a thing which may cauſe a forfeiture of any kind, or may convict a man of any criminal miſbehaviour. For any of theſe cauſes, a defendant may demur to a bill in equity; and if on demurrer the defendant prevails, the plaintiff's bill ſhall be diſmiſſed; if the demurrer be over-ruled, the defendant is ordered to anſwer. 3 *Comm.* 446.

It is allowed a good cauſe of *demurrer* in Chancery, that a bill is brought for *part of a matter only*, which is proper for one intire account, becauſe the plaintiff ſhall not *ſplit cauſes*, and make a multiplicity of ſuits. *Vern.* 29.

If an *original bill* be brought *for matters, part of which are in a former bill and decree, and part new, or by way of ſupplemental bill*; the court will, on a demurrer to ſo much as was contained in the former decree, ſend it to a maſter to ſee what was, and what was not in the firſt bill, and allow the *demurrer* accordingly. *Gilb. E. R.* 184. See further, title *Chancery*.

After the plaintiff and defendant have joined, iſſue in fact, which goes to the whole, neither of them can *demur*, without conſent of the other. But there may be a *demurrer* to evidence. Though now it is more uſual to take exceptions to evidence at the bar at *Niſi prius, ore tenus*, which is tantamount to a *demurrer*. If doubts ariſe, caſes are made, or points reſerved, and a verdict taken, ſubject to the opinion of the court. See *poſt.* title *Demurrer to Evidence*.

If a defendant pleads to part, and *demurs* to part; the *demurrer* ſhould firſt be determined, and the iſſue laſt; becauſe upon the trial of the iſſue, the jury may aſſeſs damages as to both. *Palm.* 517. Where there is a *demurrer* in part, and iſſue is joined upon the other part, and the plaintiff hath judgment on the *demurrer*; here he may enter a *Non-proſ.* as to the iſſue, and proceed to a writ of enquiry upon the *demurrer*: but otherwiſe he cannot have ſuch writ of inquiry. 1 *Salk.* 219: See 1 *Stra.* 532, 574.

If there be three counts in the declaration, to which there is a general demurrer; if any one of the counts be good, judgment muſt be for the plaintiff, if ſuch count can be joined with the other two. 1 *Wilſ.* 252.

A *demurrer* is to be ſigned, and argued on both ſides by counſel. After a *demurrer* is joined, the plaintiff having entered it on the roll, delivers the roll to the Secondary, and makes a motion for a *Conſilium* or day to argue it, which the court grants of courſe, on the Secondary's reading the record; then the *demurrer* muſt be entered by the plaintiff in the court-book with the Secondary, who, on his rule ſets down the day appointed for argument, at leaſt four days before the *demurrer* is argued: and paper-books, containing all the proceedings at length, which are afterwards entered on record, are made and delivered to the judges, two days before argument. See *Imp. K. B.*

The *demurrant* argues firſt, and the Court will hear but two counſel on a day, *viz.* one of a ſide; and, if deſired on either ſide, (unleſs the caſe be very plain,) the court will hear further arguments the next term. If the major part of the judges of the court cannot determine the matter on the *demurrer*, it is to be ſent into the Exchequer-chamber to be determined by all the judges of *England*. 1 *Inſt.* 71. Demurrers are now frequently put in for delay. In ſuch caſes, the party wiſhing to avoid the delay, makes up four demurrer-books, and delivers to the judges, two days before the day when judgment is moved for; which is given of courſe without argument.

When the Court gives judgment on *demurrer* in debt for the plaintiff in the action, the judgment is for the plaintiff to recover his debt, coſts and damages; but if it be in action on the caſe, a writ of inquiry of damages muſt be awarded, before the plaintiff can have *final* judgment. If judgment on the *demurrer* is for the defendant in the action, the judgment is, that the plaintiff take

nothing by his writ, bill, &c. and that the defendant go without day. *Wood's Inſt.* 603.

General *demurrer* being entered, it cannot be afterwards waved, without leave of the court, but a ſpecial *demurrer* generally may, unleſs the plaintiff hath loſt a term, or the aſſizes by the defendant's *demurring*. *Impey, K. B.*

DEMURRER TO EVIDENCE. This happens where a record or other matter is produced in evidence, concerning the legal conſequences of which there ariſes a doubt in law: in which caſe the adverſe party may, if he pleaſes, demur to the whole evidence; which admits the truth of every fact that has been alledged, but denies the ſufficiency of them all in point of law to maintain or overthrow the iſſue, as the caſe may be. 1 *Inſt.* 72: 5 *Rep.* 104. This draws the queſtion of law from the cognizance of the jury to be decided, *as it ought*, by the court, out of which the record is ſent. 3 *Comm.* 372.

So if the plaintiff brings witneſſes to prove a fact, and a matter of law ariſeth upon it; if the defendant admits their teſtimony to be true, there alſo the defendant may *demur* in law: and ſo may the plaintiff *demur* upon the defendant's evidence. And in theſe caſes, the counſel for the plaintiff and defendant agree the matter of fact in diſpute; and the jury are diſcharged; and the matter of law is referred to the judges to determine.

But where evidence is given for the King, in an information or other ſuit, and the defendant offers to *demur* upon it, the King's counſel *are not obliged* to join therein; but the Court ought to direct the jury to find the ſpecial matter. And, indeed, becauſe juries of late uſually find a doubtful matter ſpecially, *demurrers upon evidence* are now ſeldom uſed. See 5 *Rep.* 104: 1 *Inſt.* 72: 2 *Inſt.* 426.

If the Court doth not agree to a *demurrer to evidence* in a civil cauſe; they ought to ſeal a *bill of exceptions*, &c. 9 *Rep.* 13 —See title *Bill of Exceptions*.

DEMURRER TO INDICTMENTS. This is incident to criminal caſes, as well as civil, when the fact as alledged is allowed to be true, but the priſoner joins iſſue upon ſome point of law in the indictment; by which he inſiſts that the fact, as ſtated, is no felony, treaſon, or whatever the crime is alledged to be. Thus, for inſtance, if a man be indicted for *feloniouſly* ſtealing a greyhound, which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil treſpaſs to ſteal it: in this caſe the party indicted may demur to the indictment; denying it to be felony, though he confeſſes the act of taking it. Some have held, (2 *Hal. P. C.* 257,) that if on demurrer, the point of law be adjudged *againſt* the priſoner, he ſhall have judgement and execution, as if convicted by verdict. But this is denied by others; (2 *Hawk. P. C. c.* 32. § 5, 6;) who hold, that in ſuch caſe he ſhall be directed and received to plead the general iſſue, *Not guilty*, after a demurrer determined againſt him. Which appears the more reaſonable, becauſe it is clear, that if the priſoner freely diſcovers the fact in court, and refers to the opinion of the court, whether it be felony or no; and upon the fact thus ſhewn, it appears to be felony; the court will not record the confeſſion, but admit him afterwards to plead not guilty. 2 *Hal. P. C.* 225. And this ſeems to be a caſe of the ſame nature, being for the moſt part a miſtake in point of law, and in the conduct of his pleading; and though a man by miſ-pleading, may in ſome caſes loſe his property, yet the law will not ſuffer him by ſuch niceties to loſe his life. However, upon this doubt, demurrers to indictments are ſeldom uſed; ſince the ſame advantages may be taken upon a plea of Not guilty; or afterwards in arreſt of judgment, when the verdict has eſtabliſhed the fact. See *Smith* v. *Bowen*, *Mich.* 7 *An.* in which caſe the demurrer was continued on the record with a *ceſſet triatio exitûs*, &c. and after the demurrer was determined againſt the defendant, a *Venire* was awarded. See *Salk.* 59, 60: *Dyer* 38: 2 *Hawk. P. C. ubi ſuprà in n*: 4 *Comm.* 333, 4.

DEMY-SANGUE, Half-blood: where a man marries a woman, and hath iſſue by her a ſon, and the wife dying he marries another woman, by whom he hath alſo a ſon; now theſe two ſons, though they are called *brothers*, are but *brothers of the half-blood*, becauſe they had not both one father and mother: and therefore by law they cannot be heirs to one another; for he that claims freehold as heir to another by deſcent, muſt be of the whole blood to him from whom he claimeth. *Terms de Ley.*—See titles *Deſcent*, *Executor*.

DEN, from the Sax. *Den.* i. e. *Vallis*, *Locus Sylveſtris.*] The name of places ending in *den*, as *Biddenden*, &c. ſignify the ſituation to be in a valley, or near woods. *Blount.*

DEN AND STROND, Is a liberty for ſhips or veſſels to run or come aſhore: and King *Ed.* 1. by charter granted this privilege to the Barons of the *Cinque Ports*. *Placit. temp. Ed.* 1.

DENA TERRÆ, A hollow place between two hills; and the word *dena* is uſed for a little portion of woody ground, commonly called a coppice. *Domeſday.*

DENARII, A general term for any ſort of *pecunia numerata*, or ready money. *Paroch. Antiq.* 320.

DENARII DE CARITATE, Cuſtomary oblations made to *Cathedral Churches* about the time of *Penteceſt*, when the pariſh prieſts, and many of their people went in proceſſion to viſit their mother church: this cuſtom was afterwards changed into a ſettled due, and uſually charged upon the pariſh prieſt; though at firſt it was but a gift of *charity*, or preſent, to help to maintain and adorn the biſhop's ſee. *Cartular. Abbat. Glaſton. MS. f.* 15.

DENARIUS, An *Engliſh* penny: it is mentioned in the *Stat. Ed.* 1. *de compoſitione menſurarum*, &c.

DENARIUS DEI, God's penny, or *earneſt* money given and received by the parties to contracts, &c. *Cart. Ed.* 1. The earneſt money is called *Denarius Dei*, or *God's penny*, becauſe, in former times, the piece of money ſo given to bind the contract, was given to God, *i. e.* To the church, or the poor.

DENARIUS S. PETRI, An annual payment of one penny from every family to the *Pope*, during the time that the *Roman* Catholic religion prevailed in this kingdom, paid on the feaſt of St. *Peter*. See *Peter-Pence*.

DENARIUS TERTIUS COMITATUS. Of the *fines* and other profits of the *county-courts*, originally when thoſe courts had ſuperior juriſdiction before other courts were erected, two parts were reſerved to the King, and a *third part* or *penny* to the *Earl of the county*; who either received it in ſpecie at the aſſiſes and trials, or had an equivalent compoſition for it out of the *Exchequer*. *Paroch. Antiq.* 418.

DENBERA,

DENBERA, From the Sax. *Den*, a vale, and *berg*, a *barrow* or hog.] A place for the running and feeding of hogs, wherein they are penned; by ſome called a *Swine-comb*. *Cowel*.

DENIZEN, See title *Alien*.

DENSHIRING OF LAND, Is the caſting parings of earth, turf, and ſtubble into heaps, which when dried are burnt into aſhes, for a compoſt on poor barren land. This method of improvement is uſed on taking in and incloſing common and waſte ground; and in many parts of *England* is called *burn-beating*, but in *Staffordſhire* and other counties, they term it *denſhiring of land*.

DE NON DECIMANDO *Modus*. To be diſcharged of tithes. See *Modus Decimandi*.

DE NON RESIDENTIA CLERICI REGIS, An ancient writ where a perſon was employed in the King's ſervice, *&c.* to excuſe and diſcharge him of *non-reſidence*. 2 *Inſt*. 624.

DENTRIX, A fiſh with many teeth. *Chart. Hen.* 6. *Monaſt. Ramſey*.

DEODAND, *Deo dandum*.] By this is meant whatever perſonal chattel is the immediate occaſion of the death of any reaſonable creature: which is forfeited to the King to be applied to pious uſes, and diſtributed in alms by his high almoner, though formerly deſtined to a more ſuperſtitious purpoſe. 1 *H. P. C.* 419: *Fleta lib.* 1. *c.* 25.

It ſeems to have been originally deſigned as an expiation for the ſouls of ſuch as were ſnatched away by ſudden death; and for that purpoſe ought properly to have been given to Holy Church, in the ſame manner as the apparel of a ſtranger who was found dead, was applied to purchaſe maſſes for the good of his ſoul. And this may account for that rule of law, that no deodand is due, where an infant under the age of diſcretion is killed by a fall *from* a cart or horſe, or the like, not being in motion; whereas, if an adult perſon falls from thence, and is killed, the thing is certainly forfeited. 3 *Inſt*. 57: 1 *H. P. C.* 422. Such infant being preſumed incapable of actual ſin, and therefore not needing a deodand to purchaſe propitiatory maſſes. 1 *Comm*. 300.

Thus ſtands the law, if a perſon be killed by a fall from a thing ſtanding ſtill. But if a horſe, or ox, or other animal of his own motion, kill as well an infant, as an adult; or if a cart run over him, they ſhall in either caſe be forfeited as deodands; which is grounded upon this additional reaſon, that ſuch misfortunes are in part owing to the negligence of the owner; and therefore he is properly puniſhed by ſuch forfeiture. *Bract. l.* 3. *c.* 5.

Where a thing not in motion is the occaſion of a man's death, that part only which is the immediate cauſe is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a Deodand. 1 *H. P. C.* 422.—But wherever the thing is in motion, not only that part which immediately gives the wound (as the wheel which runs over his body,) but all things which move with it, and help to make the wound more dangerous, (as the cart and loading, which increaſe the preſſure of the wheel,) are forfeited. 1 *Hawk. P. C. c.* 26.

It matters not whether the owner of the thing moving to the death of a perſon were concerned in the killing or not: for if a man kills another with my ſword, the ſword is forfeited. *Dr. & Stud. d.* 2. *c.* 51. And therefore in all indictments for homicide, the inſtrument of death, and the value, are preſented and found by the Grand Jury; (as that the ſtroke was given by a certain penknife, value 6*d*.) that the King or his grantee may claim the Deodand. For it is no Deodand, unleſs it be preſented as ſuch by a jury of twelve men. 3 *Inſt*. 57: 5 *Rep*. 110: 1 *Inſt*. 144.

No Deodands are due for accidents happening upon the high ſea, that being out of the juriſdiction of the Common law: but if a man falls from a boat or ſhip in freſh water and is drowned, it hath been ſaid that the veſſel and cargo are in ſtrictneſs of law a Deodand. 3 *Inſt*. 58: 1 *H. P. C.* 423: *Moll. de Jur. Marit.* 2. 225.

Juries however have of late perhaps too frequently taken upon themſelves to mitigate theſe forfeitures, by finding only ſome trifling thing, or part of an entire thing to have been the occaſion of the death. But in ſuch caſes, although the finding by the jury be hardly warrantable by law, the court of *K. B.* hath generally refuſed to interfere on behalf of the Lord of the Franchiſe, to aſſiſt ſo unequitable a claim. *Foſt. on Homic.* 266.

Deodands, as well as other forfeitures in general, wrecks, treaſure-trove, *&c.* may be granted by the King to particular ſubjects as a Royal Franchiſe: and indeed they are for the moſt part granted out to the lords of manors or other liberties; to the perverſion of their original deſign. 1 *Comm*. 299. *& ſeq*.

If a man riding over a river, is thrown off his horſe by the violence of the water, and drowned, his horſe is not *Deodand*; for his death was cauſed *per curſum aquæ*. 2 *Co*. 483.

If a perſon wounded by any accident, as of a cart, horſe, *&c.* die within a year and a day after, what did it, is *Deodand*: ſo that if a horſe ſtrikes a man, and afterwards the owner ſells the horſe, and then the party that was ſtricken dies of the ſtroke, the horſe, notwithſtanding the ſale, ſhall be forfeited as *Deodand*. *Plowd.* 260: 5 *Rep*. 110.

Things fixed to the freehold; as a bell hanging in a ſteeple, a wheel of a mill, *&c.* unleſs ſevered from the freehold, cannot be *Deodands*. 2 *Inſt*. 281. And there is no forfeiture of a *Deodand*, till the matter is found of record, by the jury that finds the death; who ought alſo to find and appraiſe the *Deodand*. 5 *Rep*. 110: 1 *Inſt*. 144. After the coroner's inquiſition, the ſheriff is anſwerable for the value, where the *Deodand* belongs to the King; and he may levy the ſame on the town, *&c.* Wherefore the inqueſt ought to find the value of it. 1 *Hawk. P. C.*

Grants of *Deodands* how to be inrolled, 3 & 4 *W. & M. c.* 22. *ſect.* 1. The goods and chattels of *felo de ſe*, *&c.* were likewiſe anciently held to be Deodands, and are now forfeitable to the Crown. See title *Felo de ſe*. 1 *Lil*. 443.

DE ONERANDO PRO RATA PORTIONIS, A writ where a perſon is diſtrained for rent, that ought to be paid by others proportionably with him. *F. N. B.* 234. If a man hold twenty acres of land, by fealty and twenty ſhillings rent; and he aliens one acre to one perſon, and another acre to another, *&c.* the lord ſhall not diſtrain one alienee for the whole rent, but for the rate and value of the land he hath purchaſed, *&c.* And if he be diſtrained for more, he ſhall have this writ. *New Nat. Br.* 586.

DEPARTURE. A term of law properly applied to a defendant, who firſt pleading one thing in bar of an action, and being replied unto, in his rejoinder, quits that and ſhews another matter, contrary to, or not purſuing his firſt plea, which is called a *departure from his plea*: alſo where a plaintiff in his declaration ſets forth one thing, and after the defendant hath pleaded, the plaintiff in his replication ſhews new matter different from his declaration, this is a *departure*. *Plowd.* 7, 8: 2 *Inſt.* 147. But if a plaintiff in his replication *depart* from his count, and the defendant takes iſſue upon it; if it be found for the plaintiff, the defendant ſhall take no advantage of that *departure*: though it would have been otherwiſe, if he had demurred upon it. *Raym.* 86: 1 *Lil. Abr.* 444.

If a man plead a general agreement in bar, and in his rejoinder alledge a ſpecial one, this is a *departure* in pleading: and if an action is brought at Common law, and the plaintiff by his replication would maintain it by virtue of a cuſtom, &c. it hath been held a *departure*. 1 *Nelſ. Abr.* 638. Where a matter is omitted at firſt, it is a *departure* to plead it afterwards. *Ibid.* If in covenant, the defendant pleads performance; and after rejoins that the plaintiff ouſted him, it is a *departure* from his plea. *Raym.* 22. In debt upon bond for performance of covenants in a leaſe, the defendant pleaded performance; and afterwards in his rejoinder ſet forth that ſo much was paid in money, and ſo much in taxes, &c. upon demurrer, it was adjudged a *departure* from the plea; becauſe he had pleaded performance, and afterwards ſet forth other matter of excuſe, &c. 1 *Salk.* 221.

Debt upon bond for performance of an award, made for payment of money; if the defendant plead performance, and the plaintiff having replied and aſſigned a breach of non-payment, &c. the defendant rejoins that he is ready to pay the money at the day, &c. this is a *departure* from his plea; for performance is payment of the money; and payment, and ready to pay, are different iſſues. *Sid.* 10: 4 *Leon.* 79. In debt upon bond for non-performance of an award; the defendant pleads that the award was, that he ſhould releaſe all ſuits to the plaintiff, which he had done; the plaintiff replies that ſuch an award was made, but that the award was further, that the defendant ſhould pay to the plaintiff ſuch a ſum, &c. the defendant rejoins that true it is, that by the award he was to pay the plaintiff the ſaid ſum, but that the award was alſo, that the plaintiff ſhould releaſe to the defendant all actions, &c. which he had not done; on demurrer this was held a *departure* from the plea, being all new matter. 2 *Bulſt.* 39: *Godb.* 155: 1 *Nelſ.* 637. After *nullum fecerunt arbitrium*, the defendant cannot plead that the award is void, without being a *departure* from the former plea: and if where *nul tiel agard* is pleaded, then the award is ſet forth, and a joinder that it was not tendered, it is a *departure*. 1 *Lev.* 133: *Lut.* 385.

A *departure* muſt be always from ſomething that is *material*; or it will not be allowed: if in treſpaſs for taking goods, the plaintiff reply, that after the taking, the defendant converted them to his own uſe, this being an abuſe, makes a treſpaſs; and the converſion is either trover or treſpaſs at the plaintiff's election, ſo that by his replication he may make it treſpaſs, and be no *departure*. 1 *Salk.* 221, 222. In *circumſtances* of *time*, &c. laid as to promiſes, the plaintiff is not tied to a preciſe day; for if the defendant by his plea, force the plaintiff to vary, it is no *departure* from his declaration. 1 *Nelſ.* 640, 641. And if another *place* be mentioned in the replication, in action of debt; as this is a perſonal thing, it is no *departure*, becauſe he who is indebted to another in one place, is ſo in every place. *Sid.* 228.

If new matter which explains or fortifies the *bar* be *rejoined* by the defendant, it is not a *departure*. 1 *Wilſ.* 8; 97, 8: *Co. Lit.* 304 *a*.

A *departure* being a denial of what is before admitted, is a ſaying and un-ſaying, and for that an iſſue cannot be joined upon it, it is bad for the incertainty. 1 *Lil.* 444. See further titles *Pleading*: *Novel Aſſignment*: *Treſpaſs*.

DEPARTURE IN DESPITE OF THE COURT, and entry of it. See title *Default*.

DEPARTURE OF GOLD AND SILVER, The *parting* or dividing of thoſe *metals*, from others that are coarſer. See *Stat.* 4 *H.* 7.

DEPOPULATIO AGRORUM, Deſtroying and ravaging a country; an offence where the benefit of clergy was denied at common law. 2 *Hal. Pl.* 333. See title *Clergy, benefit of*.

DEPOPULATION, *Depopulatio.*] Is a waſting or deſtruction; a deſolation or unpeopling of any place, by fire, ſword, peſtilence, &c. 12 *Rep.* 30.

DEPOPULATORES AGRORUM, Theſe were great offenders, by the ancient common law; ſo called, becauſe by proſtrating and ruining of houſes for habitation of the King's people, they, as it were, *depopulated* towns and villages, leaving them without inhabitants. See *Stat.* 4 *Hen.* 3. *c.* 2: 3 *Inſt.* 204. and title *Clergy, benefit of*.

DEPOSITION, *Depoſitio.*] The teſtimony of a witneſs, otherwiſe called a *deponent*, put down in writing by way of anſwer to interrogatories exhibited for that purpoſe, in *Chancery*, &c. Proof in the High Court of *Chancery* is by *depoſitions* of witneſſes; and the copies of ſuch regularly taken and publiſhed, are read as evidence at the hearing. For the purpoſes of examining witneſſes in or near *London* there is an examiner's office appointed: but for ſuch as live in the county, a commiſſion to examine witneſſes is uſually granted to four commiſſioners, two named of each ſide, or any three or two of them to take the depoſitions there. And if the witneſſes reſide beyond ſea, a commiſſion may be had to examine them there, upon their own oaths; and, if foreigners, upon the oaths of two ſkilful interpreters. And it hath been eſtabliſhed that the depoſition of an Heathen who believes in the Supreme Being taken by commiſſion in the moſt ſolemn manner according to the cuſtom of his own country may be read in evidence. 1 *Atk.* 21.—The commiſſioners are ſworn to take the examinations truly and without partiality, and not to divulge them till publiſhed in the Court of Chancery; and their clerks are alſo ſworn to ſecrecy. The witneſſes are compellable by proceſs of *ſubpœna*, as in the courts of Common law, to appear and ſubmit to examination. And when their depoſitions are taken they are tranſmitted to the court with the ſame care that the anſwer of a defendant is ſent. 3 *Comm.* 449.

After a witneſs is fully examined, the examinations are *read over* to him, and the witneſs is at *liberty to alter*, or amend any thing; after which he *ſigns them*, and then, and not before, the examinations are complete, and *good evidence*. 1 *P. Wms.* 415. The ſame practice prevails in the *Commons*, in *Eccleſiaſtical* cauſes.

Where

Where a witneſs was examined in a cauſe in Chancery, and, *before ſigning his examination died*, the Maſter of the Rolls, upon adviſing with the Maſter in Chancery then in court, denied the making uſe of the *depoſitions*, as being not perfect. 1 *P. Wms.* 414.

But where, *after an order for publication, defendant examined* a witneſs, and then perceiving the irregularity (it being after publication) the defendant on the *uſual affidavit* by himſelf, his clerk in court, and ſolicitor, *that they had not ſeen, nor would ſee any of the depoſitions, got an order to re-examine* this witneſs; but before re-examination the witneſs died; upon affidavit of this, Ld. Ch. *Parker* ordered that the defendant might make uſe of the *depoſitions*, the re-examination being prevented by the act of God. 1 *P. Wms.* 415.

Depoſitions in the *Chancery* after a cauſe is determined, may be given in evidence in a trial at bar in *B. R.* in a ſuit for the ſame matter, between the ſame parties, if the party that *depoſed* be dead; but not otherwiſe, for if he be living, he muſt appear in perſon in court to be examined, &c. 1 *Lil. Abr.* 445.

See further as to the admiſſion of written depoſitions in evidence at Common law. *Bull. N. P.* 229, 239–242, and this Dict. title *Evidence*.

Depoſitions of informers, &c. taken upon oath before a coroner, upon an inquiſition of death; or before juſtices of peace on a commitment or bailment of felony, may be given in evidence at a trial for the ſame felony; if it be proved on oath that the informer is dead, or unable to travel, or kept away by the procurement of the priſoner; and oath muſt be made that the *depoſitions* are the ſame that were ſworn before the coroner or juſtice, without any alteration. 2 *Hawk. P. C.*

Depoſitions taken before a coroner, cannot be given in evidence upon an appeal for the ſame death; becauſe it is a different proſecution from that wherein they were taken: And it has been adjudged, That the evidence given by a witneſs at one trial, could not, in the ordinary courſe of juſtice, be made uſe of againſt a criminal, on the death of ſuch witneſs, at another trial. 2 *H. P. C.*

The examinations of witneſſes abroad, and of ſuch as are aged or going abroad *ae bene eſſe*, to be read in evidence, if the trial ſhould be deferred till after their death or departure, are now very frequently effected by mutual conſent in trials at Common law, if the parties are open and candid: and this may alſo be done indirectly at any time, through the channel of a Court of Equity: but ſuch a practice has never yet been adopted directly as a rule of a court of law. Yet where the cauſe of action ariſes in *India*, and a ſuit is brought thereupon in any of the courts of *Weſtminſter*, the Court may iſſue a commiſſion to examine witneſſes upon the ſpot, and tranſmit the depoſitions to *England*. *Stat.* 13 *Geo.* 3. *c.* 63.

DEPOSITION is uſed in the law in another ſenſe, *viz.* To ſignify the depriving a perſon of ſome dignity, See titles *Degradation*; *Deprivation*.

Depoſition is alſo taken for *death*; and *dies depoſitionis*, the day of one's death. *Litt. Dict.*

DEPRIVATION, *Deprivatio.*] A depriving or taking away; as when a biſhop, parſon, vicar, &c. is depoſed from his preferment. Of *deprivations* there are two ſorts, *deprivatio à beneficio*, and *ab officio*; the *deprivation à beneficio* is when for ſome great crime, &c. a miniſter is wholly *deprived* of his living: And *deprivation ab officio* is where a miniſter is for ever *deprived* of his orders, which is alſo called *depoſition* or *degradation*; and is commonly for ſome heinous offence meriting death, and performed by the biſhop in a ſolemn manner. *Blount.* See *Degradation*.

Deprivatio à beneficio is an act of the Spiritual Court, grounded upon ſome crime or defect in the perſon *deprived* by which he is diſcharged from his ſpiritual promotion or benefice, upon ſufficient cauſe proved againſt him. 1 *Nelſ. Abr.* 641.

Deprivation may alſo be by a particular clauſe in ſome act of parliament: the *deprivation* of biſhops, &c. is declared lawful by ſtatute 39 *Eliz. c.* 8. And by the King's commiſſion, as he hath the ſupremacy lodged in him, a biſhop may be *deprived*: for ſince a biſhop is veſted with that dignity by commiſſion from the King, it is reaſonable he ſhould be *deprived*, where there is juſt cauſe, by the ſame authority: but the canons direct, that a biſhop ſhall be *deprived* in a ſynod of the province; or, if that cannot be aſſembled, by the archbiſhop; and twelve biſhops at leaſt, not as his aſſiſtants, but as judges. It has been adjudged, that an archbiſhop may *deprive* a biſhop for ſimony, &c. for he hath power over his ſuffragans, who may be puniſhed in the archbiſhop's court for any offence againſt their duty. 1 *Salk.* 134. See title *Biſhop*.

The cauſes of *deprivation* are many: if a clerk obtain a preferment in the church, by ſimoniacal contract; if he be an excommunicate, a drunkard, fornicator, adulterer, infidel, ſchiſmatick or heretick; or guilty of murder, manſlaughter, perjury, forgery, &c. If a clerk be illiterate and not able to perform the duty of his church; if he is a ſcandalous perſon in his life and converſation; or baſtardy is objected againſt him: if one be a mere layman, and not in holy orders; or under age, *viz.* the age of twenty-three years; be diſobedient and incorrigible to his ordinary; or a con-nonformiſt to the canons; if a parſon refuſe to uſe the Common Prayer, or preach in derogation of it; do not adminiſter the Sacraments, or read the Articles of Religion, &c. See titles *Parſon*; *Clergy*.

If any parſon, vicar, &c. have one benefice with cure of ſouls, and take plurality, without a faculty or diſpenſation: or if he commit waſte in the houſes and lands of the church, called Dilapidations, all theſe have been held good cauſes for *deprivation* of prieſts. *Degg's Parſon's Counſellor*, 98, 99, &c: 3 *Inſt.* 204. See titles *Advowſon*, II; *Chaplain*; *Ceſſion*. And refuſing to uſe the Common Prayers of the church, plurality of livings, &c. are cauſes of *deprivation ipſo facto*, in which caſe the church ſhall be void, without any ſentence declaratory; and avoidances by act of parliament need no declaratory ſentence: But in other caſes there muſt be a declaratory ſentence. *Dyer* 275. See title *Parſon*.

Where a benefice is only voidable, but not void before ſentence of *deprivation*, the party muſt be cited to appear; there is to be a libel againſt him, and a time aſſigned to anſwer it, and alſo liberty for advocates to plead, and after all a ſolemn ſentence pronounced: Though none of theſe formalities are required, where the living is made *ipſo facto* void. *Can.* 122. If a *deprivation* be for a thing merely of eccleſiaſtical cognizance, no appeal lies; but the party has his remedy by a commiſſion of review, which is granted by the King of mere grace. *Mor* 781.

DEPUTY,

DEPUTY, *Deputatus.*] One that exerciſes an office, &c. in another man's right; whoſe forfeiture or miſdemeanor, ſhall cauſe him, whoſe *deputy* he is, to loſe his office. The Common law takes notice of *deputies* in many caſes, but it never takes notice of under-deputies; for a *deputy* is generally but a perſon authoriſed, who cannot authoriſe another. 1 *Lill. Abr.* 446. A man cannot make his *deputy* in all caſes; except the grant of the office juſtify him in it, and where it is to one, to execute by *deputy*, &c.

And there is a great difference between a *deputy* and aſſignee of an office; for an aſſignee hath an intereſt in the office itſelf, and doth all things in his own name; for whom his grantor ſhall not anſwer, unleſs in ſpecial caſes. But a deputy hath not any intereſt in the office, but is only the ſhadow of the officer, in whoſe name he doth all things. And where an officer hath power to make aſſigns, he may implicitly make *deputies*. And a ſheriff may make a *deputy*, or under-ſheriff, although he have not ſuch expreſs words in his patent. 9 *Rep.* 49.—*Cowel.*

A *deputy cannot make a deputy*; becauſe it implies an aſſignment of his whole power, which he cannot aſſign over; but he may impower another to do a particular act. 1 *Salk.* 96: *Lit.* 379.

Judges cannot act by *deputy*, but are to hold their courts in perſon; for they may not transfer their power over to others. 2 *Hawk. P. C. c.* 1. § 9. But it has been adjudged, that recorders may hold their courts by *deputy*. 1 *Lev.* 76. The office of *Cuſtos Brevium* and Chirographer in *C. B.* cannot be executed by *deputy*. 1 *Nelſ. Abr.* 644. A ſteward of a court may make a *deputy*; and acts of an under-ſteward's *deputy* have been held good in ſome caſes. *Cro. Eliz.* 534.

A coroner ought not to execute his office by *deputy*, it being a judicial office of truſt; and judicial offices are annexed to the perſon. 1 *Lil.* 446. If the office of parkerſhip be granted to one, he may not grant this to another; becauſe it is an office of truſt and confidence. *Terms de Ley.*

A bailiff of a liberty, may make a *deputy*. *Cro. Jac.* 240. And a conſtable may make a *deputy*, who may execute the warrant directed to the conſtable, &c. 2 *Danv.* 482. See title *Conſtable.*

When an office deſcends to an infant, ideot, &c. ſuch may make a *deputy* of courſe. 9 *Rep.* 47. Where an office is granted to a man and his heirs, he may make an aſſignee of that office; and by conſequence a *deputy*.

A *Deputy* of an office, hath no intereſt therein, but doth all things in his maſter's name, and his maſter ſhall be anſwerable; but an aſſignee hath an intereſt in the office, and doth all things in his own name, for whom his grantor ſhall not anſwer, unleſs in ſpecial caſes. *Terms de Ley.*

A ſuperior officer muſt anſwer for his *deputy* in civil actions, if he is not ſufficient: but in criminal caſes it is otherwiſe, where *deputies* are to anſwer for themſelves. 2 *Inſt.* 191, 466: *Doct. & Stud. c.* 42.

DE QUIBUS SUR DISSEISIN, A writ of entry, See *F. N. B.* 191.

DER, From the Sax. *Deor, Fera.*] The names of places beginning with this word, ſignify that formerly wild beaſts herded there together.

DERAIGN or DEREYN, *Diſrationare; dirationare.*] Seems to be derived literally from the Fr. *deraigner* or *deranger*, To confound and diſorder, or to turn out of courſe or diſplace; as *deraignment* or departure out of religion. *Stat.* 31 *H.* 8. *cap.* 6. And *deraignment* and diſcharge of their profeſſion. *Stat.* 33 *H.* 8. *c.* 29. Which is ſpoken of thoſe religious men that forſook their orders or profeſſion; and ſo doth *Kitchen* uſe it, where he ſays the leſſee entered into religion, and afterwards was *derained*. *p.* 157.

In our *Common Law* this word is uſed diverſly; but generally to *prove*, *viz.* to *deraign* that right, *deraign* the warranty, &c. *Glanv. lib.* 2. *cap.* 6: *F. N. B.* 146. If a man hath an eſtate in fee with warranty, and enfeoffs a ſtranger with warranty, and dies; and the feoffee vouches the heir, the heir ſhall *derain* the firſt warranty, &c. *Plowd.* 7. And jointenants and tenants in common ſhall have aid, to the intent to *deraign* the warranty paramount. 31 *H.* 8. *cap.* 1: See *Bracton, lib.* 3. *tract.* 2. *cap.* 28. *Britton* applieth this word to a ſummons that they be challenged as defective, or not lawfully made, *cap.* 21. And *Skene* confounds it with our waging and making of law. See *Lex Deraiſnia.*

Perhaps this word *deraign*, and the word *deraignment* derived from it, may be uſed in the ſenſe of *to prove* and *a proving*, by diſproving of what is aſſerted in oppoſition to truth and fact.

DERELICT, *Derelictus.*] Any thing forſaken or left; or wilfully caſt away. *Derelict* lands ſuddenly left by the ſea belong to the King: but if the ſea ſhrink back ſo ſlowly that the gain be by little and little, *i. e.* by ſmall and imperceptible degrees, it ſhall go to the owner of the lands adjoining. See 2 *Comm.* 261.

DESCENDER, *Writ of formedon* in. A writ which lieth, where *a gift in tail* is made, and the *tenant in tail alienes* the lands entailed, or is diſſeiſed of them and dies; the *heir in tail* ſhall have this writ againſt him, who is then the actual tenant of the freehold. *F. N. B.* 211, 212, See title *Formedon.*

DESCENT, or HEREDITARY SUCCESSION; Lat. *Deſcenſus*: Fr. *Diſcent*; in which latter way the term is uſually ſpelt in all old law books.] The title whereby a man, on the death of his anceſtor, obtains the freehold eſtate of ſuch anceſtor, by right of repreſentation, as his *Heir-at-law*.—It is otherwiſe defined; The order or means whereby lands or tenements are derived unto any man from his anceſtor.—An *Heir* is he upon whom the law caſts the eſtate immediately on the death of his anceſtor: and the eſtate ſo deſcending, is in law called the Inheritance. See 2 *Comm.* 200. *lib.* 2. *c.* 14; from whence much of the following matter is abridged.

It may not be an uſeleſs preliminary obſervation, that the law of *Deſcents of real eſtates*, is totally diſtinct from that of the *Diſtribution of perſonal property*; for which latter ſee title *Executor* III: V. 8.

Deſcent, being created *by law*, and the moſt ancient title, it is termed the worthieſt means by which land can be acquired; and an Heir is in by that, in preference to a grant, or deviſe, &c. which are called titles by *purchaſe*. It is a rule in law, that a man cannot raiſe a fee-ſimple to his own right heirs, by the name of heirs, as a *purchaſe*, either by conveyance or deviſe; for if he deviſe lands to one who is the heir at law, the deviſe is void, and he ſhall take by *deſcent*. *Dyer* 54, 126. And it is the ſame where the lands will come to the heir, either in a direct or collateral line; or where the heir comes to an eſtate by way of limitation, when the word *heirs* is not a

word of *purchaſe*. *Ibid.* A father hath two ſons by ſeveral venters, and deviſes his land to his wife for life, and after her deceaſe to his eldeſt ſon; though the ſon doth not take the eſtate preſently on the death of his father, he ſhall be in by *deſcent*, and not by purchaſe, and the deviſe ſhall be void as to him. *Style* 148: 1 *Nelſ. Abr.* 645. But it is ſaid he may make his election, and take by *deviſe*, if he pleaſes.

A man being ſeiſed of lands which he had by the mother's ſide, deviſed them to his heirs on the part of his mother; and it was adjudged, that the deviſee ſhall take by *deſcent*. 3 *Lev.* 127. And when the heir takes that which his *anceſtor* would have taken if living, he ſhall take it by *deſcent*, and not by purchaſe. 2 *Danv.* 557. But generally, where an eſtate is deviſed to the heir at law, attended with a *charge*, as to pay money debts, &c. in ſuch caſe he takes by *purchaſe*, and not by *deſcent*. Though conditions to pay money have been conſtrued only a charge in equity; and that they do not alter the *deſcent* at Common law. 1 *Lut.* 593: 1 *Salk.* 241. See further, titles *Limitation*; *Purchaſe*; *Eſtate*; *Will*.

If one die ſeiſed of land, in which another hath right to enter, and it deſcends to his heir; ſuch *deſcent* ſhall take away the other's right of entry, and put him to his action for recovery thereof. *Stat.* 32 *H.* 8. *cap.* 33: *Co. Lit.* 237. But a *deſcent* of ſuch things as lie in grant, as advowſons, rents, commons in groſs, &c. puts not him who hath right to his action. *Co. Lit.* 237: 2 *Danv. Abr.* 561. And a *deſcent* ſhall not take away the entry of an infant; nor of a feme covert, where the wrong was done to her during the coverture. 2 *Danv.* 563.

The *Doctrine of Deſcents*, or law of inheritance in fee-ſimple, is a point of the higheſt importance; and is indeed the principal object of the laws of real property in *England*. All the rules relating to purchaſes, whereby the legal courſe of deſcents is broken and altered, perpetually refer to this ſettled law of inheritance, as a *datum* or firſt principle univerſally known, and upon which their ſubſequent limitations are to work.

In order therefore to treat a ſubject of this univerſal conſequence the more clearly, it ſeems better to lay aſide ſuch matters as will only tend to cauſe embarraſſment and confuſion. The queſtion, who are, and who are not capable of being heirs, comes more properly under the titles *Heir*; *Attainder*; *Eſcheat*; which ſee. We may alſo paſs over the frequent diviſion of deſcents, into thoſe by *Cuſtom*, *Statute* and *Common law*. As to deſcents by *particular cuſtom*, as to all the ſons in *gavelkind*, or to the youngeſt in *Borough Engliſh*, ſee thoſe titles, and title *Cuſtom*; and as to deſcents by *ſtatute*, or fees-tail *per formam doni*, in purſuance of the *Stat.* of *Weſtm.* 2; ſee titles *Eſtate*; *Limitations*; *Tenure*.

As the law of Deſcents depends not a little on the nature of kindred, and the ſeveral degrees of conſanguinity, it will be previouſly neceſſary to ſtate, briefly, the true notion of this kindred or alliance in blood.

CONSANGUINITY, or kindred, is defined by the writers on theſe ſubjects to be *vinculum perſonarum ab eodem ſtipite deſcendentium*; the connexion or relation of perſons deſcended from the ſame ſtock or common anceſtor. This conſanguinity is either lineal or collateral.

Lineal conſanguinity, is that which ſubſiſts between perſons, of whom one is deſcended in a direct line from the other, as between a man and his father, grandfather, and great grandfather, and ſo upwards, in the direct aſcending line: or between a man and his ſon, grandſon, great-grandſon, and ſo downwards in the direct *deſcending* line. Every generation, in this lineal direct conſanguinity, conſtitutes a different degree, reckoning either upwards or downwards: the father is related in the firſt degree, and ſo likewiſe is the ſon; grandſire and grandſon in the ſecond; great grandſire and great grandſon in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore univerſally obtains, as well in the *civil* and *canon*, as in the *Common law*.

Collateral kindred anſwers to the ſame deſcription: collateral relations agreeing with the lineal in this, that they deſcend from the ſame ſtock or anceſtor; but differing in this, that they do not deſcend one from the other. Collateral kinſmen are ſuch then as lineally ſpring from one and the ſame anceſtor, who is the *ſtirps*, or root, the *ſtipes*, trunk, or common ſtock, from whence theſe relations are branched out. As if a man hath two ſons, who have each a numerous iſſue; both theſe iſſues are lineally deſcended from him as their common anceſtor; and they are collateral kinſmen to each other, becauſe they are all deſcended from this common anceſtor, and all have a portion of his blood in their veins, which denominates them *conſanguineos*.

The very being of collateral conſanguinity, conſiſts in this deſcent, from one and the ſame common anceſtor. Thus *A.* and his brother are related; Why? Becauſe both are derived from one father: *A.* and his firſt couſin are related; Why? Becauſe both deſcended from the ſame grandfather; and his ſecond couſins' claim to conſanguinity is this, that they are both derived from one and the ſame great grandfather. In ſhort, as many anceſtors as a man has, ſo many common ſtocks he has, from which collateral kinſmen may be derived.

The method of computing theſe degrees in the canon law, which our law has adopted (*Co. Litt.* 23,) is as follows. We begin at the common anceſtor, and reckon downwards; and in whatſoever degree the two perſons, or the moſt remote of them, is diſtant from the common anceſtor, that is the degree in which they are related to each other. Thus *A.* and his brother are related in the firſt degree; for from the father to each of them is counted only one; *A.* and his nephew are related in the ſecond degree; for the nephew is two degrees removed from the common anceſtor; *viz.* his own grandfather, the father of *A.*

The learned Commentator then proceeds to lay down a ſeries of *Rules*, or *Canons of Inheritance*, according to which, eſtates are tranſmitted from the anceſtor to the heir, with an explanatory comment.

I. THE FIRST RULE is, that *Inheritances ſhall lineally* DESCEND to the iſſue of the perſon who laſt died actually ſeiſed, *in infinitum*; but ſhall never *lineally* ASCEND.

By law no inheritance can veſt, nor can any perſon be the actual complete heir of another, till the anceſtor is previouſly dead. *Nemo eſt hæres viventis*. Before that time the perſon who is next in the line of ſucceſſion is called an heir apparent, or heir preſumptive. *Heirs apparent* are ſuch, whoſe right of inheritance is indefeaſible, provided they outlive the anceſtor: as the eldeſt ſon or his iſſue, who muſt by the courſe of the Common law be heir to the father whenever he happens to die. *Heirs preſumptive* are ſuch, who, if the anceſtor ſhould die immediately, would in the preſent circumſtances of things be his heirs; but whoſe right of inheritance may be defeated

feated by the contingency of ſome nearer heir being born: as a brother or nephew, whoſe preſumptive ſucceſſion may be deſtroyed by the birth of a child; or a daughter, whoſe preſent hopes may hereafter be cut off by the birth of a ſon. Nay even if the eſtate hath deſcended, by the death of the owner, to ſuch brother, or nephew, or daughter; in the former caſes, the eſtate ſhall be deveſted and taken away by the birth of a poſthumous child; and in the latter, it ſhall alſo be totally deveſted by the birth of a poſthumous ſon. *Bro. tit. Deſcent* 58.

And beſides this caſe of a poſthumous child, if lands are given to a ſon who dies, leaving a ſiſter his heir; if the parents have at any diſtance of time afterwards another ſon, this ſon ſhall deveſt the deſcent upon the ſiſter, and take the eſtate as heir to his brother. *Co. Lit.* 11: *Doct. & Stud. d.* 1. *c.* 7. So the ſame eſtate may be *frequently* deveſted by the ſubſequent birth of nearer preſumptive heirs, before it fixes upon an heir apparent. As if an eſtate is given to an only child, who dies; it may deſcend to an aunt, who may be ſtripped of it by an after-born uncle; on whom a ſubſequent ſiſter may enter, and who will again be deprived of the eſtate by the birth of a brother, the heir apparent. *Chriſtian's note on* 2 *Comm.* 208.

It ſeems determined that every one has a right to retain the rents and profits which accrued whilſt he was thus legally poſſeſſed of the inheritance. 1 *Inſt.* 11. *in n*: 2 *Wilſ.* 526 —See further as to the entry of a poſthumous heir, *Watkins on Deſcents, c.* 4.

No perſon can properly be ſuch an anceſtor, as that an inheritance of lands or tenements can be derived from him, unleſs he hath had *actual ſeiſin* of ſuch lands, either by his own entry, or by the poſſeſſion of his own or his anceſtor's leſſee for years, or receiving rent from a leſſee of the freehold: (*Co. Litt.* 15:) or unleſs he hath had what is equivalent to corporal ſeiſin in hereditaments that are incorporeal; ſuch as the receipt of rent, a preſentation to the church in caſe of an advowſon, and the like. *Co. Litt.* 11. But he ſhall not be accounted an anceſtor, who hath had only a bare right or title to enter, or be otherwiſe ſeiſed. The ſeiſin therefore of any perſon, thus underſtood, makes him the root, or ſtock, from which all future inheritance by right of blood muſt be derived: which is very briefly expreſſed in this maxim, *ſeiſina facit ſtipitem. Flet. l.* 6. *c.* 2. § 2.

Though it be neceſſary the anceſtor be *ſeiſed*, yet it is not required that the ſeiſin continue till the death of ſuch anceſtor: for if he had been ſeiſed at any time during his life, and afterwards diſſeiſed, ſtill if he had not parted with his right or property, his heir ſhall inherit. 1 *Inſt.* 237 *b.*—See *Watkins on Deſcents.* If the hereditaments deſcending be in reverſion or remainder, expectant on an eſtate of freehold, the heir may obtain what will be equivalent to an actual ſeiſin, by granting them over for life or in tail. See *poſt.* VI. as to *poſſeſſio fratris.*

When therefore a perſon dies ſo ſeiſed, the inheritance firſt goes to his iſſue: as if there be grandfather, father, and ſon, and the father purchaſes lands and dies; his ſon ſhall ſucceed him as heir, and not the grandfather, to whom the land ſhall never *lineally* aſcend, but ſhall rather eſcheat to the lord. *Litt.* § 3. This rule, that the inheritance ſhall never *lineally* aſcend, clearly appears to be of feudal original, and the propriety of it is well defended at ſome length by the learned Commentator, to whom we refer the reader deſirous of inveſtigating the ſubject, as a matter rather of curioſity than utility.

Though an eſtate cannot *lineally* aſcend, the father may take his ſon's eſtate by an *intermediate deſcent*; for if the ſon has neither iſſue, nor brothers or ſiſters, the eſtate will deſcend to an uncle, or ſome collateral relation, to whom the father may on his deceaſe be the next heir. And in ſome caſes, the father or mother may inherit immediately from a child. As if either of them are couſin to the child; a caſe of which nature occurs in 2 *P. Wms.* 613; where a ſon died, ſeiſed in fee of land, without iſſue, brother or ſiſter, but leaving two couſins, his heirs at law, one of whom was his own mother, the queſtion was, whether the mother could take as heir to her ſon. The Maſter of the Rolls was of opinion, that though the heir was alſo mother, this did not hinder her from taking in the capacity or relation of couſin. See 2 *Comm.* 212. *in n.*

In 1 *Inſt.* 8, It is ſaid, that if a man hath iſſue an elder ſon, born out of the King's allegiance, and after hath another ſon born within the realm; the younger ſon ſhall have lands by *deſcent* from his father in this caſe, and not the elder who had never any inheritable blood in him. *Co. Lit.* 8.—But if the father in this caſe is to be ſuppoſed a natural-born ſubject at the birth of the iſſue, the child would now be alſo a natural-born ſubject by force of *Stats.* 7 *An. c.* 5: 4 *Geo.* 2. *c.* 21. But the children of perſons attainted of, or liable to the penalties of, treaſon, or in the ſervice of a foreign ſtate in enmity with *Great Britain*, are excepted from the benefit of this proviſion. See *Stat.* 25 *E.* 3. *ſt.* 2, which declares that at Common law the children of the King wherever born, may inherit. The ſame ſtatute enables children born abroad to inherit, if at their birth *both* their parents are within the King's allegiance, and their mothers paſs the ſea, with the licence of their huſbands. See 1 *Inſt.* 8. *in n.*

Lord *Coke* alſo lays it down for law, that if an alien hath iſſue in *England* two ſons, though theſe ſons are *indigenæ*, ſubjects born, they cannot inherit to each other. But in the caſe of *Collingwood* v. *Pace*, this was denied to be law, and it was expreſsly held that ſuch ſons of aliens were inheritable to each other. See 1 *Sid.* 193: 1 *Ventr.* 413. And now by *Stat.* 11 & 12 *W.* 3. *c.* 6, natural-born ſubjects may derive a title by deſcent through their parents, though aliens; but *Stat.* 25 *Geo.* 2. *c.* 39, confines the benefit of the former ſtatute to ſuch heirs as ſhall be living, and capable of taking at the death of the perſon laſt dying ſeiſed; unleſs ſuch heirs happen to be daughters, and there is afterwards a ſon or another daughter, for which caſes the ſtatute makes a ſpecial proviſion. Both theſe acts are extended to *Scotland* by *Stat.* 16 *Geo.* 3. *c.* 52. The principle, on which it has been adjudged that the children of an alien may be heirs as betweeen themſelves, though not to their father, ſeems to reach the caſe of children born after their father's attainder. See 1 *Inſt.* 8. *in n.*—And further this Dict. titles *Alien, Attainder.*

II. A SECOND GENERAL RULE, or canon is, that the *male iſſue* ſhall be admitted *before the female.* Thus ſons ſhall be admitted before daughters; or, as our law expreſſes it, the worthieſt of blood ſhall be preferred. *Hal. H. C. L.*

235. As if one hath two ſons, and two daughters, and dies; firſt the eldeſt ſon, and (in caſe of his death without iſſue) then the youngeſt ſon ſhall be admitted to the ſucceſſion in preference to both the daughters.

The reaſon of this, as well as of the preceding rule, muſt be deduced from feodal principles: for, by the genuine and original policy of that conſtitution, no female could ever ſucceed to a proper feud, inaſmuch as females were incapable of performing thoſe military ſervices, for the ſake of which that ſyſtem was eſtabliſhed. But our law does not extend to a total excluſion of females, as the Salic law, and others, where feuds were moſt ſtrictly retained: it only poſtpones them to males; for, though daughters are excluded by ſons, yet they ſucceed before any collateral relations.

III. A THIRD RULE, or Canon of deſcent, is; that where there are *two or more males* in equal degree, *the eldeſt ſon* ſhall inherit; but the *females all together*.

As if a man hath two ſons, and two daughters, and dies; his eldeſt ſon ſhall alone ſucceed to his eſtate, in excluſion of the ſecond ſon and both the daughters; but, if both the ſons die without iſſue before the father, the daughters ſhall both inherit the eſtate as coparceners. *Litt.* § 5: *Hal. C. L.* 238. This rule is alſo of feudal original, and aroſe from thence on the eſtabliſhment of that conſtitution in *England*, by *William the Conqueror*.

Yet we find, that ſocage eſtates frequently deſcended to all the ſons equally, ſo lately as when *Glanvil* wrote, in the reign of *Henry* II. and it is mentioned in the *Mirror*, (*c.* 1. § 3,) as a part of our ancient conſtitution, that knights' fees ſhould deſcend to the eldeſt ſon, and ſocage fees ſhould be partible among male children. However, in *Henry* III.'s time, we find by *Bracton*, (*l.* 2. *c.* 30, 1,) that ſocage lands, in imitation of lands in chivalry, had almoſt entirely fallen into the right of ſucceſſion by primogeniture, as the law now ſtands; except in *Kent*, where they gloried in the preſervation of their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the ſons; and except in ſome particular manors and townſhips, where their local cuſtoms continued the deſcent, ſometimes to all, ſometimes to the youngeſt ſon only, or in other more ſingular methods of ſucceſſion.

As to the females, they are ſtill left as they were by the ancient law; for they were all equally incapable of performing any perſonal ſervice: and therefore one main reaſon for preferring the eldeſt ceating, ſuch preference would have been injurious to the reſt: and the other principal purpoſe, the prevention of the too minute ſubdiviſion of eſtates, was left to be conſidered and provided for by the lords, who had the diſpoſal of theſe female heireſſes in marriage. However, the ſucceſſion by primogeniture, even among females, took place as to the inheritance of the Crown; wherein the neceſſity of a ſole and determinate ſucceſſion, is as great in the one ſex, as in the other. 1 *Inſt.* 165. And the right of ſole ſucceſſion, though not of primogeniture, was alſo eſtabliſhed with reſpect to female dignities and titles of honour. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldeſt ſhall not of courſe be Counteſs, but the dignity is in ſuſpence or abeyance till the King ſhall declare his pleaſure; for he, being the fountain of honour, may confer it on which of them he pleaſes. *Ibid.*—See titles *Abeyance*, *Peers*.

IV. A FOURTH RULE, or Canon of deſcent, is; that the *lineal deſcendants, in infinitum*, of any perſon deceaſed, ſhall *repreſent* their anceſtor; that is, ſhall ſtand in the ſame place as the perſon himſelf would have done, had he been living.

Thus the child, grandchild, or great grandchild, (either male or female) of an eldeſt ſon, ſucceeds before a younger ſon, and ſo *in infinitum*. *Hale H. C. L.* 236, 7. And theſe repreſentatives ſhall take neither more nor leſs, but juſt ſo much as their principals would have done. As if there be two ſiſters, and one dies, leaving ſix daughters; and then the father of the two ſiſters dies, without other iſſue: theſe ſix daughters ſhall take among them exactly as much as their mother would have done, had ſhe been living; that is, a moiety of the lands in co-parcenary: ſo that, upon partition made, if the land be divided into twelve parts, the ſurviving ſiſter ſhall have ſix parts, and her ſix nieces, one part each.

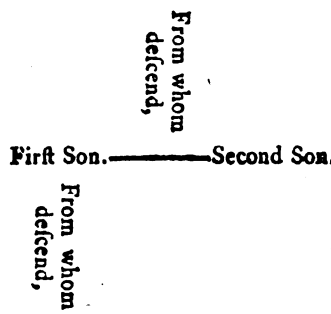
This taking by repreſentation, is called ſucceſſion *in ſtirpes* according to the roots; ſince all the branches inherit the ſame ſhare that their root, whom they repreſent, would have done. So if the next heirs of a man be ſix nieces, three by one ſiſter, two by another, and one by a third; his inheritance by the laws of *England*, is divided only into three parts, and diſtributed *per ſtirpes*, thus; one third to the three elder children who repreſent one ſiſter, another third to the two who repreſent the ſecond, and the remaining third to the one child who is the ſole repreſentative of her mother.

This mode of repreſentation is a neceſſary conſequence of the double preference given by our law, firſt to the male iſſue, and next to the firſt born among the males. For if all the children of three ſiſters were to claim *per capita*, in their own right, as next of kin to the anceſtor, without any reſpect to the ſtocks from whence they ſprung, and thoſe children were partly male, and partly female, then the eldeſt male among them would exclude not only his own brethren and ſiſters, but all the iſſue of the other two daughters, or elſe the law in this inſtance, muſt be inconſiſtent with itſelf, and depart from the preference which it conſtantly gives to the males, and the firſt born, among perſons in equal degree. Whereas, by dividing the inheritance according to the roots, or *ſtirpes*, the rule of deſcent is kept uniform and ſteady; the iſſue of the eldeſt ſon excludes all other pretenders, as the ſon himſelf (if living) would have done; but the iſſue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the ſame: and among theſe ſeveral iſſues, or repreſentatives of the reſpective roots, the ſame preference to males, and the ſame right of primogeniture obtain, as would have obtained at the firſt among the roots themſelves, the ſons or daughters of the deceaſed. As 1. if a man hath two ſons, *A.* and *B.* and *A.* dies, leaving two ſons, and then the grandfather dies; now the eldeſt ſon of *A.* ſhall ſucceed to the whole of his grandfather's eſtate: and if *A.* had left only two daughters, they ſhould have ſucceeded alſo to equal moieties of the whole, in excluſion of *B.* and his iſſue. But 2. if a man hath only three daughters, *C. D.* and *E*; and *C.* dies leaving two ſons, *D.* leaving two daughters, and *E.*

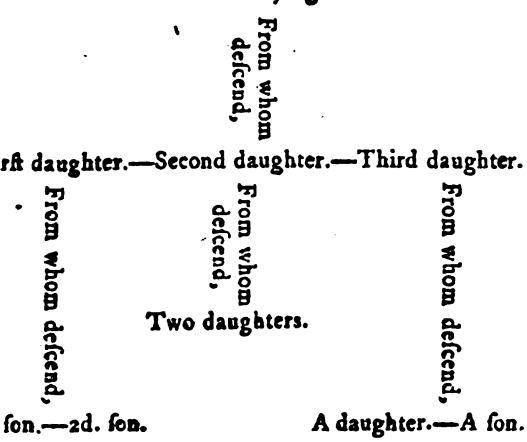
leaving a daughter and a ſon, who is younger than his ſiſter: here when the grandfather dies, the eldeſt ſon of *C.* ſhall ſucceed to one third, in excluſion of the younger; and the two daughters of *D.* to another third in partnerſhip; and the ſon of *E.* to the remaining third, in excluſion of his eldeſt ſiſter. And the ſame right of repreſentation, guided and reſtrained by the ſame rules of deſcent, prevails downwards *in infinitum*.

How far the two immediately preceding, and other, caſes in the courſe of this title may be explained by the following ſcheme, the ſtudent is left to determine. It may perhaps afford a hint for ſtatements in more complicated caſes of deſcent. For regular tables of Conſanguinity and Deſcent, See 1 *Inſt*; *The Commentaries*; and *Watkins's Treatiſe on Deſcent*.

1. The PERSON dying ſeiſed.



2. The PERSON dying ſeiſed.



King *John*, however, who kept his nephew *Arthur* from the throne, by diſputing this right of repreſentation, did all in his power to aboliſh it throughout the realm. *Hale H. C. L.* 217, 229. But in the time of his ſon King *Henry* III. the rule was indiſputably ſettled in the manner here laid down, *Bract. l.* 2. *c.* 30. § 2; and ſo it has continued ever ſince. And thus much for *lineal* deſcents.

V. A FIFTH RULE is, that, *on failure of lineal deſcendants*, or iſſue of the perſon laſt ſeiſed, the inheritance ſhall deſcend to his *collateral* relations, being of the blood of the firſt purchaſor, ſubject to the three preceding rules. Thus if *A.* purchaſe land, and it deſcend to *B.* his ſon, who dies ſeiſed thereof without iſſue; whoever ſucceeds to this inheritance, muſt be of the blood of *A.* the firſt purchaſor of this family. *Co. Litt.* 12. The firſt purchaſor, *perquiſitor*, is he who firſt acquired the eſtate to his family, whether the ſame was transferred to him by ſale or by gift, or by any other method, except only that of deſcent.

This is a rule almoſt peculiar to our own laws, and thoſe of a ſimilar feudal original; and this rule or canon cannot otherwiſe be accounted for than by recurring to feudal principles, which did not originally permit the deſcent of lands to any but one of the lineal deſcendants of the firſt purchaſor, who in the caſe of a *feudum novum*, or eſtate purchaſed by the anceſtor himſelf, could only be his own offſpring; ſo that ſuch eſtate could not deſcend even to his brother. See this *Dict.* title *Tenures*; I. 3.

But when the feodal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his anceſtors; and then the collateral relations were admitted to ſucceed even *in infinitum*, becauſe they might have been of the blood of, that is deſcended from, the firſt imaginary purchaſor.

Of this nature, are all the grants of fee-ſimple eſtates of this kingdom; for there is now in the law of *England*, no ſuch thing as a grant of a *feudum novum*, to be held *ut novum*; unleſs in the caſe of a fee-tail, and there this rule is ſtrictly obſerved, and none but the lineal deſcendants of the firſt donee (or purchaſor) are admitted; but every grant of lands in fee-ſimple, is with us a *feudum novum*, to be held *ut antiquum*, as a feud whoſe antiquity is indefinite: and therefore the collateral kindred of the grantee, or deſcendants from any of his lineal anceſtors, by whom the lands might poſſibly have been purchaſed, are capable of being called to the inheritance.

Yet, when an eſtate hath really deſcended in a courſe of inheritance to the perſon laſt ſeiſed, the ſtrict rule of the Feudal law is ſtill obſerved; and none are admitted, but the heirs of thoſe through whom the inheritance hath paſſed; for all others have demonſtrably none of the blood of the firſt purchaſor in them, and therefore ſhall never ſucceed. As, if lands come to *A.* by deſcent from his mother; no relation of his father (as ſuch) ſhall *ever* be his heir of theſe lands; and, *vice verſa*, if they deſcended from his father, no relation of his mother (as ſuch) ſhall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any ſhare of his father's blood. And ſo, if the eſtate deſcended from his father's father, the relations of his father's mother, ſhall for the ſame reaſon never be admitted, but only thoſe of his father's father.

Hence the expreſſion *heir at law* muſt always be uſed with reference to a ſpecific eſtate: for if an only child has taken by deſcent an eſtate from his father, and another from his mother; upon his death without iſſue, theſe eſtates will deſcend to two different perſons. So alſo, if his two grandfathers and two grandmothers, had each an eſtate, which deſcended to his father or mother, being only children, then theſe four eſtates will deſcend to four different heirs. 2 *Comm.* 222 *in n.*

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This then is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of iſſue in the laſt proprietor, the eſtate ſhall deſcend to the blood of the firſt purchaſor; or, that it ſhall reſult back to the heirs of the body of that anceſtor, from whom it either really has, or is ſuppoſed by fiction of law to have originally deſcended: according to the rule laid down in the year books; *M.* 12 *Ed.* IV. 14: *Fitzherbert. Abr. t. Diſcent.* 2: *Brook. Ibid.* 38: and *Hale H. C. L.* 243; "That he who would have been heir to the father of the deceaſed, (and of courſe to the mother, or any other real or ſuppoſed purchaſing anceſtor) ſhall alſo be heir to the ſon;" a maxim that will hold univerſally, except in the caſe of a brother or ſiſter of the half blood, which exception (as we ſhall ſee hereafter) depends upon very ſpecial grounds.

VI. A SIXTH RULE, or canon is, that the *collateral heir* of the perſon laſt ſeiſed, muſt be his next collateral kinſman, of the *whole blood.*

Firſt, he muſt be his next collateral kinſman, either perſonally, or *jure repreſentationis*; which proximity is reckoned according to the canonical degrees of conſanguinity. Therefore, the brother being in the firſt degree, he and his deſcendants ſhall exclude the uncle and his iſſue, who is only in the ſecond. And herein conſiſts the true reaſon of the different methods of computing the degrees of conſanguinity, in the civil law on the one hand, and in the canon and common laws on the other.

When the paternal and maternal lines are both admitted to the inheritance, the moſt remote collateral kinſman in the paternal line, will inherit before the neareſt in the maternal. So that the expreſſion that the *collateral heir*, muſt be the next *collateral kinſman*, is qualified by the general rules of deſcent which prefer the male line to the female.

The deſignation of perſon, however, in ſeeking for the next of kin, will come to exactly the ſame end, (though the degrees will be differently numbered,) which-ever method of computation we ſuppoſe the law of *England* to uſe; ſince the right of repreſentation of the parent by the iſſue, is allowed to prevail *in infinitum.* Indeed it may be queſtioned how far the introduction of the computation of kindred, either by the canon or civil law, is of uſe in the Common-law doctrine of Deſcents.

This right of repreſentation being eſtabliſhed, the former part of the preſent rule amounts to this; that, on failure of iſſue of the perſon laſt ſeiſed, the inheritance ſhall deſcend to the other ſubſiſting iſſue of his next immediate anceſtor. Thus, if *A.* dies without iſſue, his eſtate ſhall deſcend to his eldeſt brother, (if more than one) or his repreſentatives; he being lineally deſcended from *A*'s father his next immediate anceſtor. On failure of brethren, or ſiſters, and their iſſue, it ſhall deſcend to the uncle of *A.* the lineal deſcendant of his grandfather; and ſo on *in infinitum.*

The *elder brother* of the whole blood ſhall have land by *deſcent*, purchaſed by a middle or younger brother, if ſuch die without iſſue; for as to *deſcents* between brethren, the eldeſt is the moſt worthy of blood to inherit to them as well as to the father. *Lit.* 3: 3 *Rep.* 40.

Here it muſt be obſerved, that the lineal anceſtors though (according to the firſt rule) incapable themſelves of ſucceeding to the eſtate, becauſe it is ſuppoſed to have already paſſed them, are yet the common ſtocks from which the next ſucceſſor muſt ſpring.—But though the common anceſtor be thus the root of the inheritance, yet it is not neceſſary to *name* him in making out the pedigree or deſcent. For the deſcent between two brothers, is held to be an *immediate* deſcent; and therefore title may be made by one brother, or his repreſentatives, *to* or *through* another, without mentioning their common father. 1 *Sid.* 196: 1 *Ventr.* 423: 1 *Lev.* 60: 12 *Mod.* 619.

The law takes no notice of the *diſability* of the father in caſe of *deſcent*, but only of the immediate relation of brothers and ſiſters, as to their eſtates; ſo that the inability of the father doth not hinder the *deſcent* between them: for example; A man had iſſue a ſon and a daughter, and was attainted of treaſon, and died; the ſon purchaſed lands and died without iſſue; and it was adjudged that notwithſtanding the attainder of the father, the daughter ſhall take by *deſcent* from her brother, becauſe the *deſcent* between them was immediate, and the law doth not regard the diſability of the father. 4 *Leon.* 5. See 4 *Rep.* 31, 124.

Where a perſon ſeiſed of lands, hath iſſue two daughters, if one of them commits felony, after the father's death, both daughters being alive, a moiety ſhall *deſcend* to one daughter, and the other ſhall eſcheat. *Co. Lit.* 163.

But, ſecondly, the heir need not be the neareſt kinſman abſolutely, but only *ſub modo*; that is; he muſt be the neareſt kinſman of the *whole* blood; for, if there be a much nearer kinſman of the *half* blood, a diſtant kinſman of the whole ſhall be admitted, and the other entirely excluded: nay, the eſtate ſhall eſcheat to the lord, ſooner than the half blood ſhall inherit.

A kinſman of the whole blood is he that is derived, not only from the ſame *anceſtor*, but from the ſame *couple of anceſtors.* For, as every man's own blood is compounded of the bloods of his reſpective anceſtors, he is only properly of the whole or entire blood with another, who hath (ſo far as the diſtance of degrees will permit) all the ſame ingredients in the compoſition of his blood that the other hath. Thus the blood of *A.* being compoſed of thoſe of his father and his mother, therefore his brother being from both the ſame parents hath entirely the ſame blood with *A*; or in other words he is his brother of the whole blood. But if, after the death of *A*'s. father, his mother had married a ſecond huſband, and had iſſue by him; the blood of this iſſue, being compounded of the blood of *A.*'s mother only, on the one part, but of that of the ſecond huſband, on the other part, it hath therefore only half the ſame ingredients with that of *A.* himſelf; ſo that ſuch iſſue is only *A*'s brother of the half blood; and for that reaſon they ſhall never inherit to each other. So alſo if the father has two ſons, *A.* and *B.* by different venters, or wives; theſe two brethren are not brethren of the whole blood, and therefore ſhall never inherit to each other, but the eſtate ſhall rather eſcheat to the lord. Nay even if the father dies, and his lands deſcend to his eldeſt ſon *A. who enters thereon*, and dies ſeiſed without iſſue; ſtill *B.* ſhall not be heir to this eſtate, becauſe he is only of the half blood to *A.* the perſon laſt ſeiſed: but it ſhall deſcend to a ſiſter (if any) of the whole blood to *A*; for in ſuch caſes the maxim is, that *poſſeſſio fratris facit ſororem eſſe hæredem*, the ſeiſin or poſſeſſion of the brother makes the ſiſter to be heir. Yet, had *A.* died *without entry* then *B.*

might have inherited; not as heir to *A.* his half brother, but as heir to their common father, who was the perſon laſt actually ſeiſed. *Hale H. C. L.* 238.

Of ſome inheritances there cannot be a ſeiſin, or *poſſeſſio fratris*: as if the eldeſt brother dies before a preſentation to an advowſon, it will deſcend to the half brother, as heir to the perſon laſt ſeiſed, and not to the ſiſter of the whole blood. 1 *Bur. Ec.* 11. So of reverſions, remainders and executory deviſes, there can be no ſeiſin or *poſſeſſio fratris*; and if they are reſerved or granted to *A.* and his heirs, he who is heir to *A.* when they come into poſſeſſion is entitled to them by deſcent: that is the perſon who would have been heir to *A.* if *A.* had lived ſo long and had then died actually ſeiſed. 2 *Woodd.* 256: *Fearne* 448: 2 *Wilſ.* 29. and ſee further this title *ad finem* relative to the *deſcent of reverſions, &c.*—But though a *poſſeſſio fratris* cannot properly be of a remainder or reverſion expectant upon an eſtate of freehold, yet by the exertion of certain acts of ownerſhip, as by granting them over for term of life, a *poſſeſſio fratris* of them may be made. 8 *Rep.* 35 *b*: 1 *Inſt.* 15 *a*; 191 *b*.—There can be no *poſſeſſio fratris* of an eſtate-tail; nor of honorary dignities. Nor of the deſcent of the crown, and its poſſeſſions; nor of a mere right. See *Watkins on Deſcents. c.* 1. § 4. and the authorities there cited.

The total excluſion of the half blood from the inheritance being almoſt peculiar to our own law, is looked upon as a ſtrange hardſhip by ſuch as are unacquainted with the reaſons on which it is grounded. But theſe cenſures ariſe from a miſapprehenſion of the rule, which is not ſo much to be conſidered in the light of a rule of deſcent as of a rule of evidence; an auxiliary rule, to carry a former into execution.

To illuſtrate this rule by example. Let there be *A.* and *B.* brothers, by the ſame father and mother, and *C.* another ſon, of the ſame mother by a ſecond huſband. Now if *A.* dies ſeiſed of lands, but it is uncertain whether they deſcended to him from his father or mother; in this caſe his brother *B.* of the whole blood, is qualified to be his heir; for he is ſure to be in the line of deſcent from the firſt purchaſor, whether it were the line of the father or mother. But if *B.* ſhould die before *A.* without iſſue, *C.* the brother of the half blood is utterly incapable of being heir; for he cannot prove his deſcent from the firſt purchaſor, who is unknown; nor has he that fair probability which the law admits as preſumptive evidence, ſince he is to the full as likely *not to be* deſcended from the line of the firſt purchaſor, *as to be* deſcended: and therefore the inheritance ſhall go to the neareſt relation poſſeſſed of this preſumptive proof, the whole blood.

And, as this is the caſe in *feudis antiquis*, where there really did exiſt a purchaſing anceſtor, who is forgotten, it is alſo the caſe *in feudis novis* held *ut antiquis*, where the purchaſing anceſtor is merely ideal, and never exiſted but only in fiction of law. Of this nature are all grants of lands in fee-ſimple at this day, which are inheritable as if they deſcended from ſome uncertain indefinite anceſtor, and therefore, any of the collateral kindred of the real modern purchaſor, (and not his own offſpring only) may inherit them, provided they be of the whole blood; for all ſuch are, in judgment of law, likely enough to be derived from this indefinite anceſtor: but thoſe of the half blood are excluded, for want of the ſame probability. Nor ſhould this be thought hard, that a brother of the purchaſor, though only of the half blood, muſt thus be diſinherited, and a more remote relation of the whole blood admitted, merely upon a ſuppoſition and fiction of law; ſince it is only upon a like ſuppoſition and fiction, that brethren of purchaſors (whether of the whole or half blood) are entitled to inherit at all.

This rule as to the excluſion of the half blood, is certainly a very fine-ſpun and ſubtle nicety: but, conſidering the principles upon which our law is founded, it is not an injuſtice, nor always a hardſhip; ſince even the ſucceſſion of the whole blood was originally a beneficial indulgence, rather than a ſtrict right of collaterals: and though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could poſſibly have enjoyed before. See this *Dict. title Tenures* III. 5. The doctrine of the whole blood was calculated to ſupply the frequent impoſſibility of proving a deſcent from the firſt purchaſor; without ſome proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpoſe it anſwers, for the moſt part, effectually enough. It ſeems however that in ſome inſtances, the practice is carried farther than the principle upon which it goes will warrant. It is more eſpecially over-ſtrained, when a man has two ſons by different venters, and the eſtate on his death deſcends from him to the eldeſt, who enters, and dies without iſſue; in which caſe the younger ſon cannot inherit this eſtate, becauſe he is not of the whole blood to the laſt proprietor. This, it muſt be owned, carries a hardſhip with it, even upon feudal principles: for the rule was introduced only to ſupply the proof of a deſcent from the firſt purchaſor; but here, as this eſtate notoriouſly deſcended from the father, and as both the brothers confeſſedly ſprung from him, it is demonſtrable, that the half brother muſt be of the blood of the firſt purchaſor, who was either the father or ſome of the father's anceſtors.

It is moreover worthy of obſervation, that the Crown, (which is the higheſt inheritance in the nation) may deſcend to the half blood of the preceding ſovereign. *Plowd.* 245: *Co. Litt.* 15; ſo that it be the blood of the firſt monarch, purchaſor (or in the feudal language) conqueror, *conquæſtor*, of the reigning family. Thus it actually did deſcend from king *Edward* VI. to queen *Mary*, and from her to Queen *Elizabeth*, who were reſpectively of the half blood to each other. For, the royal pedigree being always a matter of ſufficient notoriety, there is no occaſion to call in the aid of this preſumptive rule of evidence, to render probable the deſcent from the royal ſtock, which was formerly king *William* the *Norman*, and is now (by *Stat.* 12 *Will.* III. *c.* 2,) the Princeſs *Sophia* of *Hanover*. Hence alſo it is, that in eſtates-tail, where the pedigree from the firſt donee muſt be ſtrictly proved, half blood is no impediment to the deſcent. *Lit.* § 14, 15; becauſe when the lineage is clearly made out, there is no need of this auxiliary proof. Alſo in titles of honour half blood is no impediment to the deſcent; but a title can only be tranſmitted to thoſe who are *deſcended* from the firſt perſon ennobled. 1 *Inſt.* 15. See this Dict. title *Peers*. How far it might be deſireable to amend the law of deſcents in one or two inſtances, and ordain that the half blood might always inherit, where the eſtate notoriouſly deſcended from it's own proper anceſtor, and, in caſes of new-purchaſed lands or uncertain deſcents, ſhould never be excluded by the whole blood in a remoter degree; or how far a private

inconvenience

inconvenience ſhould be ſtill ſubmitted to, rather than a long eſtabliſhed rule ſhould be ſhaken, is for the Legiſlature to determine. See further 2 *Comm.* 233. *in n.*

The rule then, together with it's illuſtration, amounts to this; that in order to keep the eſtate of *A.* as nearly as poſſible in the line of his purchaſing anceſtor, it muſt deſcend to the iſſue of *the neareſt couple* of anceſtors that have left deſcendants behind them; becauſe the deſcendants of one anceſtor only are not ſo likely to be in the line of that purchaſing anceſtor, as thoſe who are deſcended from both.

In order then to avoid the confuſion and uncertainty that might ariſe between the ſeveral ſtocks wherein the purchaſing anceſtor may be ſought for, another qualification is requiſite, beſides the *proximity* and *entirety*; which is that of *dignity*, or *worthineſs*, of blood. For,

VII. THE SEVENTH and laſt rule or canon is, that *in collateral inheritances* the *male ſtocks* ſhall be preferred to the *female*; (that is, kindred derived from the blood of the male anceſtors, however remote, ſhall be admitted before thoſe of the blood of the female, however near;) unleſs where the lands have, in fact deſcended from a female.

Thus the relations on the father's ſide are admitted *in infinitum*, before thoſe on the mother's ſide are admitted at all. *Litt.* § 4. And the relations of the father's father, before thoſe of the father's mother, and ſo on.—This rule ſeems to have been eſtabliſhed in order to effectuate and carry into execution the fifth rule, or principal canon of collateral inheritance, before laid down; that every heir muſt be of the blood of the firſt purchaſor.

That this was the true foundation of the preference of the *agnati* or male ſtocks, in our law, will farther appear, if we conſider, that, whenever the lands have notoriouſly deſcended to a man from his mother's ſide, this rule is totally reverſed; and no relation of his by the father's ſide, as ſuch, can *ever* be admitted to them: becauſe he cannot poſſibly be of the blood of the firſt purchaſor. And ſo, *è converſo* if the lands deſcended from the father's ſide, no relation of the mother, as ſuch, ſhall *ever* inherit. 1 *Inſt.* 14.—See *Watkins on Deſcent*, *c.* 5.

But it has been reſolved, that a *fine* and *render* of lands, claimed by a party, as heir at law *ex parte materna*, will alter the quality of the eſtate; ſo that it ſhall deſcend to the heir *ex parte paterna*. 6 *Rep.* 63: *Carthew* 141.

Alſo if a man ſeiſed of land, as heir of the part of his mother, make a feoffment and take back an eſtate to him and his heirs; this, as a purchaſe, alters the *deſcent*, and if he die without iſſue, the heir of the part of the father ſhall inherit it. *Co. Lit.* 12.

The ſhort Reſult of all the above rules and explanations is, that when a man (*A.*) dies ſeiſed of an eſtate in fee-ſimple, it ſhall,—1. In the firſt place, deſcend to his *eldeſt ſon* and heir *or his iſſue*.—2. If his line be extinct, then to the *ſecond* or other ſons of *A.* reſpectively, in order of birth; or their iſſue; the *iſſue* of an *elder brother* being ſtill preferred to the *perſon* of a *younger*, that is to ſay, the children of the ſecond ſon, to the 3d ſon himſelf, and ſo on.—3. In default of ſons, or their iſſue, then to all the daughters of *A.* together, or their iſſue. See *ante* III. IV.—4. On failure of deſcendants from *A.* himſelf, then to the iſſue of his father *and* mother; the eldeſt brother of the whole blood, or his iſſue; or on failure of them, the other whole brothers of *A.* reſpectively, in order of birth, or their iſſue; or on failure of them, the ſiſters of *A.* of the whole blood reſpectively, or their iſſue.—5. On failure of deſcendants from the father and mother of *A.* then to the iſſue of his grand-father and grand-mother by the father's ſide; ſtill tracing the line of relationſhip on the father's ſide, till it entirely fails; when and not before, recourſe muſt be had to the relations of his mother in the ſame regular ſucceſſive order as in the paternal line. See more fully and accurately, 2 *Comm. c.* 14, *p.* 200.—240; on the whole of this ſubject, which in ſome points ſeems at firſt inextricably intricate; but will ſoon unfold itſelf to the reſearches of the diligent ſtudent; who to underſtand many parts of it ſhould be intimately acquainted with the law of *Tenures*. See that title in this Dictionary.

As to the DESCENT of REVERSIONS and REMAINDERS expectant upon eſtates of freehold, ſee *Watkins's Eſſay on the Law of Deſcents* (1793); from whence ſome curſory obſervations have already been adopted, and the following extract from which, on this part of the ſubject, may be deſerving attention.

"The principles which apply to the deſcent of an eſtate in poſſeſſion do not apply to the deſcent of an eſtate in remainder or reverſion, expectant on an eſtate of freehold, but they apply when the particular eſtate is only for years: a tenant for years being conſidered merely as the bailiff of the freeholder and to hold the poſſeſſion for him. 1 *Inſt.* 239. *b. n.* 2.

"When a reverſion or remainder, expectant upon an eſtate of freehold, continues in a courſe of deſcent, without certain acts of ownerſhip exerted, ſuch reverſion, &c. ſtill continually devolves, on the death of each particular heir, to the perſon who can *then* make himſelf heir to the donor or purchaſor; without any regard to the very heir of the precedent perſon who ſucceeded to it *by deſcent*; till when the particular eſtate is determined, it ultimately veſts *in poſſeſſion* in him, who *at ſuch determination*, is the right heir of ſuch donor, purchaſor or original remainder-man. For as there was no intermediate perſon actually ſeiſed of ſuch reverſion or remainder, no one could be the mean of turning its deſcent, and becoming a new ſtock or *terminus*; but ſuch ſtock muſt yet be the donor, purchaſor or remainder-man, and muſt ſo continue, (if no alienation be made) till ſuch eſtate ſhall become veſted in poſſeſſion; and conſequently, it will be abſolutely neceſſary to prove, on every devolution, a deſcent, not from the immediate predeceſſor who took by *deſcent*, (for with him, as ſuch, in this caſe, there is nothing to do) but from the donor, purchaſor, or original remainder-man. Whoever, therefore, can make himſelf heir to ſuch donor, &c. will be entitled to the inheritance in reverſion or remainder, though expectant; but yet not ſo as to be capable of tranſmitting it to *his own* right heirs, (as ſuch) except by granting it over; till it becomes veſted in poſſeſſion, by the determination of the particular eſtate which ſupported it, or whereon it was expectant, (when it would ceaſe to be a reverſion or remainder,) in him who ſhould be, at that time, the right heir of the donor, &c. which perſon would then become the ſtock of deſcent, and him from whom the future pedigree muſt run on his obtaining an *actual* ſeiſin of it. See *Fearn's Conting. Rem.* 449: (3d *edit.*) *Co. Litt.* 11 *b*; 14 *a*; 15 *a*: 3 *Co.* 42: *Cro. Car.* 411—12: 8 *Co.* 96 *a*: 1 *Co.* 95, 99: *Plowd.* 56, 113, 585, 9: *Brooke Deſcent* 2 & 58; *Done*, 5 & 21; *Seire Fac.* 126: *Cro. Eliz.* 334, 5: *Dyer* 129, *pl.* 63: See 2 *Com. Dig.* title *Copyhold*, (K. 11); *Deſcent* (C. 2.): *Robinſon on Gavelk. Appendix*: *Kitch.* 215: 1 *Vez.* 174.

"So

"So also with respect to contingencies and executory devises—Thus on a devise to *G.* in fee; but if he happened to die under the age of twenty one years, leaving no issue, then to *P.* in fee; after the decease of the testator, *P.* died in the life-time of *G.* who afterwards died under the age of twenty-one and without issue; it was held that the lands vested in *P*'s heir at law, upon the happening of the contingency, (*viz.* on the death of *G.* under age, and without issue,) but that the interest, while it was contingent, did not so attach in *G.* who was heir at law to *P.* on his decease, as to carry it, on his death, to *his* heir at law, who was not heir at law to *P.* but that it vested in that person *who was heir at law to P.* (the first purchasor) *at the time of the contingency happening.* See 2 *Wilf.* 29. *Goodright and Searle*; and *cited* also in *Fearne on Con. Rem.* 448. (3d *edit.*) *And see Cro. Car.* 410, 13: *Hobart* 33: *Plowd.* 485, 9: 3 *Com. Dig.* tit. *Descent.* (C. 2.)"

See *ante* VI.—See further as to other points concerning the doctrine of Descents and points involved therewith, titles *Estate*; *Heir*; *Limitation*; *Remainder*; *Executory Devise* &c.

DESCENT of CROWN LANDS.—See titles *Descent*; *King.*

DESCENT of DIGNITIES.—See titles *Descent*; *Peer.*

DESCRIPTION, *descriptio.*] In deeds and grants there must be a *certain description* of the *lands* granted, the *places* where the *lands* lie, and of the *persons* to whom granted, &c. to make them good. But wills are more favoured than grants as to those *descriptions*: and a wrong *description* of the person will not make a devise void, if there be otherwise a sufficient certainty what person was intended by the testator. 1 *Nelf. Abr.* 647.

Where a first *description* of land, &c. is false, though the second is true, a deed will be void: *contra*, if the first be true, and the second false. See 3 *Rep.* 2, 3. 8. 10. 28. 33, 34, &c. See titles *Deed*; *Will.*

DESERTION FROM THE ARMY, See title *Courts-Martial.*

DE SON TORT DEMESNE, See *De injuriâ suâ propriâ*; and titles *Trespass*; *Pleading.*

DESPITUS, A contemptible person. *Fleta, lib.* 4. *cap.* 5. *par.* 4.

DESUBITO, To weary a person with continual barkings, and then to bite; which is provided against by old laws. *Leg. Alured.* 26.

DETACHIARE, To seize or to take into custody another person's goods, &c. by *attachment* or other course of law. *Cowel.*

DETAINER, See titles *Forcible Entry and Detainer.*

DETERMINATION OF WILL, See title *Estate at Will.*

DETINET, See *Debet & Detinet.*

DETINUE, *detinendo.*] In the Common law is like *actio depositi* in the Civil law; and is a writ which lies against him, who having goods or chattels delivered to keep, refuseth to re-deliver them. In this action of *detinue* it is necessary to ascertain the thing detained in such a manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn or the like, for that cannot be known from other money or corn; unless it be in a bag or a sack, for then it may be distinguishably marked. In order therefore to ground an action of *detinue*, which is only for the detaining, these points are necessary; See 1 *Inst.* 286; 1. That the defendant came lawfully into possession of the goods, as either by delivery to him or by finding them—2. That the plaintiff have a property.—3. That the goods themselves be of some value.—4. That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the several values of the several parcels detained, and also damages for the detention. And the judgment is conditional; that the plaintiff recover the said goods; or, if they cannot be had, their respective values, and also the damages for detaining them. *Co. Ent.* 170: *Cro. Jac.* 681.

There is one disadvantage which attends this action, *viz.* that the defendant is herein permitted to wage his law; (that is, to exculpate himself by oath; See title *Wager of Law*;) and thereby defeat the plaintiff of his remedy; which privilege in this case is grounded on the confidence originally reposed in the bailee by the bailor, in the borrower by the lender, or the like: from whence arose a strong presumptive evidence, that in the plaintiff's own opinion, the defendant was worthy of credit. See 1 *Inst.* 295.

For this and other reasons the action of *detinue* is now much disused, and has given place to the action of Trover. See title *Trover*; and also title *Bailment.*

The following cases on the subject of *Detinue*, may prove matter of use as well as of curiosity, and see further *Viner*, title *Detinue*, and *Bull. N. P.* 49—51.

Detinue may be brought for a piece of gold, of the price of 21 *s.* though not for 21 *s.* in money; for here is a demand of a certain particular piece. *Bull. N. P.* 50.

If a man receiving money from a banker, put part thereof into his bag, and while he is telling the rest, the bag is stolen; no action of *detinue*, &c. lies; because by putting up the money, he had appropriated it to his own use. *Comb.* 475. A man lends a sum of money to another, *detinue* lies not for it, but debt: but if *A.* bargains and sells goods to *B.* upon condition to be void, if *A.* pays *B.* a certain sum of money at a day; now if *A.* pays the money, he may have *detinue* against *B.* for the goods, though they came not to the hands of *B.* by bailment, but by bargain and sale. *Cro. Eliz.* 867: 2 *Danv.* 510.

If a man delivers goods to *A*, to deliver to *B.* *B.* may have *detinue*, for the property is in him: and where he delivers them to *B.* and after grants them to *D.* he shall not have *detinue* after the grant, but the grantee shall have it. *Yelv.* 241: 1 *Bulst.* 69. When goods are delivered to one, and he delivers them over to another, action of *detinue* may be had against the second person, and if he delivers them to one that has a right thereto, yet it is said he is chargeable: also if a person to whom a thing is delivered dieth, *detinue* lieth against his executors, &c. or against any person to whom a thing comes. 2 *Danv. Abr.* 511.

A man may have a general *detinue* against another that finds his goods: though if I deliver any thing to *A.* to re-deliver, and he loses it, if *B.* finds it and delivers it to *C.* who has a right to the same, he is not chargeable to me in *detinue*, because he is not privy to my delivery. 7 *H.* 6. 22: 9 *H.* 6. 58.

In actions of *detinue*, the thing must be once in the possession of the defendant; which possession is not to be altered by act of law, as seisure, &c. And the nature of the thing must continue, without alteration, to intitle one to this action. *F. N. B.* 138. If I find goods, and before

fore the owner brings his action, I ſell them; or they are recovered out of my hands upon an execution, or outlawry againſt the owner, &c. he cannot have *detinue* againſt me. 12 *E.* 4. 8: 27 *H.* 8. 13. But action of *detinue* will lie againſt him that finds goods, if they are waſted by wilful negligence. *Dr. & Stud.* 129.

A man buys cloth or other things of another, on a good and perfect contract; if the ſeller keeps the things bought, *detinue* lieth. *Dyer* 30, 203. Where one takes my goods into his cuſtody to keep them for me, and refuſes to reſtore them; although he have nothing for the keeping of them, this action will lie. 4 *Rep.* 84: 29 *Aſſ. pl.* 28. If I deliver to one a trunk that is locked, with things in it, and keep the key myſelf, and ſomething be taken out of it, writ of *detinue* lieth not for this: but if the trunk, and all that is in it be taken away, there it lies. 11 *Rep.* 89: 4 *E.* 3.

This action will not lie, where a man delivers goods to me, and I bid him take them again, if he refuſes to do it: or where one takes my goods or cattle by wrong as a treſpaſſer; or by way of diſtreſs for rent or as damage-feaſant, &c. Nor for a horſe ſick, when it is taken or lent; if he dies of that ſickneſs. *Bro. Detin.* 242: 43 *E.* 3. 21: 21 *E.* 4. And if it be a ring that is delivered to another, and he breaks it, it is doubted whether action of *detinue* may lie; becauſe the thing is altered, and cannot be returned as it was: but action on the caſe lieth. And although, where goods are found, and ſold, &c. *detinue* lies not: yet action upon the caſe of *trover and converſion* may be brought. 12 *E.* 4. 8: 18 *E.* 4. 22.

DETINUE OF CHARTERS. A man may have detinue for deeds and charters concerning land; but if they concern the freehold, it muſt be in *C. B.* and no other court. Action of detinue lies for charters which make the title of lands; and the heir may have a *detinue of charters*, although he hath not the land: if my father be diſſeiſed, and dieth, I ſhall have detinue for the charters, notwithſtanding I have not the land; but the executors ſhall not have the action for them. *New Nat. Br.* 308. If a man keep my charters from me, concerning the inheritance of my land, and I know the certainty of them, and the land; or if they be in a cheſt locked, &c. and I know not their certainty, I may recover them by this writ: ſo where lands are given to me and *J. S.* and my heirs, and he dies, if another gets the deeds, and if tenant in tail give away the deed of entail, and then die, his iſſue may bring a writ of *detinue of charters*. *Co. Lit.* 286: 1 *Rep.* 2: *F. N. B.* 138. But if the tenant in fee-ſimple do give away his deeds of the land, his heir may not have this action: and in caſe a woman great with child by her deceaſed huſband keeps the charters from his daughter and heir that concern the land, during the time ſhe is with child, this writ will not lie againſt her. 41 *E.* 3. 11.

Detinue was brought for a deed, and the plaintiff had a verdict, that the defendant detained the deed, and the jury gave 20*l.* damages, but did not find the value of the deed; and then there iſſued out a *diſtringas* to deliver the deed, or the value, and afterwards a writ of inquiry was awarded for the value: whereupon the jury found a different value from what the firſt verdict found; and it was adjudged good. *Raym.* 124: 1 *Nelſ. Abr.* 649. In *detinue of charters*, if the iſſue be upon the detinue, and it is found that the defendant hath burnt the charters, the judgment ſhall not be to recover the charters, which it appears cannot be had; but it is ſaid it ſhall be for the plaintiff to recover the land in damages. 2 *Rol. Abr.* 101: 2 *Danv. Abr.* 511. For detaining of deeds and charters concerning the inheritance of lands, or an indenture of leaſe, the defendant ſhall not wage his law, as he may in a common action of *detinue*. 1 *Inſt.* 295.

DETINUE OF GOODS IN FRANK-MARRIAGE, Is on a divorce between a man and his wife; after which, the wife ſhall have this writ of detinue for the goods given with her in marriage. *Mich.* 35 *E.* 1: *New Nat. Br.* 308.

DETRACTARI, To be torn in pieces with horſes ——*Apoſtatæ, ſacrilegi, & hujuſmodi*, detractari *debent & comburi. Fleta, lib.* 1. *cap.* 37. But we know not, now, of any ſuch puniſhment by our laws.

DETUNICARE, To diſcover or lay open to the world. *Matth. Weſtm.* 1240.

DEVADIATUS, Is where an offender is without ſureties or pledges. *Domeſday.*

DEVASTAVIT; OR DEVASTAVERUNT BONA TESTATORIS. A writ that lies againſt executors or adminiſtrators, for paying debts upon ſimple contract, before debts on bonds and ſpecialties, &c. for in this caſe they are liable to action, as if they had ſquandered away, or *waſted* the goods of the deceaſed, or converted them to their own uſe; and are compellable to pay ſuch debts by ſpecialty out of their own goods, to the value of what they ſo paid illegally. *Dyer* 232. But if an executor pays debts upon ſimple contract, before he hath any notice of bonds, it is no *devaſtavit*; and regularly this notice is by an action commenced againſt him, for the law doth not oblige him to take notice of it himſelf, nor of a judgment againſt his teſtator, becauſe he is not privy to acts done either by or againſt him. 1 *Mod.* 175: 1 *Lev.* 215.

Where an executor payeth legacies before debts, and hath not ſufficient to pay both, it is a *devaſtavit*. Alſo where an executor ſells the teſtator's goods at an undervalue, it is a *devaſtavit*; but this is underſtood where the ſale is fraudulent; for if more money could not be had, it is otherwiſe. *Keilw.* 59: 1 *Nelſ. Abr.* 649. Executors keeping the goods of the deceaſed in their hands, and not paying the teſtator's debts; or ſelling them, and not paying off debts, &c. or not obſerving the law which directs them in the management thereof; or doing any thing by negligence or fraud, whereby the eſtate of the deceaſed is miſemployed, are guilty of a *devaſtavit*, or waſte; and they ſhall be charged for ſo much *de bonis propriis*, as if for their own debt. 8 *Rep.* 133. But the fraud or negligence of one executor is not chargeable on the reſt, where there are ſeveral executors. 1 *Rol. Abr.* 929.

There are ſome caſes in the old books, in which it hath been held, if an executor waſtes the goods of the teſtator, and afterwards makes his executor, and dies, leaving aſſets, that an action of debt will not lie againſt the executor of the waſting executor, upon a ſuggeſtion of a *devaſtavit* or waſte by the firſt executor; becauſe it is a perſonal wrong which died with him. 3 *Leon.* 241. But in this caſe there is a difference between a lawful executor, and an executor *de ſon tort*; for as an executor *de ſon tort* poſſeſſes himſelf of the goods wrongfully, if he afterwards waſtes them, and dies, leaving aſſets, his executor

ecutor shall be charged upon the suggestion of a *devastavit* in his testator, because he came wrongfully by the goods, and therefore the wrong shall not die with his person. 2 *Lev.* 133.—See title *Executor*, V. 1. And before the *Stat.* 30 *Car.* 2. *c.* 7, it was decreed in equity against the executor of a lawful executor, who had wasted the goods, and died, that such executor should be liable to make good to the creditors of the testator, so much as the first executor had wasted, and so far as he had assets of the said first executor. 1 *Chanc. Rep.* 257.

By the said *Stat.* 30 *Car.* 2. *c.* 7, it is enacted, That if an executor *de son tort* wastes the goods, and dies, his executors shall be liable in the same manner as their testator would have been, if he had been living. And it has been since adjudged, that a rightful executor, who wastes the goods of the testator, is in effect an executor *de son tort* for abusing his trust; 3 *Mod.* 113. And his executor or administrator is made liable to a *devastavit*, by *Stat.* 4 & 5 *W.* & *M. c.* 24, which statute makes the *Stat.* 30 *C.* 2. *c.* 7, perpetual.

Debt lies against an executor in the *debet* and *detinet*, where there is a judgment against his testator, upon a suggestion only, that he had wasted the goods; and this is a more expeditious way than the old method of *sci. fac. inquiry*, which was issued to shew cause why the plaintiff should not have execution against the executor *de bonis propriis*, and thereupon the sheriff returned a *devastavit*, &c. 1 *Lev.* 147: 1 *Nelf.* 653.

A husband is to be charged for waste done by his wife *dum sola*; but the husband is not chargeable after the death of a wife executrix, on suggestion of a *devastavit* in a declaration against him. *Cro. Car.* 603: *Lutw.* 672. And it has been adjudged, that a feme covert executrix cannot do any waste during the coverture; though for waste done by the husband she shall be charged, if she survive him; but then it must be on a judgment obtained against him, and not on a bare suggestion of a *devastavit*, &c. 2 *Lev.* 145. If an executor or administrator confesses judgment, or suffers it to go by default, he thereby admits *assets*, and is estopped to say the contrary in an action on such judgment suggesting a *devastavit*. 1 *Wilf.* 258.—See titles *Debt*; and further, particularly title *Executor*, VI. 2.

DEVENERUNT, A writ heretofore directed to the escheator on the death of the heir of the King's tenant under age and in custody, commanding the escheator that by the oaths of good and lawful men he inquire what lands and tenements by the death of the tenant *came to the King*. *Dyer* 360. This writ is now disused; but see *Stat.* 14 *Car.* 2. *c.* 11, for preventing frauds and abuses in his Majesty's *Customs*.

DEVEST, *devestire.*] Is opposite to *invest*. As to *invest* signifies to deliver the possession of any thing to another; so to *devest* signifieth to take it away. *Feud. lib.* 1. *cap.* 7.

DEVISE, from the Fr. *deviser*, to divide or sort into parcels.] A gift of lands, &c. by a last will and testament. The giver is called the *devisor*; and he to whom the lands are given, the *devisee*. A *devise* in writing is, in construction of law, no deed; but an instrument by which lands are conveyed.

To DEVISE, is to give by will.

The word was formerly, particularly applied to bequests of land; but is now generally used for the gift of any legacies whatever.

For the law relating to *Devises*, as well of real as personal estates, See fully this *Dict.* title *Will*. As to Executory Devises, See title *Executory Devise, Estate, Limitation, Remainder*.

DEVOIRES OF CALEIS, Fr. *Devoir*, Duty.] The customs due to the King, for merchandise brought into or carried out of *Calais*, when our staple remained there. *Stat.* 2 *R.* 2. *stat.* 1. *c.* 3.—See *Stat.* 34 *Ed.* 1. *c.* 18.

DEXTRARIUS, One at the *right hand* of another. And the word *dextrarios* has been used for light horses, or horses for the great saddle; from the Fr. *destrier*, a horse for service.

DEXTRAS DARE, Shaking of hands in token of friendship; or a man's giving up himself to the power of another person. *Walsingh. p.* 332.

DIARIUM, Is taken for daily food; or as much as will suffice for the day. *Du Cange*.

DIASPERATUS, Stained with many colours. *Mon. tom.* 3. *pag.* 314.

DICA, A tally for accounts, by number of *taillees*, cuts or notches. *Lib. Rub. Scaccar. fol.* 30.

DICKAR, OR DICKER OF LEATHER, Is a certain quantity, consisting of *ten* hides, by which leather is bought and sold. Vide *Stat.* 51 *H.* 3. *st.* 1. There are also *dickers* of *iron*, containing ten bars to the *dicker*. This word is thought to come from the *Greek* δικὰς, which signifies ten. *Domesday*.

DICTORES AND DICTUM. The one signifies an arbitrator; and the other the arbitrament. *Malms. p.* 348.

DICTUM DE KENELWORTH. An edict or award, between King *Henry* the Third and his Barons and others, who had been in arms against him: so called, because it was made at *Kenelworth Castle* in *Warwickshire*, *anno* 51 *Hen.* 3. It contained a composition of those who had forfeited their estates in that rebellion, which composition was five year's rent of the lands and estates forfeited.

DIEM CLAUSIT EXTREMUM, A writ which issued out of the court of *Chancery* to the escheator of the county, upon the death of any of the King's tenants *in capite*, to inquire by a jury of what lands he died seised, and of what value, and who was the next heir to him. This writ to be granted at the suit of the next heir, &c. for upon that, when the heir came of age, he was to sue livery of his lands out of the King's hands. *F. N. B.* 251.

DIES, See *Day*.

DIES DATUS, Is a day or time of respite given to the defendant in a suit by the court. *Broke.*—See *Day*.

DIES MARCHIÆ, Was the day of congress or meeting of the *English* and *Scotch*, appointed annually to be held on the *marches* or borders, to adjust all differences between them, and preserve the articles of peace. *Tho. Walsingham, in Ric.* 2. *p.* 307.

DIETA, A day's journey. *Fleta, lib.* 4. *c.* 28: *Bracton, lib.* 3. *tract.* 2. *c.* 16.

DIET, *conventus.*] A legislative assembly; as the *diet* of the *Empire*, of *Ratisbon*, &c. See this *Dict.* titles *Parliament, Wittenagemote*.

DIEU ET MON DROIT, God and my Right; the *motto of* the *royal arms*, intimating, that the King of *England* holds his empire of none but God; first given by King *Rich.* I.

DIEU SON ACT, Are words often used in our old law: and it is a maxim in law, That the *act of God*, or inevitable

inevitable accident, ſhall prejudice no man. Therefore, if a houſe be blown down by tempeſt, thunder or lightening, the leſſee or tenant for life or years, ſhall be excuſed in waſte: likewiſe he hath by the law a ſpecial intereſt to take timber, to build the houſe again for his habitation. 4 *Rep.* 63: 11 *Rep.* 82. So when the condition of a bond conſiſts of two parts in the *disjunctive*, and both are poſſible at the time of the obligation made, and afterwards one of them becomes impoſſible by the act of God, the obligor is not bound to perform the other part. 5 *Rep.* 22. And where a perſon is bound to appear in court, at a certain day, if before the day he dieth, the obligation is ſaved, *&c.* See particularly relative to this term, titles *Bailment*, *Carrier*.

DIFFACERE, To deſtroy: and *diffactio* is a maiming any one. *Leg. H.* 1. *c.* 64, 92.

DIFFORCIARE RECTUM, To take away, or deny juſtice. *Mat. Paris. anno* 1164.

DIGEST. The book of Pandects of the Civil law; which hath its name from its containing *Legalia præcepta excellenter* Digeſta. *Du Cange.*—See title *Civil Law*.

DIGNITY, *dignitas.*] Signifies honour and authority; reputation, *&c.* And *dignity* may be divided into ſuperior and inferior: as the titles of Duke, Earl, Baron, *&c.* are the higheſt names of *dignity*; and thoſe of Baronet, Knight, Serjeant at Law, *&c.* the loweſt. Nobility only can give ſo high a name of *dignity*, as to ſupply the want of a ſurname in legal proceedings: and as the omiſſion of a name of *dignity* may be pleaded in abatement of a writ, *&c.* ſo it may be where a peer, who has more than one name of *dignity*, is not named by the Moſt Noble. See title *Abatement*. No temporal *dignity* of any foreign nation can give a man a higher title here than that of Eſquire. 2 *Inſt.* 667.—See titles *Addition*; *Deſcent*; *Peer*.

DIGNITY ECCLESIASTICAL, *dignitas eccleſiaſticalis.*] Is defined by the Canoniſts to be *adminiſtratio cum juriſdictione & poteſtate aliqua conjuncta*; of which there are ſeveral examples in *Duarenus, de Sacris Eccleſ. &c. lib.* 2. *c.* 6. *Dignitates eccleſiaſticæ*, are mentioned in the *Stat.* 26 *H.* 8. *c.* 31 & 32. And of church *dignities*, *Cambden* in his *Britannia*, *p.* 161, reckons in *England* 544.

DIGNITARIES, *dignitarii.*] Thoſe who are advanced to any dignity eccleſiaſtical; as a Biſhop, Dean, Archdeacon, Prebendary, *&c.* But there are ſimple Prebendaries, without cure or juriſdiction, which are not *dignitaries*. 3 *Inſt.* 155.

DILAPIDATION, *dilapidatio.*] Is where an incumbent on a church living ſuffers the parſonage houſe or out-houſes to fall down, or be in decay for want of neceſſary reparation: or it is the pulling down or deſtroying any of the houſes or buildings, belonging to a ſpiritual living, or deſtroying of the woods, trees, *&c.* appertaining to the ſame; for it is ſaid to extend to the committing or ſuffering any wilful waſte, in or upon the inheritance of the church. *Deggs's Parſ. Counſ.* 89. It is the intereſt of the church in general to preſerve what belongs to it for the benefit of the ſucceſſors; and the old canons, and our own provincial conſtitutions require the clergy ſufficiently to repair the houſes belonging to their benefices; which, if they neglect or refuſe to do, the biſhop may ſequeſter the profits of the benefice for that purpoſe, *&c.* *Right's Clerg.* 143. And by the Canon law, *dilapidations* are made a debt, which is to be ſatisfied out of the profits of the church; but the Common law prefers debt on contracts, *&c.* before debt for *dilapidations*. *Hern.* 136.

The proſecution in theſe caſes may be brought either againſt the incumbent himſelf, or againſt his executors or adminiſtrators; and the executor or adminiſtrator of him in whoſe time it was done or ſuffered, muſt make amends to the ſucceſſor: and if the proceedings are againſt the incumbent, then they ought to be in the ſpiritual court. That court may alſo proceed againſt an executor, or the ſucceſſor may have an action of the caſe or debt at the Common law, in which action he ſhall recover damages in proportion to the *dilapidations*. 1 *Nelſ. Abr.* 656: *Parſ. Counſ.* 97, 98: *Carter* 224: 3 *Lev.* 268.

It is alſo ſaid to be good cauſe of deprivation, if the Biſhop, Parſon, Vicar, or other eccleſiaſtical perſon dilapidates the buildings, or cuts down timber growing on the patrimony of the church unleſs for neceſſary repairs. 1 *Ro. Rep.* 86: 11 *Rep.* 98: *Godb.* 259. And that a writ of prohibition will alſo lie againſt him in the courts of Common law. 3 *Bulſt.* 158: 1 *Ro. Rep.* 335.

By *Stat.* 13 *Eliz. c.* 10, if any *Parſon*, *&c.* ſhall make a gift of his goods and perſonal eſtate to defraud his ſucceſſor of his remedy for *dilapidations*, ſuch ſucceſſor may have the ſame remedy in the ſpiritual court againſt the perſon to whom ſuch gift is made, as he might have againſt the executors of the deceaſed *parſon*. And by *Stat.* 14 *Eliz. c.* 11, money recovered for *dilapidations*, is to be employed in the reparations of the ſame houſes ſuffered to be in decay, or the party recovering ſhall forfeit double the value of what he receives, to the King.

If a parſon ſuffers *dilapidations*, and afterwards takes another benefice, whereby his former benefice becomes void, his ſucceſſor may have an action againſt him, and declare that by the cuſtom of the kingdom he ought to pay him ſo much money as ſhall be ſufficient to repair the dilapidations. 3 *Lev.* 268. In caſe a parſon comes to a living, the buildings whereof are in decay by *dilapidations*, and his predeceſſor did not leave a ſufficient perſonal eſtate to repair them, ſo that he is without remedy, he is to have the defects ſurveyed by workmen, and atteſted under their hands in the preſence of witneſſes, which may be a means to ſecure him from the incumbrance brought upon him by the fault of his predeceſſor. *Country Parſon's Companion* 60.

DILATORY PLEAS, Are ſuch as are put in merely for *delay*; and there may be a demurrer to a *dilatory plea*, or iſſue may be taken on the *fact*, if falſe. If the plea is *true* in *fact*, and *good* in *law*, and is in *abatement*, the plaintiff muſt enter up judgment of *caſſetur*, before he commences a new ſuit. If the plea is adjudged ill, on *demurrer*, there muſt be a *reſpondeas ouſter*, and defendant muſt plead another plea. If *iſſue* in *fact*, is taken, and found by the jury, for *plaintiff*, in *caſe*, *&c.* they aſſeſs the damages. In *debt*, the judgment for plaintiff is final, *&c.* The truth of *dilatory pleas* is to be made out by affidavit of the fact, *&c.* by *Stat.* 4 *An. c.* 16. § 11.—See title *Pleading*.

DILIGIATUS, Outlawed, *i. e. de lege ejectus. Leg. Hen.* 1. *c.* 45.

DILLIGROUT, Pottage formerly made for the *King's table*, on his *coronation* day: and there was a tenure in ſerjeanty, by which lands were held of the King, by the ſervice of finding this pottage, at that ſolemnity. 39 *H.* 3.

DIMIDIETAS, Uſed in records for a moiety, or one half.

DIMINISHING the *coin*, See title *Coin*.

DIMINUTION, *diminutio.*] Is where the plaintiff or defendant, on an appeal to a ſuperior court, alledges that part of the record is omitted, and remains in the inferior court not certified; whereupon he prays that it may be certified by *certiorari*. *Co. Ent.* 232, 242. Of courſe *diminution* is to be certified on a writ of error; though if iſſue be joined upon the errors aſſigned, and the matter is entered upon record, which is made a *conſilium*, in this caſe there muſt be a rule of court granted for a *certiorari* to certify *diminution*. 1 *Lil. Abr.* 245. *Diminution* cannot be alledged of a thing which is fully certified; but in ſomething that is wanting, as want of an original, or a warrant of attorney, &c. 2 *Lev.* 206: 1 *Nelſ. Abr.* 658. And if on *diminution* alledged, and the plaintiff in error certify one original, &c. which is wrong; and the defendant in error certifies another that is true; the true one ſhall ſtand. *Cro. Jac.* 597: *Cro. Car.* 91.

After a writ of error brought, and the defendant hath pleaded *in nullo eſt erratum*, he cannot afterwards alledge *diminution*; becauſe by that plea he affirmeth or alloweth the record to be ſuch as is certified upon the writ of error. *Godb.* 266. But in ſome caſes, *diminution* hath been alledged, after *in nullo eſt erratum* pleaded, *ex gratiâ curiæ*; though not *ex rigore juris*. *Palm.* 85. And there is an inſtance, that the court in ſuch a caſe hath awarded a *certiorari*, to inform their conſcience of the truth of the record in *C. B.* where the defendant in error had not joined *in nullo eſt erratum*. 1 *Nelſ.* 658.—See further title *Judgment, Reverſal of*.

DIMISSORY LETTERS, *literæ dimiſſoriæ.*] Are ſuch as are uſed where a candidate for holy orders has a title in one dioceſe, and is to be ordained in another: the proper dioceſan ſends his *letters dimiſſory* directed to ſome other ordaining biſhop, giving leave that the bearer may be ordained, and have ſuch a cure within his diſtrict. *Cowel.*

DIOCESE, *dioceſis.*] Signifies the circuit of every biſhop's juriſdiction. For this realm hath two ſorts of diviſions; one into ſhires or counties, in reſpect to the *temporal ſtate*; and another into *dioceſes*, in regard to the *eccleſiaſtical ſtate*, of which we reckon twenty-one in *England*, and four in *Wales*. *Co. Lit.* 94. Alſo the kingdom is ſaid to be divided in its eccleſiaſtical juriſdiction into two *provinces* of *Canterbury* and *York*; each of which provinces is divided into *dioceſes*, and every *dioceſe* into archdeaconries, and archdeaconries into pariſhes, &c. *Wood's Inſt.* 2.

The bounds of *Dioceſes* are to be determined by witneſſes and records, but more particularly by the adminiſtration of divine offices. To which purpoſe, there are two rules in the Canon law: in one caſe, upon a diſpute between two biſhops upon this head, the direction is, that they proceed in the buſineſs, by ancient books or writings, and alſo by witneſſes, reputation, and other ſufficient proof: in the other caſe, where the queſtion was, by whom a church built upon the confines of two *dioceſes* ſhould be conſecrated, the rule laid down is, that it ſhould be conſecrated by the biſhop of that city, who, before it was founded, baptized the inhabitants, and adminiſtered to them other divine offices. *Gibſ.* 133.

The juriſdiction of the *city* is not included in the name of *dioceſe*, ſo ſaith the Canon law: and accordingly, in citations in general viſitations, directed to the clergy, it is ordered to cite the clergy of the *city and dioceſe*. *Gibſ.* 133.

A biſhop may perform divine offices, and uſe his epiſcopal habit, in the *dioceſe* of another, without leave; but may not perform therein any act of juriſdiction, without permiſſion of the other biſhop. *Gibſ.* 133.

A clergyman dwelling in one *dioceſe*, and beneficed in another, and being guilty of a crime, may, in different reſpects, be puniſhed in both; that is, the biſhop in whoſe *dioceſe* he dwells, may proſecute him; but the ſentence, ſo far as it affects his benefice, muſt be carried into execution by the other biſhop. *Gibſ.* 134.—See titles *Biſhop*; *Clergy*; *Convocation*.

DISABILITY, *diſabilitas.*] An incapacity in a man to inherit any lands, or take that benefit which otherwiſe he might have done; which may happen four ways; by the act of an anceſtor, or of the party himſelf, by the act of God, or of the law.

1. *Diſability*, by the act of the anceſtor, is where the anceſtor is attainted of treaſon, &c. which corrupts the blood of his children, ſo that they may not inherit his eſtate. See title *Attainder, Deſcent*.

2. *Diſability*, by the act of the party, is where a man binds himſelf by obligation, that upon ſurrender of a leaſe, he will grant a new eſtate to the leſſee; and afterwards he grants over the reverſion to another, which puts it out of his power to perform it.

3. *Diſability*, by the act of God, is where a perſon is of non-ſane memory, whereby he is incapable to make any grant, &c. So that if he paſſeth an eſtate out of him, it may after his death be made void; but it is a maxim in law, *That a man of full age ſhall never be received to diſable his own perſon*. See title *Lunacy*.

4. *Diſability*, by the act of the law, is where a man by the ſole act of the law, without any thing done by him, is rendered incapable of the benefit of the law; as an alien born, &c. *Terms de Ley*: 4 *Rep.* 123, 124: 5 *Rep.* 21: 8 *Rep.* 43.—See title *Alien*.

There are alſo other *diſabilities*, by the Common law, of *ideocy*, *infancy*, and *coverture*, as to grants, &c. And by ſtatute in many caſes: as *papiſts* are diſabled to make any preſentation to a church, &c. *Officers* not taking the oaths, are incapable to hold offices: *Foreigners*, though naturalized, to bear offices in the government, &c. See the proper titles. A perſon ſhall not be admitted to *diſable* himſelf to avoid an office of charge, &c. no more than a man ſhall be allowed to ſay that he was an *ideot*, &c. to avoid an act done by himſelf. *Carth.* 307. As to the diſability of *Diſſenters*, See that title, and title *Nonconformiſts*. As to pleas of *diſability* in the perſon of the plaintiff, See title *Abatement*.

DISADVOCARE, To deny, or not acknowledge a thing. *Hengham Magna, cap.* 4.

DISAGREEMENT, Will make a nullity of a thing, that had eſſence before: and *diſagreement* may be to certain acts, to make them void, &c. *Co. Lit.* 380.—See title *Agreement*.

DISALT, According to *Littleton*, is to diſable a perſon. *Lit.* title *Diſcontinuance*.

DISBOSCATIO, A turning wood ground into arable or paſture.

DISCARCARE,

DISCARCARE, From *Dis*, and *Cargo*.] To unlade a ſhip or veſſel by taking out the cargo or goods. *Placit. Parl.* 18 *Ed.* 1.—See *Carcatus*.

DISCEIT, See *Deceit*.

DISCENT, See *Deſcent*.

DISCHARGE, On writs and proceſs, &c. is where a man is confined by ſome legal writ or authority, and doth that which by law he is required to do; he is releaſed or *diſcharged* from the matter for which he was confined. If one be arreſted by a *latitat* out of *B. R.* and the plaintiff do not file a declaration againſt the defendant in priſon in two terms, he ſhall be *diſcharged* on common bail. 1 *Lil. Abr.* 470. Alſo where a defendant on arreſt is admitted to *bail*, if the bail bring in the principal before the return of the ſecond *ſcire facias* iſſued out againſt them, they ſhall be *diſcharged*. If an *obligee* diſcharges one joint obligor, where ſeveral are jointly bound, it *diſcharges* the others. *March.* 129. And a man may *diſcharge* a *promiſe* made to himſelf, &c. *Cro. Jac.* 483.—See titles *Accord*; *Acquittal*; *Habeas Corpus*; *Satisfaction*; *Bond*, &c.

DISCLAIMER, *diſclamium*, from Fr. *clamer*, with the privative *dis*.] Is a plea containing an expreſs denial, or renouncing of a thing; as if a tenant ſue a *replevin*, upon the diſtreſs of the lord, and the lord avows the taking, ſaying the tenant holds of him as of his lord, and that he diſtrained for the rent not paid, or ſervice not performed: now, if the tenant ſay he doth not hold of him, this is called a *diſclaimer*, and the lord proving the tenant to hold of him, on a writ of right *ſur diſclaimer* brought, the tenant ſhall loſe his land. *Terms de Ley*.

This *Diſclaimer* by a tenant, is conſidered as a civil crime, and puniſhed accordingly, by forfeiture of lands to the lord, on reaſons moſt apparently feodal. *Finch.* 270, 1. So if in any court of record, the particular tenant does any act which amounts to a virtual diſclaimer; if he claims any greater eſtate than was granted him at the firſt infeodation; or takes upon himſelf thoſe rights which belong only to tenants of a ſuperiour claſs. 1 *Inſt.* 252: if he affirms the reverſion to be in a ſtranger by accepting his fine, attorning as his tenant, colluſive pleading, and the like; ſuch behaviour amounts to a forfeiture of his particular eſtate. 1 *Inſt.* 253: 2 *Comm.* 275: 3 *Comm.* 233.

If a writ of *præcipe* be brought againſt two perſons for land, and one of them, the tenant, ſaith that he is not tenant, nor claims any thing in the lands; this is a *diſclaimer* as to him, and the other ſhall have the whole land. *Terms de Ley*. And when a tenant hath *diſclaimed*, upon action brought againſt him, he ſhall not have reſtitution on writ of error, &c. againſt his own act; but is barred of his right to the land *diſclaimed*. 8 *Rep.* 62. But a verbal *diſclaimer* ſhall not take place againſt a deed of lands: nor ſhall the *diſclaimer* of a wife during the coverture bar her entry on her lands. 3 *Rep.* 26.

Baron and Feme may diſclaim for the wife; though if the huſband hath nothing but in right of his wife, he cannot *diſclaim*. 2 *Danv. Abr.* 569. Such perſon as cannot loſe the thing perpetually in which he *diſclaims*, ſhall not be permitted to *diſclaim*: a biſhop, &c. may not *diſclaim*, for he cannot diveſt the right out of the church. Though in a *quo warranto*, at the ſuit of the King, againſt a biſhop or others for franchiſes and liberties, if the biſhop, &c. *diſclaims* them, this ſhall bind the ſucceſſors. *Co. Lit.* 102, 103. If a man be vouched becauſe of a reverſion on a leaſe made by himſelf, he cannot *diſclaim*: but an heir may diſclaim, being vouched upon a leaſe made by his anceſtor. 2 *Danv.* 569.

A perſon may *diſclaim* in the principal, and not in the incident; as he that is vouched becauſe of a reverſion, cannot *diſclaim* in the reverſion, ſaving the ſeigniory. 40 *Ed.* 3. 27. If the lord *diſclaims* his ſeigniory, in a court of record, it is extinct, and the tenant ſhall hold of the lord next paramount to the lord *diſclaiming*. *Lit. ſect.* 146.

It is ſaid not to be neceſſary, that the *writ of right ſur diſclaimer* ſhould be brought againſt the perſon that *diſclaims*; for if it be only againſt him that is found tenant of the land, though he be a ſtranger, it is not material. 2 *Danv.* 570. By plea of *non-tenure*, nothing is diſowned but the freehold, which may be good where the tenant hath the reverſion in fee, and not the freehold; but when ſuch tenant *diſclaims*, or pleads non-tenure and *diſclaims*, the demandant ſhall have the whole, as the whole is *diſclaimed*. *Ibid.*

By *Stat.* 21 *Jac.* 1. *c.* 16. *ſ.* 5, In all actions of treſpaſs *quare clauſum fregit*, wherein the defendant ſhall *diſclaim* any title to the land, and the treſpaſs be by negligence or involuntary, the defendant ſhall be admitted to plead a *diſclaimer*, and that the treſpaſs was by *negligence* or *involuntary*, and a *tender* of *ſufficient amends* before the action brought; and if the iſſue be found for the defendant, or the plaintiff be nonſuited, the plaintiff ſhall be barred from the ſaid action, and all ſuits concerning the ſame. See title *Pleading*.

Beſides theſe *diſclaimers* by tenants of lands, there are *diſclaimers* in divers other caſes: for there is a *diſclaimer of blood*, where a perſon denies himſelf to be of the blood or kindred of another, in his *plea*. *F. N. B.* 102. And a *diſclaimer of goods*, as well as lands; as if a man *diſclaimeth* goods, on arraignment of felony, when he ſhall loſe them, though he be cleared. *Standf. P. C.* 186. In *Chancery*, if a defendant by his anſwer renounces the having any intereſt in the thing in queſtion, this is likewiſe a *diſclaimer*. See title *Chancery*. And there is a deed of *diſclaimer* of *executorſhip* of a will, &c. where an executor refuſes, and throws up the ſame.

DISCONTINUANCE,

DISCONTINUATIO, from Fr. *diſcontinuer*, *ceſſare*.] An interruption or breaking off. An injury to real property, which conſiſts in the keeping out the true owner of an eſtate, by a tenant whoſe entry was at firſt lawful, but who wrongfully detains the poſſeſſion afterwards.

This happens when he who hath an eſtate-tail, maketh a larger eſtate of the land than by law he is entitled to do: in which caſe the eſtate is good, ſo far as his power extends who made it, but no further. *Finch, L.* 190. As if tenant in tail makes a feoffment in fee-ſimple, or for the life of the feoffee, or in tail; all which are beyond his power legally to make, for that by the Common law extends no farther than to make a leaſe for his own life: in ſuch caſe, the entry of the feoffee is lawful during the life of the feoffor; but if he retains the poſſeſſion after the death of the feoffor, it is an injury which is termed a *diſcontinuance*; the ancient legal eſtate, which ought to have ſurvived to the heir in tail being gone; or at leaſt ſuſpended, and for a while *diſcontinued*. For, in this caſe, on the death of the alienors neither the heir in

tail, nor they in remainder or reverſion expectant on the determination of the eſtate-tail, can enter on and poſſeſs the land ſo aliened: but muſt bring their writ, and ſeek to recover poſſeſſion by law. 3 *Comm.* 172: 1 *Inſt.* 325: *F. N. B.* 191, 4.

In the caſe of a *Diſſeiſin*, (ſee that title) while the poſſeſſion remains in the diſſeiſor, it is a mere naked poſſeſſion unſupported by any right; and the diſſeiſee may reſtore his own poſſeſſion, and put a total end to the poſſeſſion of the diſſeiſor by an entry on the land, without any previous action: but if the diſſeiſor dies, his heir comes to the poſſeſſion of the eſtate by a lawful title: it is the ſame if the diſſeiſor aliens; the alienee comes in by a lawful title. By reaſon of this lawful title, the heir in the firſt inſtance, and the alienee in the ſecond, acquires a preſumptive right of poſſeſſion, which is ſo far good, that even the perſon diſſeiſed loſes by it his right to recover the poſſeſſion by entry; and can only recover it by an action at law. When the right of entry is thus loſt, and the party can only recover by action, the poſſeſſion is ſaid to be diſcontinued. This is the *general* import of the word *diſcontinuance*; but in its *uſual* acceptation it ſignifies the effect of alienations made by huſbands ſeiſed in right of their wives; by eccleſiaſticks ſeiſed in right of their church; or by tenants in tail; thoſe being the three inſtances adduced by *Littleton* of Diſcontinuance. Thus before the *Stat.* 11 *H.* 7. *c.* 20, the alienation of a woman ſeiſed of an eſtate in dower, or of any eſtate of the gift of her huſband, or of any of his anceſtors, was ſaid to be a diſcontinuance: and before the *Stats.* 32 *H.* 8. *c.* 28: 14 *Eliz. c.* 8, recoveries ſuffered by tenants for life, tenants by the curteſy, or tenants in tail after poſſibility of iſſue extinct, or even by the feoffee of tenant for years, worked a diſcontinuance. See 1 *Rep.* 14.

It is to be obſerved, that there is a material difference between the ſituation or title of the alienee of any perſon, whoſe alienation makes a diſcontinuance, and the ſituation or title of the heir or alienee of a diſſeiſor; for the heir and alienee of a diſſeiſor immediately claim under a perſon coming in by a wrongful title, and their eſtates though not defeaſible by entry, are *immediately* defeaſible by action. But the alienee of every perſon, whoſe alienation is ſaid to be a diſcontinuance, [or rather whoſe alienation cauſes a diſcontinuance,] claims by a perſon having a lawful eſtate; and the eſtate of the alienee is unimpeachable during the life of the alienor. It ſhould alſo be obſerved, that a diſcontinuance extends to thoſe caſes only, where a perſon is diſpoſſeſſed of an eſtate of freehold, and where though he has loſt his right of entry, he can ſtill recover the poſſeſſion by action. The peculiar import of the word Diſcontinuance, where applied to the caſes mentioned by *Littleton*, is thus ſhortly, but forcibly expreſſed by *Houard*, in his Ancient Laws of the French—"An interruption of the right, which one has on an eſtate, by the ſale which another, charged to preſerve that right, has made of it."—See 1 *Inſt.* 325 *a.* And the long and learned note there on the doctrine of Diſcontinuance at large.

By the Common law, the alienation of an huſband who was ſeiſed in right of his wife, worked a diſcontinuance of the wife's eſtate: till the *Stat.* 32 *H.* 8. *c.* 28, provided, that no act by the huſband alone ſhould work a diſcontinuance of, or prejudice the inheritance or freehold of the wife: but that after his death, ſhe or her heirs may *enter* on the lands in queſtion. Formerly alſo, if an alienation was made by a ſole Corporation, as a Biſhop or Dean, without conſent of the Chapter, this was a diſcontinuance. *F. N. B.* 194. But this is now quite antiquated by the diſabling *Stats.* 1 *Eliz. c.* 19: 13 *Eliz. c.* 10; which declare all ſuch alienations abſolutely void *ab initio*; and therefore at preſent no diſcontinuance can be thereby occaſioned. 3 *Comm.* 172.

Having ſaid thus much on the general nature of Diſcontinuance, a title which though of conſiderable extent in the old law, is now very much abridged by ſtatute, the following ſelection on the ſubject may be ſufficient in this place: referring the enquiring ſtudent to *Com. Dig.* title *Diſcontinuance*, and the other abridgements; for further information when neceſſary.

A *Diſcontinuance* taketh away an entry only: and to every *diſcontinuance* it is neceſſary there ſhould be a deveſting or diſplacing of the eſtate, and turning the ſame to a right; for if it be not turned to a right, they that have the eſtate cannot be driven to an action. *Co. Lit.* 327. And an eſtate-tail cannot be *diſcontinued*, but where he that makes the *diſcontinuance*, was once ſeiſed by force of the intail, where the eſtate-tail is executed; unleſs by reaſon of a warranty. *Lit. Sect.* 637, 641. Alſo if tenant in tail levies a fine, *&c.* this is no *diſcontinuance*, till the fine is executed; becauſe if he dies before execution, the iſſue may enter. *Co. Lit.* 33: 2 *Danv. Abr.* 572.

A *Diſcontinuance* may be five ways, *viz.* by *feoffment*, *fine*, *recovery*, *releaſe* and *confirmation* with warranty. 1 *Rep.* 44. A grant without livery, or a grant in fee without warranty, are no *diſcontinuances*: an exchange will not make a *diſcontinuance*; as if tenant in tail exchanges land with another, that is not any *diſcontinuance*, by reaſon no livery is requiſite thereon. 2 *Danv.* 57. It is the ſame of a bargain and ſale, *&c.* And an alteration of ſuch things as lie in grant, and not in livery, works no *diſcontinuance*; for ſuch grant does no wrong either to the iſſue in tail, or him in reverſion or remainder, becauſe nothing paſſeth but during the life of tenant in tail, which is lawful; and every *diſcontinuance* worketh a wrong. *Co. Lit.* 332.

If tenant in tail of a copyhold eſtate, ſurrenders to another in fee, this makes not any *diſcontinuance*, (except there be a cuſtom for it) but the heir in tail may enter; though this hath been a great queſtion. 1 *Leon.* 95; 2 *Danv.* 571. If there be tenant for life, remainder in tail, and remainder in tail, *&c.* And tenant for life, and he in the firſt remainder in tail levy a fine, this is no *diſcontinuance* of either of the remainders: 1 *Rep.* 76. But if there be tenant in tail, remainder in tail, *&c.* and tenant in tail enfeoffs him in reverſion in fee: or where there is tenant for life, remainder in tail, reverſion in fee, and tenant for life enfeoffs the reverſioner; theſe are *diſcontinuances*, becauſe there is a mean or immediate eſtate. 1 *Rep.* 140: *Co. Lit.* 335: 3 *Danv.* 575.

If there be tenant in tail, remainder to his right heirs, and he makes feoffment in fee, this is a *diſcontinuance*; though ſuch tenant that made the feoffment, hath the fee in him. 2 *Danv.* 572. A man is tenant for life, the remainder in tail, remainder in fee, and the tenant for life makes a feoffment to him in remainder in fee; this is ſuch a *diſcontinuance* of the eſtate-tail, as produceth a forfeiture. 3 *Rep.* 59. If a tenant in tail be diſſeiſed, and after,

after releaſe with warranty to the diſſeiſor, it will be a *diſcontinuance*: ſo if he releaſe or confirm to tenant for life. *Lit. Sect.* 135; 1 *Rep.* 44. And if, where there is a tenant for life, and remainder in tail, the tenant for life levies a fine to his own uſe; and after tenant for life and he in remainder join in a feoffment by letter of attorney, this is a *diſcontinuance* of the eſtate-tail and the fee. *Dyer* 327.

If tenant in tail makes a feoffment in fee upon condition, and the condition is broken, the iſſue may enter notwithſtanding this *diſcontinuance*. *Lit.* 632. Tenant in tail grants all his eſtate to another, though without livery and ſeiſin; and if that other perſon make a feoffment in fee, it will not be a *diſcontinuance* to take away the entry of him in reverſion or remainder. *Lit.* 145: 1 *Rep.* 46: 10 *Rep.* 97. A leaſe is made for life, remainder in tail; and he in remainder in tail diſſeiſes the tenant for life, and makes a feoffment in fee, and dies without iſſue, and then tenant for life dieth; this is no *diſcontinuance* to him in reverſion. *Lit.* 146: 1 *Brown.* 36. And if tenant in tail of a rent, common, advowſon, or the like, grant it in fee, it is not a *diſcontinuance*: nor where ſuch tenant granteth any thing out of land, &c. *Lit.* 138: *Finch's Law* 193.

Where a tenant in tail of a manor makes a leaſe for life, not warranted by *Stat.* 32 *Hen.* 8. *c.* 28, of part of the demeſnes, this is a *diſcontinuance* of this parcel; and it is ſaid makes it no parcel of the manor. 2 *Rol. Abr.* 58.

There can be no *diſcontinuance* by tenant in tail of the gift of the Crown, *Stat.* 34 & 35 *H.* 8. *c.* 20. Nor by tenant in tail of fee-farm rents, to bar the remainder veſted by the ſtatute; *Stat.* 22 & 23 *Car.* 2. *c.* 24. *ſ.* 6. And ſome *diſcontinuances* at Common law are now made bars as to the iſſue in tail; though they ſtill remain *diſcontinuances* in ſome caſes, to him in remainder, &c. ſuch as fines, with proclamations by *Stats.* 4 *H.* 7. *cap.* 24: 32 *H.* 8. *cap.* 36. If the huſband levy a fine with proclamations, and dieth, the wife muſt enter, or avoid the eſtate of the conuſee within five years, or ſhe is barred for ever, by the *Stat.* 4 *H.* 7. *c.* 24. For the *Stat.* 32 *H.* 8. *cap.* 28, doth help the *diſcontinuance*, but not the bar. *Co. Lit.* 326. Huſband and wife tenant in ſpecial tail, the huſband alone levied a fine to his own uſe, and afterwards he deviſed the land to his wife for life, the remainder over, rendering rent, &c. The huſband dies, the wife enters and pays the rent, and dies: in this caſe it was adjudged, that the fine had barred the iſſue in tail, but not the wife. *Dyer* 351. The entry of the wife in this caſe was a diſagreement to the eſtate of inheritance, and an agreement to the eſtate for life: but if the wife had not waived the inheritance, the eſtate tail as to the wife had remained. 9 *Rep.* 135.

If lands be given to the huſband and wife, and to the heirs of their two bodies, and the huſband maketh a feoffment in fee, and dieth; the wife is helped by *Stat.* 32 *H.* 8. *c.* 28; and ſo is the iſſue of both their bodies 1 *Inſt.* 326. The huſband is tenant in tail, the remainder to the wife in tail, the huſband makes a feoffment in fee; by this, the huſband, by the Common law, did not only diſcontinue his own eſtate tail, but his wife's remainder: but by *Stat.* 32 *Hen.* 8. *c.* 28, after the death of the huſband without iſſue, the wife may enter by the ſaid act. Though if the huſband hath iſſue, and maketh a feoffment in fee of his wife's land, and his wife dieth; the heir of the wife ſhall not enter during the huſband's life, neither by the Common law nor by the ſtatute. 1 *Inſt.* 326.

A *Diſcontinuance* may be defeated, where the eſtate that worked it is defeated: as if a huſband make a feoffment of the wife's land upon condition, and after his death, his heir enters on the feoffee for the condition broken; now the *diſcontinuance* is defeated, and the feme may enter upon the heir, *Co. Lit.* 336.

DISCONTINUANCE OF PLEA, Is where divers things ſhould be pleaded to, and ſome are omitted; this is a *diſcontinuance*. 1 *Nelſ. Abr.* 660, 661. If a defendant's plea begin with an anſwer to part, and anſwers no more, it is a *diſcontinuance*: and the plaintiff may take judgment by *nil dicit*, for what is not anſwered: but if the plaintiff plead over, the whole action is diſcontinued. 1 *Salk.* 139. Debt upon bond of 500*l.* the defendant as to 225*l.* part of it, pleads payment, &c. And upon demurrer to this plea, it was adjudged that there being no anſwer to the reſidue, it is a *diſcontinuance* as to that, for which the plaintiff ought to take judgment by *nil dicit*. 1 *Salk.* 180. Where no anſwer is given to one part, if the plaintiff pleads thereto, he cannot have judgment according to his declaration; for which reaſon it may be a *diſcontinuance* of the whole. 1 *Nelſ.* 660. But this is helped after verdict by ſtat. 32 *H.* 8. *c.* 30. See titles *Amendment*; *Pleading*.

DISCONTINUANCE OF PROCESS. This Diſcontinuance is ſomewhat ſimilar to a nonſuit; for when a plaintiff leaves a chaſm in the proceedings of his cauſe, as by not continuing the proceſs regularly from day to day, and time to time as he ought to do, the ſuit is diſcontinued; and the defendant is no longer bound to attend; but the plaintiff muſt begin again by ſuing out a new original, uſually paying coſts to his antagoniſt. Antiently by the demiſe of the King all ſuits depending in his courts were at once diſcontinued; but to prevent the expence as well as delay attending this rule of law the *Stat.* 1 *Ed.* 6. *c.* 7, enacts that no action ſhall be diſcontinued by ſuch death of the King. The continuance of the ſuit by improper proceſs, or by giving the party an illegal day, is properly a *mis-continuance*.

Where an action is long depending, and continued from one term to another, the *continuances* muſt be all entered, otherwiſe there will be a *diſcontinuance*; whereupon a writ of error may be brought, &c. 1 *Nelſ. Abr.* 660. If the plaintiff in a ſuit doth nothing, it is a *diſcontinuance*, and he muſt begin his ſuit again: and where it is too late to amend a declaration, &c. or the plaintiff is adviſed to proſecute in another court, he is to diſcontinue his ſuit, and proceed *de novo*. But a *diſcontinuance* of an action is not perfect till it is entered on the roll, when it is of record. *Cro. Car.* 236.

The plaintiff cannot diſcontinue his action after a demurrer joined, and entered; or after a verdict, or a writ of inquiry, without leave of the court. *Cro. Jac.* 35: 1 *Lill. Abr.* 473. In actions of debt or covenant, after a demurrer joined, the court will give leave to diſcontinue, if there be an apparent cauſe, as if the plaintiff through his own negligence is in danger of loſing his debt: but if the demurrer be argued, then he ſhall not have leave to diſcontinue; nor where he brings another action for the ſame cauſe, and this is pleaded in abatement of the firſt action. *Sid.* 84.

It has been ruled, upon a motion to diſcontinue, that the court may give leave after a ſpecial verdict; which is not compleat and final; but never after a general verdict. 1 *Salk.* 178. See *Hardw.* 200, 1. So after enquiry executed and returned, *Carth.* 81.

After iſſue and a verdict plaintiff cannot diſcontinue without conſent of defendant, for if plaintiff will not enter up judgment defendant may. *Salk.* 178.—After demurrer argued and allowed, diſcontinuance may be allowed on payment of coſts. *Sty.* 76, 116: 3 *Lev.* 440.

And where a man hath a juſt cauſe of action, for a matter of any conſequence, and unadviſedly demurs to a plain bar, &c. and defendant joins in demurrer, and it is argued, and the court are of opinion the plea is *good* in *law*, tho' it may be *falſe* in *fact*, the court will, even after giving their opinions, but before judgment given, on motion, permit the plaintiff to withdraw his *demurrer*, on payment of coſts, and take iſſue.

The plaintiff may if he ſees occaſion diſcontinue before or after declaration delivered by a ſide bar rule on payment of coſts *N. on R. Mich.* 10 *Geo.* 2. But in replevin the avowant cannot have ſuch rule.

An appeal may as well be diſcontinued by the defect of the proceſs or proceeding in it, as it may be by the inſufficiency of the original writ, &c. For by ſuch defect, the matter depending is as it were out of court. 1 *Lill.* 473. A *diſcontinuance* or miſcontinuance, at common law reverſes a judgment given by default; and *diſcontinuance* upon a demurrer is error; but a miſcontinuance after appearance is not ſo. 8 *Rep.* 150: 46 *Ed.* 3. 30.

Diſcontinuance of proceſs is helped at Common law by appearance: and by *Stat.* 32 *H.* 8. *cap.* 30, All *diſcontinuances*, miſcontinuances and negligences therein, of plaintiff or defendant, are cured after verdict. See tit. *Amendment*.

DISCOVERT, The law term for a woman unmarried or widow, one not within the bonds of matrimony. *Law Fr. Dict.*

DISCOVERY, The act of revealing or diſcloſing any matter by a defendant in his anſwer to a bill filed againſt him in a court of equity. See title *Chancery*.

To adminiſter to the ends of juſtice, without pronouncing a judgment which may affect any rights, the Courts of equity in many caſes compel a diſcovery. This juriſdiction is exerciſed to aſſiſt the adminiſtration of juſtice, in the proſecution or defence of ſome other ſuit, either in the Court of Equity itſelf or in ſome other court: and a diſcovery has been compelled to aid the juriſdiction of a foreign court. But if a bill is brought to aid, by a diſcovery, the proſecution or defence of any proceeding *not merely civil*, in any other court, as an indictment or information, a Court of Equity will not exerciſe its juriſdiction to compel a diſcovery; and the defendant may demur. 2 *Vez.* 398. And in the caſe of ſuits merely civil in a Court of ordinary juriſdiction, if that Court can itſelf compel the diſcovery required, a Court of Equity will not interfere. 1 *Atk.* 288: 1 *Vez.* 205: 2 *Vez.* 451.

A bill for a diſcovery muſt ſhew an intereſt in the plaintiff in the ſubject to which the required diſcovery relates; and ſuch an intereſt as intitles him to call on the defendant for the diſcovery. See *Finch Rep.* 36, 44: 1 *Vern.* 399.

As the object of a Court of Equity in compelling a diſcovery is either to enable itſelf or ſome other court to decide on matters in diſpute between the parties, the diſcovery ſought muſt be material, either to the relief prayed by the bill, or to ſome other ſuit actually inſtituted, or capable of being inſtituted. If therefore the plaintiff does not ſhew by his bill ſuch a caſe as renders the diſcovery which he ſeeks, material to the relief, if he prays relief; or does not ſhew a title to ſue the defendant in ſome other court; or that he is actually involved in litigation with the defendant or liable to be ſo; and does not alſo ſhew that the diſcovery which he prays is material to enable him to ſupport or defend a ſuit; he ſhews no title to the diſcovery; and conſequently a demurrer to the bill for ſuch purpoſe will be allowed. See *Finch Rep.* 214: 1 *Vez.* 205: 2 *Vez.* 396, 9: 2 *Atk.* 388: 1 *Vern.* 204.

The ſituation of a defendant may render it improper for a court of equity to compel a diſcovery; either, 1. becauſe the diſcovery may ſubject the defendant to *pains and penalties*, or to ſome *forfeiture* or ſomething in the nature of a forfeiture: or 2. it may hazard his title in a caſe where in conſcience he has at leaſt an equal right with the perſon requiring the diſcovery; though that right may not be clothed with a perfect legal title; as to which latter, ſee 1 *Vez.* 205: 3 *Atk.* 453.—It is a general rule that no one is bound to anſwer ſo as to ſubject himſelf to *puniſhment*, in whatever manner that puniſhment may ariſe; (as by pains and penalties, a criminal proſecution, &c.) or whatever may be the nature of the puniſhment 2 *Vez.* 245, 451: 1 *Vez.* 246: 1 *Eq. Ab.* 131. *p.* 10: 1 *Atk.* 450: 2 *Atk.* 393: *Viner* title *Uſury* Q 4: *Toth.* 135.

But if the plaintiff alone is intitled to the penalties, and expreſsly waves them by his bill, the defendant ſhall be compelled to make the diſcovery; for it can no longer ſubject him to a penalty. 1 *Vern.* 60.—And though a diſcovery may ſubject a defendant to penalties, to which the plaintiff is not entitled, and which conſequently he cannot wave, yet if the defendant has expreſsly covenanted, not to plead or demur to the diſcovery ſought, which is the common caſe with reſpect to ſervants of the *Eaſt India* Company, he ſhall be compelled to anſwer. 1 *Eq. Ab.* 77, 8. Where too a perſon by his own agreement ſubjects himſelf to a payment in the nature of a penalty on his doing a particular act a demurrer, to diſcovery of that act will not be allowed.

It ſeems however that a demurrer will be allowed to any diſcovery which may tend to ſhew the defendant guilty of any moral turpitude, as the birth of a child out of wedlock. *Park.* 163: but ſee 2 *Vez.* 451.—But a mother may in ſome caſes be compelled to diſcover where her child was born, though it may lead to prove the child an alien. 2 *Vez.* 287, 494.

A defendant may likewiſe demur to a bill which may ſubject him to any *forfeiture of intereſt*; as if a bill is brought to diſcover whether a leaſe has been aſſigned without licence; or whether a defendant entitled during widowhood, or liable to forfeiture of a legacy in caſe of marriage without conſent is married: or to diſcover any matter, which may ſubject a defendant intitled to any office or franchiſe to a *quo warranto*. See *Toth.* 69: 1 *Vez.* 56: 2 *C. R.* 68: 2 *Atk.* 392: 2 *Vez.* 265: 1 *Eq. Ab.* 131. *c.* 10.

A defendant may in the ſame manner demur to a diſcovery, which may ſubject him to any thing in the *nature* of a forfeiture; as to a diſcovery whether he was educated in the popiſh religion, by which he might incur the incapacities

incapacities in ſtat. 11 & 12 *W.* 3. which the ſtat. 18 *Geo.* 3. *c.* 60. does not entirely remove: or whether a clergyman was preſented to a ſecond living which avoided the firſt. See 3 *Atk.* 457: 2 *Comm.* 661: 3 *Bac. Abr*: 3 *Atk.* 453.

See further this Dict. title *Chancery*; and Mr. *Mitford*'s treatiſe there cited.

DISCRETION, *Diſcretio.*] When any thing is left to any perſon to be done according to his *diſcretion*, the law intends it muſt be done with ſound *diſcretion*, and according to law: and the court of *B. R.* hath a power to redreſs things that are otherwiſe done, notwithſtanding they are left to the *diſcretion* of thoſe that do them. 1 *Lil. Abr.* 477.

Diſcretion is to diſcern between right and wrong; and therefore whoever hath power to act at *diſcretion*, is bound by the rule of reaſon and law. 2 *Inſt.* 56, 298. And though there be a latitude of diſcretion given to one, yet he is circumſcribed, that what he does be neceſſary and convenient; without which no liberty can defend it. *Hob.* 158. The aſſeſſment of fines on offenders committing affrays, &c. and the binding of perſons to the good behaviour, are at the *diſcretion* of our judges and juſtices of peace. And in many caſes, for crimes not capital, the judges have a diſcretionary power to inflict corporal puniſhment on the offenders. Infants, &c. under the age of *diſcretion*, are not puniſhable for crimes; and want of *diſcretion* is a good exception againſt a witneſs. See title *Age*; and other appoſite titles.

To DISFRANCHISE, Is to take away one's freedom or privilege: it is the contrary to *enfranchiſe*. And corporations have power to *diſfranchiſe* members, in certain caſes. See titles *Corporation*; *By-Law*.

DISHERISON, A *diſinheriting*: mentioned in *ſtats.* 20 *Ed.* 1: 8 *R.* 2.

DISHERITOR. One that *diſinheriteth*, or puts another out of his inheritance. *Stat.* 3 *Ed.* 1. *c.* 39.

DISMES, *Decimæ.*] *Tithes*, or the *tenth* part of all the fruits of the earth, and of beaſts, or labour, due to the clergy. It ſignifieth alſo the *tenths* of all *ſpiritual livings* given to the prince, which is called a *perpetual diſme*. *Stat.* 2 & 3 *Ed.* 3. *cap.* 35. And formerly this word (*tenths*) ſignified a *tax* or tribute levied of the *temporalty*. *Holliugſh.* in *H.* 2. *f.* 111. For the laws of the *diſmes* or *tithes*, See titles *Tithes*; *Taxes*.

DISPARAGEMENT. In the time of the old tenures; the matching an heir in marriage under his degree, or againſt decency. *Co. Lit.* 107: *Magn. Chart. c.* 6. See this Dict. title *Tenures*.

TO DISPAUPER. When a perſon by reaſon of his poverty, is admitted to ſue *in formâ pauperis*; if afterwards, before the ſuit is ended, the ſame party have any lands or perſonal eſtate fallen to him or be guilty of any thing whereby he is liable to have this privilege taken from him, then he is put out of the capacity of ſuing *in forma pauperis*, and is ſaid to be *diſpaupered*. See title *Coſts* II.

DISPENSATION. See title *Biſhops*; and as to *Diſpenſations* to hold *pluralities*; ſee titles *Chaplains*; *Ceſſion*.

DISPENSATIONS OF THE KING. If a *diſpenſation* by the *Archbiſhop* of *Canterbury*, is to be in extraordinary matters, or in a caſe that is new, the *King* and his council are to be conſulted: and it ought to be confirmed under the broad ſeal. The *King*'s authority to grant *diſpenſations* remains as it did at common law; notwithſtanding ſtat. 25 *H.* 8. *c.* 21: *Cro. Eliz.* 542, 601. See further as to the diſpenſing power of the Crown by *non obſtante*, &c. this Dict. title *King*.

DISPERSONARE, To ſcandaliſe or diſparage. *Blount.*

DISSIGNARE. To break open a ſeal—*Sepulto patre teſtamentum* diſſignatum *eſt*. *Neubrigenſis, lib.* 2. *c.* 7.

DISSEISIN. From the Fr. *Diſſaiſin.*]

A ſpecies of injury by *ouſter* to the freehold eſtate of another.—A wrongful putting out of him that is ſeiſed of the freehold. 1 *Inſt.* 277. As where a perſon enters into lands or tenements, and his entry is not lawful, and keeps him that hath the eſtate from the poſſeſſion thereof. *Bract. lib.* 4. *c.* 3. And *diſſeiſin* is of two ſorts; either *ſingle diſſeiſin*, committed without force of arms; or *diſſeiſin by force*; but this latter is more properly *deforcement*. *Brit. cap.* 42, 43.

Seiſin is a technical term to denote the completion of that inveſtiture, by which the tenant was admitted into the tenure, and without which no freehold could be conſtituted, or paſs. *Diſſeiſin* muſt therefore mean the turning the tenant out of his tenure and uſurping his place and feudal relation —Lord *Mansfield* in the caſe of *Taylor ex dem. Atkyns* v. *Horde*, 1 *Burr.* 60: 5 *Bro. P. C.* 247.

Now however from the ſeveral ſtatutes, firſt reſtraining and at length aboliſhing all military tenures, little more is left than the names of *feoffment*, *ſeiſin*, *tenure* and *freeholder*, without any preciſe knowledge of the things originally ſignified by thoſe terms. *Ibid.*

In the ſame caſe Lord *Mansfield* ſaid "Diſſeiſin is a complicated fact, and differs from diſpoſſeſſing. The freeholder by diſſeiſin differs from a poſſeſſor by wrong.—Though the term diſſeiſin happens to be the ſame, the thing ſignified by that word as applied to the two caſes of *actual diſſeiſin*, or *diſſeiſin by election* is very different."—In this caſe it was attempted to ſupport a common recovery, by ſuppoſing the tenant to the præcipe, to have gained a freehold by diſſeiſin —The nature of a diſſeiſin was therefore elaborately inveſtigated by the counſel; and the idea of a freehold being gained thereby, learnedly repelled by Lord *Mansfield*. See further title *Fine*.

Diſſeiſin therefore ſeems to imply the turning the tenant out of his fee, and uſurping his place and relation.—To conſtitute an *actual diſſeiſin* it was neceſſary that the diſſeiſor had not a right of entry; (or to uſe the old law expreſſion that his entry was not congeable;) that the perſon diſſeiſed was at the time of the diſſeiſin, in the actual poſſeſſion of the lands; that the diſſeiſor expelled him from them by ſome degree of conſtraint or force; and that he ſubſtituted himſelf to be tenant to the Lord. But how this ſubſtitution was effected, it is difficult, perhaps impoſſible now to diſcover. 1 *Inſt.* 266. *b. in n*; 330. *b. in n.* the latter a very long and abſtruſe note on the ſubject and entering fully into the principles of the caſe abovementioned.

The injuries of *Abatement* and *Intruſion*, (ſee thoſe titles) are by a wrongful entry where the poſſeſſion is vacant; but this of *Diſſeiſin* is an attack upon him who is in actual poſſeſſion, and turning him out of it. The former were an ouſter from a freehold in law; this is an ouſter from a freehold in deed. Diſſeiſin may be effected either in corporeal inheritances, or in incorporeal. Diſſeiſin of things corporeal, as of houſes, lands, &c. muſt be by entry and actual diſpoſſeſſion of the freehold. *Co. Litt.* 181; as if a man enter either by force or fraud into the houſe of another, and turns, or at leaſt keeps, him or his ſervants out of poſſeſſion. Diſſeiſin of incorporeal hereditaments can-

not

not be an actual diſpoſſeſſion, for the ſubject itſelf is neither capable of actual bodily poſſeſſion, nor diſpoſſeſſion: but it depends on their reſpective natures and various kinds; being in general nothing more than a diſturbance of the owner in the means of coming at, or enjoying them. But all diſſeiſins of hereditaments incorporeal, are only ſo at the election and choice of the party injured; if, for the ſake of more eaſily trying the right, he is pleaſed to ſuppoſe himſelf diſſeiſed. *Litt.* § 588, 9. Otherwiſe as there can be no actual diſpoſſeſſion, he cannot be compulſively diſſeiſed of any incorporeal hereditaments.

And ſo too, even in corporeal hereditaments, a man may frequently ſuppoſe himſelf to be diſſeiſed, when he is not ſo in fact, for the ſake of entitling himſelf to the more eaſy and commodious remedy, of an aſſiſe of *novel diſſeiſin*, inſtead of being driven to the more tedious proceſs of a writ of entry. *Heng. Parv. c.* 7: 4 *Burr.* 110.

The true injury of an actual or *compulſive diſſeiſin* according to what has been already ſtated ſeems to be that of diſpoſſeſſing the tenant, and ſubſtituting oneſelf to be the tenant of the lord in his ſtead; in order to which in the times of pure feudal tenure the conſent or connivance of the lord, who upon every deſcent or alienation perſonally gave, and who therefore alone could change, the ſeiſin or inveſtiture, ſeems to have been conſidered as neceſſary. But when in proceſs of time the feodal form of alienations wore off, and the lord was no longer the inſtrument of giving actual ſeiſin, it is probable that the lord's acceptance of rent or ſervice, from him who had diſpoſſeſſed another, might conſtitute a complete diſſeiſin. Afterwards no regard was had to the lord's concurrence, but the diſpoſſeſſor himſelf, was conſidered the ſole diſſeiſor: and this wrong was then allowed to be remedied by entry only, without any form of law, as againſt the diſſeiſor himſelf; but required a legal proceſs againſt his heir or alienee. And when the remedy by aſſiſe was introduced under *Henry* II. to redreſs ſuch diſſeiſins, as had been committed within a few years next preceding, the facility of that remedy induced others, who were wrongfully kept out of the freehold, to feign or allow themſelves to be ſeiſed, merely for the ſake of the remedy. 3 *Comm.* 169. *&c.*

By *Magna Charta*, 9 *Hen.* 3. *c.* 29, No man is to be *diſſeiſed* or put out of his freehold, but by lawful judgment of his peers, or by the law of the land: and by *ſtat.* 32 *H.* 8. *c.* 33. the dying ſeiſed of any *diſſeiſor* of or in any lands, *&c.* having no right therein, ſhall not be a deſcent in law, to take away an entry of a perſon having lawful title of entry; except the *diſſeiſor* hath had peaceable poſſeſſion five years, without entry or claim by the perſon having lawful title. But if a *diſſeiſor* having expelled the right owner hath ſuch peaceable poſſeſſion of the lands five years without claim, and continues in poſſeſſion ſo as to die ſeiſed, and the land deſcends to his heirs, they have a right to the poſſeſſion thereof till the perſon that is owner recovers at law; and the owner ſhall loſe his eſtate for ever, if he do not proſecute his ſuit within the time limited by the ſtatute of limitations. *Bac. Elem.* And if a *diſſeiſee* levy a fine of the land whereof he is *diſſeiſed*, unto a ſtranger, the *diſſeiſor* ſhall keep the land for ever; for the *diſſeiſee* againſt his own fine cannot claim, and the conuſee cannot enter, and the right which the *diſſeiſee* had, being extinct by the fine, the *diſſeiſor* ſhall take advantage of it. 2 *Rep.* 56. But this is to be underſtood, where no uſe is declared of the fine by the *diſſeiſee*; when it ſhall enure to the uſe of the *diſſeiſor*, *&c.* by *Bridgman*, C. J. 1 *Lev.* 128.—See title *Claim Continual.*

If a feme ſole be ſeiſed of lands in fee, and is *diſſeiſed*, and then taketh huſband; in this caſe, the huſband and wife, as in right of the wife, have right to enter, and yet the dying ſeiſed of the *diſſeiſor*, ſhall take away the entry of his wife, after the death of the huſband. *Co. Lit.* 246. If a perſon *diſſeiſes* me, and, during the *diſſeiſin*, he or his ſervant cut down the timber growing upon the land, and afterwards I re-enter into the land, I ſhall have action of treſpaſs againſt him; for the law, as to the *diſſeiſor* and his ſervants, ſuppoſes the freehold to have been always in me: but if the *diſſeiſor* be *diſſeiſed* by another, or if he makes a feoffment, gift in tail, leaſe for life or years, I ſhall not have an action againſt the ſecond *diſſeiſor*, or againſt thoſe who come in by title: for all the meſne profits ſhall be recovered againſt the *diſſeiſor* himſelf. 11 *Rep.* 52: *Keilw.* 1.

A *diſſeiſor* in aſſiſe, where damages are recovered againſt him, ſhall recover as much as he hath paid in rents chargeable on the lands before the *diſſeiſin*. *Jenk. Cent.* 189. But if the *diſſeiſor* or his feoffee ſows corn on the land, the *diſſeiſee* may take it whether before or after ſeverance. *Dyer* 31, 173: 11 *Rep.* 46. Where a man hath a houſe in fee, *&c.* and locks it, and then departs; if another perſon comes to his houſe, and takes the key of the door, and ſays that he claims the houſe to himſelf in fee, without any entry into the houſe, this is a *diſſeiſin* of the houſe. 2 *Danv. Abr.* 624. If the feoffor enters on the land of the feoffee, and makes a leaſe for years, *&c.* it is a *diſſeiſin*, though the intent of the parties to the feoffment, was, that the feoffee ſhould make a leaſe to the feoffor for life. 2 *Rep.* 59. If leſſee for years is ouſted by his leſſor; this is ſaid to be no *diſſeiſin*. *Cro. Jac.* 678.

A man who enters on another's land, claiming a leaſe for years, who hath not ſuch leaſe, is a *diſſeiſor*: though if a man enters into the houſe of another by his ſufferance, without claiming any thing, it will not be a *diſſeiſin*. 9 *H.* 6. 21, 31: 2 *Danv.* 625. If a perſon enters on lands by virtue of a grant or leaſe, that is void in law; he is a *diſſeiſor*. 2 *Danv.* 630. A leſſee at will, makes a leaſe for years, it is a *diſſeiſin*, at the election of the leſſor at will: but it is the *diſſeiſin* of the leſſee at will, not of the leſſee for years. *Hill.* 7 *Car. B. R.* If a man enters into the land of an infant, though by his aſſent; this is a *diſſeiſin* to the infant, at his election. 11 *Ed.* 3: *Aſſ.* 87. And if a perſon commands another to enter upon lands, and make a *diſſeiſin*, the commander is a *diſſeiſor*, as well as ſuch other; unleſs the command be conditional, when it may be otherwiſe. 22 *Aſſ.* 99: 2 *Danv.* 631.

If a man forces another to ſwear to ſurrender his eſtate to him, and he doth ſo, it will be a *diſſeiſin* of the eſtate. So, forcibly hindring a perſon from tilling his land, is a *diſſeiſin* of the land. *Co. Litt.* 161. But if one enter wrongfully into the lands of another, and he accepts rent from ſuch perſon, he ſhall not afterwards be taken for a *diſſeiſor*. *Dyer* 173. Where any perſon is diſturbed from entering on land, it is a *diſſeiſin*: a denial of a rent, when lawfully demanded, is a *diſſeiſin* of the rent. *Co. Litt.* 153. Alſo hindring a diſtreſs for rent, by force; or making reſcous of a *diſtreſs*, are a *diſſeiſin* of the rent. 2 *Danv.* 624, 625. An infant, or feme covert, may be a *diſſeiſor*, but it muſt be by actual entry on lands, *&c.*

A feme

A feme covert ſhall not be a *diſſeiſoreſs*, by the act of the baron: if he *diſſeiſes* another to her uſe, ſhe is not a *diſſeiſoreſs*; nor if the wife agrees to it during the coverture: yet if after his death, ſhe agrees to it, ſhe *is* a *diſſeiſoreſs*. 2 *Danv.* 626, 627. Aſſiſes that lie againſt *diſſeiſors* are called *writs of diſſeiſin*; and there are ſeveral writs of entry *ſur diſſeiſin*, of which ſome are in the *per*, and others in *le poſt*, &c.

After all that has been here ſaid on this head, we muſt conclude by obſerving that writs of *aſſiſe* on *diſſeiſins*, are now diſuſed; and the feigned action of ejectment is introduced in their place. It is not amiſs to be acquainted with this learning, but *treſpaſs* and *ejectment* ſupply the place of almoſt every kind of *aſſiſe*. See thoſe titles, and title *Aſſiſe of Novel Diſſeiſin*.

DISSEISOR, Is in general he that *diſſeiſeth* or puts another out of his land, without order of law: and a *diſſeiſee* is he that is ſo put out. 4 *Hen.* 4. As the king in judgment of law can do no wrong, he cannot be a *diſſeiſor*. 1 *E.* 5. 8. A *diſſeiſor* is to be fined and impriſoned; and the *diſſeiſee* reſtored to the land, &c. by *Stat.* 20 *H.* 3. *c.* 3. Where a *diſſeiſor* is *diſſeiſed*, it is called *diſſeiſin* upon *diſſeiſin*. See title *Diſſeiſin*.

DISSENTERS. Separatiſts from the Church and the ſervice and worſhip thereof. Though the experience of the turbulent diſpoſition of theſe Sectariſts occaſioned in former times ſeveral diſabilities and reſtrictions (perhaps not entirely conſiſtent with the ſpirit of true Toleration) to be laid upon them by abundance of ſtatutes; (See *ſtatutes* 23 *Eliz. c.* 1: 29 *Eliz. c.* 6: 35 *Eliz. c.* 1: 22 *C.* 2. *c.* 1;) yet at length the Legiſlature, with a ſpirit of true magnanimity, extended that indulgence to *them* which they themſelves, when in power, had held to be countenancing ſchiſm, and had denied to the church of *England*. The penalties are conditionally ſuſpended by the *ſtat.* 1 *W. & M. ſt.* 1. *c.* 18. "for exempting their majeſties' proteſtant ſubjects, *diſſenting* from the church of *England*, from the penalties of certain laws," commonly called the *Toleration-act*; which is confirmed by *ſtat.* 10 *Ann. c.* 2; and declares that neither the laws above-mentioned nor the *ſtatutes* 1 *Eliz. c.* 2. § 14: 3 *Jac.* 1. *cc.* 4, 5, nor any other penal laws made againſt Popiſh recuſants (except the Teſt Acts) ſhall extend to any Diſſenters, other than papiſts, and ſuch as deny the Trinity: Provided. 1. That they take the oaths of allegiance and ſupremacy; (or make a ſimilar affirmation, being Quakers. See *Stat.* 8 *Geo.* 1. *c.* 6;) and ſubſcribe the declaration againſt popery; 2. That they repair to ſome congregation certified to, and regiſtered in, the court of the biſhop or archdeacon, or at the county ſeſſions. 3. That the doors of ſuch meeting houſe ſhall be unlocked, unbarred, and unbolted; in default of which the perſons meeting there are ſtill liable to all the penalties of the former acts.

Diſſenting Teachers, in order to be exempted from the penalties of the *Statutes* 13 & 14 *Car.* 2. *c.* 4: 15 *Car.* 2. *c.* 6: 17 *Car.* 2. *c.* 2: 22 *Car.* 2. *c.* 1; are alſo to ſubſcribe the articles of religion mentioned in *Stat.* 13 *Eliz. c.* 12; (which only concern the confeſſion of the true Chriſtian faith, and the doctrine of the ſacraments;) with an expreſs exception of thoſe relating to the government and powers of the church, and to infant baptiſm; or if they ſcruple ſubſcribing the ſame, ſhall make and ſubſcribe the declaration preſcribed by 19 *Geo.* 3. *c.* 44, profeſſing themſelves to be Chriſtians and proteſtants, and that they believe the ſcripture to contain the revealed will of God, and to be the rule of doctrine and practice.

Thus, though the crime of non-conformity is by no means univerſally abrogated, it is ſuſpended and ceaſes to exiſt with regard to theſe *Proteſtant Diſſenters*, during their compliance with the conditions impoſed by theſe ſtatutes; and under theſe conditions, all perſons who will approve themſelves no papiſts or oppugners of the Trinity are left at full liberty to act as their conſcience ſhall direct them, in the matter of religious worſhip. And if any perſon ſhall willfully, maliciouſly, or contemptuouſly diſturb any congregation, aſſembled in any church, or permitted meeting-houſe, or ſhall miſuſe any preacher, or teacher there, he ſhall (by virtue of the ſame *Stat.* 1 *W. & M.*) be bound over to the ſeſſions of the peace, and forfeit 20 *l.*) But by *Stat.* 5 *Geo.* 1. *c.* 4, no Mayor or principal magiſtrate, muſt appear at any diſſenting meeting with the enſigns of his office, on pain of diſability to hold that or any other office; the Legiſlature judging it a matter of propriety, that a mode of worſhip, ſet up in oppoſition to the national, when allowed to be exerciſed in peace, ſhould be exerciſed alſo with decency, gratitude, and humility.—Diſſenters alſo who ſubſcribe to the declaration in the *Stat.* 19 *Geo.* 3, are exempted (unleſs in the caſe of endowed ſchools and colleges) from the penalties of the *Stats.* 13 & 14 *Car.* 2. *c.* 4: & 17 *Car.* 2. *c.* 2; which prohibit (upon pain of fine and impriſonment) all perſons from teaching ſchool, unleſs they be licenſed by the Ordinary, and ſubſcribe a declaration of conformity to the liturgy of the church, and reverently frequent the divine ſervice *eſtabliſhed* by the laws of this kingdom.

Diſſenters choſen to any *parochial* or *ward* offices, and ſcrupling to take the oaths may execute the office by deputy, who ſhall comply with the law in this behalf. *Stat.* 1 *W. & M. ſt.* 1. *c.* 18.—But it appears that they are not ſubject to fine on refuſing to ſerve corporation offices.—For where a freeman of *London*, was elected one of the ſheriffs, but refuſed to take the office on account of his being a diſſenter, and as ſuch not having received the ſacrament according to the rights of the church of *England*, within a year before his election, an action was brought againſt him in the Sheriff's Court, for the penalty incurred by ſuch refuſal, and a judgment recovered; which judgment was affirmed, in a writ of error brought in the Court of Huſtings. But the defendant having obtained a ſpecial commiſſion of errors, the Judges Delegates reverſed both judgments; and on a writ of error in Parliament, this judgment of reverſal was affirmed; the judges being (except one) of opinion that the defendant was at liberty to object to the *validity* of his election on the ground of his own non-conformity. 3 *Bro. P. C.* (8vo. ed.) 465. *Harriſon* v. *Evans*.

For further matter relative to Diſſenters, See title *Non-conformiſts*; *Oaths*; (wherein of the *Corporation* and *Teſt Acts*,) *Blaſphemy*; *Religion*; *Toleration*; *Quakers*.

DISTILLERS, Of ſtrong waters, ſpirits, &c. are ſubject to divers regulations under the Exciſe-laws, in order to avoid frauds in the revenue; for ſome particulars relative to which ſee this Dict. title *Spirituous Liquors*; and alſo title *Exciſe*.

DISTRESS,

DISTRICTIO.] The taking of a perſonal chattel out of the poſſeſſion of the wrong-doer, into the cuſtody of the party injured, to procure a ſatisfaction for the wrong committed. 3 *Comm.* 6. The term *Diſtreſs* is alſo applied to the thing taken or diſtrained.

A man may take a *diſtreſs* for homage, fealty, or any ſervices; for fines and amercements; and for damage-feaſant, *&c.* And the effect of it is to compel the party either to *replevy* the *diſtreſs*, and conteſt the taking in an action againſt the diſtrainer; or, which is more uſual, to compound or pay the debt or duty, for which he was diſtrained.

There are likewiſe *diſtreſſes* in actions compulſory to cauſe a man to appear in court: and of theſe there is a *diſtreſs perſonal*, of a man's moveable goods, and profits of lands, *&c.* for contempt in not appearing after ſummoned; and *diſtreſſes real*, upon immoveable goods. And none ſhall be diſtrained to anſwer for any thing touching their freeholds, but by the King's writ. *Stat.* 52 *Hen.* 3. *c.* 1.

Diſtreſs is alſo divided into *finite* and *infinite*: *Finite*, is that which is limited by law, how often it ſhall be made to bring the party to trial of action, as once, twice, *&c.* And *infinite*, is without limitation, until the party appears; which is likewiſe applicable to jurors not appearing: then it hath had a further diviſion into a *grand diſtreſs*, and *ordinary diſtreſs*; the former whereof extends to all the goods and chattels which the party hath within the county. *F. N. B.* 904: *Old Nat. Br.* 43, 113: *Brit. c.* 26. *f.* 52.

Let us now conſider, more particularly;

I. 1. *Who may diſtrain, and for what*; 2. *And what may be diſtrained.*

II. *At what Time, and in what Manner, generally the Diſtreſs ſhould be made.*

III. *Of the Statutes regulating Diſtreſs.*

I. 1. THE MOST USUAL INJURY for which a diſtreſs may be taken is, that of non-payment of rent; and it may now be laid down as an univerſal principle, that a Diſtreſs may be taken for any kind of rent in arrear. See *poſt.* III.—For neglecting to do ſuit to the lord's court, or other certain perſonal ſervice, the lord may diſtrain of common right. *Bro. Diſtreſs* 15: 1 *Inſt.* 46.—For amercements in a Court Leet, a diſtreſs may be had of common right; but not for amercements in a Court Baron, without a ſpecial preſcription to warrant it. *Brownl.* 36. Another injury, for which diſtreſſes may be taken, is, where a man finds beaſts of a ſtranger wandering in his grounds *damage feaſant*; doing him hurt or damage by treading down his graſs, *&c.* in which caſe the owner of the ſoil may diſtrain them, till ſatisfaction made to him for the injury he has ſuſtained.—Laſtly, for ſeveral duties and penalties inflicted by ſpecial Acts of Parliaments, remedy by diſtreſs and ſale is given. See *poſt.* III.

Of common right a perſon may diſtrain for rents, and all manner of ſervices; and for rent reſerved upon a gift in tail, leaſe for life, years, *&c.* though there be no clauſe of *diſtreſs* in the deed, ſo as the reverſion be in himſelf: but on a feoffment in fee, a *diſtreſs* may not be taken, unleſs expreſsly reſerved in the deed. *Co. Lit.* 57, 205: *Doctor and Student, cap.* 9.—See *Co. Lit.* 204.

A man grants a rent out of the manor of *D.* and further, that if the rent be behind, the grantee ſhall diſtrain for it in the manor of *S.* this is a rent in the manor of *D.* and only a penalty on the other manor. 1 *Shep. Abr.* 567. If a perſon ſeiſed of land in fee, demiſe it to one upon condition to pay his wife 5*l.* a year rent, and if it be behind and in arrear, that ſhe ſhall diſtrain for it; the wife may take a *diſtreſs* for the rent. *Dyer* 3, 48. There is a lord and tenant by 3*l.* rent and fealty, the lord dies, and his wife is endowed of the thirds of the ſeigniory; here ſhe may diſtrain for one pound, and the heir for two pounds: ſo if a rent be divided amongſt parceners, each of them may have a *diſtreſs* for her part; but this may not be till the partition is made. *Bro.* 45.

If one jointenant make a gift in tail, of the land, reſerving a certain rent, and the rent be in arrear; he may not diſtrain the beaſts of the other jointenant. 33 *H.* 6. 35. But if *A.* and *B.* are tenants in common, and *A.* leaſes his moiety to *C.* for years, rendering rent, and *C.* leaſe it to *B.* if the rent is behind, *A.* may take a *diſtreſs* of the cattle of *B.* his fellow tenant in common. 7 *Rep.* 23: *Moor* 558.

To juſtify taking a *diſtreſs*, the party muſt ſee he hath good cauſe to diſtrain; that he have power to take the *diſtreſs*, and from the perſon from whom he takes it; that the thing, for the quality of it, be diſtrainable, and he diſtrain it in due time and place, *&c.* He who takes a *diſtreſs* for another, ought to have good warrant for doing it; and muſt do it in his name: and a bailiff or ſervant, may diſtrain for his maſter. 1 *Cro.* 748: 2 *Cro.* 436: *Godb.* 110. A *diſtreſs* ought to be made of ſuch things whereof the ſheriff may make replevin, and deliver again in as good plight and condition as they were at the time of the taking. *Co. Lit.* 47.

2. *Diſtreſſes* are to be of a thing valuable, whereof ſomebody hath a property; things *ferae naturae*, as dogs, conies, *&c.* may not be diſtrained. 1 *Rol. Abr.* 664, 666. It is the ſame of cattle of the plough, beaſts of huſbandry, ſheep, or horſes joined to a cart, with a rider upon it. 1 *Vent.* 36. This means a diſtreſs for *rent*, *&c. contrà* of diſtreſs *damage feaſant*.

Sheep are equally privileged with *averia carucae*, and cannot be taken if any other diſtreſs can be found. See 2 *Inſt.* 133.—But it has been adjudged that beaſts of the plough may be taken for the poor's rate, under *Stat.* 43 *Eliz.* becauſe the remedy given by that and other ſtatutes for compelling the payment of particular rates or ſums of money, though called a diſtreſs, is in effect an *execution.* 1 *Burr.* 579.—See *acc. Saund.* on 22 *C.* 2. againſt *Conventicles* 39; referred to in *Com. Dig. Diſtreſs*, (C.) but not cited in 4 *Burr.*

A horſe with a rider upon his back; or a horſe in an inn, or put into a common; an ax in a man's hand, cutting down wood; or any thing a perſon carries about him; utenſils and inſtruments of a man's trade or profeſſion, or the books of a ſcholar; corn in a mill, or goods in a market to be ſold for the uſe of the public; materials in a weaver's ſhop, for making of cloth; another perſon's garment in the houſe of a taylor, *&c.* are not diſtrainable; nor is any thing that is fixed to the freehold of a houſe, as a furnace, doors, windows, boards, *&c.* 1 *Sid.* 422, 440: *Co. Lit.* 47: 2 *Danv. Abr.* 461.

Deer in a private incloſure may be diſtrained. 3 *Comm.* 8.—Some have thought that a horſe on which one is riding may be diſtrained for *damage feaſant*. 2 *Keb.* 596: 1 *Sid.* 440; but the opinion was extrajudicial, and may be,

be queſtioned; for 1 *Ro. Ab.* 664. (A.) *pl.* 4: and the caſe in 7 *E.* 3. *Fitz. Ab. Avowry* 199, are directly *contra*. See alſo *Cro. Eliz.* 549, 596. Some alſo have inclined to think that horſes drawing a cart laden with corn, though one is riding in the cart, may be diſtrained for rent; and for that purpoſe may be ſevered from the cart, if the perſon diſtraining doth not chooſe to take the cart with the corn alſo, all of which, as it ſeems, are equally liable to the diſtreſs. See 2 *Keb.* 529, 596: *Raym.* 18: 1 *Vent.* 36: 1 *Sid.* 422, 440; in which latter book the reporter makes a query, whether the man's being on the cart, ſhould not privilege the whole team.—If ferrets and nets in a warren be taken *damage feaſant* it is good; but if they are in the hands of a man, they cannot be diſtrained, *any more* (ſays the Reporter) *than a horſe on which a man is*; nor can they be diſtrained if they are out of the warren, 2 *E.* 2. *Avowry* 182: 7 *E.* 3. *ib.* 199.—See *Vin.* title *Diſtreſs.* A.

Goods, cattle, not of the plough, *&c.* ſheaves of corn; corn in the ſtraw, or threſhed; and carts with corn, (but not victuals) hay in a barn, or ricks of hay; money in a bag ſealed, though not out of a bag, *&c.* may be diſtrained for rent: and ſo may cattle or goods driving to market, if put into a paſture by the way. *Co. Lit.* 47: 1 *Lutw.* 214: *Mod.* 385. Beaſts of the tenant feeding on commons or waſtes, appendant or appurtenant to the demiſed premiſes, may be diſtrained for rent. 3 *Comm.* 11.

If a driver of cattle aſks leave of the leſſor to put his cattle into his ground for a night, and he gives leave, as well as the leſſee; yet it is ſaid he is not concluded from diſtraining them for rent. 2 *Vent.* 59: 2 *Danv.* 642.

Beaſts that eſcape into the tenant's ground, may be diſtrained for rent, though they have not been *levant* and *couchant*. 1 *Inſt.* 47. This doctrine has been objected to as too general; and ſeveral diſtinctions are taken, the ſum of which ſeems to be, that if a ſtranger's beaſts eſcape into another's land by default of the owner of the beaſts, as by breaking the fences, they may be diſtrained for rent immediately, without being *levant* or *couchant*; but that if they eſcape there by default of the tenant of the land, as for want of his keeping a ſufficient fence, then they cannot be diſtrained for rent or ſervice of any kind, till they have been *levant* and *couchant*; nor afterwards by a landlord for rent on a leaſe, unleſs on notice, the owner of the beaſts neglects to remove them: though it is ſaid that ſuch notice is not neceſſary, where the diſtreſs is by the lord of the fee for an ancient rent, or by the grantee of a rent charge.—See this ſubject argued at large in *Kemp.* v *Crewes*, 2 *Lutw.* 1573.

If *A.* brings yarn to his neighbour's houſe to weigh, it cannot be diſtrained by the lord. *Noy. n.* 298: *Vide* 15 *E.* 3. *Avowry* 216.—See *Noy.* 68. and S. C. in *Cro. Eliz.* 549, 596.—For other caſes in which the property of ſtrangers is privileged from diſtreſs, for the ſake of trade and commerce, See *Francis* v. *Wyatt*, 3 *Burr.* 1498. In that caſe the queſtion was, whether a perſon's chariot, which ſtood at a common livery ſtable, could be diſtrained for rent due, from the keeper of the livery ſtable; and the Court after two arguments, appearing to be ſtrongly inclined in favour of the diſtreſs, the owner of the chariot declined bringing the queſtion to a third argument.

The goods of a Carrier are privileged, and cannot be diſtrained for rent, though the waggon wherein loaded, is put into the barn of a houſe, *&c.* on the road. 1 *Salk.* 249.

Now by *Stat.* 2 *W. & M. c.* 5, ſheaves or cocks of corn, or corn looſe or in the ſtraw, or hay in any hovel ſtack or rick, or otherwiſe on the land, may be diſtrained for rent on demiſe, leaſe, or contract.

At Common law *corn growing* could not be diſtrained, becauſe it adheres to the freehold. 1 *Ro. Ab.* 666. *H. pl.* 4: but by *Stat.* 11 *Geo.* 2. *c.* 19, Landlords are impowered to diſtrain all ſorts of corn, graſs, or other product growing on the eſtate demiſed, and to cut and gather them when ripe.

Diſtreſſes for rent are to be reaſonable, and not exceſſive; and not to be taken in the King's highway, or the common ſtreet; or in the ancient fees of the church. 51 *H.* 3. *ſtat.* 4: 52 *H.* 3. *c.* 1, 2, 3, 4, 15: 9 *Ed.* 2. *ſt.* 1. *c.* 9. Except in caſe of an amercement in the *leet*.

All *diſtreſſes* for rent muſt be made on the premiſſes, by the Common law. And by *Stat.* 8 *An. c.* 14, if any tenant fraudulently removes goods from off the premiſſes, the landlord may in five days ſeize ſuch goods whereſoever found, as a *diſtreſs* for the rent in arrear; unleſs the goods are ſold for a valuable conſideration before the ſeizure. By *Stat.* 11 *Geo.* 2. *c.* 19, *thirty* days are allowed. And, whereas at Common law, for rent due the laſt day of the term, the leſſor could not diſtrain; becauſe the term ended before the rent was due, and the leſſee had the whole day to pay it; nor where the leſſee held over his term, for rent incurred during the term, (See 1 *Inſt.* 47.) now, by the *Stat.* 8 *An. c.* 14, where leaſes are expired, a *diſtreſs* may be taken, provided it be done within ſix months, and during the landlord's title and tenant's poſſeſſion.

Diſtreſſes for ſervices are to be on the land: but for an amercement in a leet, the *diſtreſs* may be taken any where within the hundred, as well out of the land, as on it, wherever the cattle are of him that is amerced; for the amercement charges only the perſon, and not the land; and for this a *diſtreſs* may be taken in the high ſtreet. 2 *Danv. Abr.* 644, 645. The lord cannot diſtrain for amercements in a court-baron, without a preſcription; though he may in the leet: and the goods and cattle of another, may not be taken in *diſtreſs* on my ground, for an amercement, *&c.* ſet upon me in a court-leet or court-baron. 11 *Rep.* 44: 12 *H.* 7. 13. For ſervices a *diſtreſs* cannot be taken but where the ſervices are certain; or may be reduced to a certainty. *Co. Lit.* 96.

II. ALL DISTRESSES muſt be made by day; unleſs in the caſe of *damage feaſant*; an exception allowed leſt the beaſts ſhould eſcape before they are taken. 1 *Inſt.* 142.

The landlord might not formerly break open a houſe to make a diſtreſs, for that is a breach of the peace. But when he was in the houſe, it was held that he might break open an inner door. 1 *Inſt.* 161: *Comb.* 17. By *Stat.* 11 *Geo.* 2. *c.* 19, (See *poſt*,) he may by aſſiſtance of the peace-officer, break open in the day time any place, whither the goods have been fraudulently removed, and locked up to prevent a diſtreſs; oath being firſt made in caſe it be a dwelling houſe, of a reaſonable ground to ſuſpect that ſuch goods are concealed therein. See 3 *Comm.* 11.

Where a landlord comes to diſtrain cattle, which he ſees on the tenant's ground, if the tenant, or any other, to prevent the *diſtreſs*, drives the cattle off the land, the landlord may make freſh purſuit, and diſtrain them:

though if before the *diſtreſs*, the owner of the cattle tenders his rent, and a *diſtreſs* is taken afterwards, it is wrongful. 2 *Inſt.* 107, 160.

A *diſtreſs* of cattle muſt be brought to the common *pound*, or be kept in an open place; and if they are put into a common pound, the owner is to take notice of it at his peril; but if in any other open place, notice is to be given to the owner, that he may feed them; and then if the cattle die for want of food, the tenant ſhall bear the loſs; and the landlord may diſtrain again for his rent. 5 *Rep.* 90: *Co. Lit.* 47, 96. Where one impounds cattle diſtrained, he cannot juſtify the tying them in the pound: if he ties a beaſt, and it is ſtrangled, he muſt anſwer it in damages. 1 *Salk.* 248. If the perſon diſtraining *damage-feaſant* put the *diſtreſs* in a broken pound, and the *diſtreſs* eſcapes, he can have no action for the ſame: it is otherwiſe if from a good pound, without his default, when he may have action for the treſpaſs. *Salk. Ibid.* By *Stats.* 53 *H.* 3. *c.* 4: 1 *P. & M. c.* 12, none ſhall drive a *diſtreſs* out of the county, on pain to be fined and amerced: and no *diſtreſs* of cattle ſhall be driven out of the hundred where taken to any pound, except to a pound overt in the ſame county, and not above three miles diſtant; nor ſhall any *diſtreſs* be impounded in ſeveral places under the penalty of 5*l.* and treble damages.

By *Stat.* 11 *Geo.* 2. *c.* 19 § 10, perſons diſtraining for rent, may impound the diſtreſs on any convenient part of the land chargeable with the diſtreſs.

After a *diſtreſs* is in the pound, it is ſaid to be *in cuſtodiâ legis*, ſo that the owner of it hath no abſolute property therein; and therefore he cannot ſell or forfeit it, nor may the ſame be taken in execution, *&c.* but it muſt be as a pledge or means to help the party diſtraining to his debt or duty. *Co. Lit.* 190: *Finch L.* 135. Cattle diſtrained may not be uſed, becauſe by law they are only as a pledge; unleſs it be for the owner's benefit, by milking, *&c. Cro. Jac.* 148.

When a *diſtreſs* is taken of houſehold goods, or other dead things, they are to be impounded in a houſe, or other pound covert, *&c.* And if the *diſtreſs* is damaged, the diſtrainer muſt anſwer it. *Wood's Inſt.* 191. And they are to be removed immediately; except corn or hay, by *Stat.* 2 *W. & M. ſeſſ.* 1. *cap.* 5. But if a landlord doth not remove goods immediately, but quits them till another day, during which time they are taken away, it is not a reſcous, for want of poſſeſſion. *Mod. Ca.* 215: 1 *Nelſ.* 672.—See *poſt* III.

Where goods are unlawfully diſtrained, the owner may reſcue them, before they are impounded; but not afterwards. *Co. Lit.* 47. But the ſafeſt way is to replevy, as there are few caſes, in law, where a man is allowed to be his own judge, if any.—If lands lie in ſeveral counties, a *diſtreſs* may be made in one county for the whole rent. *Co. Lit.* 154. And if a landlord comes into a houſe, and ſeizes upon ſome goods as a *diſtreſs*, in the name of all the goods in the houſe; this is a good ſeizure of all. 6 *Mod.* 215.

By *Stat.* 2 *W. & M. c.* 5, if any *diſtreſs* and ſale be made where there is no rent due, the owner of the goods diſtrained ſhall recover double the value of the goods, and full coſts. Alſo by the Common law, if a lord or other perſon ſhall diſtrain ſeveral times for his ſervice or rent, when none is in arrear, the tenant may have an *aſſiſe de ſovent diſtreſs*, *&c. F. N. B.* 176.

Where a man is entitled to diſtrain for an entire duty, he ought to diſtrain for the whole at once, and not for part at one time, and part at another. 2 *Lutw.* 1532. But if he diſtrains for the whole, and there is not ſufficient on the premiſſes, or he happens to miſtake in the value of the thing diſtrained, and ſo takes an inſufficient diſtreſs, He, his executors, *&c.* may take a ſecond diſtreſs to complete his remedy. *Cro. Eliz.* 13: *Stat.* 17 *Car.* 2. *c.* 7: 4 *Burr.* 590.

Diſtreſſes muſt be proportioned to the thing diſtrained for. By the *Stat. of Marlbridge*, 52 *H.* 3. *c.* 4, if any man takes a great or unreaſonable diſtreſs, for rent arrere he ſhall be heavily amerced for the ſame. As if the landlord diſtrains two oxen for 12*d.* rent, the taking of both is an unreaſonable diſtreſs. 2 *Inſt.* 407. But if there were no other diſtreſs nearer the value to be found, he might reaſonably have diſtrained one of them; but for homage, fealty, or ſuit and ſervice, as alſo for parliamentary wages (when they uſed to be paid) it is ſaid no diſtreſs can be exceſſive. *Bro. Ab.* t. *Aſſiſe* 291: *Prerog.* 98. For as theſe diſtreſſes cannot be ſold, the owner upon making ſatisfaction, may have his chattels again. 3 *Comm.* 12.

The remedy for exceſſive diſtreſſes is, by a ſpecial action on the *Stat. of Marlbridge*; for an action of treſpaſs is not maintainable upon this account, it being no injury at the Common law. 1 *Vent* 104: *Fitzgib.* 85: 4 *Burr.* 590.—See titles *Avowry*, *Replevin*, *Recaption*, *Reſcous*, &c.

III. See further as to Diſtreſs 3 *Comm.* 6, 145; and in the ſeveral abridgments titles *Diſtreſs* and *Replevin*, and alſo *Gilbert* on *Replevins*.—See alſo *Stats.* 2 *Wm. & M. ſt.* 1. *c.* 5: 8 *An. c.* 14: 4 *Geo.* 2. *c.* 28: 11 *Geo.* 2. *c.* 19.

Theſe ſtatutes have made great alterations in the ancient law of diſtreſs, particularly by empowering perſons who diſtrain for rent of any kind, to ſell the diſtreſs for payment of rent in arrear, if the tenant or owner fails to replevy with ſufficient ſecurity, within five days after taking of the diſtreſs, and giving the tenant notice of the cauſe; in this caſe the conſtable is bound to aſſiſt, the goods are to be appraiſed by two ſworn appraiſers, and the overplus, if any, left in the conſtable's hands for the uſe of the owner. This improvement of the remedy by diſtreſs, was firſt introduced by *Stat.* 2 *W. & M. c.* 5, with reſpect to rents due on demiſe, or contract; and afterwards by *Stat.* 4 *Geo.* 2. *c.* 28, was extended to rents-ſeck, rents of aſſiſe, and chief-rents. Before theſe two ſtatutes, the remedy by diſtreſs was very imperfect; for the diſtreſs was merely taken *nomine pœnæ*, to compel ſatisfaction, and could not be ſold or uſed for the profit of the perſon diſtraining, except in caſe of the King and ſome few other inſtances.—See further as to diſtreſſes and other remedies for rent, this Dict. titles *Ceſſavit*, *Rent*, *Leaſe*, &c.

The following extracts will more fully explain the nature of diſtreſs by ſtatute.

By *Stat.* 11 *Geo.* 2. *c.* 19, if any tenant of lands or tenements ſhall fraudulently carry away his goods, to prevent *diſtreſs*, the landlord may, within thirty days after, diſtrain them wherever they ſhall be found, as if they had been on the premiſſes; but no ſuch goods ſhall be diſtrained,

diſtrained, if ſold *bona fide* for valuable conſideration before ſeizure, to any perſon not privy to the fraud. Tenants committing ſuch fraud, or others aſſiſting, ſhall forfeit double the value of the goods carried off, to be recovered by action of debt, &c. And where they ſhall not exceed 50*l.* value, the landlord may exhibit a complaint before two juſtices of peace, who are to examine the fact, and enquire into the value of the goods, and thereupon order the offender to pay double value, leviable by *diſtreſs* and ſale; and, for want thereof, commit the offender to the houſe of correction for ſix months. Landlords, or their agents, may, with the aſſiſtance of a conſtable, ſeize any goods fraudulently concealed in any houſe, out-houſe, &c.

And in caſe of a dwelling-houſe, on oath firſt made to ſome juſtice, of reaſon to ſuſpect that ſuch goods are therein, may break open the ſame, and diſtrain them: they may alſo diſtrain for rent and cattle, or ſtock of their tenants, feeding in any common; or corn, graſs, hops, fruits, &c. growing on the land, which they ſhall cut, gather, cure and lay up when ripe, in *any proper place*, giving notice to the tenant within a week where lodged, and diſpoſe thereof towards the ſatisfaction of the rent and charges; the appraiſement to be taken when cut or cured: but, if after a *diſtreſs* ſo taken, before the product be ripe and gathered, the tenant ſhall pay the rent, and charges of the *diſtreſs*, the ſaid *diſtreſs* ſhall ceaſe.

Perſons may ſecure *diſtreſſes* lawfully taken, and ſell them *upon the premiſſes* in like manner as may be done off the ſame, by 2 *W. & M. ſeſſ.* 1. *c.* 5. And any perſons may go to and from the premiſſes, to view, appraiſe, buy, or take away the goods of the purchaſer; and if a reſcous be made of the *diſtreſs*, the perſons aggrieved ſhall have the remedy given by the ſaid ſtatute.

Diſtreſſes made for rent juſtly due, ſhall not be unlawful, nor diſtrainers be treſpaſſers *ab initio*, for any irregularity in the diſpoſition thereof; but the parties grieved to have ſatisfaction for *ſpecial damage*, in an *action* on the *caſe*, &c. But no tenant ſhall recover by ſuch action, if *tender of amends*, hath been made before the action brought. And in all actions of treſpaſs, or on the caſe relating to the entry, *diſtreſs*, or ſale, made by landlords for rents, the *defendants* may *plead* the *general iſſue*, and if the plaintiffs become non-ſuit, &c. ſhall recover double coſts of ſuit.

By *Stat.* 27 *Geo.* 2. *c.* 20, Juſtices of peace, in all caſes, where they are impowered to levy penalties by any act of parliament, are in their warrants of *diſtreſs*, to limit a time for the ſale of the goods; the Conſtable making ſuch *diſtreſs* may deduct the reaſonable charges of detaining, keeping, and ſelling ſuch *diſtreſs*, out of the money ariſing by the ſale; and the overplus, if any, after ſuch charges, and alſo the penalty or ſum of money, ſhall be fully paid, ſhall be returned to the owner of the goods diſtrained; and the Conſtable, if required, ſhall ſhew the warrant to the party whoſe goods are diſtrained, and ſuffer a copy thereof to be taken.—This act not to alter or repeal the *Stats.* 7 & 8 *W.* 3. *c.* 34, and 1 *Geo.* 1. *c.* 6, relating to *Diſtreſſes* on *Quakers* for *Tithes* and *Church Rates*.

DISTRESS OF THE KING. By the Common law no Subject can diſtrain out of his fee or ſeigniory; unleſs cattle are driven to a place out of the fee, to hinder the lord's *diſtreſs*, &c. But the King may diſtrain for rent-ſervice, or fee-farm, in all the lands of the tenant whereſoever they be; not only on lands held of himſelf, but of others: where his tenant is in actual poſſeſſion, and the land manured with his own beaſts, &c. 2 *Inſt.* 132: 2 *Danv. Abr.* 643.

DISTRESS OF A TOWN. If a town be aſſeſſed to a certain ſum, a *diſtreſs* may be taken in any part, ſubject to the whole duty. 2 *Danv.* 643.

DISTRIBUTION of Inteſtates' Eſtates; See title *Executor*. V. 8.

DISTRICTIONE SCACCARII, The *Stat.* 51 *H.* 3. *ſtat.* 5, as to Diſtreſſes for the King's debt.

DISTRICT, *diſtrictus.*] A territory, or place of juriſdiction; the circuit wherein a man may be compelled to appear; alſo the place in which one hath the power of diſtraining: and where we ſay *hors de ſon fee*, out of the fee, it has been uſed for *extra diſtrictum ſuum. Brit. c.* 120.

DISTRINGAS, A writ directed to the Sheriff, or other officer commanding him to *diſtrain* a man for a debt to the King, &c. or for his appearance at a day affixed. There is a great diverſity of this writ; which was ſometimes of old called *conſtringas. F. N. B.* 138. There is alſo a *diſtringas* againſt Peers and perſons intitled to privilege of parliament, under *Stat.* 10 *Geo.* 3. *c.* 50; by which the effects (in law called the *iſſues*) levied may be ſold to pay the plaintiff's coſts. And it has been held that this ſtatute extends to *all* writs of *diſtringas*. 5 *Burr.* 2726.—See titles *Proceſs*; *Parliament*; (*privilege of*). In *detinue* after judgment, the plaintiff may have a *diſtringas* to compel the defendant to deliver the goods, by repeated diſtreſſes of his chattels. 1 *Ro. Ab.* 737: *Raſt. Entr.* 215.—See title *Execution*.

DISTRINGAS JURATORES, A writ directed to the ſheriff, to diſtrain upon a *jury* to appear; and return iſſues on their lands, &c. for non-appearance. Where an iſſue in fact is joined to be tried by a *jury*, which is returned by the ſheriff in a panel upon a *venire facias* for that purpoſe; thereupon there goes forth a writ of *diſtringas jurator'*, to the ſheriff, commanding him to have their bodies in court, &c. at the return of the writ. 1 *Lil. Abr.* 483. The writ of *diſtringas jur'* ought to be delivered to the ſheriff ſo timely, that he may warn the jury to appear four days before the writ is returnable, if the *jurors* live within forty miles of the place of trial; and eight days if they live farther off. *Ibid.* 484. There may be an *alias*, or *pluries diſtringas jur'* where the *jury* doth not appear. See titles *Jury*; *Trial*.

DIVEST, See *Deveſt*.

DIVIDENDS OF BANKRUPTS, EFFECTS, See title *Bankrupt*.

DIVIDEND IN THE EXCHEQUER, Is taken for *one part* of an *indenture*. *Stat.* 10 *Ed.* 1. *c.* 11.

DIVIDEND OF STOCKS, A *dividable* proportionate ſhare of the *intereſt* of *ſtocks* erected on public funds; as the *Bank*, *South-Sea*, and *India* ſtocks, &c. See title *Funds*.

DIVISA, Hath various ſignifications: ſometimes it is uſed for a *device*, award or decree: ſometimes for *deviſe* of a portion or parcel of lands, &c. by will: and ſometimes it is taken for the bounds or limits of diviſion of a pariſh or farm, &c. as *diviſas perambulare*, to walk the bounds of a pariſh; in which ſenſe it has been extended to the diviſion between counties, and given name to towns.

towns, as to the *Deviſes*, a town in *Wiltſhire*, ſituate on the confines, the *Diviſion* of the Weſt *Saxon* and *Mercian* kingdoms. *Leg. H.* 2. *cap.* 9: *Leg. Inæ, c.* 44: *Leg. H.* 1. *c.* 57. *Cowel.*

DIVORCE, *divortium*; *à divertendo.*] The ſeparation of two, *de facto* married together, made by law: it is a judgment *ſpiritual*; and therefore, if there be occaſion, it ought to be reverſed in the ſpiritual court. *Co. Lit.* 335. And, beſides ſentence of *divorce*, in the old law, the woman *divorced* was to have of her huſband a writing called a *bill of divorce*, which was to this effect, *viz. I promiſe that hereafter I will lay no claim to thee*, &c.—See title *Baron* and *Feme.* III. 2: VI: and particularly XI. See alſo title *Marriage.*

There are many *divorces*, mentioned in our books; as *cauſâ præcontractûs*; *cauſâ frigiditatis*; *cauſâ conſanguinitatis*; *cauſâ affinitatis*; *cauſâ profeſſionis*, &c. But the uſual *divorces* are only of two kinds, *i. e. à menſa & thoro*, from bed and board; and *à vinculo matrimonii*, from the very bond of marriage. A *divorce à menſa & thoro* diſſolveth not the marriage; for the *cauſe* of it is *ſubſequent* to the marriage, and ſuppoſes the marriage to be lawful: this *divorce* may be by reaſon of adultery in either of the parties, for cruelty of the huſband, &c. And as it doth not diſſolve the marriage, ſo it doth not debar the woman of her dower; or baſtardize the iſſue, or make void any eſtate for the life of huſband and wife, &c. *Co. Lit.* 235: 3 *Inſt.* 89: 7 *Rep.* 43. The woman under ſeparation by this *divorce*, muſt ſue by her next friend; and ſhe may ſue her huſband in her own name for alimony. *Wood's Inſt.* 62.

A *divorce à vinculo matrimonii*, abſolutely diſſolves the marriage, and makes it void from the beginning, the cauſes of it being precedent to the marriage; as *præcontract* with ſome other perſon, conſanguinity or affinity, within the *Levitical* degrees, impotency, impuberty, &c. On this *divorce* dower is gone; and if by reaſon of *præcontract*, conſanguinity, or affinity, the children begotten between them are baſtards. *Co. Lit.* 335: 2 *Inſt.* 93, 687. But in theſe *divorces*, the wife, it is ſaid, ſhall receive all again that ſhe brought with her, becauſe the nullity of the marriage ariſes through ſome impediment; and the goods of the wife were given for her advancement in marriage, which now ceaſeth: but this is where the goods are not ſpent; and if the huſband give them away during the coverture, without any colluſion, it ſhall bind her: if ſhe knows her goods unſpent, ſhe may bring action of detinue for them; and as for money, &c. which cannot be known, ſhe muſt ſue in the ſpiritual court. *Dyer* 62: *Nelſ. Abr.* 675. This *divorce* enables the parties to marry again. But in the other caſes, a power for ſo doing muſt be obtained by act of parliament.

Where lands were formerly given to huſband and wife, and the heirs of their bodies in *frank-marriage*; if they had been afterwards *divorced*, the wife was to have her whole lands; and by *divorce* an eſtate-tail of baron and feme, it is ſaid, may be extinct. *Godb.* 18. After a ſentence of *divorce* is given in the ſpiritual court *cauſâ præcontractûs*, the iſſue of that marriage ſhall be baſtards, ſo long as the ſentence ſtands unrepealed: and no proof ſhall be admitted at Common-law to the contrary. *Co. Lit.* 235: 1 *Nelſ.* 674. In ſuch caſe, iſſue of a ſecond marriage may inherit until the ſentence is repealed. 2 *Leon.* 207. If after a *divorce à menſa & thoro*, either of the parties marry again, the other being living, ſuch marriage is a mere nullity; and by ſentence to confirm the firſt contract, ſhe and her firſt huſband become huſband and wife to all intents, without any formal *divorce* from the ſecond. 1 *Leon.* 173. Alſo on this *divorce*, as the marriage continues, marrying again while either party is living, hath been held to be bigamy within the *Stat.* 1 *Jac.* 1. *c.* 11.—*Cro. Car.* 333: 1 *Nelſ.* 674.

A divorce for *adultery* was anciently *à vinculo matrimonii*; and therefore in the beginning of the reign of Queen *Elizabeth*, the opinion of the church of *England* was, that after a divorce for adultery, the parties might marry again; but in *Foliambe's* caſe, *H.* 44 *El.* in the ſtar-chamber, that opinion was changed; and archbiſhop *Bancroft*, by the advice of divines, held, that adultery was only a cauſe of divorce *à menſa & thoro.* 3 *Salk.* 138.

Sentence of *divorce* muſt be given in the life of the parties, and not afterwards: but it may be repealed in the ſpiritual court, after the death of the parties. *Co. Lit.* 33, 244: 7 *Rep.* 44; 5 *Rep.* 98. Upon the *divorce* of a man and his wife, equity will not aſſiſt the wife in recovering dower, at the huſband's death, but ſhall leave her to the law; neither ought the ſpiritual court to grant her adminiſtration, ſhe not being ſuch a wife as is intitled to it; nor will the Chancery decree her a diſtributive ſhare. *Preced. Canc.* 111, 112.

DIURNALIS, See *Dayzvere.*

DOCKET, or DOGGET. A brief in writing on a ſmall piece of paper or parchment, containing the effect of a greater writing. *Weſt Symbol. par.* 2. *ſect.* 106. And when rolls of *judgments* are brought into *C. B.* they are *docketted*, and entered on the *docket* of that term; ſo that upon any occaſion you may ſoon find out a judgment, by ſearching theſe dockets, if you know the attorney's name. *Stat.* 4 & 5 *W. & M. c.* 20.—See title *Judgments.* Exemplification of *decrees in Chancery* and Commiſſions of *Bankruptcy*, are alſo *docketted.*

DOCTRINES, *illegal*, *aſſerting*, or *publiſhing.* See titles *Libel*; *Sedition*; *Treaſon.*

DOGS, The law takes notice of a greyhound, maſtiff *dog*, ſpaniel and tumbler; for trover will lie for them. *Cro. Eliz.* 125: *Cro. Jac.* 44. A man hath a property in a maſtiff: and where a maſtiff falls on another dog, the owner of that dog cannot juſtify the killing the maſtiff; unleſs there was no other way to ſave his dog, as that he could not take off the maſtiff, &c. 1 *Saund.* 84: 3 *Salk.* 139. The owner of a dog is bound to muzzle him if miſchievous, but not otherwiſe: and if a man doth keep a dog, that uſeth to bite cattle, &c. if after notice given to him of it, or his knowing the dog is miſchievous, the creature ſhall do any hurt, the maſter ſhall anſwer for it. *Cro. Car.* 254, 487: *Stra.* 1264.—See titles *Action*; *Treſpaſs.*

By *Stat.* 10 *Geo.* 3. *c.* 18, If any perſon ſhall ſteal *any dog or dogs*, they ſhall be liable to forfeit for the firſt offence from 30 to 20*l.* or be committed to gaol, for from twelve to ſix months, at the diſcretion of two juſtices—for the ſecond offence to forfeit from 50 to 30*l.* or be impriſoned for from eighteen to twelve months, *and alſo whipped.*—A puniſhment perhaps not too ſevere for notorious dog-ſtealers; but which may afford a dangerous handle for oppreſſion: and *Burn*, title *Dogs*, ſeems ſeriouſly to doubt whether the ſtatute extends to Bitches—a queſtion that we believe has never yet been argued in a court of law.

DOG-DRAW,

DOG-DRAW, The manifeſt deprehenſion of an offender againſt veniſon in a *foreſt*, when he is found drawing after a deer, by the ſcent of a hound led in his hand: or where a perſon hath wounded a deer, or wild beaſt, by ſhooting at him, or otherwiſe, and is caught with a *dog drawing* after him to receive the ſame. *Manwood, par.* 2. *cap.* 8.—See title *Foreſt.*

DOGGER, A light ſhip or veſſel: as a *Dutch dogger*, &c. *Stat.* 31 *Ed.* 3. *cap.* 1. and *Dogger fiſh*, are *fiſh* brought in thoſe ſhips. *Stat. ibid.*

DOGGER-MEN, Fiſhermen that belong to *dogger-ſhips*. 25 *H.* 8. *c.* 2.

DOITKIN, or *doit*. Was a baſe coin of ſmall value, prohibited by the *Stat.* 3 *H.* 5. *c.* 1. We ſtill retain the phraſe, in common ſaying, when we would undervalue a man, *that he is not worth a* doit. See title *Coin.*

DO LAW, *facere legem.*] Is the ſame with to make law. *Stat.* 23 *H.* 8. *c.* 14.

DOLE, *dola.*] A *Saxon* word ſignifying as much as *pars* or *portio* in the *Latin*: and anciently where a meadow was divided into ſeveral ſhares, it was called a *dole meadow.* 4 *Jac.* 1. *c.* 11. See *Dalus.*

DOLEFISH. Seems to be the ſhare of *fiſh*, which the *fiſhermen*, yearly employed in the *North* ſeas, do cuſtomarily receive for their allowance. *Stat.* 35 *H.* 8. *c.* 7.

DOLG-BOTE, *Sax.*] A recompence or amends, for a ſcar or wound. *Sax. Dict. LL. Aluredi Reg. cap.* 22.

DOLLAR, A piece of foreign coin, paſſing for about 4 *s.* 6 *d. Lex. Mercat.*

DOM-BEC OR DOM-BOC, *Sax.* See *Dome-book.*

DOME, OR DOOM, from the Sax. *dom.*] A judgment, ſentence, or decree. And ſeveral words end in *dom*: as *kingdom*, *earldom*, &c. from whence they may be applied to the juriſdiction of a lord, or a king. *Mon. Angl. tom.* 1. *fol.* 284.

DOME-BOOK, *Liber judicialis*;] A book compoſed under the direction of *Alfred*, for the general uſe of the whole kingdom, containing the local cuſtoms of the ſeveral provinces of the kingdom. This book is ſaid to have been extant ſo late as the reign of *Ed.* IV; but it is now loſt. It probably contained the principal maxims of the common law, the penalties for miſdemeanors and the forms of judicial proceedings. Thus much at leaſt may be collected from the injunction to obſerve it which is found in the laws of *Edward* the Elder, ſon of *Alfred*, *c.* 1. See alſo *Leg. Inæ. c.* 29. and *Spelm. in verb. Dombec.* This book was compiled by *Alfred* for the uſe of the Court Baron, Hundred and County Court, the Court Leet and Sheriff's tourn. See 1 *Comm.* 64: 4 *Comm.* 411. See poſt *Domeſday.*

DOMESDAY OR DOMESDAY-BOOK: *Liber judiciarius, vel cenſualis Angliæ.*] A moſt ancient record, made in the time of *William* I. called the *Conqueror*, and now remaining in the *Exchequer* fair and legible, conſiſting of *two volumes*, a greater and a leſs; the greater containing a *ſurvey* of all the *lands* in *England*, except the counties of *Northumberland*, *Cumberland*, *Weſtmoreland*, *Durham*, and part of *Lancaſhire*, which it is ſaid were never ſurveyed; and excepting *Eſſex*, *Suffolk*, and *Norfolk*; which three laſt are comprehended in the leſſer volume. There is alſo a *third book*, which differs from the others in form more than matter, made by the command of the ſame King. And there is a *fourth book* kept in the Exchequer which is called *Domeſday*; and, though a very large volume, is only an abridgment of the others. Likewiſe a *fifth book* is kept in the *Remembrancer*'s office in the Exchequer, which has the name of *Domeſday*, and is the very ſame with the fourth before mentioned. Our anceſtors had many *dome-books.* King *Alfred* had a roll which he called *Domeſday*; and the *Domeſday* book made by *Will.* I. referred to the time of *Edward* the Confeſſor, as that of King *Alfred* did to the time of *Ethelred*; See ante *Dome-book.* The fourth book of *Domeſday* having many pictures, and gilt letters in the beginning, relating to the time of King *Edward* the Confeſſor, this led him who made notes on *Fitzherbert's Regiſter* into a miſtake in *p.* 14, where he tells us, that *liber* Domeſday *factus fuit tempore regis Edwardi.*

The book of *Domeſday* was begun by five juſtices, aſſigned for that purpoſe in each county, in the year 1081, and finiſhed *anno* 1086. And the queſtion whether lands are *antient demeſne*, or not, is to be decided by the *Domeſday* of *Will.* I. from whence there is no appeal: and it is a book of that authority, that even the Conqueror himſelf ſubmitted ſome caſes, wherein he was concerned to be determined by it. The addition of *day* to this *Dome book* was not meant with any alluſion to the *final day of judgment*, as moſt perſons have conceived; but was to ſtrengthen and confirm it, and ſignifieth the judicial deciſive record or book of *dooming* judgment and juſtice. *Hammond's Annot'. Camden* calls this book *Gulielmi Librum Cenſualem*, the *Tax-Book* of King *William*; and it was further called *Magna Rolla Winton.* The dean and chapter of *York* have a regiſter ſtiled *Domeſday*; ſo hath the biſhop of *Worceſter*; and there is an ancient roll in *Cheſter caſtle*, called *Domeſday-Roll. Blount.* A tranſcript of the *Domeſday book* of *W.* I. has been made and publiſhed, by which the acceſs to it is rendered more familiar to our Antiquaries and Hiſtorians. See *Spelm.* in verb. *Domeſdei*, and this Dict. title *Tenures*, II. 1.

DOMES-MEN. Judges, or men appointed to doom, and determine ſuits and controverſies, hence *æg deme*, *I deem*, or judge. Vide *days-men.*

DOMICELLUS. An obſolete *Latin* word, anciently given as an appellation or addition to the King's natural ſons in *France*, and ſometimes to the eldeſt ſons of noblemen there; from whence we borrowed theſe additions: as ſeveral natural children of *John of Gaunt*, Duke of *Lancaſter*, are ſtiled *domicelli* by the charter of legitimation. 20 *R.* 2. But according to *Thorn*, the *domicelli* were only the better ſorts of ſervants in monaſteries.

DOMIGERIUM, Is ſometimes uſed to ſignify danger; but otherwiſe, and perhaps more properly, it is taken for power over another; *ſub* domigerio *alicujus vel manus eſſe. Bract. lib.* 4. *tract.* 1. *cap.* 10.

DOMINA, A title given to honourable women, who anciently in their own right of inheritance held a barony. *Paroch. Antiq.*

DOMINICA IN RAMIS PALMARUM, *Palm Sunday.* 23 *Ed.* 1.

DOMINIUM, right or regal power. *Paroch. Antiq.* 498.

DOMINUS. This word prefixed to a man's name, in ancient times uſually denoted him a knight, or a clergyman; and ſometimes a gentleman, not a knight, eſpecially a lord of a manor.

DOMO REPARANDA, Is a writ that lay for one againſt his neighbour by the fall of whoſe houſe he feared a damage and injury to his own. *Reg. Orig.* 153.

DOMUS CONVERSORUM. An ancient houſe built or appointed by King *Hen.* III. for ſuch *Jews* as were *converted* to the Chriſtian faith: but King *Ed.* III. who expelled the Jews from this kingdom, deputed the place for the cuſtody of the rolls and records of the *Chancery*. See *Rolls*.

DOMUS DEI, The hoſpital of St. *Julian* in *Southampton*, ſo called. *Mon. Angl. tom.* 2. 440. A name applied to many hoſpitals.

DONATIO CAUSA MORTIS. A death-bed diſpoſition of property ſo called, *viz.* when a perſon in his laſt ſickneſs, apprehending his diſſolution near, delivers or cauſes to be delivered to another the poſſeſſion of any perſonal goods, (under which have been included bonds, and bills drawn by the deceaſed upon his banker) to keep in caſe of his deceaſe. This gift, if the donor dies, needs not the aſſent of his executor; yet it ſhall not prevail againſt creditors; and is accompanied with this implied truſt, that, if the donor lives, the property thereof ſhall revert to himſelf, being only given in contemplation of death; or *mortis cauſa*. *Prec. Chan.* 269: 1 *P. Wms.* 404, 441: 3 *P. Wms.* 357: 2 *Comm.* 514: 2 *Vez.* 431: *Ward* v. *Turner*. This latter caſe collects all the law on the ſubject of donations *cauſâ mortis*; and particularly conſiders what ſhall be a ſufficient delivery of different kinds of property to give effect to ſuch donations.—There may be a *donatio cauſa mortis* of bonds bank notes and bills payable to bearer; but not of other promiſſory notes or bills of exchange, theſe being choſes in action which do not paſs by delivery. See further this Dict. titles *Legacy*; *Will*.

DONATIVE, *donativum*.] Is a benefice merely *given* and diſpoſed of by the patron to a man, without either preſentation to, or inſtitution by, the Ordinary, or induction by his order. *F. N. B.* 35. *Donatives* are ſo termed, becauſe they began only by the foundation and erection of the *donor*. The King might of ancient time found a church or chapel, and exempt it from the juriſdiction of the Ordinary; ſo he may by his letters patent give licence to a common perſon to found ſuch a church or chapel, and make it *donative*, not preſentable; and that the incumbent or chaplain ſhall be deprived by the founder and his heirs, and not by the biſhop; which ſeems to be the original of *donatives* in *England*. See 2 *Comm.* 22; and this Dict. title *Advowſon*.

When the King founds a church, &c. *donative*, it is of courſe exempted from the Ordinary's juriſdiction, though no particular exemption is mentioned; and the Lord Chancellor ſhall viſit the ſame: and where the King grants a licence to any common perſon to found a church or chapel, it may be *donative*, and exempted from the juriſdiction of the biſhop, ſo as to be viſited by the founder, &c. *Co. Litt.* 134: 2 *Rol. Abr.* 230. The reſignation of a *donative* muſt be to the donor or patron, and not to the Ordinary; and *donatives* are not only free from all ordinary juriſdiction, but the patron and incumbent may charge the glebe to bind the ſucceſſor: and if the clerk is diſturbed, the patron may bring *quare impedit*, &c. Alſo the patron of a *donative* may take the profits thereof when it is vacant. *Co. Lit.* 344: *Cro. Jac.* 63.

If the patron of a *donative* will not nominate a clerk, there can be no lapſe: but the biſhop may compel ſuch patron to nominate a clerk by eccleſiaſtical cenſures; for though the church is exempt from the power of the Ordinary, the patron is not exempted: and the clerk muſt be qualified like unto other clerks of churches; no perſon being capable of a *donative*, unleſs he be a prieſt lawfully ordained, &c. *Yelv.* 61. *Stat.* 14 *Car.* 2. *cap.* 4: 1 *Lill.* 488.

There may be a *donative* of the King's gift with cure of ſouls, as the church of the *Tower* of *London* is: and if ſuch *donative* be procured for money, it will be within the ſtatute of ſimony. *Mich.* 9 *Car. B. R.* A parochial church may be *donative*, and exempt from the Ordinary's juriſdiction. *Godolph.* 262. The church of *St. Mary le Bone* in *Middleſex* is *donative*, and the incumbent being cited into the ſpiritual court, to take a licence from the biſhop to preach, pretending that it was a chapel, and that the parſon was a ſtipendiary; it was ruled in the King's Bench that it was a *donative*; and if the biſhop viſit, the court of *B. R.* will grant a prohibition. 1 *Mod.* 90: 1 *Nelſ. Abr.* 676.

If a patron of a *donative* doth once preſent his clerk to the Ordinary, and the clerk is admitted, inſtituted, and inducted, then the *donative* ceaſeth; and it becomes a church preſentative. *Co. Litt.* 344. But when a *donative* is created by letters patent, by which lands are ſettled upon the parſon and his ſucceſſors, and he is to come in by the *donation* of the King, and his ſucceſſors; in this caſe, though there may be a preſentation to the *donative*, and the incumbent come in by inſtitution and induction, yet that will not deſtroy the *donative*. 2 *Salk.* 541. All biſhopricks being of the foundation of the King, they were in ancient time *donative*. 3 *Rep.* 75. See title, *Biſhops*.

Donatives have two peculiar properties; one, that the preſentation does not devolve to the king as in other livings when the incumbent is made a biſhop. *Ca. Parl.* 184.—The other that a donative is within the ſtatute of pluralities, if it is the *firſt* living; but if a donative is the ſecond benefice taken without a diſpenſation, the firſt would not be void; for the words of the ſtatute are *inſtituted and inducted* to any other, which are not applicable to donatives. 1 *Woodd.* 330.—And therefore it ſeems if donatives are taken laſt they may be held with any other preferment.

DONIS, Statute *de*. The ſtatute of *Weſtm.* 2. *viz.* 13. *Ed.* 1. *c.* 1. called the ſtatute *de donis conditionalibus*. This ſtatute revives, in ſome ſort, the ancient feodal reſtraints which were originally laid on alienations; by enacting, that from thenceforth the will of the donor be obſerved, and that the tenements ſo given, (to a man and the heirs of his body) ſhould at all events go to the iſſue, if there were any, or if none, ſhould revert to the donor. ſee 2 *Comm.* 12; and this Dict. titles *Eſtate*; *Tail*; *Limitation*.

DONOR AND DONEE. *Donor* is he who gives lands or tenements to another in tail, &c. And the perſon to whom given is the *donee*.

DOOMSDAY, See *Domeſday*.

DORTURE, *dormitorium*.] The common room or chamber, where all the *Fryars*, or religious of one *convent*, ſlept and lay all night. *Stat.* 25 *H.* 8. *c.* 11.

DOSSALE. Hangings or tapeſtry.—*Mat. Par.*

DOTE ASSIGNANDA, Is a writ that lay for a widow, where it was found by office, that the King's tenant was ſeiſed of lands in fee, or fee-tail at the day of his death, and

and that he held of the King in chief, &c. In which caſe, the widow came into the *Chancery*, and there made oath, that ſhe would not marry without the King's leave; whereupon ſhe had this writ to the eſcheator, to aſſign her *dower*, &c. But it was uſual to make the aſſignment of the dower in the *Chancery*, and to award a writ to the eſcheator, to deliver the lands aſſigned unto her. *Stat.* 15 *Ed.* 4. *cap.* 4: *Reg. Orig.* 297: *F. N. B.* 263. See title *Dower*.

DOTE UNDE NIHIL HABET, A writ of *dower*, that lies for the widow againſt the tenant who bought land of her huſband in his life-time, whereof he was ſolely ſeiſed in fee-ſimple or fee-tail, and of which ſhe is dowable. *F. N. B.* 147. See the law and the form of the writ in *Booth's Real Actions* 166. &c. See further title *Dower*.

DOTIS ADMENSURATIONE, *Admeaſurement* of *dower*, where the widow holds more than her ſhare, &c. See titles *Admeaſurement*; *Dower*.

DOTKIN, ſee *Doitkin*.

DOUBLE PLEA, *duplex placitum*.] Is where a defendant alledgeth for himſelf two ſeveral matters, in bar of the plaintiff's action, when one of them is ſufficient; which ſhall not be admitted: as if a man plead ſeveral things, the one not depending upon the other, the plea is accounted *double*, and will not be allowed; but if they mutually depend on each other, and the party may not have the laſt plea without the firſt, then it ſhall be received. *Kitch.* 223. And where a *double* plea that is wrong, is pleaded; if the plaintiff reply thereto, and take iſſue of one matter; if that be found againſt him, he cannot afterwards move in arreſt of judgment; for by the replication it is allowed to be good. 18 *Ed.* 4. 17.

If a man pleads two or more matters, when he is compelled to ſhew them, it makes not the *plea double*; ſo it is where two diſtinct things are pleaded, which require but one anſwer: and in caſe a man pleads two ſeveral matters or things, and only one is material, the other being ſurpluſage, or but matter of inducement, and needing no anſwer, the plea is not *double*. *Hob.* 197. Where there are ſeveral inducements to a plea, they ſhall not make the *plea double*: and *double pleas* are allowable in aſſiſes of *novel diſſeiſin*, &c. but not in other actions. *Jenk. Cent.* 75.

By *Stat.* 4 *Ann. c.* 16. *ſect.* 4, It ſhall be lawful for any defendant or tenant in any action or ſuit, or for any plaintiff in replevin, in any court of record, with the leave of the ſame court, to plead as many ſeveral matters thereto, as he ſhall think neceſſary for his defence. That is, in ſo many ſeparate and diſtinct pleas, and where there are more pleas than one. By virtue of this ſtatute defendant is ſaid to plead *double*, by leave of the court.—See further title *Pleading*.

DOUBLE QUARREL, *duplex querela*.] Is a complaint made by any clerk, or other, to the archbiſhop of the province, againſt an inferior Ordinary, for delaying or refuſing to do juſtice in ſome cauſe eccleſiaſtical; as to give ſentence, inſtitute a clerk, &c. and ſeems to be termed a *double quarrel*, becauſe it is moſt commonly made againſt both the judge, and him at whoſe ſuit juſtice is denied or delayed: the effect whereof is, that the archbiſhop taking notice of the delay, directs his letters under his authentical ſeal to all clerks of his province, commanding them to admoniſh the Ordinary within a certain number of days to do the juſtice required, or otherwiſe to appear before him or his official, and there alledge the cauſe of his delay: and to ſignify to the Ordinary, that if he neither perform the thing enjoined, nor appear and ſhew cauſe againſt it, he himſelf, in his *court of audience*, will forthwith proceed to do the juſtice that is due. *Cowel*.

DOUBLES, *Fr.*] Letters patent. *Stat.* 14 *H.* 6. *c.* 6.

DOVER CASTLE. The conſtable of *Dover caſtle* ſhall not hold plea of any foreign county within the caſtle gates, except it concern the keeping of the caſtle; nor ſhall he diſtrain the inhabitants of the ports, to plead elſewhere or otherwiſe than as they ought, according to the charters, &c. *Stat.* 28 *Ed.* 1. *c.* 7. See title *Cinque Ports*.

DOW. To give or *endow*, from the *Latin* word *do*.

DOWAGER, *dotata*, *dotiſſa*.] A widow endowed; applied to the widows of Princes, Dukes, Earls, and other great perſonages.

DOWAGER, *Queen*.] Is the widow of the King, and as ſuch enjoys moſt of the privileges belonging to her as Queen conſort. But it is not high treaſon to conſpire her death, or violate her chaſtity; becauſe the ſucceſſion to the crown is not thereby endangered. But no man can marry her, without ſpecial licence from the King, on pain of forfeiting his lands and goods. 2 *Inſt.* 18. See *Riley's Plac. Parl.* 672: 1 *Comm.* 223. See title *King*.

DOWER,

DOTARIUM.] The Portion which a Widow hath of the lands of her huſband after his deceaſe, for the ſuſtenance of herſelf, and education of her children. 1 *Inſt.* 30. See title *Tenure*, III. 8.

I. *Of the ſeveral Kinds of Dower.*
II. 1. *What Woman ſhall be endowed*; 2. *Of what Eſtate.*
III. *Of the Aſſignment and Admeaſurement of Dower.*
IV. *What ſhall be deemed a Bar and Forfeiture of Dower.*
V. *Of the Proceedings in Dower.*

I. There were formely five kinds of *dower* in this kingdow. 1. *Dower by the Common law*; which is a third part of ſuch lands or tenements whereof the huſband was ſole ſeiſed in fee-ſimple, or fee-tail, during the coverture; and this the widow is to enjoy during her life.

2. *Dower by cuſtom*; which is that part of the huſband's eſtate to which the widow is intitled after the death of her huſband, by the *cuſtom* of any manor or place, ſo long as ſhe lives ſole and chaſte; and this is more than one third part, for in ſome places ſhe ſhall have *half* the land, as by the cuſtom of *gavelkind*; and in divers manors the widow ſhall have the *whole* during her life, which is called her *free-bench*: but as cuſtom may inlarge, ſo it may abridge *dower* to a 4th part. *Co. Litt.* 33.

3. *Dower ad oſtium eccleſiæ*; made by the huſband himſelf immediately after the marriage, who named ſuch particular lands of which his wife ſhould be endowed; and in ancient time it was taken, that a man could not by this *dower*, endow his wife of more than a third part, though of leſs he might: and as the certainty of the land was openly declared by the huſband, the wife after his death might enter into the land of which ſhe was endowed without any other aſſignment. *Co. Litt.* 34: *Lit.* § 39.

4. *Dower ex aſſenſu patris*, which is only a ſpecies of *the dower ad oſtium eccleſiæ*; which likewiſe was of certain lands named by a ſon who was the huſband, with the conſent of his father then living and always put in writing as ſoon as the ſon was married: and if a woman thus endowed or *ad oſtium eccleſiæ*, after the death of her huſband, entered into the land allotted her in *dower*, and agreed thereto, ſhe was concluded to claim any *dower* by the Common law. *Lit.* §§ 40, 41.

5. *Dower de la pluis belle*; which was where the wife was endowed with the faireſt part of her huſband's eſtate.

But of all theſe kinds of *Dower*, the two firſt are now only in uſe.

II. 1. A Woman to be endowed muſt be the actual wife of the party at the time of his deceaſe. If ſhe be divorced *à vinculo matrimonii*, ſhe ſhall not be endowed; for *ubi nullum matrimonium, ibi nulla dos. Bract. lib. 2. c. 39. § 4.* But a divorce *à menſa et thoro* only, doth not deſtroy the dower; *Co. Litt.* 32; no, not even for adultery itſelf by the Common law. Yet now by *Stat. Weſtm. 2*, (13 *Ed. 1. c.* 34,) if a woman voluntarily leaves (which the law calls eloping from) her huſband, and lives with an adulterer, ſhe ſhall loſe her dower, unleſs her huſband be voluntarily reconciled to her. And in a caſe where *John de Camoys* had aſſigned his wife by deed, it was decided in parliament, that, notwithſtanding the pretended purgation of the adultery in the ſpiritual court, the wife was not entitled to dower, 2 *Inſt.* 435. If however after the elopement of a wife, her huſband and ſhe demean themſelves as huſband and wife, it is evidence of reconciliation. *Dyer* 105. *Lady Powys*'s caſe, where the reconciliation was ſpecially pleaded and allowed.—It was formerly held, that the wife of an ideot might be endowed, though the huſband of an ideot could not be tenant by the curteſy. *Co. Litt.* 31. But as it ſeems to be at preſent agreed, upon principles of ſound ſenſe, and reaſon, that an ideot cannot marry, being incapable of conſenting to any contract, this doctrine cannot now take place. By the antient law the wife of a perſon attainted of treaſon or felony could not be endowed; to the intent, ſays *Staundforde*, (*P. C. b. 3. c.* 3,) that if the love of a man's own life cannot reſtrain him from ſuch atrocious acts, the love of his wife and children may: though *Britton*, (*c.* 110.) gives it another turn; *viz.* that it is preſumed the wife was privy to her huſband's crime. However the *Stat.* 1 *Ed. 6. c.* 12, abated the rigour of the common law in this particular, and allowed the wife her dower. But a ſubſequent *Stat.* 5 & 6 *Ed. 6. c.* 11, revived the ſeverity againſt the widows of traitors, who are now barred of their dower; (except in the caſe of certain treaſons relating merely to the coin; *ſtats.* 5 *Eliz. c.* 11: 18 *Eliz. c.* 1.: 8 & 9 *W. 3. c.* 26: 15 & 16 *Geo. 2. c.* 28;) but the widows of felons are not barred. An alien alſo cannot be endowed unleſs ſhe be Queen conſort; for no alien is capable of holding lands. *Co. Litt.* 31. See *poſt* at the end of this *Div.* The wife muſt be above nine years old at her huſband's death, otherwiſe ſhe ſhall not be endowed. *Litt.* § 36. See 2 *Comm.* 130.

The wife of a man who is baniſhed ſhall have *dower* in his life-time; it is held otherwiſe, if he is profeſſed in religion: and a jointreſs of a baniſhed huſband ſhall enjoy her jointure, in his life. *Co. Litt.* 133: *Perk.* 5. 307.

If a woman be of the age of nine years, at the death of her huſband, ſhe ſhall be endowed of whatſoever age he is; becauſe after the death of the huſband, the marriage is adjudged lawful. *Co. Litt.* 33.

The wife of a *felo de ſe* ſhall have dower. *Plow.* 261 *a.* 262 *a.* So if the huſband be outlawed in treſpaſs, or any civil action, for this works no corruption of blood or forfeiture of lands. *Bro.* 82: *Perk.* 388: *Co. Litt.* 31 *a.*

If a woman being a lunatick kill her huſband, or any other, yet ſhe ſhall be endowed, becauſe this cannot be felony in her who was deprived of her underſtanding by the act of God; ſo though ſhe be of ſound mind, and refuſed to bring an appeal of his death, when he is killed by another, yet ſhe ſhall be endowed; for this is only a waver of that privilege the law has given her to be avenged of her huſband's murderer; ſo it ſeems if ſhe refuſes to viſit and aſſiſt her huſband in his ſickneſs, yet ſhe ſhall be endowed, for this is only undutifulneſs, which the law does not puniſh with the loſs of her entire ſubſiſtence. *Perk.* 364, 365.

If a man take an *alien* to wife and dieth, ſhe ſhall not be endowed, except the wife of the King, who ſhall be endowed by the law of the Crown.—And if a Jew born in *England* marry a Jeweſs alſo born here, the huſband becomes a chriſtian, purchaſes lands and dies.—The wife, (not being alſo a chriſtian) ſhall not have dower. 1 *Inſt.* 31 *b*: 32 *a.*

In the notes on Mr. *Hargrave*'s edition of *Co. Litt.* the latter part of the above is confirmed; as to the former there is the following remarkable note. "Anciently a woman alien was not dowable; but by ſpecial act of parliament not printed, *Rot. Parl.* 8 *H.* 5. *n.* 15, all women aliens who from thenceforth ſhould be married to *Engliſh* men *by licence of the King*, are enabled to demand their Dower after the death of their huſbands, to whom they ſhould in time to come be married, in the ſame manner as *Engliſh* women. But this act did not extend to thoſe married before; and therefore in *Rot. Parl.* 9 *H.* 5. *n.* 9, there is a ſpecial act of parliament to enable *Beatrice* counteſs of *Arundel* born in *Portugal* to demand her Dower. *Hal.* MSS: See *Acc.* 1 *Ro. Ab.* 675."—See alſo 9 *Vin.* 210. (8vo. ed.)

2. A Woman is now by law entitled to be endowed of all lands and tenements, of which her huſband was ſeiſed in fee-ſimple, or fee-tail *general* at any time during the coverture; and of which any iſſue, which ſhe might have had, might by poſſibility have been heir. *Litt.* § 36. 53. Therefore if a man, ſeiſed in fee-ſimple, has a ſon by his firſt wife, and afterwards marries a ſecond wife, ſhe ſhall be endowed of his lands; for her iſſue might by poſſibility have been heir, on the death of the ſon, by the former wife. But, if there be a donee in *ſpecial tail*, who holds lands to him and the heirs of his body begotten on *A.* his wife; though *A.* may be endowed of theſe lands, yet if *A.* dies, and he marries a ſecond wife, that ſecond wife ſhall never be endowed of the lands entailed; for no iſſue, that ſhe could have, could by any poſſibility inherit them. *Ibid.* § 53.

But in caſe land be given to the huſband and wife in tail, the remainder in tail to the huſband, and the firſt wife dying without iſſue, he marries another wife; this ſecond wife will be intitled to *dower*, after his death. *Lit.* § 53: 40 *Ed.* 3. 4: 2 *Shep. Abr.* 63. For here he hath

hath an eſtate in tail. The wife of a *tenant in common*, but not a *jointenant*, ſhall have *dower*; and ſhe ſhall hold her part in common with the tenants in common. *Kitch.* 160.

A ſeiſin in law of the huſband will be as effectual as a ſeiſin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the huſband's title to an actual ſeiſin, as it is in the huſband's power to do with regard to the wife's lands; which is one reaſon why he ſhall not be a tenant by the curteſy, but of ſuch lands whereof the wife, or he himſelf in her right, was actually ſeiſed in deed. *Co. Litt.* 31.—The ſeiſin of the huſband, for a tranſitory inſtant only, when the ſame act which gives him the eſtate conveys it alſo out of him again, (as where by a fine land is granted to a man, and he immediately renders it back by the ſame fine,) will not entitle the wife to dower. *Cro. Jac.* 615: 2 *Rep.* 67: *Co. Litt.* 31: for the land was merely *in tranſitu* and never veſted in the huſband, the grant and render being one continued act. But, if the land abide in him for the interval of but one ſingle moment, it ſeems that the wife ſhall be endowed thereof. And in ſhort a widow may be endowed of all her huſband's lands, tenements, and hereditaments, corporeal or incorporeal, under the reſtrictions before mentioned; unleſs there be ſome ſpecial reaſon to the contrary.

Thus, a woman ſhall not be endowed of a caſtle, built for defence of the realm. *Co. Litt.* 31, 5: 3 *Lev.* 401: Nor of a common without ſtint; for, as the heir would then have one portion of this common, and the widow another, and both without ſtint, the common would be doubly ſtocked. *Co. Litt.* 32: 1 *Jon.* 315. Copyhold eſtates are alſo not liable to dower, being only eſtates at the lord's will; unleſs by the ſpecial cuſtom of the manor, in which caſe it is uſually called the *widow's free-bench*. 4 *Rep.* 22. See title *Copyhold*. But where Dower is allowable, it matters not though the huſband alien the lands during the coverture; for he aliens them liable to dower. *Co. Litt.* 32.

It is now ſettled that although the huſband may be tenant by the curteſy of a truſt eſtate of inheritance, (ſee title *Curteſy*,) the wife is not entitled to Dower out of ſuch an eſtate. 3 *P. Wms.* 229.—The reaſon aſſigned for this is that the wife was not endowed of a uſe at Common Law.—And from analogy to truſts it has been determined that a wife ſhall not be endowed of an equity of redemption, where the eſtate was mortgaged in fee by the huſband previous to the marriage. 1 *Bro. C. R.* 326.

The following further particulars as to what eſtate a woman ſhall be endowed of are worthy the attention of the Student.

If lands are exchanged by the huſband for other lands, the wife may be endowed of which lands ſhe will, as the huſband was ſeiſed of both; though ſhe may not be endowed of the lands given and taken in exchange. *Co. Litt.* 31.

Where the eſtate, which the huſband hath during the marriage, is ended, there the wife ſhall loſe her *dower*. *New. Nat. Br.* 333. But of an eſtate-tail in lands determined, a woman ſhall be endowed; in like manner as a man may be tenant by the curteſy of her lands. *Co. Litt.* 31. And if a wife be endowed of her third part, and afterwards evicted by an elder title, ſhe ſhall have a new writ of *dower*, and be endowed of the other lands. 2 *Danv. Abr.* 670. Though this is, where it is the immediate eſtate deſcended to the heir; and not when it is the eſtate of an alienee. 9 *Rep.* 17. The wife is *dowable* where lands are recovered againſt the huſband by default or covin: and a woman deforced of her *dower* ſhall recover damages, *viz.* the value of her *dower* from her huſband's death. 13 *E.* 1: 20 *H.* 3. If the huſband doth not die ſeiſed, after demand and refuſal to aſſign *dower* to her, ſhe ſhall have damages from the time of the refuſal. *Jenk. Cent.* 45. She ſhall be endowed of a reverſion, expectant on a term of years; and of a rent reſerved thereon. *Lutw.* 729. If the huſband hath only an eſtate for life, *remainder to another in tail*, though the remainder over is to his heirs, the wife ſhall not be endowed. 2 *Danv.* 656. A woman ſhall not be endowed of the goods of her huſband; nor of a caſtle, or capital meſſuage: but of all other lands and tenements ſhe may. *Co. Lit.* 35.

A grantee of a rent in fee or tail, dies without heir, his wife ſhall be endowed: but not where the rent ariſes upon a reſervation to the donor and his heirs, on a gift in tail, and the donee dies without iſſue; for this is a collateral limitation. *Plowd.* 156: *F. N. B.* 149. If during the coverture, the huſband doth extinguiſh rents by releaſe, &c. yet ſhe ſhall be endowed of them; for as to her dower in the eye of the law, they have continuance. *Co. Lit.* 32. And where a rent is deſcended to the huſband but he dies before any day of payment; notwithſtanding the wife ſhall be endowed of it. 1 *H.* 7. 17. If lands are given to the huſband and wife in tail, and after the death of the huſband, the wife diſagrees, ſhe may recover her *dower*; for by her waiving her eſtate, her huſband in judgment of law was ſole ſeiſed *ab initio*. 3 *Rep.* 27. If lands are improved, the wife is to have one third according to the improved value. *Co. Lit.* 32. And if the ground delivered her be ſowed, ſhe ſhall have the corn. 2 *Inſt.* 81.

Dower is an inſeparable incident to an eſtate in tail or fee, and cannot be taken away by condition. If one ſeiſed in fee of lands make a gift in tail, on condition that the wife ſhall not have *dower*, the condition is void. 6 *Rep.* 41. If tenant in tail die without iſſue, ſo that the land reverts to the donor; or in caſe he covenants to ſtand ſeiſed to uſes, and dies, his wife will be endowed: and a deviſe of land by the huſband to his wife by will, is no bar of her *dower*, but a benevolence. 8 *Rep.* 34: *Yelv.* 51: *Bro. Dower.* 69. See *poſt.* IV.

A perſon grants and conveys land to *D.* and his heirs, on condition, to re-demiſe the ſame back, &c. which afterwards he does, and dies; here *D.*'s widow may nevertheleſs be *endowed*. *Abr. Caſ.* 217. *A.* is tenant in tail of lands, the remainder to *B.* in tail, remainder to *A.* in fee; if *A.* bargains and ſells the land to *C.* and his heirs, the wife of the bargainee ſhall have *dower*, determinable upon the death of the tenant in tail. 10 *Rep.* 96. And if a feoffment be made upon condition to reinfeoff, and the feoffee take a wife, ſhe may have her *dower* till re-infeoffment, or an entry made for not doing it: and ſo it is of other defeaſible eſtates. 2 *Rep.* 59: *Perk.* §. 420. If one be diſſeiſed, and after doth marry, if he die before entry, his wife ſhall not have *dower*: and where a perſon recovers land in a real action, and before his entry or execution made he dieth, the wife ſhall not be endowed of this land. 2 *Rep.* 56: *Perk.* 377. In theſe caſes the huſband

was not actually ſeiſed, *ſed qu.?* for, as before obſerved, where there is a ſeiſin in law, ſhe ſhall be endowed. *Co. Lit.* 31, 32. *&c.* So that theſe caſes depend on the conſtruction of what is, and what is not a *ſeiſin in law*. And ſee poſt. *Div.* IV. towards the end, and *Perk.* 379, 380.

Although of copyhold lands a woman ſhall not be endowed, unleſs there be a ſpecial cuſtom for it; yet if there be a cuſtom to be endowed thereof, then ſhe ſhall have the aſſiſtance of ſuch laws as are made for the more ſpeedy recovery of dower in general, being within the ſame miſchief, and therefore ſhall recover damages within the ſtatute of *Merton.* 4 *Co.* 22: *Hob* 216: 5 *Co.* 116.

Of tithes women were not dowable till 32 *H.* 8. *c.* 7; for before that ſtatute tithes were not a lay fee, but now they are dowable of them. *Style's P. R.* 122: 11 *Co.* 25: *Co. Lit.* 32 *a.* 159 *a*: 1 *Rol. Abr.* 682.

Of an advowſon, be it appendant or in groſs, a woman ſhall be endowed; for this may be divided as to the fruit and profit of it, *viz.* to have the third preſentation. See *Perk.* 343, 344: *F. N. B.* 148, 150: *Co. Lit.* 32: *Cro. Jac.* 621: *Cro. Eliz.* 360: 1 *Rol. Abr.* 683: *Co. Lit.* 379: 3 *Leon.* 155: *Cro. Jac.* 691.

III. By the old law, grounded on the feodal exactions, a woman could not be endowed without a fine paid to the lord: neither could ſhe marry again without his licence; leſt ſhe ſhould contract herſelf, and ſo convey part of the feud, to the lord's enemy. *Mirr. c.* 1. § 3. This licence the lord took care to be well paid for; and, as it ſeems, would ſometimes force the dowager to a ſecond marriage, in order to gain the fine. But to remedy theſe oppreſſions, it was provided, firſt by the famous charter of *Henry* I. *A. D.* 1101, and afterwards by *Magna Charta c.* 7, that the widow ſhall pay nothing for her marriage, nor ſhall be diſtrained to marry afreſh if ſhe chooſes to live without a huſband; but ſhall not however marry againſt the conſent of the lord; and farther, that nothing ſhall be taken for aſſignment of the widow's dower, but that ſhe ſhall remain in her huſband's capital manſion-houſe for forty days after his death, during which time her dower ſhall be aſſigned. Theſe forty days are called the widow's *quarentine*; a term made uſe of in law to ſignify the number of forty days, whether applied to this occaſion or any other. The particular lands, to be held in dower, muſt be aſſigned, by the heir of the huſband, or his guardian; *Co. Litt.* 34, 5. not only for the ſake of notoriety, but alſo to entitle the lord of the fee, to demand his ſervices of the heir, in reſpect of the lands ſo holden. For the heir by this entry becomes tenant thereof to the lord, and the widow is immediate tenant to the heir, by a kind of ſubinfeudation, or under-tenancy, completed by this inveſtiture or aſſignment; which tenure may ſtill be created, notwithſtanding the ſtatute of *quia emptores*, becauſe the heir parts, not with the fee-ſimple, but only with an eſtate for life. If the heir or his guardian do not aſſign her dower within the time of quarentine, or do aſſign it unfairly, ſhe has her remedy at law, and the ſheriff is appointed to aſſign it. *Co. Litt.* 34, 5. Or if the heir (being under age) or his guardian aſſign more than ſhe ought to have, it may be afterwards remedied by a writ of *admeaſurement* of dower. *F. N. B.* 148: *Finch L.* 314: *ſt. Weſtm.* 2, 13 *Ed.* 1. *c.* 7. If the thing of which ſhe is endowed be diviſible, her dower muſt be ſet out by metes and bounds, but if it be indiviſible, ſhe muſt be endowed ſpecially; as of the third preſentation to a church, the third toll-diſh of a mill, the third part of the profits of an office, the third ſheaf of tithe and the like. *Co. Litt.* 32.

The aſſignment of the lands is for the life of the woman; and if lands are aſſigned to a woman for years, in recompenſe of *dower*, this is no bar of *dower*; for it is not ſuch an eſtate therein as ſhe ſhould have. 2 *Danv. Abr.* 668. Alſo where other land is aſſigned to the woman, that is no part of the lands wherein ſhe claims *dower*; that aſſignment will not be good or binding: And there muſt be certainty in what is aſſigned; otherwiſe, though it be by agreement, it may be void. 4 *Rep.* 2: 1 *Inſt.* 34. If a wife accept and enter upon leſs land than the third of the whole, on the ſheriff's aſſignment ſhe is barred to demand more. *Moor* 679. But if where a wife is intitled to *dower* of the lands of her firſt huſband; her ſecond huſband accepts of this *dower* leſs than her third part, after his death ſhe may refuſe the ſame, and have her full third part. *Fitz. Dower*, 121.

If a wife having right of *dower* in the land, accept of a leaſe for years thereof after the death of her huſband, it ſuſpends the *dower*; though not ſuch acceptance of a leaſe before the huſband's death, *&c.* for then the wife has only a *title* to have *dower*, and not an *immediate right* of *dower*. *Bro. Ca.* 372: *Jenk. Cent.* 15. A widow accepting of *dower* of the heir, againſt common right, ſhall hold it ſubject to the charges of her huſband; but otherwiſe it is if ſhe be endowed againſt common right by the ſheriff. 2 *Danv.* 672. By proviſion of law, the wife may take a third part of the huſband's lands, and hold them *diſcharged*. *Ibid.* If *dower* be aſſigned a woman on condition, or with an exception; the condition and exception are void. *Cro. Eliz.* 541.

Where there are three manors, one of them may be aſſigned to the wife in *dower* in lieu of *dower* in all three; though it is ſaid that a third part of every manor ought to be aſſigned. *Moor* 12, 47. The ſheriff may aſſign a rent out of the land in lieu of *dower*; and her acceptance of the rent will bar *dower* out of the ſame land, but not of other lands. 2 *And.* 31: *Dyer* 91: 1 *Nelſ. Abr.* 680.

A woman intitled to *dower* cannot enter till it be aſſigned to her, and ſet out either by the heir, tertenant or ſheriff, in certainty. 1 *Rol. Abr.* 681: *Dyer* 343: *Plowd.* 529: *Bro.* 16: *Co. Lit.* 34 *b.* 37 *a. b.*

None can aſſign *dower* but thoſe who have a freehold, or againſt whom a writ of *dower* lies; therefore a tenant by ſtatute merchant, ſtatute ſtaple, or *elegit*, or leſſee for years cannot aſſign *dower*, for none of theſe have an eſtate large enough to anſwer the plaintiff's demand. *Perk.* 403, 404: *Co. Lit.* 35: *Bro.* 63, 94: 1 *Rol. Abr.* 681: 6 *Co.* 57.

If a woman be *dowable* of land, meadow, paſture, wood, *&c.* and any of theſe be aſſigned in lieu of *dower* of all the reſt, it is good, though it be againſt common right, which gives her but the third part of each, for the heir's enjoyment of the reſidue ſufficiently accounts for her title to what ſhe has. 1 *Rol. Abr.* 683: *Moor, pl.* 47, 66.

If lands whereof a woman hath no right to be endowed, or a rent out of ſuch lands be aſſigned in lieu of her *dower*, this does not bar her demand of *dower*, for ſhe having no manner of title to thoſe lands, cannot without livery and ſeiſin be any more than tenant at will, which is no ſufficient recompence for an eſtate for life, which her dower

was

was to be. *Perk.* 407: *Co. Lit.* 34: 4 *Co.* 1: *Co. Lit.* 169: *Bro.* 3.

If the heir within age aſſign to the wife more land in *dower* than ſhe ought to have, he himſelf ſhall have a writ of *admeaſurement* of dower at full age by the Common law: ſo if too much be aſſigned in dower by the heir within age, or his guardian in chivalry; and the heir dies, his heir ſhall have ſuch writ, to rectify the aſſignment; but the heir, in whoſe time the aſſignment of too much was by the guardian, cannot have ſuch writ till his full age, becauſe till then the intereſt of the guardian continues; and if any wrong be done, it is to the guardian himſelf, and not to the heir; if a diſſeiſor aſſigns too much, the heir of the diſſeiſee ſhall have *admeaſurement* by the Common law. *F. N. B.* 148, 332: *Co. Lit.* 39 *a*: 2 *Inſt.* 367: 7 *H.* 2. 4. See *Statutes* 13 *E.* 1. *c.* 7 & 8.

If the heir within age, before the guardian enters, aſſigns too much in dower, the guardian ſhall have a writ of *admeaſurement* of dower, by the ſtatute of *W.* 2. *c.* 7. before which ſtatute the guardian had no remedy becauſe the writ of *admeaſurement* being a real action, lay not for the guardian, who had but a chattel; alſo by the ſame ſtatute it is provided, that if the guardian purſue ſuch writ feintly, or by colluſion with the wife, the heir at full age ſhall have a writ of *admeaſurement*, and may alledge the feint pleading or colluſion generally. 2 *Inſt* 367.

If the wife after aſſignment of dower *improves* the lands, ſo as thereby they become of greater value than the other two parts, no writ of *admeaſurement* lies; ſo if they be of greater value, by reaſon of mines open at the time of the aſſignment, no writ of *admeaſurement* lies, becauſe the land in quantity was no more than ſhe ought to have; and then it is lawful to work the mines, which were open at the time of ſuch aſſignment. *F. N. B.* 149: 2 *Inſt.* 368: 5 *Co.* 12.

IV. Upon preconcerted marriages, and in eſtates of conſiderable conſequence, tenancy in Dower happens very ſeldom: for the claim of the wife to her dower at the Common law, diffuſing itſelf ſo extenſively, it became a great clog to alienations, and was otherwiſe very inconvenient to families. Wherefore ſince the alteration of the ancient law reſpecting Dower *ad oſtium eccleſiæ*, which hath occaſioned the entire diſuſe of that ſpecies of Dower, jointures have been introduced in their ſtead, as a bar to the claim at Common-law.

A widow may be barred of her Dower, not only by elopement, divorce, being an alien, the treaſon of her huſband, and other diſabilities before-mentioned, (See *ante* II.) but alſo by detaining the title deeds, or evidences of the eſtate from the heir, until ſhe reſtores them. *Ibid.* 39. Though if ſhe denies the detainer, and it is found againſt her, ſhe loſes her Dower. *Hob.* 199: 9 *Rep.* 19. By the *Stat. of Glouceſter*, 6 *Ed.* 1. *c.* 7, if a dowager aliens the land aſſigned her for Dower, ſhe forfeits it *ipſo facto*, and the heir may recover it by action. A woman alſo may be barred of her Dower, by levying a fine with her huſband, or ſuffering a recovery of the lands during her coverture. *Pig. of Recov.* 66: 2 *Rep.* 74: *Plowd.* 514.—See title *Fine and Recovery*.

But the moſt uſual method of barring Dower, is by jointures, as regulated by the *Stat.* 27 *Hen.* 8. *c.* 10.

A Jointure, which, ſtrictly ſpeaking, ſignifies a joint-eſtate, limited to both huſband and wife, but in common acceptation extends alſo to a ſole eſtate, limited to the wife only, is thus defined by *Coke*, 1 *Inſt.* 36. "A competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or poſſeſſion, preſently after the death of the huſband; for the life of the wife at leaſt." This deſcription is framed from the *Stat.* 27 *Hen.* 8. *c.* 10, commonly called the ſtatute of *Uſes*. (See title *Uſes*.)—Before the making of that ſtatute, the greateſt part of the land in *England* was conveyed to uſes; the property or poſſeſſion of the ſoil being veſted in one man, and the *uſe*, and profits thereof, in another; whoſe directions, with regard to the diſpoſition thereof, the former was in conſcience obliged to follow, and might be compelled by a court of equity to obſerve. Now, though a huſband had the *uſe* of lands in abſolute fee ſimple, yet the wife was not entitled to any Dower therein; he not being *ſeiſed* thereof: wherefore it became uſual, on marriage, to ſettle by expreſs deed ſome ſpecial eſtate to the uſe of the huſband and his wife, for their lives, in joint-tenancy, or jointure; which ſettlement would be a proviſion for the wife, in caſe ſhe ſurvived her huſband. At length the ſtatute of uſes ordained, that ſuch as had the *uſe* of lands, ſhould, to all intents and purpoſes, be reputed and taken to be abſolutely *ſeiſed* and poſſeſſed of the ſoil itſelf. In conſequence of which legal ſeiſin, all wives would have become dowable of ſuch lands as were held to the uſe of their huſbands, and alſo entitled at the ſame time to any ſpecial lands that might be ſettled in jointure: had not the ſame ſtatute provided, that upon making ſuch an eſtate in jointure to the wife before marriage, ſhe ſhall be for ever precluded from her Dower. 4 *Rep.* 1, 2.

But in this caſe, theſe four requiſites muſt be punctually obſerved.—1. The jointure muſt take effect immediately on the death of the huſband.—2. It muſt be for the life of the wife herſelf at leaſt, and not *pur auter vie*, or for any term of years, or other ſmaller eſtate.—3. It muſt be made to herſelf, and no other in truſt for her.—4. It muſt be made in ſatisfaction of her whole Dower, and not of any particular part of it, and muſt be ſo expreſſed to be in the deed; or it may be averred to be ſo. 1 *Inſt.* 36: 4 *Rep.* 3: *Ow.* 33.

If the jointure be made to her *after* marriage, ſhe has her election after her huſband's death as in Dower *ad oſtium eccleſiæ*, and may either accept it, or refuſe it, and betake herſelf to her Dower at Common-law, for ſhe was not capable of conſenting to it during coverture.

So where a *deviſe* is expreſſed to be given in lieu and ſatisfaction of Dower, or where that is the clear and manifeſt intention of the teſtator, the wife ſhall not have both, but ſhall have her choice. 1 *Inſt.* 366. *in n.*

If, by any fraud, or accident, a jointure made before marriage proves to be on a bad title, and the jointreſs is evicted, or turned out of poſſeſſion, ſhe ſhall then (by the proviſions of the ſame *Stat.* 27 *H.* 8. *c.* 10,) have her Dower *pro tanto* at the Common-law.

If a woman who is under age at the time of marriage, agrees to a jointure and ſettlement in bar of her Dower, and of her diſtributive ſhare of her huſband's perſonal property, in caſe he dies inteſtate; ſhe cannot afterwards waive it; but is as much bound as if ſhe were of age at the time of the marriage. *Drury* v. *Drury*, (or *Buckingham* E. v. *Drury*) 3 *Bro. P. C.* (8vo. ed.) 492.

There

There are ſome advantages attending tenants in dower that do not extend to jointreſſes; and ſo *vice verſâ*, jointreſſes are in ſome reſpects more privileged than tenants in dower. Tenant in Dower by the old Common-law, is ſubject to no tolls or taxes; and hers is almoſt the only eſtate on which, when derived from the King's debtor, the King cannot diſtrain for his debt; if contracted during the coverture: *Co. Lit.* 31 *a*: *F. N. B.* 150. But on the other hand, a widow may enter at once, without any formal proceſs, on her jointure land, as ſhe alſo might have done on Dower *ad oſtium eccleſiæ*, which a jointure in many points reſembles; and the reſemblance was ſtill greater, while that ſpecies of Dower continued in its primitive ſtate; whereas no ſmall trouble, and a very tedious method of proceeding, is neceſſary to compel a legal aſſignment of Dower. *Co. Lit.* 36. And, what is more, though Dower be forfeited by the treaſon of the huſband, yet lands ſettled in jointure remain unimpeached to the widow. 1 *Inſt.* 37. Wherefore *Coke* very juſtly gives it the preference, as being more ſure and ſafe to the widow, than even Dower *ad oſtium eccleſiæ*, the moſt eligible ſpecies of any. 2 *Comm.* 135, *&c.* An additional advantage is, that a jointure is not forfeited by the adultery of the wife as Dower; and Chancery will decree againſt the huſband a performance of marriage articles, though he alledges and proves that the wife lives ſeparate from him in adultery. *Sidney* v. *Sidney*, 3 *P. Wms.* 269, *&c.* and the notes to that caſe.

Further as to the means by which a woman may be barred of her Dower.—Where a woman releaſes her right to him in reverſion, her *Dower* may be extinguiſhed. 8 *Rep.* 151.

If a woman takes a leaſe for life of her huſband's lands after his death, ſhe ſhall have no *Dower*, becauſe ſhe cannot demand it againſt herſelf; and if ſhe takes a leaſe for years only, yet ſhe ſhall not ſue to have *Dower* during theſe years, becauſe it was her own act to ſuſpend the fruit and effect of her *Dower* during that time. *Perk.* 350: *F. N. B.* 149: *Mo. pl.* 403.

If a recovery be had againſt the huſband by colluſion, this ſhall not bar the wife of *Dower*; as if the recovery be by confeſſion, or reddition, which are always underſtood to be by colluſion, the huſband alway's acting and concurring in obtaining of them; but it ſeems to have been a very great doubt, whether a recovery by default ſhould not be a bar: and the better opinion being that ſuch recovery was a bar at Common-law, therefore the *Stat. W.* 2. *cap.* 4, was made, which ordains that notwithſtanding ſuch recovery by default, *&c.* pleaded, the tenant ſhall moreover in bar of the *Dower* ſhew his right to the tenements recovered; and if it be found that he had no right, then ſhall the demandant recover her *Dower* notwithſtanding ſuch recovery by default againſt her huſband. 2 *Inſt.* 349: *Perk.* 376.

By *Stat. W.* 2. *cap.* 4, it appears, that if the recoveror had right, then the wife is barred; therefore if the heir of the diſſeiſor be in by deſcent, and the diſſeiſee enters upon him, and marries, and the heir of the diſſeiſor recovers by default, or reddition, in a writ of entry, in nature of an aſſiſe, and the huſband dies, his wife ſhall not have *Dower*, becauſe he, who recovered, had right to the poſſeſſion by the deſcent; *aliter*, if this diſſeiſin, deſcent, *&c.* were *after* marriage, becauſe the huſband was ſeiſed before of a rightful eſtate during the coverture, whereof his wife had title of *Dower*, which cannot be defeated by the diſſeiſin, deſcent and recovery, which all happened during the coverture. *Perk.* 379, 380.

If the huſband levy a fine with proclamation of his lands, and dies, his wife is bound to make her claim within five years after his death; otherwiſe ſhe ſhall be barred of her *Dower*; for though her title of *Dower* was not conſummate at the time of the fine levied; yet it being initiate by the marriage and ſeiſin of the huſband, the fine begins to work upon it preſently after the huſband's death; and if ſhe does not claim it within five years after, ſhe ſhall be barred. 2 *Co.* 93: 10 *Co.* 49, 99: 3 *Inſt.* 216: *Hob.* 265: *Mo. pl.* 154, 879: *Dyer* 224: 13 *Co.* 20.

See further as to bar of Dower by jointure, deviſe, *&c.* this Dict. title *Jointure*.—And further as to forfeiture thereof by the crime of the Baron, *ante* II. and this Dict. title *Forfeiture* I.

V. The Wife is, as ſoon as ſhe can after the deceaſe of her huſband, to demand her *Dower*, leſt ſhe loſe the value from the time of his death: and in action of *Dower*, the firſt proceſs is *ſummons* to appear: and if the tenant or defendant do not appear, nor caſt an eſſoin, a grand *cape* lies to ſeize the lands, *&c.* By *Stat.* 31 *Eliz. c.* 3. every ſummons on the land is to be made fourteen days before the return of the writ, and proclamation made at the church door on a *Sunday*, or elſe no *grand cape* to be awarded, but an *alias* and *pluries* ſummons till proclamation. But on the return of the writ of ſummons, the attorney for the tenant or defendant may enter with the filazer that the tenant appears, and prays *view*, *&c.* Then a writ of view goes out, whereby the ſheriff is to ſhew the tenant the land in queſtion; upon the return of which writ of view, the tenant's attorney takes a declaration, and puts in a plea; the moſt general one is, *ne unques ſeizie*, *&c. viz.* that the huſband was *never ſeiſed* of any eſtate, whereof the wife can be endowed; and when iſſue is joined, you muſt proceed to trial, as in other actions; upon trial, the jury are to give damages for the meſne profits from the death of the huſband (if he die ſeiſed) for which, execution ſhall be made out; and then you have a writ to the ſheriff to give poſſeſſion of a third part of the lands. The ſheriff may give poſſeſſion or ſeiſin to the woman by a clod, or by graſs growing on the land, or by any beaſt being thereon. 40 *E.* 3: *Fitz. Dower* 48.—See *Impey's Sheriff*.

A widow may recover her *Dower* with a *ceſſat executio*, in caſe there be any thing objected, precedent to the title of *Dower*, *&c.* till that is determined. 1 *Nelſ.* 684, 687: 1 *Salk.* 291. Judgment in *Dower* is to recover a third part of lands and tenements *by metes and bounds*. A wife may have her *writ of dower* againſt an heir, an alienee, a diſſeiſor, *&c.* or againſt any one that has power to aſſign *Dower*; if the lord enters on the land for an eſcheat, ſhe may bring it againſt him, but to the King ſhe muſt ſue by petition. 9 *Rep.* 10: *Plowd.* 141: *Dyer* 263: *Co. Lit.* 59. This writ was brought againſt eight perſons feoffees of the huſband after marriage, two confeſſed the action, and the other ſix pleaded to iſſue; here the demandant had judgment to recover the third part of two parts of the land, in eight parts to be divided: and after the iſſue being found for the demandant againſt the other ſix, ſhe recovered againſt them the third part of the ſix parts of the ſame land as her *Dower*. *Dyer* 187: *Co. Lit.* 32.

At

At the Common-law, before the *Stat. of W.* 1. *c.* 39, if a woman had accepted any part of her *Dower*, though never ſo ſmall, of any one tenant in any one county or town, ſhe had no other remedy for the reſidue, but by a writ of right of *Dower*; for if ſhe brought a writ of dower *unde nihil habet*, it was a good plea in abatement, that ſhe had accepted ſuch a part of ſuch a tenant, in ſuch a town or county; which being a great miſchief to the woman is remedied by that ſtatute, which provides that it ſhall be no plea in abatement, to ſay that ſhe hath received part of her *Dower* of any other perſon before the writ purchaſed; and this extends as well to guardian in chivalry as to the tenant of the land, becauſe ſuch guardian is to render her *Dower*. 2 *Inſt.* 261.

As to *damages* in *Dower*, they are given by the *Stat. of Merton*, *c.* 1; but that ſtatute extends only to the poſſeſſory action of dower *unde nihil habeat*, and not to the *writ of right* of *dower*, becauſe they are intended to be given for the *detention* of the poſſeſſion; and on *writs* of *right*, where the *right* itſelf is queſtionable, no damages are given, becauſe no wrong done till the right be determined; alſo that ſtatute extends only to lands, whereof the huſband died ſeiſed; and therefore judgment for the damages was reverſed, becauſe the jury did not find that the huſband died ſeiſed; for otherwiſe ſhe ſhall have no damages; as if the huſband aliens and takes back an eſtate for life, the wife ſhall recover *Dower*, but no damages; becauſe this dying ſeiſed was only of an eſtate of *freehold*; but if he makes a leaſe for years only, rendering rent, ſhe ſhall recover a third part of the reverſion with a third part of the rent and damages, becauſe there he died ſeiſed as the ſtatute ſpeaks. *Co. Lit.* 32: *Dyer* 284. *pl.* 33: *Yelv.* 112: *Dr. & Stud. lib.* 2. *c.* 13. § 166: 2 *Inſt.* 80.

Damages muſt be after demand of *Dower*, for the heir is not bound to aſſign this proviſion till demanded, becauſe the law caſts the freehold of the whole upon him, which he cannot divide without the concurrence of the wife; but a demand *in pais* before good teſtimony is ſufficient; and if the heir appear the firſt day on ſummons, and plead that he hath been always ready, and ſtill is, to render her *Dower*; ſhe may plead ſuch requeſt; and iſſue may be taken upon it; but the *feoffee of the heir* cannot plead *tout temps priſt*, becauſe he had not the land all the time ſince the death of the anceſtor, and therefore ſhe ſhall recover the meſne profits, and damages againſt him, and if he hath not provided his indemnity and recompence againſt the heir, it is his own folly. *Co. Lit.* 32.

If the heir or feoffee aſſign *Dower*, and the wife accepteth thereof, ſhe loſes her damages, becauſe having the *Dower*, which is the principal, ſhe cannot ſue for the damages, which are but conſequential or acceſſory. *Co. Lit.* 33 *a.*

Damages are given in *Dower* from the death of the huſband and to the return of the writ of enquiry, though the writ of ſeiſin iſſued a year before, but was not executed. *Hardw.* 19, *&c.* Where there are two jointenants in *Dower*, and one dies after judgment for damages, and his heir and the other jointenant bring error, the value from the time of the judgment to the affirmance, cannot be recovered againſt the ſurviving plaintiff in error only. *Id.* 50.—See 2 *Stra.* 271. On a writ of *Dower*, damages cannot be awarded by 16 *Car.* 2. without ſpeeding a writ of enquiry. *Hardw.* 51.

DOWL and DEAL, A *diviſion*: from the Brit. *Dal*, *diviſio*, from the Sax. *dælan*, i. e. *dividere*, and from thence comes the word *dealing*. So the ſtones which are laid to the boundaries of lands, are called *dowle ſtones*, *i. e.* ſuch as divide the lands. *Cowel.*

DOWRY, *Dos Mulieris.*] Was in ancient time applied to that which the wife brings her huſband in marriage; otherwiſe called *maritagium*, or marriage goods: but theſe are termed more properly, goods given in marriage, and the marriage portion. *Co. Lit.* 31. This word is often confounded with *Dower*; though it hath a different meaning from it.

DOZEIN, A territory or juriſdiction, mentioned in the ſtatute of *View and Frankpledge*, *Stat.* 18 *Ed.* 2.—See *Deciners.*

DOZEN PEERS. Were *twelve peers*, aſſigned at the inſtance of the *barons* in the reign of K. *H.* III. to be privy councillors to the King, or rather *conſervators* of the *kingdom.*

DRACO REGIS, The ſtandard *enſign*, or military colours, borne in war by our ancient Kings, having the figure of a dragon painted on them. *Rog. Hoved. ſub. ann.* 1191.

DRAGS, Seem to be floating pieces of timber ſo joined together, that by ſwimming on the water they may bear a burden or load of other things down a river. *Stat.* 6 *H.* 6. *c.* 15.

DRANA, A drain or water-courſe; ſometimes written *drecca. MSS. antiq.*

DRAPERY, *Pannaria.*] Is uſed as a head in our old ſtatute-books, extending to the making and manufacturing of all ſorts of woollen cloths. See titles *Clothiers*, *Manufacturers.*

DRAW-LATCHES, Were thieves and robbers: *Lambert* in his *Eiren. lib.* 1. *cap.* 6, calls them *thieves*, *waſters*, and *roberdſmen*; the two laſt words are grown out of uſe. They are mentioned in *Stats.* 5 *E.* 3. *c.* 14. and 7 *R.* 2. *c.* 5.

DREDGERMEN, Fiſhers for oyſters, *&c. Stat.* 2 *Geo.* 2. *c.* 19.—See titles *Fiſh*; *Oyſters.*

DREIT-DREIT, or DROIT-DROIT, *jus duplicatum.*] Are words ſignifying formerly a double right, *viz.* of poſſeſſion, and of property or intereſt. *Bract. lib.* 4. *cap.* 27: *Co. Lit.* 266.—See 2 *Comm.* 199, and this Dict. title *Eſtate.*

DRENCHES, or DRENGES, *Drengi.*] Tenants *in capite*. *Mon. Angl. tom.* 2. *fol.* 598. And according to *Spelman*, they are ſuch as at the coming of *William the Conqueror*, being put out of their eſtates, were afterwards reſtored thereunto; on their making it appear that they were owners thereof, and neither *in auxilio*, or *conſilio*, againſt him. *Spelm.*

DRENGAGE, *Drengagium.*] The tenure by which the *drenches* or *drenges* held their lands. *Trin.* 21 *Ed.* 3. *Ebor. & Northumberland. Rot.* 191.

DRIFT OF THE FOREST, *Agitatio animalium in Foreſta.*] A view or examination of what cattle are in the *foreſt*, that it may be known whether it be ſurcharged or not; and whoſe the beaſts are, and whether they are commonable, *&c.* Theſe *drifts* are made at certain times in the year by the officers of the *foreſt*; when all the cattle of the *foreſt* are *driven* into ſome pound or place incloſed, for the purpoſes aforementioned; and to the end it may be diſcovered, whether any cattle of ſtrangers be there, which

which ought not to common. *Manw. par.* 2. *c.* 15: *Stat.* 32 *H.* 8. *c.* 13: 4 *Inſt.* 309.—See title *Foreſt.*

DRINKLEAN, in ſome records *Potura Drinklean.*] A contribution of tenants, in the time of the *Saxons*, towards a *potation*, or ale, provided to entertain the lord, or his ſteward.

DROFDENE, Among the *Saxons*, a grove, or woody place, where cattle were kept; and the keeper of them was called *Drofman. Domeſday.*

DROFLAND, or DRYFLAND, *Saxon.*] A tribute or yearly payment made by ſome tenants to the King, or their landlords, for driving their cattle through a manor to fairs or markets. *Cowel.*

DROIT, *Right*, Is the higheſt writ of all other real writs whatſoever, and hath the greateſt reſpect, and the moſt aſſured and final judgment; and therefore is called a *writ of right*, and in the old books *Droit. Co. Lit.* 158. There are divers of theſe writs uſed in our law, as

DROIT DE ADVOWSON.
DROIT DE DOWER.
DROIT DE GARDE.
DROIT PATENT.
DROIT RATIONABILI PARTE.
DROIT SUR DISCLAIMER.

} As to all which ſeveral *writs of right*, and their various uſes, ſee *Recto*, and *Writs*; and the ſeveral titles to which theſe writs belong.

Alſo conſult *Booth* on *Real Actions.*

DROMONES, DROMOS, DROMUNDA, Ships of great burden; Men-of-war. *Walſing. Anno* 1292.—*Mat. Paris. ſub ann.* 1191.

DROVERS, Thoſe that buy cattle in one place to ſell in another: they are to be married men and houſeholders, and be licenſed, by *Stat.* 5 *Eliz. c.* 12; that part of the ſtatute directing them to be married and houſeholders, is now totally diſregarded. See title *Cattle.*

DRUGGERIA, A place of *drugs*, or *druggſter's* ſhop.

DRUNKENNESS, Is an offence for which a man may be puniſhed in the Eccleſiaſtical court; as well as by juſtices of peace by ſtatute.

By *Stats.* 4 *Jac.* 1. *c.* 5: 21 *Jac.* 1. *c.* 7, If any perſon ſhall be convicted of *drunkenneſs* by the view of a juſtice, oath of one witneſs, &c. he ſhall forfeit five ſhillings for the firſt offence, to be levied by diſtreſs and ſale of his goods; and for want of a diſtreſs ſhall ſit in the ſtocks *ſix* hours; and for the ſecond offence, he is to be bound with two ſureties in ten pounds each, to be of the good behaviour, or be committed.

Tippling, is a *ſpecies* of drunkenneſs. By *Stat.* 1 *Jac.* 1. *c.* 9. § 2, 3: 1 *C.* 1. *c.* 4: 21 *Jac.* 1. *c.* 7. § 4, If any inn-keeper, victualler, or ale-houſekeeper, ſhall ſuffer any perſon (except travellers, and labouring people at their dinner hour) to continue drinking or tippling in an alehouſe, &c. he ſhall forfeit 10*s.* to the poor, to be recovered by diſtreſs, or the party offending to be committed till payment; and diſabled to keep an alehouſe for three years.

By *Stats.* 4 *Jac.* 1. *c.* 5. § 4: 1 *Jac.* 1. *c.* 9: 21 *Jac.* 1. *c.* 7: 1 *C.* 1. *c.* 4, The perſons tippling ſhall forfeit 3*s.* 4*d.* or be ſet in the ſtocks for *four* hours. And an alehouſe-keeper tippling ſhall be diſabled to keep an alehouſe for three years. 7 *Jac.* 1. *c.* 10.

See further titles *Churchwardens*; *Conſtable.*

He who is guilty of any crime, through his own voluntary *drunkenneſs*, ſhall be puniſhed for it as if he had been ſober. *Co. Lit.* 247: 1 *Hawk. P. C.* 3. It has been held, that *drunkenneſs* is a ſufficient cauſe to remove a magiſtrate: and the proſecution for this offence by *Stat.* 4 *Jac.* 1. *c.* 5, was to be, and ſtill may be, before juſtices of peace in their ſeſſions, by way of indictment, &c.

Equity will not relieve againſt a bond, &c. given by a man when drunk, unleſs the drunkenneſs is occaſioned through the management or contrivance of him to whom it is given. 3 *P. Wil.* 130. *in n.* 1 *Inſt.* 247: *Plowd.* 19: and this Dict. titles *Bond*; *Fraud*; *Chancery.*

DRY EXCHANGE, *Cambium Siccum.*] A term invented in former times for the diſguiſing and covering of *uſury*; in which ſomething was pretended to paſs on both ſides, whereas in truth nothing paſſed but on one ſide, in which reſpect it was called *dry. Stat.* 3 *H.* 7. *c.* 5.—See *Cowel.*

DRY RENT, A rent reſerved without clauſe of diſtreſs. See *Rent-ſeck.*

DUCES TECUM, Is a writ commanding a perſon to appear at a certain day in the Court of *Chancery*, and to *bring with him* ſome writings, evidences, or other things which the court would view. *Reg. Orig.* So *ſubpœnas duces tecum*, are often ſued out at Common-law, to compel witneſſes, to produce, on trials, at *Niſi prius*, deeds, bonds, bills, notes, books, or memorandums, &c. which are in their cuſtody or power, and which relate to the iſſue in queſtion. But if they are in the poſſeſſion or power of the adverſe party or his attorney, it is cuſtomary to give notice to the attorney to produce them, and on proof made in open court, before the judge of *Niſi prius*, of ſuch notice, the court generally compels the attorney, or his client to produce the ſame, if material. If not produced, *parol* evidence may be given of their contents. See titles *Evidence*; *Trial.*

DUCES TECUM LICET LANGUIDUS, A writ directed to the ſheriff, upon a return that he cannot bring his priſoner without danger of death, he being *adeo languidus*; then the court grants a *habeas corpus* in the nature of a *duces tecum licet languidus. Book Entr.* But this is now out of uſe; and where the perſon's life would be endangered by removal, the law will not permit it to be done.

DUCKING-STOOL. See *Caſtigatory.*

DUES, *eccleſiaſtical*, non-payment of. Various *Dues* to the clergy, are cognizable in the ſpiritual court; which makes decrees for their actual payment. *Offerings*, *oblations*, and *obventions*, not exceeding the value of 40*s.* may by *Stat.* 7 & 8 *W.* 3. *c.* 6, be recovered in a ſummary way, before two juſtices of peace.

DUEL, *Duellum.*] In our ancient law is a fight between perſons in a doubtful caſe for the trial of the truth. *Fleta.*—See title *Battel.* But this kind of *Duel* is diſuſed; and what we now call a *Duel* is, a fighting between two, upon ſome quarrel precedent: wherein, if a perſon is killed, both the principal and his ſeconds are guilty of murder, and whether the ſeconds fight or not. *H. P. C.* 47, 51.

If two perſons quarrel over night, and appoint to fight the next day; or quarrel in the morning, and agree to fight in the afternoon; or ſuch a conſiderable time after, by which it may be preſumed the blood was cooled; and then they meet and fight a *Duel*, and one kill the other,

it

it is murder. 3 *Inſt.* 52: *H. P. C.* 48: *Kel.* 56. And whenever it appears, that he who kills another in a *Duel*, or fighting on a ſudden quarrel, was maſter of his temper at the time, he is guilty of murder; as if after the quarrel he fall into another diſcourſe, and talk calmly thereon; or alledge that the place where the quarrel happens is not convenient for fighting; or that his ſhoes are too high, if he ſhould fight at preſent, &c. *Kel.* 56: 1 *Lev.* 180.

If one *challenge* another, who refuſes to meet him, but tells him that he ſhall go the next day to ſuch a place about buſineſs, and then the challenger meets him on the road, and aſſaults the other; if the other in this caſe kill him, it will be only manſlaughter; for here is no acceptance of the challenge, or agreement to fight: and if the perſon challenged refuſeth to meet the challenger, but tells him that he wears a ſword, and is always ready to defend himſelf; if then the challenger attack him, and is killed by the other, it is neither murder nor manſlaughter, if neceſſary in his own defence. *Kel.* 56.—See further at length title *Murder*; and as to Challenges, title *Challenge to Fight*.

DUKE, Lat. *Dux*, Fr. *Duc*, *à Ducendo*.] Signified among the ancient Romans, *ductorem exercitûs*, ſuch as led their armies; ſince which, they were called *duces*, and were governors of provinces, &c. In ſome nations, the ſovereigns of the country are called by this name; as the *Duke of Savoy*, &c. In *England*, the title of *Duke* is the next dignity to the Prince of *Wales*: and the firſt *Duke* we had in *England* was *Edward the Black Prince*, ſo famed in our *Engliſh* hiſtories for heroick actions; who was created *Duke of Cornwall* in the 11th year of King *Ed.* III. After which, there were more made in ſuch manner as that their titles deſcended to their poſterity. They are created with ſolemnity, *per cincturam gladii, cappæ & circuli aurei in capite impoſitionem. Cambd. Brit. p.* 166.—See title *Peer*.

DUM FUIT INFRA ÆTATEM, A writ whereby an infant who had made a feoffment of his lands, when he came of full age, might recover thoſe lands and tenements which were ſo aliened: and within age, he might enter into the land, and take it back again, and by his entry he ſhould be remitted to his anceſtor's right. *New Nat. Br.* 426. If the huſband and wife alien the wife's land, during the nonage of both of them, the wife at her full age after the death of the huſband, ſhall have a writ of *dum fuit infra ætatem. M.* 14 *E.* 3. By this *writ* to the ſheriff, he ſhall command *A.* that he render to *B.* who is of full age, two meſſuages and lands, &c. which *B.* demiſed to him, *while he was within age*, as he ſaith; or into which the ſaid *A.* hath not entered, but by *C.* to whom the ſaid *B.* the ſame demiſed; and unleſs, &c. *F. N. B.* 477.—See title *Infant*.

DUM NON FUIT COMPOS MENTIS, Is a writ that lay where a man not of ſound memory aliened any lands or tenements, againſt the alienee. And he ſhall alledge that he was not of *ſane memory*, but being viſited with infirmity, loſt his diſcretion for a time, ſo as not to be capable of making a grant, &c. *New Nat. Br.* 449. See title *Diſability*; *Lunatic*; and *F. N. B.* 202.

DUN, *Down*, Which termination is now varied into *don*; it ſignifies a mountain or high open place; ſo that the names of thoſe towns which end in *dun*, or *don*, as *Aſhdon*, &c. were either built on hills, or near them in open places. *Domeſday*.

DUNSETTS, Thoſe who dwell on hills or mountains.

DUNUM; DUNA, *Dunnarium*, A down or hill. *Chart. MSS.*

DUODENA, A jury of twelve men. *Walſing.* 256.

DUODENA MANU, Twelve witneſſes to purge a criminal of an offence. See titles *Jurare duodecimâ manu*; *Wager of Law*.

DUPLEX QUERELA, A proceſs eccleſiaſtical. See *Double Quarrel*.

DUPLICATE. Is uſed for the ſecond letters-patent, granted by the Lord Chancellor, in a caſe wherein he had before done the ſame; which were therefore thought void. *Cromp. Juriſd. fol.* 215. But it is more commonly a copy or tranſcript of any deed or writing, account, &c. or a ſecond letter, written and ſent to the ſame party and purpoſe as a former, or a copy of diſpatches for fear of a miſcarriage of the firſt, or for other reaſons. See *Stat.* 4 *Car.* 2. *c.* 10.

It is alſo the name of the diſcharge, given by the quarter ſeſſions, &c. to an *inſolvent debtor*, who takes the benefit of an act, for relief of *inſolvent debtors*, with reſpect to the impriſonment of their perſons.—See title *Inſolvent*.—See alſo title *Pawnbrokers*.

DUPLICITY in *pleading*. This muſt be avoided as it begets confuſion. Every plea muſt be ſimple, intire, connected and confined to one ſingle point: it muſt never be entangled with a variety of diſtinct independent anſwers to the ſame matter; which muſt require as many different replies, and introduce a multitude of iſſues upon one and the ſame point. See titles *Double Plea*; *Pleading*.

DURANTE ABSENTIA, *Adminiſtration*. An adminiſtration granted when the executor is out of the realm, to continue in force until his return. See this Dict. title *Executor*.

DURANTE MINORE ÆTATE, *Adminiſtration*. An infant cannot act as executor until ſeventeen, during which minority this adminiſtration is granted. See title *Executor*.

DURDEN, A thicket of wood in a valley. *Cowel.*

DURESS, *Durities*, Conſtraint.] Whatever is done by a man to ſave either life or limb, is looked upon as done by the higheſt neceſſity and compulſion. Therefore if a man through fear of death or mayhem, is prevailed upon to execute a deed, or do any other legal act, theſe, though accompanied with all other requiſite ſolemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehenſion of loſing his life, or even his limbs in caſe of non-compliance. 2 *Inſt.* 483.—And the ſame is alſo a ſufficient excuſe for the commiſſion of many miſdemeanours. The conſtraint a man is under in theſe circumſtances, is called in law *Dureſs*; of which there are two ſorts, *Dureſs of Impriſonment*, where a man actually loſes his liberty; and *Dureſs per minas*; (by threats) where the hardſhip is only threatened and impending.

If a man is under *Dureſs of Impriſonment*, or illegal reſtraint of liberty, until he ſeals a bond or the like, he may alledge this Dureſs, and avoid the extorted bond. But if a man be lawfully impriſoned, and either to procure his diſcharge, or on any other fair account, ſeals a

bond or deed, this is not by Dureſs of impriſonment, and he is not at liberty to avoid it. 2 *Inſt.* 482. See this Dict. title *Priſoner*.

Dureſs per minas, is either for fear of loſs of life, or elſe for fear of mayhem or loſs of limb. And this fear muſt be upon ſufficient reaſon; *non ſuſpicio cujuſlibet vani et meticuloſi hominis, ſed talis qui poſſit cadere in virum conſtantem. Bract. l.* 2. *c.* 5.—A fear of battery, (or being beaten) though never ſo well grounded, is no *Dureſs*; neither is the fear of having one's houſe burned, or one's goods taken away and deſtroyed; becauſe in theſe caſes, ſhould the threat be performed, a man may have ſatisfaction by recovering equivalent damages; but no ſuitable atonement can be made for the loſs of life or limb. 2 *Inſt.* 483.—See 1 *Comm.* 131, 6.

As to criminal caſes.—In time of war or rebellion, a man may be juſtified in doing many treaſonable acts by compulſion of the enemy or rebels, which would admit of no excuſe in time of peace. 1 *Hal. P. C.* 50. This however ſeems only or at leaſt principally to hold as to poſitive crimes, ſo created by the laws of Society; and which therefore Society may excuſe; but not as to natural offences ſo declared by the laws of God. Therefore though a man may be violently aſſaulted, and hath no other poſſible means of eſcaping death, but by killing an innocent perſon; this fear and force ſhall not acquit him of murder, for he ought rather to die himſelf than eſcape by ſuch means. 1 *Hal. P. C.* 51. But in ſuch a caſe he is permitted to kill the aſſailant; for there the law of nature and ſelf defence have made him his own protector. 4 *Comm.* 30.—See this Dictionary, titles *Baron and Feme*; *Felony*; *Murder*, &c.

Further as to civil caſes.—It has been adjudged, that if a man makes a deed by *Dureſs* done to him by taking of his cattle, though there be no *Dureſs* to his perſon, yet this ſhall avoid the deed. 2 *Danv. Abr.* 686. If a perſon threaten another to make a deed to a third perſon, it is by *Dureſs*, and void; as if ſuch third perſon had made the threatening. 2 *Inſt.* 482: 3 *Inſt.* 92: 4 *Inſt.* 97. And where a man is impriſoned until he makes a bond at another place; if afterwards he doth it when at large, the bond is by *Dureſs*, and void.

If a perſon be arreſted upon an action at the ſuit of another, and the cauſe of action is not good, if he make a bond to a ſtranger, it is not *Dureſs*; though if he make it to the plaintiff, it is, and being ſued upon the bond, he may plead it was made by *Dureſs*, and ſo avoid it: alſo the party ſhall have an action for the falſe impriſonment itſelf. 1 *Rep.* 119: *Perk.* § 16: *Cromp. Jur.* 296: 1 *Lil. Abr.* 494. If the arreſt is under colour of *legal proceſs*, the action muſt be a *ſpecial action on the caſe*, not an action of *treſpaſs vi et armis*.

If one impriſoned make an obligation by *Dureſs*, and after he is at large, takes a defeaſance upon it; this will eſtop him to ſay it was made *per Dureſs*. And where *A.* and *B.* by *Dureſs* to *B.* ſeal a bond or deed, it may be good as to *A.* that was never threatened. 3 *H.* 6. 16: *Bro.* 17: *Mich.* 7 *Jac.* 1.—See 43 *E.* 3. 10: 2 *Danv.* 686.

A man ſhall not avoid a deed by *Dureſs* of a ſtranger: for it hath been held that none ſhall avoid his own bond for the impriſonment or danger of any other than of himſelf only. *Cro. Jac.* 187. Yet a ſon ſhall avoid his deed by *Dureſs* of the father: and the huſband ſhall avoid a deed made by *Dureſs* of the wife; though a ſervant ſhall not avoid a deed made by *Dureſs* of his maſter, or the maſter the deed ſealed by *Dureſs* of his ſervant. 2 *Danv.* 686. If a man is taken by virtue of a proceſs iſſuing out of a court that hath not power to grant it; or in cuſtody on a falſe charge of felony, &c. and for his enlargement and diſcharge gives bond, &c. this may be avoided, as taken by *Dureſs*. *Cro. El.* 646: 4 *Inſt.* 97: *Allen* 92.

A ſtatute merchant may be avoided by *audita querela*, becauſe it was made by *Dureſs*, or impriſonment. A will ſhall be avoided by *Dureſs* or menace of impriſonment. A feoffment made by *Dureſs* is voidable; but not void. But no averment ſhall be taken againſt a deed inrolled, that it was made by *Dureſs*. 1 *Rol. Abr.* 862: 2 *Danv.* 685. A marriage had by *Dureſs* is voidable: and by *Stat.* 31 *H.* 6. *c.* 9, obligations, ſtatutes, &c. obtained of women by force, to marry the perſons to whom made, or otherwiſe, unleſs for a juſt debt, are declared void. If a perſon executes a deed by *Dureſs*, he cannot plead *non eſt factum*, becauſe it is his deed; though he may avoid it by ſpecial pleading, and judgment *Si actio*, &c. 5 *Rep.* 119. Records may not regularly be ſaid to be made by *Dureſs*, and therefore ſhall not be avoided by this plea or pretence. 2 *Shep. Abr.* 319.—See further this Dict. title *Fraud*; *Fine*, &c.

DURHAM, The biſhoprick of *Durham* was diſſolved, and the King to have all the lands, &c. by *Stat.* 7 *Ed.* 6. But this act was afterwards repealed, and the biſhoprick newly erected, with all juriſdiction eccleſiaſtical and temporal annexed to the County Palatine. The juſtices of the County Palatine of *Durham* may levy fines of lands in the county: and writs upon proclamation, &c, are to be directed to the biſhop. *Stats.* 5 *Eliz. c.* 27: 31 *Eliz. c.* 2. Writs to elect members of parliament in the County Palatine of *Durham* ſhall go to the biſhop or his chancellor, and be returned by the ſheriff, &c. *Stat.* 25 *Car.* 2. *c.* 9.—See further title *Counties-Palatine*.

As to the Courts of which three Counties, and the Royal Franchiſe of *Ely*, we may here inſert what was there omitted. They are a ſpecies of private courts of a limited local juriſdiction, and having at the ſame time an excluſive cognizance of pleas in matters both of law and equity. 4 *Inſt.* 213, 8: *Finch. R.* 452. In all theſe, as in the Principality of *Wales* the King's ordinary writs iſſuing under the Great Seal out of Chancery do not run; that is they are of no force. For as originally all *jura regalia* were granted to the Lords of theſe Counties-Palatine, they had of courſe the ſole adminiſtration of juſtice by their own judges appointed by themſelves, and not by the Crown. It would therefore be incongruous for the King to ſend his writ to direct the judge of another's court in what manner to adminiſter juſtice between the ſuitors. But when the privileges of theſe Counties-Palatine were abridged by *Stat.* 27 *H.* 8. *c.* 24, it was alſo enacted, that all writs and proceſs ſhould be made in the King's name, but ſhould be teſted or witneſſed in the name of the owner of the Franchiſe. Wherefore all writs whereon actions are founded, and which have current authority here, muſt be under the ſeal of the reſpective franchiſes; the two former of which, *Cheſter* and *Lancaſter*, are now united to the Crown, and the two latter (*Durham* and *Ely*) under the government of their ſeveral biſhops. And the judges of aſſiſe who ſit therein, ſit by virtue of a ſpecial commiſſion from the owners of the ſeveral franchiſes,

and

and under the seal thereof, and not by the usual commissions under the Great Seal of *England*. 3 *Comm.* 78.

DURSLEY, Signifies *blows* without wounding or bloodshed, vulgo *dry blows*. *Blount*.

DUSTY-FOOT, See *Court of Piepowder*.

DUTCHY COURT OF LANCASTER, See titles *Chancellor of the Dutchy of Lancaster*; *Counties-Palatine*.

DUTIES of *persons*. *Allegiance* is the *duty* of the *people*, *protection* the *duty* of the *magistrate*; yet they are reciprocally the *rights*, as well as *duties* of each other. *Allegiance* is the *right* of the *magistrate*, and *protection* the *right* of the *people*. 1 *Comm.* 123.

DUTY, Any thing that is known to be due by law, and thereby recoverable, is a *duty* before it is recovered; because the party interested in the same hath power to recover it. 1 *Lill.* 495.

DWELLING-HOUSE, A man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case. 1 *Hal. P. C.* 547: 4 *Comm.* 224.—See titles *Burglary*; *Riot*.

DWINED, *Consumed*; from whence comes the word *dwindle*.

DYERS, By *Stat.* 3 & 4 *E.* 6. *c.* 2, No *dyer* may dye any cloth with orchel; or with Brazil, to make a false colour in cloth, wool, &c. on pain of 20*s.* By *Stat.* 23 *Eliz. c.* 9, *Dyers* are to fix a seal of lead to cloths, with the letter M. to shew that they are well mathered, &c. or forfeit 3*s.* 4*d.* *per* yard. By *Stat.* 23 *Geo.* 3. *c.* 15, several penalties are inflicted on *dyers*, who dye any cloths deceitfully, and not throughout with woad, Indico and mather; dying blue with logwood to forfeit 20*l.* *Dyers* in *London* are subject to the inspection of the *Dyers' Company*, who may appoint searchers; and out of their limits, justices of the peace in sessions to appoint them: opposing the searchers, incurs 10*l.* penalty.—See this Dict. title *Labourers*; *Manufacturers*.

DYKE-REED, rather DYKE-REVE, An officer that hath the care and oversight of the *dykes* and *drains* in fenny countries; as of *Deeping fens*, &c. mentioned in *Stat.* 16 & 17 *Car.* 2. *c.* 11.

DYRGE or DIRGE, A mournful song over the dead; from the Teutonick *dyrke*, *laudare*, to praise and extol, whence it is a laudatory song. *Cowel*.

DYRENUM, A ditty or song.—*Venire cum toto ac pleno* dyreno; to sing harvest home. *Paroch. Antiq.* 320.

E.

EADLING, See *Adeling*.

EAHALUS, from the Sax. *Eale*, Cervisia, & *Hus*, Domus.] An ale-house: In the laws of King *Alfred* we often find this word.

EALHORDA. The privilege of assising and selling *ale and beer*. It is mentioned in a charter of King *Hen.* II, to the abbot of *Glastonbury*.

EALDERMAN, or *Ealdorman*.] Among the *Saxons* was as much as *Earl* with the *Danes*. *Cambd. Brit.* 107. Also an *elder*, senator, &c. *Ealdermen* or *aldermen*, are now those that are associated to the mayor or chief officer in the common council of a city or borough town. *Stat.* 24 *H.* 8. *c.* 13. See titles *Aldermen*; *Squire's Ang. Sax. Gov.* 107, 161, 220, *n.* 257. *n.* and Lord *Lytt. Hist. H.* II. *V.* 2. 215.

EARL. Sax. *Eorle*, Lat. *Comes*.] This it is said was a great title among the *Saxons*, and is the most ancient of the *English* peerage, there being no title of honour used by our present Nobility that was likewise in use by the *Saxons*, except this of *Earl*; which was usually applied to the First in the Royal Line. *Verstegan* deriveth this word from the Dutch *Ear*, *i. e.* Honour, and *Ethel*, which signifies Noble: But whencesoever it is derived, the title *Earl* was at length given to those who were associates to the King in his council and martial actions; and the method of investiture into that dignity was *per cincturam gladii*, without any formal charter of creation. *Dugdale's Warwicksh.* 302. *William* the First, called the *Conqueror*, gave this dignity in fee to his Nobles, annexing it to this or that county or province; and allotting them for the maintenance of it a certain portion of money arising from the prince's profits, for the pleadings and forfeitures of the provinces. *Camd.* And formerly one *Earl* had divers shires under his government, and had lieutenants under him in every shire, such as are now *sheriffs*; as appears by divers of our old statutes. *Cowel.*

But about the reign of King *John* and ever since, our Kings have made *Earls* of counties, &c. by charter; giving them no authority over the county, nor any part of the profits arising out of it; only sometimes they have had an annual fee out of the Exchequer, &c. An *Earl*, *Comes*, was heretofore correlative with *commitatus*; and anciently there was no *Earl*, but had a shire or county for his *earldom*; but of late times the number of *Earls* very much increasing, several of them have chosen for their titles some eminent part of a county, considerable town, village, or their own seats, &c. Besides these local *Earls*; there are some personal and honorary; as *Earl-Marshal* of *England*; See titles *Constable*; *Court of Chivalry*; and others nominal, who derive their titles from the names of their families. *Lex Constitutionis*, *p.* 78. Their place is next to a Marquis, and before a Viscount: And as in very ancient times, those who were created *Counts* or *Earls*, were of the blood royal; our *British* monarchs to this day call them in all public writings, "Our most dear Cousin:" They also originally did, and still may use the style of *Nos*. See titles *Countee*; *Peers*; *Sheriff*.

EARNEST. Money paid in part of a larger sum, or part of the goods delivered, on any contract, &c. which being done by way of *earnest*, the property of the goods is absolutely bound by it: And the *buyer* may recover the goods by action, as well as the *vendor* may the price of them. And by the statute of frauds, *Stat.* 29 *Car.* 2. *c.* 3, No contract for sale of goods, to the value of 10*l.* or more, to be valid, unless such *earnest* is made or given. See title *Frauds*.

EASEMENT, *Aisiamentum*, from the Fr. *Aise*, *Commoditas*.] Is defined to be a service or convenience, which one neighbour hath of another, by *charter* or *prescription*, without profit; as a way through his land, a sink, or such like. *Kitch.* 105. A person may prescribe to an *easement* in the freehold of another, as belonging to some ancient house, or to land, &c. And a way over the land of another; a gate-way, water-course, or washing place on another's ground, may be claimed by *prescription* as *easements*. But a multitude of persons cannot prescribe; though for an *easement* they may plead custom. *Cro. Jac.* 170: 3 *Leon.* 254: 3 *Mod.* 294. To allege an *easement* by *consuevit* only, is the best way: And things of necessity shall not be extinguished by unity of possession; but a way of *ease* may be thus extinguished. *Lil. Abr.* 496. See title *Prescription*.

EASTER. The name of a goddess which the *Saxons* worshipped in the month of *April*, and so called, because she was the goddess of the *East*. *Blount*. In our church it is the feast of the *Passover*, in commemoration of the sufferings of our Saviour.

EAST-INDIA COMPANY.

A Corporation or "UNITED COMPANY OF MERCHANTS OF ENGLAND TRADING TO THE EAST INDIES;" which name is given to them in *Stat.* 6 *Ann. c.* 17. § 13. More explicitly, according to their charter, and the adjustment of their rights by *Stat.* 9 & 10 *Will.* 3. *c.* 44. § 61; trading "into, and from, the *East-Indies*, in the countries and parts of *Asia* and *Africa*, and in, to, and from the islands, ports, havens, cities, creeks, towns, and places of *Asia*, *Africa* and *America*, or any of them beyond the *Cape of Good Hope*, to the *Straights of Magellan*, where any trade or traffick of merchandize is or may be used or had, and to and from every of them."

The Laws

EAST-INDIA COMPANY.

The laws relative to this important Company, ſhall be conſidered in the following order.

I. *The* ORIGIN, *and* UNION *of the Old and New* Eaſt India Companies.
II. *The* STATE *of the preſent* Eaſt India Company, *and the Regulations by certain Statutes, and otherwiſe relating thereto.*
III. *The* RIGHTS, *permanent and temporary, of the preſent* Eaſt India Company.
IV. STATUTES *relative to the preſent* Eaſt India Company; *particularly the Statute* 33 *Geo.* 3. *c.* 52, "*for ſettling the Government and Trade of* India, *and for the Appropriation of the Territorial Revenues and Profits of the Trade.*"

I. THE PASSAGE by ſea to the peninſula of *India*, and the Eaſtward part of the Continent of *Aſia*, the preſent ſeats of our *Aſiatic* trade, was not diſcovered till about the latter end of the 15th century; and, of the various attempts made from hence by individuals, to open a trade thither, none proved ſucceſsful until Queen *Elizabeth* A. D. 1600, eſtabliſhed the firſt incorporated Company by the name of *the London Eaſt India Company*. After a long ſeries of diſaſters and loſſes this Company obtained from the country powers of *India*, at a great expence, the privilege of a limited trade in certain parts of *India*, and *Perſia*; and of making ſmall ſettlements or houſes of trade called *Factories* for the reſidence of their factors and ſervants. In thoſe times the charters of the crown, and the powers which they conveyed were not thought to require parliamentary ſanction; nor was it till after the Reſtoration that the rights or authorities derived under them to the Company, were firſt called in queſtion.

By the interruptions, however, of ſpeculative adventurers, called *Interlopers*, who had begun to reſiſt the excluſive claims of the Old Company, under their charters, on the ground of their wanting the ſanction of parliamentary authority, and by occaſional failures of inveſtments of goods from abroad, and the then not unfrequent loſſes of ſhips in their paſſage, the commerce of the Company was often chequered with diſaſters and diſappointments.

Notwithſtanding theſe diſcouragements the Company, formed by degrees various factories and houſes of trade, both in *India* and *Perſia*. When by this means they had at length become more ſucceſsful, various attempts were made to induce the Crown, and even Parliament itſelf to interpoſe and revoke the charters of the Company; ſome on pretext that every man had an equal right to trade in the *Eaſt* as well as in the *Weſt Indies*; while others hoped to effect it on propoſals of terms of advantage in point of public finance, that they might themſelves be erected into an excluſive Company.

Such was the ſtate of things in 1693; when the Company, by an accidental failure in the payment of a ſmall duty which had been impoſed on their capital ſtock, (See *Stat.* 4 & 5 *W.* & *M. c.* 15. §§ 10, 12,) gave an opening to Government to determine their charters, rendered void by that default: and though in the ſame year the Crown to obviate all doubts revived their powers and excluſive privileges by a new charter, the Company were obliged to ſubmit to a condition, that their capacity of trading ſhould in future be determinable on three years' notice. The legal obſtacle to the erecting a new Company being thus removed, the *Stat.* 9 & 10 *W.* 3. *c.* 44, was paſſed for borrowing two millions on a loan at 8 *per cent.* towards carrying on the war; and as an encouragement to ſubſcribers it was declared, that they ſhould be incorporated by a charter from the King into *a general ſociety*; with liberty for each individual member to trade to *India*, and the other limits of the old Company's excluſive charter; ſo that the value of his exports exceeded not his ſhare of this loan or capital: and that ſuch of the ſubſcribers as ſhould chooſe to convert their ſubſcriptions into a *joint ſtock*, ſhould be at liberty ſo to do, and be incorporated by a *ſeparate charter* by the name of *The Engliſh Eaſt India Company*; with the privilege of trading with and to the amount of ſuch joint ſtock. All perſons but thoſe incorporated, and ſuch as they ſhould licenſe were prohibited from this trade, except the old Company; who had time given them to wind up their commercial affairs.

The act reſerved a power to determine the charters both of the General Society and the New Company after *September* 1711, on repayment of the loan and three years' notice.

The bulk of the ſubſcribers having agreed to trade as a ſeparate Company, with a joint ſtock, the old Company, to whoſe prejudice the two new corporations were to be erected, found means to become members for a very large proportion of the loan of two millions. With an intereſt thus acquired they joined with the *Engliſh* Company, and by means of their ſuperior knowledge and poſſeſſions, they obtained a decided influence in the general courts of the new Company, and thus paved the way to that union, which afterwards took place in 1702; and which A. D. 1708 was confirmed by parliament, by *Stat.* 6 *Ann. c.* 17. By the terms of this union the warehouſes at home and ſhipping, and alſo all the ſettlements and factories of the old Company in the *Eaſt-Indies*, *Perſia* and *China*, including the iſlands of *Bombay* and *Saint Helena* with their dependencies, and all their rights and privileges however derived, became veſted in the United Company; except their *Body Politic* which was ſurrendered to the Crown.

The curious reader may wiſh to learn what became of the General Society, whoſe members were individually authoriſed to trade, as far as the value of their ſubſcriptions in goods exported from hence. All that can be diſcovered of them is, that though they were actually incorporated by the King's charter, and were therefore legally authorized to ſend ſhips to *India* or *China*, it does not with certainty appear that any one ſhip was ever fitted out by them: and that the ſuperior advantages, of being concerned in the trade to be carried on with a joint ſtock, were ſo evident that at the time of the union of the two Companies, out of the whole loan of two millions, only 7, 200 *l.* then remained the property of the ſeparate traders of the General Society; and that this ſum alſo was ſoon abſorbed in the *United Company*, whoſe capital or trading ſtock by which their dividend of profits was to be governed, thereupon became fixed at *Two Millions*.

II. THE

II. THE FIRST ENLARGEMENT of the Company's term took place in 1708: (*Stat.* 6 *Ann. c.* 17;) when the United Company bargained with the Public to advance 1,200,000 *l.* as a loan but without any intereſt; (or, which operated as the ſame thing, at a reduced intereſt of 5 *per cent.* on the two loans conjointly;) for an extention of their term, in the excluſive trade, of fifteen years; and thus their nominal trading capital on which the dividend was made, became advanced to 3,200,000 *l.*

In 1712 the Company petitioned Parliament, (on the ground that the term which remained unexpired in their trade was too ſhort to admit their riſking the expences of regaining and ſecuring the *pepper trade*, which had been engroſſed by the *Dutch*,) that their corporate capacity might be continued, though the debt due to them from the Public ſhould be redeemed. In conſequence of this petition the *Stat.* 10 *Ann. c.* 28 paſſed for repealing all former proviſoes and powers of determining their trade or incorporation; but with power for the Public to redeem the debt at any time after *September* 1733. And thus the United Company were ſuppoſed to have obtained a perpetuity, as well in the excluſive trade as in all their chartered rights and capacities. They however ſubmitted themſelves in that reſpect, to the pleaſure of Parliament in 1730; when the *Stat.* 3 *Geo.* 2. *c.* 14. was paſſed for continuing to them their excluſive trade till 1766: for which they gave the Public a premium of 200,000 *l.* without any return of either principal or intereſt, and alſo agreed to a reduction of the rate of intereſt to 4 *per cent.* on the debt of 3,200,000 *l.* and to accept of payment of the principal by inſtallments of 500,000 *l.*

In 1744 they contracted for and obtained, by *Stat.* 17 *Geo.* 2. *c.* 17, a further addition of fourteen years in the excluſive trade; for which they lent to the publick one million at 3 *per cent.*—And in 1750 they agreed by *Stat.* 23 *Geo.* 2. *c.* 22, to a further reduction of the rate of intereſt on the former debt, to 3 *per cent.*

Thus grew the debt of 4,200,000 *l.* from the Public to the United Company, carrying with it an annuity of 126,000 *l.* This was called the 3 *per cent. Eaſt India* annuities; and are now conſolidated with the 3 *per cent. Bank* annuities. See title *National Debt*.—But the Company's capital or nominal ſum, by which their dividends were governed, continued as before at 3,200,000 *l*; the million laſt lent having been raiſed by their bonds, and therefore not added to their former capital.

The next renewal, and the laſt previous to *Stat.* 33 *Geo.* 3. *c.* 52; (ſtated at large poſt IV;) was made by contract with the public by *Stat.* 21 *Geo.* 3. *c.* 65. § 9; when a further term, determinable in 1794, was granted in the excluſive trade on payment of 400,000 *l.* in diſcharge of all claims on the Company by the Public, previous to *March* 1ſt, 1781. But it was provided that after payment of a yearly dividend of 8 *per cent.* to the holders of *India* ſtock, the ſurplus of all the net proceeds of their trade and revenues, ſhould be applied, $\frac{3}{4}$ to the uſe of the Public, and the remaining $\frac{1}{4}$ to the uſe of the Company.

The debts incurred by the Company, in the wars ſubſiſting in *India* at and after that period, prevented any ſuch ſurplus from ariſing; and therefore no participation of revenue took place under this act.—On the contrary the preſſure of thoſe debts, and the compulſory clauſes of an act of 1784, by which the Company were obliged to keep a ſtock of teas always in their ware-houſes, ſufficient for one year's conſumption, rendered it neceſſary for them to enlarge their actual trading capital, by new ſubſcriptions to 5,000,000 *l.* for which they had the ſanction of Parliament granted them by *Stat.* 26 *Geo.* 3. *c.* 62; (explained by *Stat.* 31 *Geo.* 3. *c.* 11;) and *Stat.* 29 *Geo.* 3. *c.* 65.

In 1783 the Public agreed to forego any participation of the funds of the Company under the ſaid *Stat.* 21 *Geo.* 3. *c.* 65, until certain debts ſhould be diſcharged; and by the *Relief act* of 1784, the participation, as ſettled in 1781, was to be reſumed as ſoon as the debts therein ſpecified were paid, and the bond debt reduced to a million and a half. See *Stats.* 22 *Geo.* 3. *c.* 83; 24 *Geo.* 3. *c.* 34.

Having ſaid thus much relative to the riſe and progreſs of the Company, it may not be unacceptable to ſtate ſhortly the mode of what may be called its internal œconomy.

The books of the Company are at all times open for the admiſſion of every deſcription of perſons, natives or foreigners, who may deſire to become members, and have money to adventure. It knows no diſtinction of profeſſions, religions or even ſexes, and in the general courts there is the moſt perfect equality; every one preſent has the ſame right with another to ſpeak his ſentiments and give his advice. A difference is made only in voting, which when taken by the holding up of hands requires 500 *l.* ſtock, and when by ballot 1000 *l.* ſtock, for a ſingle vote, 3000 *l.* for two votes, 6000 *l.* for three votes; and 10,000 *l.* for four votes; which is the largeſt number of votes, any member is allowed to poſſeſs; 2000 *l.* ſtock qualifies any member to become a candidate for the office of a Director or Chairman.

In the beginning of the year 1794, the number of *votes* was about 1700—that of *actual voters* however not much exceeding 1400.

A proprietor of ſtock to the amount of 1000 *l.* whether man or woman, native or foreigner has a right to give a vote in the General Courts. The Directors are twenty-four in number, including the chairman and deputy chairman; who may be re-elected in turn, ſix each year for four years ſucceſſively. (See *poſt.* IV.) The meetings or courts of Directors are to be held at leaſt once a week, but are commonly oftner, being ſummoned as occaſion requires. Out of the body of Directors are choſen ſeveral committees, who have the peculiar inſpection of certain branches of the Company's buſineſs; as the Committee of Correſpondence; a Committee of Buying; a Committee of Treaſury; a Houſe Committee; a Committee of Warehouſe; a Committee of Shipping; a Committee of Accounts; a Committee of Law Suits; and a Committee to prevent the growth of private trade. And under *Stat.* 33 *Geo.* 3. *c.* 52, a Committee of Secrecy. See *poſt* IV.

The bulk of the Company's *Exports* conſiſts of camblets, cloth, and other woollens; metals, (particularly tin, lead, and copper); naval and military ſtores; and ſilver in bullion.

The Company reſerved to themſelves the excluſive export of cloth, woollens, copper, bullion and military ſtores; and alſo clocks, toys, and other articles ornamented with jewels.

Other

Other articles exported from hence are chiefly purchaſed in *India* by *Europeans*, for their own conſumption, and are carried abroad, (in what is called private trade,) by the commanders and officers of the Company's ſhips.—The Company may licenſe whom they pleaſe, to trade in the *Eaſt Indies*. The officers and ſubordinates of their ſhips, being thirty in number for every ſhip, are allowed the benefit of it, both in export and import, according to their different ranks. This is called *private trade*; and what they pay for this permiſſion and in lieu of freight is called *Company's duties*, and forms an article of the Company's profits. The ſervants abroad are alſo frequently permitted to remit home their fortunes in merchandize, for which they pay a freight to the Company. This latter trade is diſtinguiſhed from the former by the name of *privileged trade*.

Beſides this, abundance of *Britiſh* goods are ſent to *India* by *illicit trade* carried on directly from *Great Britain*; and alſo by *clandeſtine trade* from various parts of *Europe*, in *Britiſh* ſhips under foreign colours.

See the *Stat.* 33 *Geo.* 3. *c.* 52, *poſt.* IV. in the 4, 5 and 6th diviſions of the act as there arranged.

The goods *Imported* by the Company from *India*, conſiſt chiefly of muſlins, callicoes and other piece goods, raw ſilk, cotton, indigo, pepper, ſalt-petre, opium and various ſorts of drugs; and from *China*, tea, coffee, and japan and china-ware, the other articles are comparatively of a trifling value.—Sugar has occaſionally been imported in ſmall quantities but being at preſent (*January* 1794) ſubject to a heavy duty it is in effect nearly prohibited.

The whole average amount of the cuſtoms and inland duties on the *Import-trade* of *India* and *China* to *Great Britain*, may be eſtimated at upwards of a million *per annum*; and the ſale amount thereof at nearly ſix millions *per annum*.

III. The temporary rights of the Company, conſiſt. 1ſt. Of the ſole and excluſive trade with *India*, and other parts within the limits already deſcribed; ſo that none other of the King's ſubjects can go thither or trade there except it be by leave of the Company; or purſuant to the directions of *Stat.* 33 *Geo.* 3. *c.* 52, *poſt.* IV.—2*dly*. They have the adminiſtration of the government and revenues of the territories in *India*, acquired by their conqueſts during their term in the excluſive trade; ſubject nevertheleſs to the various checks and reſtrictions contained in the ſeveral ſtatutes, which veſt that adminiſtration in them.

The rights which the Company poſſeſs in *perpetuity*, are, to be a Body Corporate and Politick, with perpetual ſucceſſion. See *Stats.* 3 *Geo.* 2. *c.* 14: 17 *Geo.* 2. *c.* 17: 21 *Geo.* 3. *c.* 65.—To purchaſe, acquire and diſpoſe at will of lands and tenements in *Great Britain*. In their charter of 10 *W.* 3. the value in *Great Britain* was not reſtricted; but by *Stat.* 3 *Geo.* 2. *c.* 14 § 14, the value therein is not to exceed 10,000*l. per annum*.—By the charter of King *William*, to make ſettlements to any extent, within the limits of their excluſive trade; build forts and fortifications; appoint governors; erect courts of judicature; coin money; raiſe, train and muſter forces at ſea and land; repel wrongs and injuries, make repriſals on the invaders or diſturbers of their peace; and continue to trade within the ſame limits, *with a joint ſtock for ever*, although their *excluſive* right of trading ſhall be determined by parliament. See the three ſtatutes immediately above cited; and as to the forces, *Stats.* 27 *Geo.* 2. *c.* 9: 1 *Geo.* 3. *c.* 14: 21 *Geo.* 3. *c.* 65: 28 *Geo.* 3. *c.* 8, explained by *Stat.* 31 *Geo.* 3. *c.* 10.

Theſe rights, it appears, the Company hold under the immediate authority of Parliament; they embrace all thoſe of the old chartered Company which ſubſiſted from the year 1600 to 1708, when, as has been already obſerved, they became veſted or abſorbed with all their fortreſſes, ſettlements and factories, and other property real and perſonal, in the preſent United Company.—They are a perpetual Corporation; and although their excluſive right to the trade, and their power of adminiſtering the government and revenues of *India*, were to be determined, they would ſtill remain an incorporated Company in perpetuity; with the excluſive property and poſſeſſion of *Calcutta* and *Fort William*, *Madras* and *Fort St. George*, *Bombay*, *Bencoolen* and *St. Helena*, and various other ſettlements and landed eſtates in *India*: and alſo a right of trading thither, with a joint ſtock; together with all their repoſitories and other conveniences adapted to their commerce and the preſervation of their merchandize, both abroad and at home.

The only privileges they can be conſtitutionally deprived of, are, thoſe of trading *to the excluſion* of others, and of *governing* the countries and collecting and appropriating the *revenues* of *India*. See *poſt* IV. *Stat.* 33 *Geo.* 3. *c.* 52. *Div.* 4.

IV. The Statutes moſt intereſting, and of moſt conſequence, beſides thoſe already enumerated and referred to, are *Stats.* 13 *Geo.* 3. *c.* 63: 24 *Geo.* 3. *ſeſſ.* 2. *c.* 25: and 33 *Geo.* 3. *c.* 52, of which an abſtract of ſome length ſeemed here neceſſary.

The other ſtatutes now in force relative to the trade and concerns of the *Eaſt-India Company*, but which it does not ſeem expedient to ſtate at large, are—*Stat.* 9 & 10 *W.* 3. *c.* 44. § 69; by which perſons trading to the *Eaſt-Indies*, are firſt to give ſecurity for cauſing all goods laden on their account in *India*, to be brought, without breaking bulk, to ſome part of *England* or *Wales*, and there to be unladen and put on land. The amount of this ſecurity is regulated by *Stat.* 6 *An. c.* 3.—*Stat.* 7 *Geo.* 1. *c.* 5. §§ 32, 33, enabling the Company to borrow money on their Common Seal.—By *Stat.* 25 *Geo.* 2. *c.* 26, which is now expired, inſurance of ſhips trading to *India* under foreign commiſſions, was prohibited.—*Stat.* 7 *Geo.* 3. *c.* 49. § 1, as to making dividends; and § 3, as to ballots.—See alſo on the ſame point *Stat.* 10 *Geo.* 3. *c.* 47. § 3.—The ſaid *Stat.* 10 *Geo.* 3. *c.* 47. in § 4. &c. declares that crimes and oppreſſions againſt His Majeſty's ſubjects in *India* may be puniſhed by information in the Court of *K. B.* in *England*.—*Stat.* 12 *Geo.* 3. *c.* 54, as to building new ſhips.—*Stat.* 17 *Geo.* 3. *c.* 8, as to the time of electing Directors.—*Stat.* 21 *Geo.* 3. *c.* 70, regulating in ſeveral particulars the power of the Supreme Court at *Fort William*; and of the Governor General and Council of *Bengal*.

By the *Stat.* 13 *Geo.* 3. *c.* 63, "for eſtabliſhing certain rules and orders for the managen ent of the affairs of the Company, as well in *India* as in *Europe*," conſiderable alterations were made in the conſtitution of the Company.

It

It was enacted that the Court of Directors ſhould in future be elected for four years; ſix members annually; but none to hold their ſeats longer than four years. That no perſon ſhould vote at the election of the Directors, who had not poſſeſſed their ſtock twelve months.—This *Stat.* alſo encreaſed the qualifications for a vote from 500*l.* to 1000*l.* (See *ante* II.)—The ſtatute ordained that the Mayor's Court of *Calcutta*, ſhould in future be confined to ſmall mercantile cauſes, to which only its juriſdiction extended before the territorial acquiſitions. That in lieu of this Court, a new one ſhould be eſtabliſhed at *Fort William*, under the title of the Supreme Court of Judicature, conſiſting of a Chief Juſtice, and three Puiſne Judges; and that theſe judges be appointed by the Crown. That a ſuperiority be given to the preſidency of *Bengal*, over the other preſidencies in *India*. That the power of nominating and removing the Governor-General and Council at *Fort William* and *Bengal*, ſhould be veſted in the Directors. [By *Stat.* 26 *Geo.* 3. *c.* 25, it is declared that His Majeſty's approbation of the appointment of the Governor-General and Council of *Fort William*, is not neceſſary.] The ſalaries of the Judges were alſo fixed at 8000*l.* to the chief juſtice, and 6000*l.* a year to each of the other three. The appointments of the Governor General and Council were fixed the firſt at 25,000*l.* and the four others at 10,000*l.* each, annually.

It has been ſaid, we know not on what foundation, that no proportionable benefit has reſulted from this act to the Company; that on the contrary, this court of juſtice occaſioned much diſcontent to the natives, as well as diſſatisfaction to the Company's ſervants. This being a political queſtion, the diſcuſſion of it is by no means applicable to the deſign of this work.

By *Stat.* 24 *Geo.* 3. *ſeſſ.* 2. *c.* 25, three things were intended.—1. The eſtabliſhing a power of *controul* in this kingdom, by which the executive government in *India*, is connected with that over the reſt of the empire.—2. The regulating the conduct of the Company's ſervants in *India*, in order to remedy the evils that had prevailed there.—3. The providing for the puniſhment of *crimes* which might reflect diſgrace upon *Great Britain*.

1. Six perſons are to be nominated by the King, as Commiſſioners for the affairs of *India*, of whom one of the Secretaries of State, and the Chancellor of the Exchequer for the time being ſhall be two, and the Preſident is to have the caſting vote if equally divided. (See *poſt. Stat.* 33 *Geo.* 3. *c.* 52. *div.* 1.) New Commiſſioners are to be appointed at the pleaſure of the Crown.—The Members of this Board of Controul, are ſworn to execute the ſeveral powers and truſts repoſed in them, without favour or affection, prejudice or malice. The Court of Directors are to deliver to this Board, for their approbation or alteration, all minutes, orders, and reſolutions of themſelves, and of the Courts of Proprietors; and copies of all letters, orders, and inſtructions propoſed to be ſent abroad. None to be ſent until after ſuch previous communication on any pretence whatever. The Directors are to appoint the ſervants abroad, but power is given to the King by his Secretary of State, to recall the Governors and Members of the Councils, and all inferior Magiſtrates. The Council of *Bengal* are ſubjected to the direction of the Company at home; and in all caſes, except thoſe of immediate danger and neceſſity, reſtrained from acting without orders from *England*.

Another object of this Act is, to redreſs the grievances of the natives of *India*; to provide for the payment of the debts of the Nabob of *Arcot*, which are a burden on his country; diſcriminating at the ſame time thoſe which were juſtly incurred, from thoſe which were forced upon him by the injuſtice and extortion of *Britiſh* oppreſſors; to aſcertain the indeterminate rights and pretenſions, on which ſo many differences aroſe between him and the *Rajah* of *Tanjore*; and to deliver the Zemindars, and other native landholders of *India*, from oppreſſion; and to ſecure to them their poſſeſſions by permanent rules of moderation and juſtice.

2. A material part of this bill is directed alſo againſt the abuſes ſaid to have prevailed in the civil and military departments; enjoining a thorough reviſal of their eſtabliſhment, together with the ſuppreſſion of ſuch places as are found to be uſeleſs, and of ſuch expences as may be conveniently avoided. And in order to prevent any deluſive ſhow of retrenchment, or any future deviation, this reform is directed to be conſtantly ſubmitted in its whole ſtate and progreſs to Parliament. (See alſo *Stats.* 28 *Geo.* 3. *c.* 8.: 31 *Geo.* 3. *c.* 10.)

Cadets and writers were heretofore ſent to *India* in ſuch numbers as to remain a burden upon the Company's eſtabliſhments. Theſe are reduced to a certain complement not to be exceeded.

A ſyſtem of ſucceſſion by ſeniority is eſtabliſhed by the act, to prevent the ſervants of the Company from riſing, merely through intereſt without merit; leaving however to the Councils abroad the power of bringing forward, for reaſons to be by them aſſigned, any perſons of extraordinary merit or capacity. (See *poſt. Stat.* 33 *Geo.* 3. *c.* 52. *div.* 3.)

3. Security having been heretofore derived to delinquents in *India*, from the circumſtance of their offences being committed within the territories of *Indian* princes, ſo as not to come within the cogniſance of the *Britiſh* Government; this act provides againſt ſuch evaſions in future, by declaring the offence equally puniſhable, in whatever territory of *India* it is committed. The act of receiving preſents, is declared to be in itſelf extortion, and puniſhable accordingly. The offences of diſobeying orders, and bargaining for offices, are pronounced to be miſdemeanors; and it is provided that offenders ſhall not compound for them with the Company; nor ever be reſtored to appointments in their ſervice. Collectors and receivers are bound by oath not to receive any private gratuity over and above the legal tribute.

With a view to prevent, or more eaſily puniſh the miſconduct of the Company's ſervants, ſeveral regulations were made by this ſtatute for the diſcovery of their property on their return to *England* from *India*; but which were all repealed by *Stat.* 26 *Geo.* 3. *c.* 57. § 31.

The Attorney-General or Court of Directors, may exhibit an information againſt any perſon guilty of the crime of extortion, or other miſdemeanors committed in the *Eaſt-Indies*, after *January* 1, 1785; which information is to be tried by Commiſſioners ſelected from both Houſes of Parliament.

The election of theſe Commiſſioners is regulated by *Stat.* 26 *Geo.* 3. *c.* 57, which in ſubſtance directs as follows. The Lords are to ballot for twenty-ſix of their houſe, and the Commons for forty of their number; their names are again to be put into a box, to be drawn

out

out by lot, in preſence of three Judges, (one of the Court of *K. B.* one of *C. P.* and one of the Exchequer) and of the parties; and the defendant may *peremptorily* challenge thirteen peers and twenty commoners, and he as well as the proſecutor may challenge as many as they pleaſe *for cauſe ſhown*. The firſt five names of the Peers, and the firſt ſeven names of the Commoners which ſhall be drawn without challenging, ſhall be returned by the three judges to the Lord *Chancellor*, to inſert their names, with thoſe of the three Judges in a *ſpecial commiſſion*, for them or any ten of them, of whom one of the Judges always to be one, to hear and determine every ſuch information, and pronounce judgment thereon; ſuch judgment to be enforced by the authority of the Court of *K. B.* and to be effectual and concluſive to all intents and purpoſes whatſoever.—This as well as the former act alſo, contains many other directions relative to the trial, as alſo relative to the diſpenſing juſtice, both in criminal and civil caſes in *India*.

The above *Stat.* 24 *Geo.* 3. *c.* 25, is explained by *Stat.* 28 *Geo.* 3. *c.* 8. as to the forces, (See *ante* III. and *Stat.* 31 *Geo.* 3. *c.* 10,) the annual accounts (*ante* 2.) and the power of the Commiſſioners as to ſalaries and gratuities.

In conſequence of the regulations adopted under this ſtatute, it has been aſſerted, we believe with truth, that the adminiſtration of our *Indian* poſſeſſions and trade has become regular and efficient; the credit of the Company has increaſed; the price of *India* ſtock has advanced; the trade of the Company has been almoſt doubled; the duties paid to the Public augmented; tranquillity for many years maintained, and a neceſſary and politic war ſupported with dignity, and terminated (in 1793) with ſucceſs and honour.

The *Stat.* 33 *Geo.* 3. *c.* 52, the commencement of which in *India* is appointed to take place on the 1ſt of *February*, 1794, being of the greateſt importance on this ſubject is here preſented in the form which ſeemed beſt adapted to elucidate the purpoſes for which it was paſt. As it concerns,—1. The Controul in *Great Britain*.—2. The Governments abroad.—3. Patronage and rule of promotion.—4. The general trade.—5. Limitations on the excluſive trade to and from *India*.—6. What ſhall at preſent be deemed illicit or clandeſtine trade.—7. Appropriations of the Company's revenue.—8. The method of ſuing for forfeitures and penalties, and proceeding as to ſeizures.—9. Regulations of general juſtice in *India*; and as to the Directors.—10. The ſtatutes repealed.

1. The act provides for the continuation of the Board of Controul in all its parts; except that the perſon firſt named in the King's Commiſſion is to be Preſident; and inſtead of the Commiſſioners being limited to ſix Privy Councillors, the number is indefinite, reſting in the King's pleaſure; of which however the two principal Secretaries of State, and the Chancellor of the Exchequer, are to be three; and His Majeſty may if he pleaſes add to the liſt two Commiſſioners not of the Privy Council.

The King may give 5000*l.* a year among ſuch of the Commiſſioners as he pleaſes; which together with the ſalary of the Secretary and Officers, and other expences of the Board, are to be paid by the *India* Company, and not, as formerly, by the Civil Liſt; the whole not to exceed 16,000 *l. per annum*.

Oaths are preſcribed for the Commiſſioners and their officers. The office of a Commiſſioner, or chief Secretary, is not to be deemed a new office to diſable them from ſitting in parliament. Nor is the appointment of a Commiſſioner not having a ſalary, or of a Chief Secretary to vacate a ſeat. Three Commiſſioners muſt be preſent to form a Board.

The *Powers* of the *Board* are in ſubſtance the ſame as under former acts of parliament. They are to ſuperintend, direct and control all acts, operations and concerns, which relate to the civil or military government and revenues of the *Britiſh* territorial poſſeſſions in *India*, ſubject to the reſtrictions after mentioned. They and their officers are to have acceſs to the papers and records of the Company, and to be furniſhed with copies or extracts of ſuch of them as ſhall be required. They are alſo to be furniſhed with copies of all proceedings of General Courts, and Courts of Directors, within eight days; and with copies of all diſpatches from abroad, relating to matters of government or revenue, immediately after their arrival. No orders on thoſe ſubjects are to be ſent by the Company to *India*, until approved by the Board, and when the Commiſſioners vary or expunge any part of the diſpatches propoſed by the Directors, they are to give their reaſons; and all diſpatches are to be returned to the Court of Directors in fourteen days. The Directors may ſtate their objections to any alterations, and the Commiſſioners are to reconſider them; and if they interfere with what the Directors deem matters of Commerce, the Directors may apply to the King in Council to determine betwixt them. But the Board are reſtricted from the appointment of any of the Company's ſervants. If the Directors, on being called upon to propoſe diſpatches, on any ſubject relating to government or revenue, ſhall fail to do ſo within fourteen days, the Board may originate their own diſpatches on that ſubject.

The Board are not to authoriſe any increaſe of ſalaries, or any allowance or gratuity to be granted to perſons employed in the Company's ſervice, except the ſame ſhall be firſt propoſed by the Company; and their intention and reaſons for ſuch grant are to be certified to both Houſes of Parliament, thirty days before the ſalary can commence.

The Directors are to appoint three of their Members to be a Committee of Secrecy, through whom diſpatches relating to government, war, peace, or treaties, may be ſent to and received from *India*. This Committee and their clerks to be ſworn to ſecrecy.

Orders of Directors concerning the government or revenues of *India*, once approved by the Board, are not ſubject to revocation by the general court of proprietors.

2. The forms of government over the preſidencies of *Bengal*, *Fort St. George*, and *Madras*, are continued in all their eſſential parts. For *Bengal* by a *Governor General* and three Members of Council. For each of the others, a Governor and three Members. Theſe latter with reſpect to treaties with the native powers of *India*, levying war, making peace, collecting and applying revenues, levying and employing forces, or other matters of civil or military government, are to be under the control of the *Government-General* of *Bengal*; and are in all caſes whatever to obey their orders; unleſs the Directors ſhall have ſent to thoſe ſettlements, any orders repugnant thereto not known to the Government-general; of which in that

caſe they are to give the Government-general immediate advice.

The Court of Directors are to appoint to theſe ſeveral governments; namely, the Governor-General, the two other Governors, and the Members of all the Councils; and likewiſe the Commander in Chief of all the Forces, and the three Provincial Commanders in Chief. None of the Commanders in Chief are, *ex officio*, to be of the Council, but they are not diſqualified from being ſo, if the Directors ſhall think fit to appoint them: and when they are Members of the Council, they are to have precedence of the other Counſellors. The Civil Members of Council, are to be appointed from the liſt of Civil Servants who have reſided twelve years in the ſervice in *India*.

The Directors may appoint to any of theſe offices proviſionally, but without ſalary, till the perſons appointed ſhall actually ſucceed in poſſeſſion. Any vacancy of Governor-General, or Governor, when no proviſional ſucceſſor is on the ſpot, is to be filled by the ſenior of the Civil Counſellors, till a ſucceſſor ſhall arrive; and the vacant ſeat in Council thereby occaſioned, ſhall be temporarily ſupplied from among the ſenior Merchants, at the nomination of the acting Governor-General, or Governor, if only one Counſellor ſhall then remain; and on other occaſions, the Governor-General and Governors, may ſupply vacancies in Council from the liſt of ſenior Merchants, until ſucceſſors duly appointed ſhall arrive to take their ſeats. In all theſe caſes, the ſalaries and allowances are to follow the acting Members while in office. If the Directors fail to appoint to vacancies in two calendar months, after notification thereof, the King may ſupply them, and the Directors ſhall not remove any perſon ſo appointed. In all other caſes, the Directors have the power of recalling or diſmiſſing any ſervants; and the like general power is veſted in the Crown. Appointments made before the act, not to be diſturbed.

The Commander in Chief of all the Forces, when at either of the ſubordinate ſettlements, is to have a ſeat at the Council Board, but is to have no ſalary in reſpect thereof; and if the provincial commander is a Member of that Council, he may continue to deliberate, but his voice ſhall be ſuſpended as long as the other ſhall remain.

Proviſion is made for ſupplying the place of any Member of Council diſabled from attending by illneſs.

The departure of any Governor, or Member of Government, or Commander in Chief, from *India*, with intent to come to *Europe*, or any written reſignation delivered in by them, ſhall be deemed an avoidance of office, and the coming into any part of *Europe*, ſhall be a ſufficient indication of that intent. No ſalary ſhall be payable to any officer or his agent during abſence, unleſs employed on actual ſervice; and if any officer, unleſs abſent on ſervice, never returns, the ſalary is to be deemed to have ceaſed from the day of his quitting the ſettlement.

The act preſcribes the order and method of conducting buſineſs at the ſeveral Council Boards. Powers are given to the Governor-General, or Governor, to act contrary to the opinions of the other Members of Council, taking upon themſelves the ſole reſponſibility.

Proviſion is made in caſe of the abſence of the Governor-General, and his viſiting any ſubordinate preſidency; and in caſe he ſhall be in the field without a Council, all the governments and officers ſhall obey his orders, and he alone ſhall be reſponſible.

All the governments are laid under reſtrictions to prevent war or extenſion of dominion in *India*, unleſs hoſtilities againſt the Company or their Allies ſhall render war unavoidable. The Members of ſubordinate governments, acting contrary to this act, or to the directions of the Government-General, may be ſuſpended or diſmiſſed by that government, and further puniſhed. The ſubordinate preſidencies are alſo required to communicate all matters of importance to the ſuperior government with all diſpatch.

The Governor-General, and other Governors, are veſted with powers of apprehending perſons, ſuſpected of illicit correſpondence with the enemies of the Company or of *Great Britain*. Witneſſes are to be examined, and croſs examined, and their evidence recorded; and the parties may either be tried in *India*, or ſent home; in the latter caſe, the depoſitions of the witneſſes are alſo to be ſent home, and are to be received in evidence, ſubject to impeachment in reſpect to the competency of the witneſſes.

To the acting Preſident of the ſeveral Council Boards, is given a caſting vote, in all caſes of equality of voices.

3. The Directors are to appoint ſo many cadets and writers only, as to ſupply vacancies according to returns from abroad. Their ages to be from fifteen to twenty-two; unleſs any cadet ſhall have been one year in the King's ſervice, and then his age is not to exceed twenty-five years.

All ſhall have promotion by ſeniority of ſervice only. Three years' ſervice qualifies a civil ſervant for a place of 500*l.* a year—ſix years' for one of 1500*l.*—nine years 3000*l.*—twelve years 4000*l.* or upwards. None to take two offices, where the joint emoluments ſhall exceed this rule. (See *ante Stat.* 24 *Geo.* 3. *c.* 25. *div.* 2.)

Nearly the ſame regulations are made by this ſtatute, relative to receiving preſents, diſobedience of orders, and bargaining for offices, as have been already mentioned in *Stat.* 24 *Geo.* 3. *c.* 25. *div.* 3. All the King's ſubjects are made amenable to all courts of competent juriſdiction abroad, and at home, for all crimes committed by them in *India*. The Company may compound civil actions, but are abſolutely reſtricted from compounding or remitting any judgment or ſentence whatever in criminal caſes.

Servants of the Company, after five years abſence, cannot return with their rank, nor ſerve again, unleſs detained by ſickneſs; or unleſs it be by leave of the Company, on a ballot of three parts in four of the General Court. In caſe of ſickneſs, the Directors are the judges in the civil ſervice; and in the military, the Directors and the Board of Controul jointly.

4. The Company's term is extended for twenty years, from *March* 1, 1794; ſubject to be determined at or after that period, on three years' previous notice by Parliament, ſignified by the Speaker of the Houſe of Commons; ſubject however as to the trade to and from *India* to the following limitations, in favour of ſuch private merchants as may chooſe to trade there. In other reſpects, and to and from *China*, and other places beyond the *Cape of Good Hope*, the former reſtrictions againſt private traders, are continued in force; and if the exclu-

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ſive trade thus limited, ſhall be hereafter diſcontinued, the Company are ſtill to retain their corporate capacity with power to trade, with a joint ſtock in common with other people. If however any new ſettlement ſhall be obtained from the *Chineſe* government, ſeparate from the Continent of *Aſia*, an export trade thither is preſerved to private merchants under certain regulations; and there is alſo a clauſe to preſerve to the Southern Whalers the benefit of their carrying trade into the Pacific Ocean, by the way of *Cape Horn*, to the Northward of the Equator, limited to 180 degrees Weſt Longitude of *London*: and ſhips from *Nootka-Sound*, are to be licenſed to trade *from thence* with *Japan* and *China*; but are not to bring any goods of the produce or manufacture of thoſe countries to *Great Britain*. See *ante* III.

5. All perſons may export and import goods to and from *India*, *in the Company's ſhips*; except that they ſhall not export military ſtores, ammunition, maſts, ſpars, cordage, anchors, pitch, tar, or copper; nor import *India* callicoes, dimities, muſlins, or other piece-goods, made or manufactured with ſilk or cotton, or with ſilk or cotton mixed, or with other mixed materials, unleſs it be done by leave of the Company. If the market ſhall not be ſufficiently ſupplied with excepted articles of import or export, (with an exception of military ſtores and copper,) the Board of Controul may open that trade alſo to individuals. If the Company ſhould not export 1500 tons of copper annually, private traders may export copper, in the Company's ſhips, to the amount of the deficiency.

The Company are to furniſh private traders, till 1796, with 3000 tons of ſhipping yearly, computed on the ſame principle as the Company's own tonnage is computed. The quantity may be increaſed by order of the Board of Controul, to meet the demands of the private traders; and if the Board order more than the Company approve, they may appeal from the order to the King in Council. And the Company are reſtricted from charging any higher freight than 5*l. per* ton outwards, and 15*l. per* ton inwards; except in time of war, or in circumſtances incidental to war, or preparations for war, when they may charge an increaſed rate of freight, in a due proportion to the rates at which they ſhall take up their own ſhipping, but the propoſed increaſe can only be made by the conſent of the *Board of Controul*; before whom the Directors are alſo required, in 1794, and in every third year afterwards, to lay a ſtatement of the affairs of ſhipping; and to abide by their order, touching any continuance, encreaſe, or abatement of the rate of freight on private trade.

Private traders are required to notify to the Company's Secretary at home, and to the proper officers in *India*, at a time limited, the quantity of tonnage wanted by them for the enſuing ſeaſon, with the place of deſtination, and the time when the goods will be ready for ſhipping. At home, this notice is to be given before the 31ſt of *Auguſt* for the ſhips of the enſuing ſeaſon, and before the 15th of *September*, they are to depoſit the ſum for the tonnage, or give ſecurity to the Directors for payment of it. Before the 30th of *October*, they are to deliver a liſt of the ſorts and quantities of the goods intended to be ſent. In failure of having them ready, by the day ſpecified in the notice, they are to forfeit their depoſit or the ſecurity, and alſo their tonnage for that turn. Similar rules are preſcribed for ſhipping goods, *&c.* in *India*; but it is left to the governments there to fix the times, and to name the officers, to whom notices are to be given. The Company is to have the benefit of all forfeited and vacant tonnage, and if more is demanded for private trade than the quantity limited, every perſon is to have his due proportion; and notice is to be given him thereof ſeven days before the day for making the depoſits. All private trade is to be regiſtered in the Company's books, and, in default of being regiſtered, it is to be conſidered as illicit trade, and puniſhable accordingly.

The reſtrictions of the law againſt the Company's ſervants, or others, from acting as factors for foreigners, or lending money to foreign Companies, or on bottomry of their ſhips, or aſſiſting them with remittances by bills, are repealed. And all legal impediments to the recovery of debts, under any pretence that they were incurred illicitly, and againſt the letter of theſe abrogated laws, are removed; and all perſons in *India*, not ſpecially prohibited by the Company, or reſtricted by their covenants, are authorized to act as mercantile agents for any who may chooſe to employ them; and if there ſhall be a want of factors (properly qualified and authorized) the Company are to licence free merchants, with the approbation of the *Board of controul*, ſo that there may be always a proper ſupply of agents for conducting the private trade abroad. But the becoming factors is not to exempt any perſons from being amenable to the general authorities of the governments in *India*; and all agents are reſtricted from going beyond ten miles from ſome principal ſettlement, without ſpecial leave.

As a further relief to private traders, the *duty* of 5 *per cent.* granted by an act of *King William*, on goods imported in private trade, is, in reſpect to the *India* trade, *repealed*; and the Company's former charge of 2 *per cent.* diſcontinued, and in lieu of theſe, and in ſatisfaction of the expences of unſhipping, hoyage, cartage, warehouſe-room, ſorting, lotting, and ſelling private goods, the Company is to have 3*l. per cent.* on the groſs amount of the ſales of private trade, the cuſtoms thereon included. The repeal or the allowance thus ſubſtituted, is however not to extend to ſpecial engagements made between the Company, and any of their officers touching their privileges.

For the eaſe of manufacturers, who may import any articles of raw materials; rules, or by-laws are to be framed and eſtabliſhed for bringing them to as early a ſale as poſſible; and for preventing any undue preference in the ſales of the ſame commodity amongſt any of the importers, whether the goods belong to the Company or to individuals, the ſales are to be open and public, by inch of candle, and the whole conſignment bought in by the private importer, is to be delivered out to him, on payment only of the duties and other dues thereon. All other goods imported in private trade, are to be ſold and treated as heretofore, according to the by-laws of the Company; and all goods in private trade are to pay to Government the ſame cuſtoms as goods imported by the Company on their own account.

And inaſmuch as the allowance of 3 *per cent.* and the rates of freight, will be inſufficient to indemnify the Company their actual charges upon private trade, the Legiſlature has exempted the Company from actions for

loſſes or embezzlements which a common carrier might, in ordinary caſes, be liable by law to make good to the owner. But the act provides that the Company's officers, and all perſons through whoſe means or negligence any loſs ſhall happen, ſhall be liable to make it good to the owner; and it gives a further remedy to the owner, in certain caſes, to recover ſatisfaction, by enabling him to proſecute under the written engagements or ſecurities taken by the Company for the ſafe keeping of their own merchandize. All the laws prohibiting the import of goods from any other place than that of their growth, and for continuing all prohibitory laws, in reſpect to the conſumption or wearing of foreign manufactures are continued. (See title *Navigation-Acts*).

6. All the old laws for preventing *Clandeſtine Trade* with *India*, and from lending to or aſſiſting, or being concerned with Foreign Companies, or Foreign Traders, are wholly abrogated; and the following proviſions are ſubſtituted in their place; obſerving that the penalties are made to extend only to ſuch of his Majeſty's ſubjects as belong to *Great Britain*, *Guernſey*, *Jerſey*, *Alderney*, *Sark*, *Man*, *Faro Iſles*, or to the Colonies, Iſlands, or Plantations in *America*, or the *Weſt Indies*; and that all veſſels and goods forfeited, may be ſeized by any of the Company's Officers in *India* or *China*.

Perſons going unlawfully to *India*, and trafficking there, forfeit ſhips, veſſels, goods, and merchandize, and double the value thereof: one-fourth to the informers, and three-fourths to the Company, they paying thereout the coſts of proſecution.

Perſons unlawfully going to *India*, ſhall be deemed unlawful traders, and ſubject to the foregoing penalties and forfeitures, and may alſo be proſecuted as for a crime and miſdemeanor, and be liable to fine and impriſonment. One moiety of the fine goes to the King, the other to the Company, if they proſecute, or elſe to any other informer.

Perſons unlawfully reſorting to *India*, may be ſeized and ſent home for trial; and on arrival, they are to give bail, or be committed to priſon.

Perſons diſmiſſed the ſervice, or whoſe licenſes ſhall have expired, if they continue in *India*, are to be conſidered as illicit traders, and are made ſubject to penalties and forfeitures of goods, *&c.* as ſuch.

Goods ſhipped clandeſtinely, or ſuch as are reſtricted by the act, and goods unſhipped at ſea, ſhall be ſeized and forfeited, with double the value, and the Maſter, or other officer, knowingly permitting or ſuffering the ſame, ſhall forfeit all his wages to the Company; to be deducted out of the monies payable to the owners, and be diſabled from again acting in the ſervice.

Any who ſhall ſolicit for, or accept a *foreign commiſſion* to ſail to, and trade in *India*, ſhall forfeit 500*l.* half to the Company, and half to the proſecutor, or the whole to the Company if they ſhall proſecute.

All Governors and Counſellors are prohibited from trading, except for the Company; and all Collectors, Superviſors, and others employed in the Revenues of *Bengal*, *Bahar*, and *Oriſſa*, or their Agents, or any in truſt for them, are prohibited from inland trade, except for the Company. The Judges of the Supreme Court of Judicature in *Bengal*, are abſolutely prohibited from traffick; and none without the permiſſion of the Company, ſhall trade in ſalt, beetle-nut, tobacco or rice, on pain of forfeiture of the goods, and treble the value, one moiety to the Company, and the other to the proſecutor.

None ſhall ſend goods from *India* to the Continent of *Europe*, by any other channel than as allowed by the act, on pain of forfeiture of double the value: but this reſtriction is not to extend to matters of agency, only on the account *bonâ fide* of any foreign Company, or foreign Merchant.

7. APPROPRIATION. *Firſt in India.* The territorial revenues are to be applied in the firſt place, in defraying all charges of a military nature. Secondly, In payment of the intereſt of the debts there already, or hereafter to be incurred. Thirdly, In payment of the civil and commercial eſtabliſhments. Fourthly, In payment of not leſs than one million *per annum* for the Company's inveſtments of goods to *Europe*, and remittances and inveſtments to *China*; and the ſurplus, if any, is to be applied in the diſcharge of debts, or ſuch other purpoſes as ſhall be directed from home. The ſum allowed for inveſtments, may from time to time be increaſed to the extent of the diminution made in the annual amount of the intereſt of debts, which ſhall be paid in *India*, or tranſferred home; for which tranſfer, proviſion is made to an extent of 500,000*l.* a year, by Bills of Exchange to be drawn upon the Company; and if the creditors ſhall not ſubſcribe to that amount, other perſons may ſubſcribe, and the money advanced by them for bills is to be applied in diſcharge of ſuch debts, and this rule is to be continued till the *India* debt ſhall be reduced to two millions. The Company may increaſe theſe tranſfers home, but the Governments abroad are reſtricted from exceeding the above amount without their orders. (See *Stat.* 34 *Geo.* 3. *c.* —).

Secondly at home. The net produce of the Company's funds at home, after payment of current charges, are thus appropriated. Firſt, In payment of a 10 *per cent.* annual dividend, on the preſent, or any increaſed amount of the capital ſtock of the Company. Secondly, Of 500,000*l. per annum* to be ſet apart on the firſt of *March*, and the firſt of *September*, half yearly; and applied in the diſcharge of the before-mentioned Bills of Exchange, for the aforeſaid reduction of the *India* debt. Thirdly, Of a like annual ſum of 500,000*l.* to the Exchequer, to be applied by Parliament for the uſe of the Public, and to be paid on the firſt of *January*, and the firſt of *July*, half-yearly, by equal inſtalments. And, laſtly, The ſurplus may be applied in the more ſpeedy reduction of the *India* debt, till reduced to two millions; or in diſcharging debts at home, ſo as not to diminiſh the bond debt below 1,500,000*l.* Subject to theſe appropriations, and after the debt in *India* is reduced to two millions, and the bond debt at home to 1,500,000*l. one-ſixth* part of the ultimate ſurplus is to be applied to an increaſe of dividend of the capital ſtock, and the remaining *five-ſixths*, is to be made a guarantee fund, or collateral ſecurity for the Company's capital ſtock, and their dividend of 10 *per cent.* until ſuch fund, by the monies paid by the Company, and the intereſt thereof, ſhall have amounted to twelve millions; and after that time, the ſaid *five-ſixths* of the ſurplus is to belong to the Public in full right. Theſe *five-ſixths* are to be paid into the *Bank*, and laid out in the purchaſe of redeemable annuities, in the names of the Commiſſioners for the reduction of the national debt, who are alſo to receive the dividends, and lay them

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out in like manner, until twelve millions have been invested. That being accomplished, the annual dividends of the stock purchased therewith, are, in the first place, to make good any defalcation in the Company's revenues, to pay the 10 *per cent.* dividend, and subject thereto, those dividends are to belong to the Public. If on the Company's exclusive trade being determined, their own assets shall prove insufficient to make good their debts, and also their capital stock rated at 200 *per cent.* the excess of such guarantee-fund is to make good the deficiency, as far as it will extend; and in the event of the Company discontinuing their trade altogether, the excess is to belong to the Public. But if the Company shall continue to trade with a joint stock, then the overplus, and the annual dividends thereof, are to remain as a like guarantee for a dividend of 10 *per cent.* and for the capital rated at 200*l.* *per cent.* as long as the Company shall trade with a joint stock; but subject to the making good any such deficiencies, the said fund is to be deemed the property of the Public.

If the bond debt at home, or the debts abroad, after being reduced to the sums before limited, shall be again increased, the former appropriation is to be revived until those debts shall be again diminished to their respective standards before limited.

Any deficiency in the funds to make good the 500,000*l.* to the exchequer in any year, is to be made good in the excesses of subsequent years; unless it happens in time of war or by circumstances incidental to war; in which case the deficiencies are not to be carried forward as a debt on the *annual* funds of the Company, nor to be brought forward as a debt to be paid by the Company, unless only in the event of their assets, on the conclusion of the exclusive trade affording more than sufficient to make good the capital stock rated at 200*l.* *per cent*: but any excess of such assets beyond that amount, is liable to make good the deficiency of any such payments to the Public; no interest is to be computed in the mean time on such deficiency.

The securities given by the cashiers of the Bank, are to extend to the monies they may receive under this act, and the treasury is to direct the allowances for management; and if the Company make default in any payments, directed by the act, they may be sued, and shall pay 15*l.* *per cent.* damages, with costs of suit.

The statute directs the manner in which receipts shall be given; and a power is lodged in the treasury, to give the Company further time for payment in cases of exigency. And it is declared that neither the claims of the Public, nor of the Company, to the *territories in India*, shall be prejudiced by the statute, *beyond the* prolongation of the term in the exclusive trade. The statute also contains a clause of mutual acquittal of all out-standing demands between the Crown and the Company, to the 24th day of *December* 1792.

The statute recognizes the rights of the Company to a sum of 467,896*l.* 7*s.* 4*d.* in money and 9,750*l.* *East India* stock; (which sums constitute the separate fund of the Company, established under the act of 1781;) and it is observed, that it will be more for the general interest of the Company to continue that money employed in trade, computing an interest upon it and to make it a fund for a permanent increase to their dividend of 10*s.* *per cent.* than to draw it from their trading capital for any sudden distribution. And it then authorizes and limits the Company to make a dividend from this separate fund, and the interest thereof, after the rate of 10*s.* *per cent.* *per annum* during their further term in the exclusive trade; and at the end of the term, it gives them a power of disposing of the remainder of this fund as they shall think fit.

The Company are not to grant any pensions or new salaries beyond 200*l.* *per annum*, to any one person, without the consent of the Board of Controul; and they are to lay before Parliament annually, a list of all their establishments abroad and at home, in which all pensions and new salaries are to be particularly noticed; and also complete accounts of all their affairs, receipts and outgoings of the preceding year, with estimates for the following year.

8. The statute gives a right of suing by action, bill or information, in any of the courts of *Westminster*, (in which case the venue is to be laid in *London* or *Middlesex*,) or in the supreme court of judicature in *Bengal*, or the Mayor's court at *Madras* or *Bombay*; and in such suits the legality of seizures of persons, ships, or goods, is made cognizable. In cases of misdemeanors, the offenders are punishable by fine and imprisonment, and if abroad, they may be sent home, as part of the punishment; and a *capias*, for arresting the accused party, is given in the first instance, which may be compounded for by bail.

For securing to the crown the duties for goods unlawfully trafficked with, in the cases of forfeiture of goods, the Attorney General may prosecute the offenders, or their partners, by bills in a court of Equity, waving penalties, and the defendants shall make full discovery of their illicit traffick upon oath, and shall be decreed to pay all the duties thereupon to Government, and 30*l.* *per cent.* on the value of the goods to the Company, and shall be relieved against all other forfeitures. The Company may, in like manner proceed against offenders by bill in equity, and if they fail they shall pay costs. Defendants are to pay costs to the Crown and to the Company, when the decree shall be against them. Other usual regulations are made as to informers, pleading, *&c.*

9. The jurisdiction of the Supreme Court of Judicature at *Fort William*, in causes of Admiralty, is made to extend to the High seas at large; whereby a defect in *Stat.* 13 *Geo.* 3. *c.* 63, for constituting that court, is cured.

For increasing the number of magistrates in *Bengal*, *Madras*, and *Bombay*, the supreme court of judicature in *Bengal* is to issue commissions of the peace, in pursuance of orders issued in council for that purpose; and any of the justices, so appointed, may by order in council, sit also in the courts of oyer and terminer, taking the oaths of justices in *England*, (excepting the oath prescribed by the act of the 18 *Geo.* 2, relating to qualification by estate). The proceedings and judgments of justices may be removed to the court of oyer and terminer by *certiorari*, but cannot be set aside for want of form but on the merits only. The justices may also associate with the judges in causes appealed, when called upon so to do.

The Governments abroad may appoint coroners to take inquests upon the bodies of persons coming to an untimely end, and appoint fees to be paid for that duty.

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The juſtices of the peace may appoint ſcavengers, and raiſe money by aſſeſſments for cleanſing, watching and repairing the ſtreets of *Calcutta*, *Madras*, and *Bombay*; they may alſo licence houſes for retailing ſpirituous liquors, and fix the limits of thoſe towns; and none are to retail ſpirits but ſuch as they ſhall ſo licence, under the penalties of the laws of *Great Britain*.

A ſpecial oath is preſcribed to be taken in future by the Directors of the Company, prohibitory of their acting as Directors when concerned in buying from, or ſelling to, the Company any goods; and prohibitory of their being concerned in any ſhipping employed by the Company, or accepting any preſent for any appointment of office, or of being concerned in any private trade contrary to the act.

10. The Acts or parts of Acts repealed, are as follows: *Stat.* 9 & 10 *W.* 3. *c.* 24. § 81.—The whole of the temporary *Stat.* 5 *Geo.* 1. *c.* 21: and ſo much of the ſeveral ſtatutes as continued it in force.—*Stat.* 7 *Geo.* 1. *c.* 21. § 1. to § 9.—The whole of *Stat.* 9 *Geo.* 1. *c.* 26.—*Stat.* 3 *Geo.* 2. *c.* 14. § 9.—*Stat.* 17 *Geo.* 2. *c.* 17. § 11:—*Stat.* 10 *Geo.* 3. *c.* 47. § 1 & 2.—*Stat.* 13 *Geo.* 3. *c.* 63. § 23. to 29. and § 32. to § 35.—*Stat.* 21 *Geo.* 3. *c.* 65. § 29.—*Stat.* 24 *Geo.* 3. *c.* 25. § 3. 13, 29 and 31.—the whole of *Stat.* 26 *Geo.* 3. *c.* 16:—and *Stat.* 26 *Geo.* 3. *c.* 57. § 32, 33.

The repeal is not to extend to offences committed before the commencement of the act, nor is it to affect the powers of the former Board of Controul, until a new one ſhall be appointed; nor to affect the powers given to the board *by Stats.* 28 *Geo.* 3. *c.* 8: 31 *Geo.* 3. *c.* 10, concerning the forces in *India*.

EASTINTUS, Sax. *Eaſt-Tyne.*] An Eaſterly coaſt or country; alſo the *Eaſt ſtreet*, *Eaſt* ſide of a river, &c. *Leg.* K. *Ed.* 1.

EASTLAND COMPANY. This Company ſubſiſted under a charter granted by Queen *Elizabeth* in 1579, for regulating the commerce into the *Eaſt country*; a name anciently given, and ſtill continued by mercantile people, to the ports of the Baltick ſea, more particularly thoſe of *Pruſſia* and *Livonia*. They were by this charter to enjoy the ſole trade, through the Sound, into *Norway*, *Sweden*, *Poland*, *Lithuania*, (excepting *Narva* which was within the charter of the *Ruſſia* Company,) *Pruſſia* and alſo *Pomerania*, from the river *Odel*, Eaſtward, *Dantzick*, *Elbing* and *Koningſburg*; alſo to *Copenhagen* and *Elſinore*, and to *Finland*, *Gothland*, *Bornholm* and *Oeland*. This charter was confirmed by another from *Charles* I. in 1629.

By the *Stat.* 25 *Car.* 2. *c.* 7, the following proviſions were made for laying open a very conſiderable part of this trade: It was declared lawful for any native or foreigner at all times to have free liberty to trade into and from *Sweden*, *Denmark* and *Norway*, notwithſtanding the charter to the Eaſtland Merchants or any other charter.—And further that every perſon being a ſubject of this realm might be admitted into the fellowſhip of merchants of *Eaſtland* on paying 40 *s.* and no more. § 5, 6.—Which latter proviſion made the trade to the other parts within the limits of the charter eaſily acceſſible.

EAT INDE SINE DIE. Words uſed on the acquittal, &c. of a defendant *that he may go without day*, *i. e.* be diſmiſſed. See title *Judgment*.

EAVES-DROPPERS. Perſons that liſten under walls or windows, or the eaves of a houſe, to hearken after diſcourſe, and thereupon to frame ſlanderous and miſchievous tales, are a common nuſance, and preſentable at the court-leet: or are indictable at the ſeſſions, and puniſhable by fine, and finding ſureties for good behaviour. *Kitch. of Courts.* 20: 4 *Comm.* 169. See title *Good Behaviour*.

EBDOMADARIUS. An *ebdomadary* or officer appointed *weekly* in cathedral churches, to ſuperviſe the regular performance of divine ſervice, and preſcribe the particular duties of each perſon attending in the choir, as to reading, ſinging, praying, &c. To which purpoſe the *ebdomadary* at the beginning of his week drew in form a bill or writing of the reſpective perſons and their ſeveral offices, called *tabula*; whereupon the perſons there entered were ſtiled *intabulati*: This is manifeſted in the ſtatutes of the *Cathedral Church of St. Paul*, digeſted by Dr. *Ralph Baldock*, Dean *of St. Paul's*, *anno* 1295, MSS.

EBEREMORTH, EBEREMORS, EBEREMURDER. *Sax.*] Bare, or downright murder. *Leg. H.* 1. *c.* 12. See title *Aberemurder*.

ECCLESIA. *Lat.*] The place where God is ſerved, commonly called a church: But in *law proceedings*, according to *Fitzherbert*, this word intends a parſonage; for ſo he expreſſes it in a queſtion, whether a benefice was *eccleſia ſive capella*, &c. *F. N. B.* 32: 2 *Inſt.* 363.

ECCLESIÆ SCULPTURA. The image or ſculpture of a church in ancient times, which was often cut out or caſt in plate or other metal, and preſerved as a religious treaſure or relique; and to perpetuate the memory of ſome famous churches. *Mon. Ang. Tom.* 3. *p.* 309.

ECCLESIASTICAL. Denotes ſomething belonging to, or ſet apart for the church; as diſtinguiſhed from *civil* or *ſecular*, with regard to the world.

Ecclesiastical Corporations. Are where the members that compoſe it are *ſpiritual perſons*. They were erected for the furtherance of religion, and perpetuating the rights of the church. See title *Corporation*.

Ecclesiastical courts. See title *Courts Eccleſiaſtical*.

Ecclesiastical Jurisdiction. By *Stat.* 37 *H.* 8. *c.* 17, The doctors of the civil law, although they be laymen, &c. may exerciſe *eccleſiaſtical juriſdiction*.

Ecclesiastical Laws. See titles *Canon Law*; *Courts Eccleſiaſtical*.

Ecclesiastical Persons or Ecclesiasticks. *Eccleſiaſtici.*] Churchmen, perſons whoſe functions conſiſt in performing the ſervice, and keeping up the diſcipline of the church. See title *Clergy*.

EDESTIA, From *Ædes*, uſed in ſome old charters for buildings.

EDIA, Aid or Help: Thus *Du Freſne* interprets it; but *Cowel* ſays it ſignifies *Eaſe*.

EDICT, *Edictum.*] An ordinance or command; a ſtatute, *Lat. Law. Dict.*

EEL-FARES. A fry or brood of eels. *Stat.* 25 *H.* 8.

EFFORCIALITER, Forcibly; as applied to military force.—*Mat. Pariſ. Anno* 1213.

EFFRACTORES, *Lat.*] Breakers applied to *burglars*, that break open houſes to ſteal.

EFTERS. *Sax.*] Ways, walks or hedges. *Blount*.

EFFUSIO SANGUINIS. The mulct, fine, or penalty impoſed by the old *Engliſh* laws for the ſhedding of blood; which the King granted to many lords of manors: And this privilege, among others, was granted to the abbot of *Glaſtonbury*. *Cartular.* MSS.

EGYPTIANS. *Egyptiani.* Commonly called *Gypſies.*—Theſe are a ſtrange kind of common-wealth among themſelves, of wandering impoſtors and jugglers who made their firſt appearance in *Germany*, about the beginning of the ſixteenth century, and have ſince ſpread themſelves all over *Europe* and *Aſia*. They were originally called *Zinganees* by the *Turks*, from their captain *Zinganeus*, who, when *Sultan Selim* conquered *Egypt*, about the year 1517, refuſed to ſubmit to the *Turkiſh* yoke, and retired into the deſarts, where they lived by rapine and plunder, and frequently came down into the plains of *Egypt*, committing great outrages in the towns upon the *Nile*, under the dominion of the *Turks*. But being at length ſubdued, and baniſhed from *Egypt*, they diſperſed themſelves in ſmall parties, into every country in the known world; and as they were natives of *Egypt*, a country where the occult ſciences, or black art, as it was called, was ſuppoſed to arrive to great perfection, and which in that credulous age, was in great vogue with perſons of all religions and perſuaſions, they found the people wherever they came, very eaſily impoſed on. *Mod. Univ. Hiſt. Vol.* 43. *p.* 271.

In the compaſs of a very few years, they gained ſuch a number of idle proſelytes, who imitated their language and complexion, and betook themſelves to the ſame arts of chiromancy, begging and pilfering, that they became troubleſome and even formidable to moſt of the States of *Europe*. Hence they were expelled from *France* in the year 1560, and from *Spain* in 1591. And the government in *England*, took the alarm much earlier, for in 1530, they are deſcribed by *Stat.* 22 *Hen.* 8. *c.* 10. as "outlandiſh people, calling themſelves *Egyptians*, uſing no craft or feat of merchandize, who have come into this realm, and gone from ſhire to ſhire, and place to place in great company, and uſed great, ſubtil, and crafty means to deceive the people; bearing them in hand, that they by palmeſtry could tell men, and women fortunes; and ſo many times by craft and ſubtilty have deceived the people of their money, and have alſo committed many heinous felonies and robberies." Wherefore they are directed to avoid [depart] the realm, and not to return, under pain of impriſonment, and forfeiture of their goods and chattels; and, upon their trials for any felonies which they might have committed, they ſhall not be entitled to a jury *de medietate linguæ*. And afterwards it was enacted by *Stats.* 1 & 2 *P.* & *M. c.* 4: 5 *Eliz. c.* 20, that if any ſuch perſons ſhall be imported into this kingdom, the importer ſhall forfeit 40 *l.* And if the *Egyptians* themſelves remain one month in this kingdom; or if any perſon being 14 years old, whether a natural born ſubject or ſtranger, which hath been ſeen or found in the fellowſhip of ſuch *Egyptians*, or which hath diſguiſed him, or herſelf like them, ſhall remain in the ſame one month, at one or ſeveral times; it is felony, without benefit of clergy. And Sir *Matthew Hale* informs us, that at one *Suffolk* aſſizes, no leſs than thirteen gypſies were executed upon theſe ſtatutes, a few years before the Reſtoration. But, to the honour of our national humanity, there are no inſtances more modern than this, of carrying theſe laws into execution. 4 *Comm.* 165, 6. Now by *Stat.* 23 *Geo.* 3. *c.* 51, the ſaid act of 5 *Eliz. c.* 20, is repealed. And the *Stat.* 17 *Geo.* 2. *c.* 5. (See title *Vagrants*) regards them only under the denomination of rogues and vagabonds.

EIA, from Sax. *Eig.*] An iſland. *Mat. Paris Anno* 883. See *Ey.*

EJECTA. A woman raviſhed or deflowered; or caſt forth from the virtuous. *Ejectus*, a whoremonger. *Blount.*

EJECTIONE CUSTODIÆ. *Ejectment de Garde.*] Is a writ which lieth againſt him that caſteth out the *guardian* from any land during the minority of the heir. *Reg. Orig.* 162: *F. N. B.* 139. There are two other writs not unlike this; the one termed *raviſhment de gard*, and the other *droit de gard*. See title *Guardian.*

EJECTIONE FIRMÆ; or EJECTMENT.

An action at law by which a perſon ouſted or amoved from the poſſeſſion of an eſtate for years, may recover that poſſeſſion: and which action is now uſed as the general mode of trying diſputed titles to lands and tenements.—See 3 *Comm.* 199. from whence the ſubſequent matter is extracted with addition from other ſources.

A writ of *Ejectione firmæ*, or action of treſpaſs in *Ejectment*, lieth where lands or tenements are let for a term of years, and afterwards the leſſor, reverſioner, remainder-man, or any ſtranger, doth eject or ouſt the leſſee of his term, *F. N. B.* 220. In this caſe he ſhall have his writ of *ejection* or *Ejectment*; to call the defendant to anſwer for entering on the lands ſo demiſed to the plaintiff for a term that is not yet expired and ejecting him. And by this writ the plaintiff ſhall recover back his term or the remainder of it, with damages.

Since the diſuſe of real actions, this mixt proceeding is become the common method of trying the title to lands or tenements. It is therefore neceſſary to delineate it's hiſtory, the manner of it's proceſs, and the principles whereon it is grounded.

The writ of covenant, for breach of the contract contained in the leaſe for years, was anciently the only ſpecific remedy for recovering againſt the leſſor a term from which he had ejected his leſſee, together with damages for the ouſter. But if the leſſee was ejected by a ſtranger claiming under a title ſuperior to that of the leſſor or by a grantor of the reverſion, (who might at any time by a common recovery have deſtroyed the term,) though the leſſee might ſtill maintain an action of covenant againſt the leſſor, for non-performance of his contract or leaſe, yet he could not by any means recover the term itſelf. *F. N. B.* 145. If the ouſter was committed by a mere ſtranger, without any title to the land, the leſſor might indeed, by a real action recover poſſeſſion of the freehold, but the leſſee had no other remedy againſt the ejector but in damages, by a writ of *ejectione firmæ*, for the treſpaſs committed in *ejecting* him from his *farm*. But afterwards, when the courts of equity began to oblige the ejector to make a ſpecific reſtitution of the land to the party immediately injured, the courts of law alſo adopted the ſame method of doing complete juſtice; and, in the proſecution of a writ of ejectment, introduced a ſpecies of remedy not warranted by the original writ, nor prayed by the declaration; (which are calculated for damages merely, and are ſilent as to any reſtitution;) *viz.* a judgment to recover the term, and a writ of poſſeſſion thereupon. This method ſeems to have been ſettled as early as the reign of *Edward* IV, though it hath been ſaid to have firſt begun under *Hen.* VII, becauſe it probably was then firſt applied to it's preſent principal uſe, that of trying the title of the land. *Bro. Ab*; *F. N. B.* 220.

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The better to apprehend the contrivance, whereby this end is effected, it is to be recollected that the remedy by ejectment is, in it's original, an action brought by one who hath a leaſe for years, to repair the injury done him by diſpoſſeſſion. In order therefore to convert it into a method of trying titles to the freehold, it is firſt neceſſary that the claimant do take poſſeſſion of the lands, to empower him to conſtitute a leſſee for years, that may be capable of receiving this injury of diſpoſſeſſion. For it would be an offence, called in our law *maintenance*, to convey a title to another, when the grantor is not in poſſeſſion of the land: and indeed it was doubted at firſt, whether this occaſional poſſeſſion, taken merely for the purpoſe of conveying the title, excuſed the leſſor from the legal guilt of maintenance. 1 *Ch. Rep. Ap.* 39.

When therefore a perſon, who hath a right of entry into lands, determines to acquire that poſſeſſion, which is wrongfully with-held by the preſent tenant, he makes (as by law he may) a formal entry on the premiſes, and being ſo in the poſſeſſion of the ſoil, he there, upon the land, ſeals and delivers a leaſe for years to ſome third perſon or leſſee; and, having thus given him entry, leaves him in poſſeſſion of the premiſes. This leſſee is to ſtay upon the land, till the prior tenant, or he who had the previous poſſeſſion, enters thereon a-freſh and ouſts him; or till ſome other perſon (either by accident or by agreement before-hand) comes upon the land, and turns him out, or ejects him. For this injury the leſſee is entitled to his action of ejectment againſt the tenant; or his *caſual ejector*, which-ever it was that ouſted him, to recover back his term and damages. But where this action is brought againſt ſuch a caſual ejector as is before mentioned, and not againſt the very tenant in poſſeſſion, the Court will not ſuffer the tenant to loſe his poſſeſſion without an opportunity to defend it. Wherefore it is a ſtanding rule, that no plaintiff ſhall proceed in ejectment to recover lands againſt a caſual ejector, without notice given to the tenant in poſſeſſion (if any there be) and making him a defendant if he pleaſes. And, in order to maintain the action, the plaintiff muſt in caſe of any defence, make out four points before the court; *viz. Title, Leaſe, Entry*, and *Ouſter*. Firſt, he muſt ſhew a good *title* in his leſſor, which brings the matter of right entirely before the Court; then, that the leſſor, being ſeiſed or poſſeſſed by virtue of ſuch title, did make him the *leaſe* for the preſent term; thirdly, that he, the leſſee, or plaintiff did *enter* or take poſſeſſion in conſequence of ſuch leaſe; and then, laſtly, that the defendant *ouſted*, or ejected him. Whereupon he ſhall have judgment to recover his term and damages; and ſhall in conſequence, have a *writ of poſſeſſion*, which the ſheriff is to execute by delivering him the undiſturbed and peaceable poſſeſſion of his term.

This is the regular method of bringing an action of ejectment, in which the title of the leſſor comes collaterally and incidentally before the Court, in order to ſhew the injury done to the leſſee by this ouſter. This method muſt be ſtill continued in due form and ſtrictneſs, (ſave only as to the notice to the tenant,) whenever the poſſeſſion is vacant, or there is no actual occupant of the premiſſes; and alſo in ſome other caſes. But, as much trouble and formality were found to attend the actual making of the *leaſe, entry*, and *ouſter*, a new, and more eaſy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premiſes in diſpute, was invented by the Lord Chief Juſtice *Rolle. Styl. Pract. Reg.* 108. (*edit.* 1657).

This new method entirely depends upon a ſtring of legal fictions; no actual leaſe is made, no actual entry by the plaintiff, no actual ouſter by the defendant, but all are merely ideal, for the ſole purpoſe of trying the title. To this end, in the proceedings, a leaſe for a term of years is ſtated to have been made, by him who claims title, to the plaintiff who brings the action; as by *John Rogers* to *Richard Smith*, which plaintiff ought to be ſome real perſon, and not merely an ideal fictitious one who hath no exiſtence, as is frequently though unwarrantably practiſed. 6 *Mod.* 309. It is alſo ſtated that *Smith* the leſſee entered; and that the defendant *William Stiles*, who is called the *caſual ejector*, ouſted him; for which ouſter he brings this action. As ſoon as this action is brought, and the complaint fully ſtated in the declaration, *Stiles*, the caſual ejector, or defendant, ſends a written notice to the tenant in poſſeſſion of the lands. *e. g. George Saunders*, informing him of the action brought by *Smith*, and tranſmitting him a copy of the declaration; withal aſſuring him that he, *Stiles*, the defendant, has no title at all to the premiſes, and ſhall make no defence; and therefore adviſing the tenant to appear in court and defend his own title: otherwiſe he, the caſual ejector, will ſuffer judgment to be had againſt him; and thereby the actual tenant, *Saunders*, will inevitably be turned out of poſſeſſion. On receipt of this caution, if the tenant in poſſeſſion does not within a limited time apply to the court to be admitted a defendant in the ſtead of *Stiles*, he is ſuppoſed to have no right at all; and upon judgment being had againſt *Stiles* the caſual ejector, *Saunders*, the real tenant, will be turned out of poſſeſſion by the ſheriff.

But, if the Tenant in poſſeſſion applies to be made a defendant, it is allowed him upon this condition; that he enter into a rule of court to confeſs, at the trial of the cauſe, three of the four requiſites for the maintenance of the plaintiff's action; *viz.* the *leaſe* of *Rogers* the leſſor, the *entry* of *Smith* the plaintiff, and his *ouſter* by *Saunders* himſelf, now made the defendant, inſtead of *Stiles*: which requiſites being wholly fictitious, ſhould the defendant put the plaintiff to prove them, he muſt of courſe be non-ſuited for want of evidence; but by ſuch ſtipulated confeſſion of *leaſe, entry* and *ouſter*, the trial will now ſtand upon the merits of the *title* only.

This done the delaration is altered by inſerting the name of *George Saunders* (the tenant) inſtead of *William Stiles*; and the cauſe goes down to trial under the name of *Smith* (the plaintiff) *on the demiſe of Rogers*, (the leſſor) *againſt Saunders*, the now defendant. And herein the leſſor of the plaintiff is bound to make out a clear title, otherwiſe his fictitious leſſee cannot obtain judgment to have poſſeſſion of the land for the term ſuppoſed to be granted. But, if the leſſor makes out his title in a ſatisfactory manner, then judgment and a writ of poſſeſſion ſhall go for *Smith*, the nominal plaintiff, who by this trial has proved the right of *Rogers* his ſuppoſed leſſor.

Yet, to prevent fraudulent recoveries of the poſſeſſion, by colluſion with the tenant of the land, all tenants are obliged by *Stat.* 11 *Geo.* 2. *c.* 19, on pain of forfeiting three years' rent, to give notice to their landlords, when they

they are ſerved with any declaration in ejectment: and any landlord may by leave of the court be made a co-defendant to the action, in caſe the tenant himſelf appears to it, or, if he makes default, though judgment muſt be then ſigned againſt the caſual ejector, yet execution ſhall be ſtayed, in caſe the landlord applies to be made a defendant, and enters into the common rule; a right which indeed the landlord had, long before the proviſion of this ſtatute. (*Styl. Pract. Reg.* 108, 111, 265: 7 *Mod.* 70: *Salk.* 257: *Burr.* 1301:) in like manner as (previous to the ſtatute of *Weſt.* 2. *c.* 3,) if in a real action the tenant of the freehold made default, the remainder-man, or reverſioner had a right to come in and defend the poſſeſſion, leſt, if judgment were had againſt the tenant, the eſtate of thoſe behind ſhould be turned to a naked right. *Bract. lib.* 5. *c.* 10. § 14.

A tenant to a mortgagor who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of the *Stat.* 11 *Geo.* 2: 1 *Term Rep.* 647.

In ejectment for a chapel, the parſon can only defend for a right to enter and perform divine ſervice. *Str.* 914.—Notwithſtanding 1 *Salk.* 250, no man is to be admitted tenant or defendant in ejectment by the common rule, unleſs he hath been in poſſeſſion or received rent, and not a mere ſtranger. *Comb.* 209.

He who claims title, ſhall be joined as a defendant though the plaintiff oppoſes it. 1 *Salk.* 256. And therefore even the wife of the leſſor. 257.

The court permitted an *heir*, who had never been in poſſeſſion, to come in and defend the ejectment. The father under whom he claimed, died juſt after having firſt obtained a ſimilar rule. 4 *Term Rep.* 122. So a mortgagee. *Comberb.* 399. As to a *ceſtui que truſt*, ſee 3 *Term Rep.* 783: 4 *Term Rep.* 122.

But if the new defendants whether land-lord, or tenant, or both, after entering into the common rule, fail to appear at the trial, and to confeſs leaſe, entry, and ouſter, the plaintiff *Smith* muſt indeed be there non-ſuited, for want of proving thoſe requiſites: but judgment will in the end be entered againſt the caſual ejector *Stiles*; for the condition on which *Saunders* (the tenant) or his land-lord, was admitted a defendant, is broken, and therefore the plaintiff is put again in the ſame ſituation as if he never had appeared at all; the conſequence of which (we have ſeen) would have been that judgment would have been entered for the plaintiff, and the ſheriff, by virtue of a writ for that purpoſe, would have turned out the tenant *Saunders* and delivered poſſeſſion to *Smith* the plaintiff. The ſame proceſs therefore as would have been had, provided no conditional rule had ever been made, muſt now be purſued as ſoon as the condition is broken.

The damages recovered in theſe actions, though formerly their only intent, are now uſually (ſince the title has been conſidered as the principal queſtion) merely nominal, as 1*s*. In order therefore to complete the remedy, when the poſſeſſion has been long detained from him that had the right to it, an action of treſpaſs alſo lies, after a recovery in ejectment, to recover the meſne profits which the tenant in poſſeſſion has wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the ejectment, or his leſſor, againſt the tenant in poſſeſſion: whether he be made party to the ejectment, or ſuffers judgment to go by default. In this caſe the judgment in ejectment is concluſive evidence againſt the defendant, for all profits which have accrued ſince the date of the demiſe ſtated in the former declaration of the plaintiff; but if the plaintiff ſues for any antecedent profits, the defendant may make a new defence. 4 *Burr.* 668.

Such is the modern way, of obliquely bringing in queſtion the title to lands and tenements, in order to try it in this collateral manner; a method which is now univerſally adopted in almoſt every caſe. It is founded on the ſame principles as the antient writs of aſſize, being calculated to try the mere *poſſeſſory* title to an eſtate; and hath ſucceeded to thoſe real actions, as being infinitely more convenient for attaining the ends of juſtice; becauſe the form of the proceeding being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, ſo as to prevent fraud and chicane, and eviſcerate the very truth of the title. The writ of ejectment and it's nominal parties (as was reſolved by all the judges) are judicially to be conſidered as the fictitious form of an action, really brought by the leſſor of the plaintiff againſt the tenant in poſſeſſion; invented, under the controul and power of the court, for the advancement of juſtice in many reſpects; and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either ſide. 4 *Burr.* 668. See alſo 3 *Burr.* 1294, 6.

But a writ of ejectment is not an adequate means to try the title of *all* eſtates, for on thoſe things, whereon an entry cannot in fact be made, no entry ſhall be ſuppoſed by any fiction of the parties. Therefore an ejectment will not lie of an advowſon, a rent, a common, or other incorporeal hereditaments. *Brownl.* 129: *Cro. Car.* 492: *Str.* 54. Except for tithes in the hands of lay appropriators, by the expreſs purview of *Stat.* 32 *Hen.* 8. *c.* 7; which doctrine hath ſince been extended by analogy to tithes in the hands of the clergy. *Cro. Car.* 301: 2 *Ld. Raym.* 789. Nor will it lie in ſuch caſes, where the entry of him that hath right is taken away by deſcent, diſcontinuance, twenty years *diſpoſſeſſion*, or otherwiſe.

More particularly, for what things ejectment will lie. *Ejectment* ought to be brought for a thing that is certain; and if it be of a manor, the manor of *A.* with the appurtenances; if of a rectory, the rectory of *B.* &c. And ſo many meſſuages, cottages, acres of arable land, meadow, &c. with the appurtenances in the pariſh of, &c. For land, muſt be diſtinguiſhed, how much of one ſort, and how much of another, &c. *Cro. Eliz.* 339: 3 *Leon.* 13. *Ejectment* lies of a church, as of an houſe called *the pariſh church of*, &c. And a church is a meſſuage, by which name it may be recovered; and the declaration is to be ſerved on the parſon who performs divine ſervice. 11 *Rep.* 25: 1 *Salk.* 256.

It lies *de uno meſſuagio ſive burgagio*; but not *de uno meſſuagio ſive tenemento*, unleſs it have a *vocat'* &. &c. to make it good, becauſe of the uncertainty of the word *tenement*. 1 *Sid.* 295. But for a meſſuage *and* tenement hath been allowed. 1 *Term Rep.* 11. So indeed for a meſſuage *or* tenement. 3 *Wilſ.* 23: 3 *Mod.* 328: 1 *Sid.* 295. It will lie for a moiety, or third part of a manor or meſſuage, &c. And for a chamber or room of a houſe well ſet forth. 11 *Rep.* 55, 59: 3 *Leon.* 210. It lieth *de domo*, which hath convenient certainty for the ſheriff to deliver poſſeſſion, &c. *Cro. Jac.* 654. It lies of a cottage

or curtilage; of a coal-mine, &c. but not of a common, piſcary, &c. *Cro. Jac.* 150. For underwood it lies, though a *præcipe* doth not. 2 *Roll. Rep.* 482, 483. But for *uno clauſo*, or *una pecia terræ*, &c. without certainty of the acres, and their nature, it doth not lie. 11 *Rep.* 55: 4 *Mod.* 1. It lieth of a cloſe, containing three acres of paſture, &c. Alſo of ſo many acres of land covered with water; though not *de aquæ curſu. Cro. Jac.* 435: 1 *Brownl.* 242. It lies for a *prebendal* ſtall, after collation to it. 1 *Wilſ.* 14.

Ejectment lies by the owner of the ſoil for land which is part of the King's Highway, or of an acre of land, deſcribed only by the name of land, though there was a wall and porch and part of a houſe built on it. 1 *Burr.* 133.

In this action the law requires, that the thing demanded be ſo particularly ſpecified, that the ſheriff may certainly know what to give the poſſeſſion of, if the plaintiff ſhould recover; for the judgment is in order to execution, and the judgment would be vain, if execution could not be had of the thing ſpecifically demanded; but in this action the judges did not confine themſelves to thoſe rules which govern the *præcipe*, but allowed ſome things to be recovered in this action, which could not be demanded in a *præcipe*; becauſe ſince the eſtabliſhment of that real action, many things have been added and improved by art, and acquired new appellations that are perfectly underſtood now by the law, which are not found in the ancient law-books; and as men began to contract by new names which were not known in the old law, ſo it was reaſonable to ſuffer the remedy to follow the nature of ſuch contracts. See 2 *Ld. Raym.* 1470: 2 *Stra.* 908: 1 *Burr.* 629. —And in general ejectment does not lie without ſhewing the quantity and quality of the land, and how many acres of arable, meadow and paſture, &c. 11 *Co.* 55: 1 *Salk.* 254: 4 *Mod.* 97.

An Ejectment is a *poſſeſſory* remedy, and only competent where the leſſor of the plaintiff may enter; therefore it is always neceſſary for the plaintiff to ſhew that his leſſor had a *right to enter*, by *proving a poſſeſſion within twenty years*, or *accounting for the want of it*, under ſome exceptions allowed by the ſtatute; *twenty years' adverſe* poſſeſſion, is a *poſitive title* to the defendant; it is not a *bar* to the *action or remedy* for the plaintiff *only*, but takes away his right of poſſeſſion. 1 *Burr.* 119. Every plaintiff muſt ſhew a right of poſſeſſion, as well as of property, and therefore the defendant needs not plead the ſtatute, as in the caſe of actions. *Ibid.*

A judgment in ejectment is the recovery of the *poſſeſſion*; (not of the *ſeiſin* or *freehold*;) without prejudice to the *right*, as it may afterwards appear between the parties. He who enters under it in truth and ſubſtance, can only *be poſſeſſed according to right, prout lex poſtulat.* If the leſſor have a freehold, he is in as a freeholder: if he has a chattel intereſt he is *in as* a termor; and in reſpect of the freehold, his poſſeſſion enures *according to right.* If he has no title, he is in as a treſpaſſer; and, without any re-entry by the true owner, is liable to account for the profits. 1 *Burr.* 114.

This action of ejectment is rendered a very eaſy and expeditious remedy to landlords whoſe tenants are in arrear, by *Stat.* 4 *Geo.* 2. *c.* 28; which enacts that every landlord, who hath by his leaſe a right of re-entry in caſe of non-payment of rent, when half a year's rent is due, and no ſufficient diſtreſs is to be had, may ſerve a declaration in ejectment on his tenant, or fix the ſame upon ſome notorious part of the premiſes which will be valid, without any formal re-entry or previous demand of rent. And a recovery in ſuch ejectment ſhall be final and concluſive, both in law and equity, unleſs the rent and all coſts be paid or tendered within ſix calendar months afterwards.

The true conſtruction upon this act is, to take off the landlord the inconvenience of his continuing always liable to an uncertainty of poſſeſſion; *(from it's remaining in the power of the tenant to offer him a compenſation at any time, in order to found an application for relief in equity;)* and to limit and to confine the tenant to ſix calendar months after execution granted, for his doing this; or elſe that the landlord ſhall from thenceforth hold the demiſed premiſes diſcharged from the leaſe. 1 *Burr.* 619. As to the proviſion of *Stat.* 11 *Geo.* 2. *c.* 19. § 16, in caſes of tenants at rack-rent being one year in arrear and deſerting the premiſes, ſee this Dict. title *Rent.*— Two Juſtices of peace may in this caſe put the landlord in poſſeſſion.

Where an ejectment is brought againſt a tenant, for the purpoſe of turning him out of his farm, &c. and the tenant actually holds the premiſes of the leſſor of the plaintiff, it is ſometimes neceſſary to give him notice to quit poſſeſſion, in order to maintain an ejectment. Here we may obſerve, that demiſes, where *no certain term* is mentioned, are held to be tenancies from *year to year*, which neither party can determine, without reaſonable notice to the other. This notice is, in moſt counties, *ſix months*, and it muſt in all ſuch caſes, expire at that part of the year, when the tenancy commenced; and therefore it hath been holden, that half a year's notice to quit poſſeſſion muſt be given to ſuch tenant; before the end of which time the landlord cannot maintain an ejectment; unleſs the tenant has attorned to ſome other perſon, or done ſome act diſclaiming to hold as tenant; in which caſe no notice is neceſſary. And the ſame law will apply to the executor of ſuch a tenant. 3 *Wilſ.* 25. See 1 *Term Rep.* 160: 4 *Term Rep.* 361. But *after the expiration of a leaſe* for a *certain term*, the tenant continuing in poſſeſſion is deemed a treſpaſſor: and therefore an ejectment which is an action of treſpaſs may be brought *without any notice to quit.*

Points of practice relating to ejectments. Where there is a tenant in poſſeſſion, in order to proceed againſt him, prepare a declaration, the copy of which, *upon ſtamp*, you ſerve the tenant with; if there be more than one tenant, each muſt be ſerved with a copy, but if the man is not at home, his wife will do (provided ſhe be ſerved on the premiſes, and ſo ſworn to); this is neceſſary both in town and country cauſes. At the time of ſervice, in all caſes it is requiſite to *read over or explain the notice at the foot of the declaration to the perſon ſerved.*—*Impey K. B.* which ſee at length.

The tenant's ſon, daughter, or ſervant, he being out of the way, muſt not be ſerved, unleſs it appear to the court, that ſuch declaration and notice came to his hands, in which caſe it has been held a good delivery; but if the tenant *purpoſely* keep out of the way to avoid being ſerved, the court on affidavit will grant a rule to ſhew cauſe why that ſhould not be deemed good ſervice.

In

In caſe the ſervant, &c. be ſerved, and motion be made that it be deemed good ſervice, the tenant muſt ſwear that the declaration never came to his hands before the time of ſhewing cauſe, or the court will make the rule abſolute. *Trin.* 30 *Geo.* 3. In this caſe to ground ſuch a motion you muſt ſhew endeavours to ſerve him at ſeveral times, &c.

The declaration muſt be ſerved before the eſſoign-day of every term, either in town or country, and the notice muſt be made to appear in the next term after delivery; but the delivery on a *Sunday*, or on the eſſoign-day of that term wherein the defendant is to appear, will not do.

If the premiſes be in *London* or *Middleſex*, the notice muſt be made to appear the firſt day of the next term after ſervice, for if made generally, the tenant in poſſeſſion has the whole term to appear in; but if the tenements lie in any other county, the notice muſt be to appear as of the next term generally.

Ejectment muſt be brought in the county where the lands lie, and the declaration muſt ſet forth the particular pariſh; and the day of the demiſe muſt be laid after the title accrues, otherwiſe the plaintiff will be non-ſuited; and the plaintiff muſt lay the commencement of his ſuppoſed leaſe, to have been precedent to the ejectment by the defendant. 1 *Sid.* 8: 2 *New Ab.* 171.

If the title of the leſſor of the plaintiff accrue in *Eaſter* vacation, yet the plaintiff may deliver his ejectment as of *Eaſter* term, and ſhall recover thereon, becauſe he makes up his iſſue, or takes judgment as of the next term; otherwiſe the act of the law which ſuppoſes the bill filed as of the firſt day of *Eaſter* term, before a title accrued to the plaintiff, would be an act of injury to him, and delay his right; for a man ejected out of a leaſe made in term time, could not complain till term was over. 2 *Ventr.* 174: It muſt be brought within twenty years, by *Stat.* 21 *Jac.* 1. *c.* 16: *Sid.* 432. See *ante*, and title *Limitation of Actions*.

It was formerly held that a declaration in ejectment could not be altered or amended after once delivered, in the moſt trivial matters; but it has ſince been held, that an ejectment is a mere fictitious action, and the demiſe mere matter of form, nor does it exiſt, and on application, the demiſe was ordered to be amended; but this was to ſave the plaintiff from being barred by a fine, if he had been obliged to bring a new ejectment; 4 *Burr.* 2447. Therefore as the demiſe may be altered, there can be no doubt but that other parts leſs material may alſo be amended; the action being invented under the control of the court, for the advancement of juſtice, and merely to try the right in queſtion. 1 *Burr.* 665. The term may be amended without conſent from five to ten years. *Str.* 1272, 1211.—A verdict cures a defect in ſetting out the title, though it cannot cure a defective title. 2 *Burr.* 1159. See title *Amendment*.

It is neceſſary to prove the defendant or his tenant in poſſeſſion of the premiſes: for the rule is, that the landlord ſhall defend for the premiſes only whereof his tenants are in poſſeſſion; and the party does not admit himſelf to be landlord of any premiſes which the plaintiff may make title to, but of ſuch only as were in poſſeſſion of thoſe tenants. 1 *Wilſ.* 220.

A new trial may, upon proper grounds, be granted in ejectment, as well as in other caſes. 4 *Burr.* 2224.

In real actions, where the freehold is recovered the demandant has execution, by the writ of *habere facias ſeiſinam*; in ejectment, therefore, it is but juſt, that a ſimilar remedy ſhall be permitted to the plaintiff, who, as he now has judgment to recover the poſſeſſion of the land, may put the ſentence of the law in execution by virtue of a writ of *habere facias poſſeſſionem*, directing the ſheriff to give actual poſſeſſion to the plaintiff, of the land recovered.

This writ may be ſued out though the leſſor of the plaintiff be dead, if teſted the laſt day of the preceding term, 4 *Burr.* 1970. The legal relation to the day of the teſte is proper to be ſupported in maintenance of a writ of poſſeſſion on a judgment in ejectment. *Ibid.*

In *ejectment*, where there are divers defendants, and the freeholds are ſeveral, no defendant may defend for more than is in his own poſſeſſion; and the plaintiff may take judgment againſt his *ejector* for what remains. 1 *Vent.* 355: 2 *Keb.* 524, 531.

If there be two defendants in *ejectment*, and one of them appears and confeſſes leaſe, entry, and *ouſter*, but the other does not appear, in that caſe the plaintiff may enter a *non-pros*, or *retraxit* againſt him, and go to trial, and have judgment againſt the other defendant. 1 *Lord Raym.* 717, 718. Alſo if an *ejectment* be brought againſt two perſons, and after iſſue joined, one dies, and a *venire* is awarded as to the two defendants, and a verdict againſt two; here, upon ſuggeſtion of the death of one of them upon the roll, judgment ſhall be given for the plaintiff againſt the other for the whole: for it is ſaid this action is grounded upon torts, which are ſeveral in their nature, and one may be found guilty and the other acquitted. *Ibid.*

Where one brings *ejectment* of land in two pariſhes, and the whole lies in one, he ſhall recover: alſo if a perſon brings *ejectment* of one acre in *B.* and part of it lies in *A.* he ſhall recover for ſuch part as lies in *B.* And if one having title to a part only of lands, bringeth an *ejectment* for the whole, he ſhall recover his part of the lands. *Plowd.* 429: *Cro. Car.* 13.

A plaintiff ſhall recover only according to the right which he hath at the time of bringing his action: and one who hath title to the land in queſtion, may on motion be made a defendant in the action with the tenant in poſſeſſion, to defend his title. 1 *Nelſ. Abr.* 694: 1 *Lill.* 497, &c. As the poſſeſſion of the land is primarily in queſtion, and to be recovered, that concerns the tenant; and the title of the land, which is tried collaterally, that concerns ſome other, who may be admitted to be a defendant with the tenant: but none other is to be admitted a defendant, but he that hath been in poſſeſſion, or receives the rents, &c.

If the plaintiff can prove his title accrued before the time of the demiſe, and that the defendant hath been longer in poſſeſſion, he ſhall recover antecedent profits; but in ſuch caſe the defendant will be at liberty to controvert his title. *Bull. Ni. Pri.* 83.

As the plaintiff in *ejectment* is a mere nominal perſon, and a truſtee for the leſſor; if he releaſe the action, the court may ſet aſide the releaſe, and he ſhall be committed for a contempt; ſo likewiſe if he releaſe an action brought in his name for the meſne profits. 1 *Salk.* 260: *Skinn.* 247. If a man is made plaintiff in *ejectment* without his knowledge, and the defendant appearing, the plaintiff thereupon becomes nonſuit, after which execution is ſued out againſt him; if it appears by his

oath that he was made plaintiff without his knowledge or order, he shall be discharged. 34 *Car. B. R*: 5 *An*: 1 *Lil.* 500.

If there be a verdict and judgment against the plaintiff, he may bring another action of trespass and *ejectment* for the land, it being only to recover the possession, *&c.* wherein judgment is not final; and it is not like a writ of right, *&c.* where the title alone is tried. *Wood's Inst.* 547: *Trin.* 23 *Car. B. R.*

The reason of an *ejectment being never final* is not laid down in the general books on this subject, but in the notes to *Eunomus* vol. 4. *p.* 189, it is thus ingeniously stated.—The reason why it is not or cannot be final seems to be this.—That it is impossible from the *structure of the record* in this action, to plead a former, in bar of another, ejectment brought.—Because 1. The plaintiff and defendant are nominal and exist in most cases on record only; and consequently may be changed in a new action. But the identity both of plaintiff and defendant must be averred in pleading a former action in bar.—2. The term demised may be laid many different ways. An ejectment however, though in its nature not final at *law*, is capable of being made so in *equity*: and the Court of Chancery will on proper grounds grant a perpetual injunction; and not permit the possession of lands to be disturbed by a vain incessant litigation of the same question. See 2 *Eq. Ab.* 171. *c.* 1: 243. *c.* 11: 222. *c.* 1: 1 *Bro. P. C.* 266, 671: 2 *Stra.* 404.

FORM *of the* DECLARATION *in* EJECTMENT, *by Original*; *against the Casual Ejector, who gives Notice thereupon to the Tenant in Possession.*

Michaelmas, the 29th of King George the Third.

BERKS to wit. } WILLIAM STILES, *late of* Newbury, *in the said county, Gentleman, was attached, to answer* Richard Smith, *of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in* Sutton *in the county aforesaid, which* John Rogers *Esq. demised to the said* Richard Smith, *for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said* Richard *and against the peace of the lord the King*, &c. *And whereupon the said* Richard *by* Robert Martin *his attorney, complains, that whereas the said* John Rogers, *on the 1st day of* October *in the twenty-ninth year of the reign of the lord the King that now is, at* Sutton *aforesaid, had demised to the same* Richard *the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said* Richard *and his assigns, from the feast of Saint* Michael *the Archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended, by virtue of which demise the said* Richard *entered into the said tenement, with the appurtenances, and was possessed thereof; and the said* Richard *being so possessed thereof, the said* William *afterwards, that is to say, on the said 1st. day of* October *in the said 29th year with force and arms, that is to say, with swords, staves and knives entered into the said tenement, with the appurtenances, in the possession of the said* Richard, *which the said* John Rogers *demised to the said* Richard *in form aforesaid, for the term aforesaid, which is not yet expired, and ejected the said* Richard *out of his said farm, and other wrongs to him did, to the great damage of the said* Richard, *and against the peace of the said lord the King. Whereby the said* Richard *saith, that he is injured and damaged to the value of 20l. And thereupon he brings suit*, &c.

Martin, *for the plaintiff*, } *Pledges of* { John Doe,
Peters, *for the defendant*, } *Prosecution*, { Richard Roe.

Mr. George Saunders,

I am informed that you are in possession of, or claim title to, the premises mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action, as a casual ejector, and having no claim or title to the same, do advise you to appear next Hilary *term in his Majesty's court of King's Bench wheresoever he shall then be in* England, *by some attorney of that court, and then and there by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.*

Your loving friend

[Date] William Stiles.

The form of the declaration by bill does not differ very materially; and the above is inserted by way of elucidation, chiefly to such *tenants*, *&c.* as may peruse this article.

For further matter relating to Ejectment see *Bull. Ni. Pri*:—and *Gilbert's Ejectments* by *Runnington*.

EJECTUM, *Ejectus maris, quod è mari ejicitur*: Jet, Jetsom, Wreck, *&c.* See title *Wreck*.

EIGNE, Fr. *aisné*.] Eldest or first born; as bastard *eigne*, and mulier *puisne* are words used in our law for the elder a bastard, and the younger lawful born. See title *Bastard*.

EINECIA, from the Fr. *aisné*, i. e. primogenitus.] Eldership. Statute of *Ireland*, 14 *Hen.* 3. See *Esnecy*.

EIRE, or EYRE, Fr. *eire*, viz. *iter*, as a *grand eire*, that is, *magnis itineribus*.] Is the court of justices *itinerant*; and *justices in eyre* are those whom *Bracton* in many places calls *justiciarios itinerantes*. These justices, in ancient time, were sent with a general commission into divers counties to hear such causes as were termed *pleas of the crown*: and this was done for the ease of the people, who must else have been hurried to the King's Bench, if the cause were too high for the county court: it is said they were sent but once in every seven years. *Bract. lib.* 3. *c.* 11. *Horn's Mirror, lib.* 2. The *eyre of the forest* is the justice-seat; which, by an ancient custom was held every three years by the justices of the forest, *journeying* up and down for that purpose. *Bract. lib.* 3. *tract.* 2. *c.* 1 & 2: *Brit. c.* 2: *Cromp. Jurisd.* 156: *Manw. par.* 1. *p.* 121.—See title *Justices in Eyre*.

ELECTION, *electio.*] In law, is when a man is left to his own free will, to take or do one thing or another, which he pleases. And if it be given of several things, he who is the first agent, and ought to do the first act, shall have the *election*: as if a person make a lease, rendering rent, or a garment, *&c.* the lessee shall have the election, as being the first agent, by the payment of the one, or delivery of the other. *Co. Lit.* 144. And if *A.* covenant to pay *B.* a pound of pepper or sugar, before *Easter*; it is at the *election* of *A.* at all times before *Easter*, which

which of them he will pay: but if he pays it not before the ſaid feaſt, then afterwards it is at the election of *B.* to demand and have which he pleaſeth. *Dyer* 18: 5 *Rep.* 59: 11 *Rep.* 51.

If I give to you one of my horſes in my ſtable, there you ſhall have the *election*; for you ſhall be the firſt agent, by taking or ſeizure of one of them. *Co. Lit.* 145. If things granted are annual, and to have continuance, the *election* (where the law gives it him) remains to the grantor, as well after the day as before: but it is otherwiſe when to be performed at once. *Ibid.* When nothing paſſes to the feoffee or grantee before *election* to have the one thing or the other, the *election* ought to be made in the life of the parties; and the heir or executor cannot make the *election*: but where an eſtate or intereſt paſſes immediately to the feoffee, donee, *&c.* there *election* may be made by them, or their heirs or executors. 2 *Rep.* 36, 37. And when one and the ſame thing paſſeth to the donee or grantee, and ſuch donee or grantee hath *election* in what manner he will take it, there the intereſt paſſeth immediately, and the party, his heirs, *&c.* may make *election* when they will. *Co. Litt.* 145: 2 *Danv. Abr.* 761.

Where the *election* creates the intereſt, nothing paſſes till *election*; and if no *election* can be made, no intereſt will ariſe. *Hob.* 174. If the *election* is given to ſeveral perſons, there the firſt *election* made by any of the perſons ſhall ſtand: as if a man leaſes two acres to *A.* for life, remainder of one acre to *B.* and of the other acre to *C.* Now *B.* or *C.* may *elect* which of the acres he will have, and the firſt *election* by one binds the other. *Co. Lit.* 145: 2 *Rep.* 36. If a man leaſes two acres for life, the remainder of one in fee to the ſame perſon; and after licences the leſſee to cut trees in one acre, this is an *election* that he ſhall have the fee in the other acre. 2 *Danv.* 762. A *real election* concerning lands is deſcendible; and *election* of a tenant in tail may prejudice his iſſue. He in remainder may make an *election*, after the death of tenant for life; but if the tenant for life do make *election*, the remainder-man is concluded. *Moor, Ca.* 247, 832.

A perſon grants a manor, except one cloſe called *N.* and there are two cloſes called by that name, one containing nine acres, and the other but three acres; the grantee ſhall not in this caſe chooſe which of the ſaid cloſes he will have, but the grantor ſhall have *election* which cloſe ſhall paſs. 1 *Leon.* 268. But if one grants an acre of land out of a waſte or common, and doth not ſay in what part, or how to be bounded, the grantee may make his *election* where he will. 1 *Leon.* 30. If a man hath three daughters, and he covenants with another, that he ſhall have one of them to diſpoſe of in marriage; it is at the covenantor's *election* which of his daughters the covenantee ſhall have, and after requeſt ſhe is to be delivered to him. *Moor* 72: 2 *Danv.* 762. Where there are three coparceners of lands, upon partition the eldeſt ſiſter ſhall have the *election*: though if ſhe herſelf make the partition, ſhe loſeth it, and ſhall take laſt of all. *Co. Lit.* 166.—See title *Eſnecy*.

In conſideration that a perſon had ſold another certain goods, he promiſed to deliver him the value in ſuch pipes of wine as he ſhould chooſe; the plaintiff muſt make his election before he brings his action. *Style* 49. An *election* which of two things ſhall be done, ought not to be made merely by bringing an action; but before, that the defendant may know which he is to do, and it is ſaid he is not bound to tender either before the plaintiff hath made his choice which will be accepted. 1 *Mod.* 217: 1 *Nelſ. Abr.* 697.

A condition of a bond is, that the obligor ſhall pay 30*l.* or twenty kine, at the obligee's *election*, within ſuch a time; the obligee at his peril is to make his *election* within the time limited. 1 *Leon.* 69. Though in debt upon bond to pay 10*l.* on ſuch a day, or four cows, at the then *election* of the obligee, it was adjudged, that it was not enough for the defendant to plead that he was always ready, *&c.* if the obligee had made his *election*; for he ought to tender both at the day, by reaſon the word *then* relates to the day of payment. *Moor* 246: 1 *Nelſ.* 694, 695.

If a man hath an *election* to do one of two things, and he cannot by any default of a ſtranger, or of himſelf, or the obligee, or by the act of God, do the one; he muſt at his peril do the other. 1 *Lil. Abr.* 506.

Where the law allows a man two actions to recover his right, it is at his *election* to bring which he pleaſeth: and when a man's act may work two ways, both ariſing out of his intereſt, he hath *election* given him to uſe it either way. *Dyer* 20: 2 *Rol. Abr.* 787. Action of treſpaſs upon the caſe, or action of treſpaſs *vi & armis*, may be brought againſt one that reſcues a priſoner, at the *election* of the party damnified by the reſcous. And an action on the caſe, or an aſſiſe lies againſt him that ſurcharges a common, at the *election* of him that is injured thereby. 1 *Lil.* 504, 505. Alſo for a rent-charge out of lands, there may be a writ of annuity or diſtreſs, at the *election* of the grantee: but after the death of the grantor, if the heir be not charged, the *election* to bring annuity ceaſeth. *Dyer* 344.

A man was indicted of felony for entering an houſe and taking away money, and found guilty, and burnt in the hand; after which the perſon who loſt the money brought an action of treſpaſs againſt the other for breaking his houſe, and taking away his money; and it was held that the action would lie; for though it was at his *election* at firſt, either to prefer an indictment or bring an action, yet by the indictment he had made no *election*, becauſe that was not the proſecution of the party, but of the Crown. *Style* 347.

If a bargain and ſale be made of lands, which is inrolled, and at the ſame time the bargainor levies a fine thereof to the bargainee, he hath his *election* to take by one or the other. 4 *Rep.* 72. A wife hath her *election* which to take, of a jointure made after marriage, or her dower, on the death of the huſband, and not before. *Dyer* 358. When a leſſor hath *election* to charge the leſſee, or his aſſignee, *for rent*; if he accepts the rent of the aſſignee, he hath determined his *election*. 3 *Rep.* 24.

If a perſon hath *election* to pay or perform one of two things at a day, and he do neither of them at that day, his *election* is gone: and where a grant is made of two acres of land, the one for life, the other in fee, or in tail, and before any *election* the feoffee makes a feoffment of both; in this caſe the *election* will be gone, and the feoffor may enter upon which he will for the forfeiture. 2 *Rep.* 37. If money on a mortgage be to be paid to a man, his heirs, or executors, the mortgagor hath election to pay it to either: and if in a feoffment it be to pay to the feoffee, his heirs or aſſigns, and he enfeoff another, the

the feoffor may pay the money to the firſt or ſecond feoffee, &c. *Co. Lit.* 210.

In ſome caſes, where one hath cauſe of ſuit, he may ſue one perſon or another at his election; for there is an election of perſons, as well as of things. *Dyer* 204, 207. A man by deed binds himſelf and his heirs to pay money, and dies; the obligee may chuſe to ſue the heir, or the executors, although both of them have aſſets. *Popb.* 151. One may have election, when he hath recovered a debt, to have his execution by *elegit*, *fieri facias*, or *capias ad ſatisfaciendum*; but where he takes an *elegit*, and hath no fruit of it, he may reſort to another writ, though the election be entered on record. *Hob.* 57: *Dyer* 60, 369.

There is no election againſt the King in his grants, &c. 1 *Leon.* 30. And an act becoming void, will determine an election. *Hob.* 152. As to election with reſpect to one action or another, See 1 *Com. Dig.* title *Action*. And this Dict. titles *Condition*; *Agreement*.

ELECTION OF A CLERK OF STATUTES-MERCHANT, A writ that lies for the choice of a clerk aſſigned to take bonds called *ſtatutes-merchant*; and is granted out of the *Chancery*, upon ſuggeſtion that the clerk formerly aſſigned is gone to dwell at another place, or is under ſome impediment to attend the duty of his office, or hath not lands ſufficient to anſwer his tranſgreſſions, if he ſhould act amiſs, &c. *F. N. B.* 164.

ELECTION OF ECCLESIASTICAL PERSONS. There is to be a free election for the *dignities* of the *church*. *Stat.* 9 *Ed.* 2. *c.* 14. And none ſhall diſturb any perſon from making free election, on pain of great forfeiture. If any perſons that have a voice in elections, take any reward for an election in any church, college, ſchool, &c. the election ſhall be void: and if any of ſuch ſocieties reſign their places to others for reward, they incur a forfeiture of double the ſum; and the party giving it, and the party taking it, is incapable of ſuch place. *Stat.* 31 *Eliz. c.* 6. See further titles *Biſhops*; *Deans*.

ELECTION OF MEMBERS OF PARLIAMENT. See title *Parliament*.

ELECTION OF A VERDEROR OF THE FOREST, *electione viridariorum foreſtæ*.] A writ which lies for the choice of a *verderor*, where any of the verderors of the foreſt are dead, or removed from their offices, &c. It is directed to the ſheriff; and, as appears by the ancient writs of this kind, the verderor is to be elected by the freeholders of the county, in the ſame manner as coroners. *New Nat. Br.* 366.

ELEEMOSYNA, Alms; *dare in puram & perpetuam eleemoſynam*, to give in pure and perpetual alms, or *frank-almoigne*; as lands were commonly given in ancient times to religious uſes. *Cowel.*—See titles *Frank-almoigne*; *Tenure*.

ELEEMOSYNÆ, The poſſeſſions belonging to the churches. *Blount*.

ELEEMOSYNA REGIS, or *eleemoſyna aratri*. A penny which King *Æthelred* ordered to be paid for every *plough* in *England*, towards the ſupport of the *poor*: it was called *Eleemoſyna Regis*, becauſe it was at firſt appointed by the *King*. *Leg. Ethelred, cap.* 1.

ELEEMOSYNARIA, The place in a religious houſe, where the common *alms* were repoſited, and thence by the almoner diſtributed to the poor.

ELEEMOSYNARIUS, The almoner or peculiar officer who received the *eleemoſynary* rents and gifts, and in due method diſtributed them to pious and charitable uſes. There was ſuch a chief officer in all the *religious houſes*: and the greateſt of our *Engliſh biſhops* had anciently their almoners, as now the King hath. *Lindwood's Provincial, lib.* 1. *tit.* 12.—See title *Almoner*.

ELEEMOSYNARY CORPORATIONS, Corporate Bodies appointed over hoſpitals, &c. conſtituted for the perpetual diſtribution of the free alms, or bounty of the founder of them. See title *Corporation*.

ELEGIT, from the words in the writ, *elegit ſibi liberari*, becauſe the plaintiff hath *choſen* this writ of execution. See 3 *Comm.* 418.] A writ of execution, founded on the *Stat. W.* 2. 13. *E.* 1. *c.* 18; that lies for him who hath recovered debt or damages, or, upon a recognizance in any court againſt one not able in his goods to ſatisfy the ſame; directed to the ſheriff, commanding him to make delivery of a *moiety* of the party's *land*, and *all his goods*, beaſts of the plough excepted. And the creditor ſhall hold the ſaid moiety of the land ſo delivered unto him, until his whole debt and damages are paid and ſatisfied; and during that term he is *tenant* by *elegit*. *Reg. Orig.* 299: *Co. Lit.* 289.

Upon an *elegit*, the ſheriff is to deliver one half of all houſes, lands, meadows and paſtures, rents, reverſions, and hereditaments wherein the defendant had any ſole eſtate in fee, or for life, into whoſe hands ſoever the ſame do afterwards come; but not of a right only to land, an annuity, copyhold lands, &c. *Dyer* 206: 7 *Rep.* 49: *Plowd.* 224. And by it, the plaintiff, &c. elects *omnia bona & catalla* of the defendant, *præter boves & aſros de caruca ſua*; and alſo a moiety of all the lands which the defendant had at the time of the judgment recovered: but it ought to be ſued within a year and a day after the judgment. *F. N. B.* 267.

But though by this ſtatute, the lands of the debtor are made liable, as well as his perſonal eſtate; yet if the creditor takes out an *elegit*, and it appears to the ſheriff, that there are goods and chattels ſufficient of the debtor's, to ſatisfy the debt, *he ought not to extend the lands*. 2 *Inſt.* 395. But an *elegit* executed upon goods only, is not a *fieri facias*, for a *fieri facias* is executed by ſale by the ſheriff; but the *elegit* by the appraiſement of the goods by a jury, and delivery to the party. 1 *Sid.* 184: 1 *Lev.* 92: 1 *Keb.* 105, 261, 465, 556, 692.

Upon this writ the ſheriff is to impanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraiſe the ſame, and alſo to inquire as to his lands and tenements; and upon ſuch inquiſition the ſheriff is to deliver all the goods and chattels (except the beaſts of the plough) and a moiety of the lands to the party, and muſt return his writ, in order to record ſuch inquiſition in that court, out of which the *elegit* iſſued: and when the jury have found the ſeiſin and value of the land, the ſheriff, and not the jury, is to ſet out and deliver a moiety thereof to the plaintiff, by metes and bounds. *Cro. Car.* 319.

All writs of execution may be good, though not returned, except an *elegit*; but that *muſt be returned*, becauſe an inquiſition is to be taken upon it, and that the court may judge of the ſufficiency thereof. 4 *Rep.* 65, 74. It has been ruled, that if more than a moiety of the lands is delivered on an *elegit* by the ſheriff, the ſame is void for the whole. *Sid.* 91: 2 *Salk.* 563. And the ſheriff cannot ſell any thing, but what is found in the inquiſi-

tion;

tion; and therefore if he ſell a term for years, &c. miſrecited in the inquiſition, as to the commencement thereof, the ſale is void. 4 *Rep.* 74.

In debt upon bond, the defendant before the trial conveyed his lands to another, &c. but he himſelf took the profits; notwithſtanding this conveyance, a moiety of his lands was extended on an *elegit*. *Dyer* 294: 3 *Rep.* 78. If two perſons have each of them a judgment againſt one debtor and he who hath the firſt judgment, brings an *elegit*, and hath the moiety of the lands delivered to him in execution; and then the other judgment creditor, ſues out another *elegit*, he ſhall have only a *moiety of that moiety*, which was not extended by the firſt judgment. *Cro. Eliz.* 483.

When lands are once taken in execution on an *elegit*, and the writ is returned and filed, the plaintiff ſhall have no other execution. 1 *Lev.* 92. And if the defendant hath lands in more counties than one, and the plaintiff awards an *elegit* to one county, and extends the lands upon the *elegit*, and afterwards files the writ, he cannot, after that, ſue out an *elegit* into the other counties: but he may immediately after entry of the judgment upon the judgment-roll, award as many *elegits*, into as many counties as he thinks fit, and execute all, or any of them, at his pleaſure. 1 *Lil. Abr.* 509: *Cro. Jac.* 246.

A man had lands in execution, upon an *elegit*, and afterwards moved for a new *elegit*, upon proof that the defendant had other lands, not known to the creditor, at the time when the execution was ſued out; and it was adjudged, that if he had accepted of the firſt by the delivery of the ſheriff, he could not afterwards have a new *elegit*; but when the ſheriff returns the writ, he may waive it, and then have a new extent. *Cro. Eliz.* 310: 1 *Nelſ. Abr.* 699. *Sed qu.*

If the defendant dies in priſon, ſo that there is no execution with ſatisfaction, the plaintiff ſhall have an *elegit* afterwards. 5 *Rep.* 86. And if all the lands extended on an *elegit* be evicted by a better title, the plaintiff may take out a new execution. 4 *Rep.* 66. Where one having land by *elegit*, is wholly evicted out of it, he may have a further execution, either againſt the defendant's lands or goods, as he might have had at firſt; ſave only, he muſt bring a *ſcire facias* againſt the defendant, or him that comes in under him; but if the eviction be of part of the land, or for a time only, ſo that the plaintiff may take his full execution by holding it over; there he cannot have any new execution, by the *Stat.* 32 *H.* 8. *c.* 5. 2 *Shep. Abr.* 115.

Where an *elegit* is ſued upon a judgment, the levying of goods thereon for part only, is no impediment, but the plaintiff may bring another *elegit pro reſiduo*, and take the lands. 1 *Lev.* 92. On a *nihil* returned upon an *elegit*, there may be brought a *capias ad ſatisfaciendum*, or *fieri facias*. 1 *Leon.* 176. And an *elegit* may be ſued after a *fieri facias* returned *nulla bona*, or where part is levied by it; and after a *capias ad ſatisfaciendum* returned *non eſt inventus*. *Hob.* 57.

A perſon in execution was ſuffered to eſcape, and then he died; the land which he had at the time of the judgment may be extended, by *elegit*, upon a *ſcire facias* brought againſt his heir, as tertenant. *Dyer* 271.

A man may have an aſſiſe of the land which he hath in execution by *elegit*, if he be deforced thereof. *Stat. Weſtm.* 2. *c.* 18. And if tenant by *elegit* alien the land in fee, &c. he who hath right ſhall have againſt him and the alienee, an aſſiſe of *novel diſſeiſin*. *Ibid.* At a trial at bar in *C. B.* the court delivered for law, that where lands are actually extended, and delivered upon an *elegit*, a fine levied on thoſe lands, and non-claim, will bar the intereſt of the tenant by *elegit*. 1 *Mod.* 217.

If tenant by *elegit*, be put out of poſſeſſion before he hath received ſatisfaction for his debt, by the heir at law, &c. he may bring action of treſpaſs, or re-enter and hold over till ſatisfied: but after ſatisfaction received, the defendant may enter on the tenant by *elegit*. 4 *Rep.* 28, 67. Tenants by *elegit*, ſtatutes-merchant, &c. are not puniſhable for waſte by action of waſte: but the party, againſt whom execution is ſued, is to have a writ of *venire facias ad computandum*, &c. and there the waſte ſhall be recovered in the debt: though it is ſaid there is an old writ of waſte in the Regiſter, for him in reverſion againſt tenant by *elegit*, committing waſte on lands which he hath in execution. 6 *Rep.* 37: *New Nat. Br.* 130. On tenant by *elegit*'s accounting, if the money recovered by the plaintiff is levied out of the lands, the defendant ſhall recover his land; and if more be received by waſte, &c. he ſhall have damages. *Terms de Ley.*—See this Dict. titles *Eſtate*; *Extent*; *Execution*.

ELF-ARROWS, Were *flint-ſtones* ſharpened on each ſide in ſhape of *arrow-heads*, made uſe of in war by the ancient *Britons*; of which ſeveral have been found in *England*, and greater plenty in *Scotland*, where it is ſaid the common people imagine they drop from the clouds; or are made by the *elves* or fairies.

ELISORS, *Electors.*] In caſes of challenge to the ſheriff and coroners for partiality, &c. the *venire* to ſummon a jury ſhall be directed to two clerks of the Court, or two perſons of the county named by the Court and ſworn. And theſe two who are called *Eliſors* ſhall indifferently name or chooſe the jury; and their return is final; no challenge being allowed to their array. *Forteſc. de Laud. leg. c.* 25: *Co. Lit.* 158.

ELKE, A kind of yew to make bows of. *Stat.* 32 *H.* 8. *cap.* 9.

ELOINE, from the Fr. *eſloiſner.*] To remove or ſend a great way off: in this ſenſe it is uſed where it is ſaid that if ſuch as are within age be *eloined*, ſo that they cannot come to ſue perſonally, their next friends ſhall be admitted to ſue for them. *Stat.* 13 *Ed.* 1. *cap.* 15.

ELONGATA, Is a return of the ſheriff in *replevin*, that *cattle* are not to be found, or are removed, ſo that he cannot make deliverance, &c. 2 *Lil. Abr.* 454, 458.

ELOPEMENT, from the Belg. *E'e matrimonium & loopen, currere*; or more probably from the Sax. *Gelooran*, to depart; the *Saxon r* being eaſily perverted from its ſhape into a *p*. *Blount.*] Is where a married woman of her own accord, goes away and departs from her huſband, and lives with an adulterer. See titles *Adultery*; *Baron and Feme*.

ELY, A royal franchiſe or county palatine. See title *Counties-Palatine*.

EMBARGO, A prohibition upon ſhipping, not to go out of any port, on a war breaking out, &c.

EMBASSADOR, See *Ambaſſador*.

EMBLEMENTS, from the Fr. *emblavence de bled*, corn ſprung or put up above ground.] The profits of ſown land: but the word is ſometimes uſed more largely, for any products that ariſe naturally from the ground, as

grais,

graſs, fruit, &c. In ſome caſes he who ſowed the *corn* ſhall have the *emblements*; and in others not: a leſſee at will ſows the land, he ſhall have the *emblements*; though if the leſſee determines the will himſelf, he ſhall not have them, but the leſſor. 5 *Rep.* 116. If leſſee at will ſows the land with grain, or other thing yielding annual profit, and the leſſor enters before ſeverance; yet the leſſee ſhall have it: but where the leſſee plants young fruit-trees, or other trees, or ſows the land with acorns, &c. he ſhall not have theſe: and if ſuch tenant by good huſbandry make the graſs to grow in greater abundance; or ſow the land with hay-ſeed, by which means it is increaſed, if the leſſor enters on the leſſee, the leſſee ſhall not have it, *becauſe graſs is the natural* profit *of the ſoil.* *Co. Lit.* 55, 56.

Where tenant for life ſows the land, and dies, his executors ſhall have the *emblements*, and not the leſſor or him in reverſion; by reaſon of the uncertainty of the eſtate. *Cro. Eliz.* 463. And if a tenant for life plants hops, and dies before ſeverance, he in reverſion ſhall not have them, but the executors of tenant for life. *Cro. Car.* 515. If tenant for years, (if he ſo long live) ſow the ground, and die before ſeverance; the executor of the leſſee ſhall have the corn: and where leſſee for life leaſes for years, if the leſſee for years ſow the land, and after leſſee for life dies before ſeverance, the executor of leſſee for years ſhall have the *emblements.* 2 *Danv. Abr.* 765.

So it is alſo if a man be tenant for the life of another; and *ceſtui que vie*, (he on whoſe life the land is held,) dies after the corn ſown, the tenant *pur auter vie* ſhall have the *emblements.* The ſame is alſo the rule if a life-eſtate be determined by the act of law. Therefore if a leaſe be made to huſband and wife during coverture, (which gives them a determinable eſtate for life,) and the huſband ſows the land; and afterwards they are divorced *à vinculo matrimonii*, the huſband ſhall in this caſe have the *emblements*; for the ſentence of divorce is the act of the law. 5 *Rep.* 116. But if an eſtate for life be determined by the tenant's own act, (as by forfeiture for waſte committed; or if a tenant during widowhood, thinks proper to marry;) in theſe and ſimilar caſes, as in that of a tenant at will determining his own tenure, the tenants ſhall not be entitled to take the *emblements.* 1 *Inſt.* 55.

If tenant for years ſows ground, and before his corn is ſevered, the term which is certain expires; the leſſor or he in reverſion ſhall have the *emblements*; but he muſt firſt enter on the lands. 1 *Lil. Abr.* 511. A leſſee for life or years ſows the land, and after ſurrenders, &c. before ſeverance, the leſſor ſhall have the corn. 2 *Danv.* 764. If there be leſſee for years upon condition that if he commit waſte, &c. his eſtate ſhall ceaſe; if he ſows the ground with corn, and after doth waſte, the leſſor ſhall have the corn. *Co. Lit.* 55. And where a lord enters on his tenant for a forfeiture, he ſhall have the corn on the ground. 4 *Rep.* 21.

Though if a feme copyholder for her widowhood ſows the land, and before ſeverance takes huſband, ſo that her eſtate is determined, the lord ſhall have the *emblements*; yet if ſuch a feme copyholder *durante viduitate*, leaſes for one year according to cuſtom, and the leſſee ſows the land, and afterwards the copyholder takes huſband, the leſſee ſhall have the corn. 2 *Danv.* 764. If a huſband holds lands for life, in right of his wife, and ſow the land, and after ſhe dies before ſeverance, he ſhall have the *emblements.* *Dyer* 316: 1 *Nelſ. Abr.* 701. And where the wife hath an eſtate for years, life, or in fee, and the huſband ſows the land, and dieth, his executors ſhall have the corn. 1 *Nelſ.* 702. But if the huſband and wife are jointtenants, though the huſband ſow the land with corn, and dies before ripe, the wife and not his executors ſhall have the corn, ſhe being the ſurviving jointenant. *Co. Lit.* 199.

When a widow is endowed with lands ſown, ſhe ſhall have the *emblements*, and not the heir. 2 *Inſt.* 81. And a tenant in dower may diſpoſe of corn ſown on the ground; or it may go to her executors, if ſhe die before ſeverance. 2 *Inſt.* 80, 81. And by the particular proviſions of *Stat.* 28 *H.* 8. *c.* 11, if a Parſon ſows his glebe, and dies, his executors ſhall have the corn: and ſuch parſon may by will diſpoſe thereof. 1 *Rol. Abr.* 655.

If tenant by ſtatute-merchant ſows the land, and before ſeverance a caſual profit happens, by which he is ſatisfied, yet he ſhall have the corn. *Co. Lit.* 55. Lands ſown are delivered in execution upon an extent, the perſon to whom delivered ſhall have the corn on the ground. 2 *Leon.* 54. And judgment was given againſt a perſon, and then he ſowed the land, and brought a writ of error to reverſe the judgment, but it was affirmed; and adjudged that the recoveror ſhall have the corn. 2 *Bulſt.* 213.

If a diſſeiſor ſows the land, and afterwards cuts the corn, but before it is carried away, the diſſeiſee enters; the diſſeiſee ſhall have the corn. *Dyer* 31: 11 *Rep.* 52. A perſon ſeiſed in fee of land dies, having a daughter, and his wife *privement enſeint* with a ſon; the daughter enters and ſows the land, and before ſeverance of the corn, the ſon is born; in this caſe the daughter ſhall have the corn, her eſtate being lawful, and defeated by the act of God; and it is for the public good that the land ſhould be ſown. *Co. Lit.* 55.

A man ſeiſed in fee-ſimple ſows land, and then deviſes the land by will, and dies before ſeverance; the deviſee ſhall have the corn; and not the deviſor's executors. *Winch* 52: *Cro. Eliz.* 61. If a perſon deviſes his lands ſown, and ſays nothing of the corn, the corn ſhall go with the land to the deviſee: and when a man ſeiſed of land, in fee or in tail, ſows it, and dies without will, it goes to the executor, and not the heir. 10 *Ed.* 4. 1 *b*: 21 *H.* 6. 30 *a*: 37 *H.* 6. 35 *b.* A deviſee for life dies, he in remainder ſhall have the *emblements* with the land. *Hob.* 132.

Tenant in fee ſows the land, and deviſes it to *A.* for life, remainder to *B.* for life, and dies; *A.* dies before ſeverance, *B.* in remainder ſhall have the corn, and not the executor of the firſt tenant for life. *Cro. Eliz.* 61, 464. Where there is a right to *emblements*, ingreſs, egreſs and regreſs are allowed by law, to enter, cut and carry them away, when the eſtate is determined, &c. 1 *Inſt.* 56.

EMBLERS DE GENTZ, *Fr.*] A ſtealing from the people: The word occurs in our old rolls of Parliament. Whereas divers murders, *emblers de gentz*, and robberies are committed, &c. *Rot. Parl.* 21 *Ed.* 3. *n.* 62.

EMBRACEOR, Fr. *embraſour.*] He that when a matter is in trial between party and party comes to the bar with one of the parties, having received ſome reward ſo to do, and ſpeaks in the caſe; or privately labours the jury, or ſtands in the court to ſurvey and overlook them, whereby they are awed or influenced, or put in fear or doubt

doubt of the matter. *Stat.* 19 *H.* 7. *cap.* 13. But lawyers, attornies, *&c.* may ſpeak in the caſe for their clients, and not be *embraceors*: alſo the plaintiff may labour the jurors to appear in his own cauſe; but a ſtranger muſt not do it: for the bare writing a letter to a perſon, or parol requeſt for a juror to appear, not by the party himſelf, hath been held within the ſtatutes againſt embracery and maintenance. *Co. Lit.* 369: *Hob.* 294: 1 *Saund.* 391. If the party himſelf inſtruct a juror, or promiſe any reward for his appearance, then the party is likewiſe an *embraceor*. And a juror may be guilty of embracery, where he by indirect practices gets himſelf ſworn on the *tales*, to ſerve on one ſide. 1 *Lil.* 513. There are divers ſtatutes relating to this offence and *maintenance*. See further title *Maintenance*, and *poſt*, *Embracery*.—See alſo titles *Jury*; *Decies tantum*.

EMBRACERY. An attempt to influence a Jury corruptly to one ſide, by promiſes, perſuaſions, entreaties, money, entertainments, and the like. The puniſhment for the perſon embracing, (the Embraceor) is by fine and impriſonment; and for the Juror ſo embraced, if it be by taking money, the puniſhment is, (by various *Stats. of Ed.* III. *viz.* 5 *E.* 3. *c.* 10: 34 *E.* 3. *c.* 8: 38 *E.* 3. *c.* 12,) perpetual infamy, impriſonment for a year, and forfeiture of ten-fold value. 4 *Comm.* 140: See 1 *Hawk. P. C. c.* 85; and the preceding title.

EMBRING DAYS, from *embers*, *cineres*, ſo called either becauſe our anceſtors, when they *faſted*, ſat in aſhes, or ſtrewed them on their heads.] Thoſe days which the ancient Fathers called *Quatuor Tempora jejunii*, and of great antiquity in the church: they are obſerved on *Wedneſday*, *Friday* and *Saturday* next after *Quadrageſima Sunday*, (or the firſt *Sunday* in *Lent*) after *Whitſunday*, *Holyrood-day* in *September*, and St. *Lucy*'s day about the middle of *December*. Theſe days are mentioned by *Britton*, *c.* 53, and other writers; and particularly in the *Stat.* 2 & 3 *Ed.* 6. *c.* 19. Our almanacks call them the *Ember Weeks*.

EMBROIDERY. By *Stat.* 22 *Geo.* 2. *c.* 36, No foreign *embroidery*, or gold or ſilver brocade, ſhall be imported, upon pain of being forfeited and burnt, and penalty of 100*l.* for each piece. No perſon ſhall ſell or expoſe to ſale any foreign *embroidery*, gold or ſilver thread, lace, fringe, brocade, or make up the ſame into any garment, upon pain of having it forfeited and burnt, and penalty of 100*l.* All ſuch *embroidery*, *&c.* found, may be ſeized and burnt, and the mercer, *&c.* in whoſe cuſtody it was found, ſhall forfeit 100*l.*—See title *Manufactures*; *Navigation-Acts*.

EMENDALS, *emenda*.] An old word ſtill made uſe of in the accounts of the Society of the *Inner Temple*; where ſo much in *emendals* at the foot of an account, on the balance thereof, ſignifies ſo much money in the bank or ſtock of the houſes, for reparation of loſſes or other emergent occaſions: *quod in reſtaurationem damni tribuitur. Spelm.*

EMENDARE, *Emendam ſolvere*.] To make *amends* for any crime or treſpaſs committed. *Leg. Edw. Confeſſ. c.* 35. Hence a capital crime, not to be attoned by fine, was ſaid to be *inemendabile*. *Leg. Canut. p.* 2.

EMENDATIO, Hath been uſed for the power of *amending* and correcting abuſes, according to ſtated rules and meaſures; as *emendatio panni*, the power of looking to the aſſize of cloth, that it be of juſt meaſure; *emendatio panis & cerviſiæ*, the aſſizing of bread and beer, *&c.*

privileges granted to lords of manors, and executed by their officers appointed in the court-leet, *&c.* *Paroch. Antiq.* 196.

EMPANEL, See *Impanel*.

EMPEROR, *imperator*.] The higheſt ruler of large kingdoms and territories; a title anciently given to renowned and victorious generals of armies, who acquired great power and dominion. And this title is not only given to the *Emperor of Germany*, as *Emperor of the Romans*; but was formerly belonging to the *Kings of England*, as appears by a charter of King *Edgar*.

ENBREVER, *Fr.*] To write down in ſhort. *Brit.* 56.

ENCAUSTUM, See *Incauſtum*.

ENCHESON, A *French* word uſed in our law books and ſtatutes, ſignifying the occaſion, cauſe or reaſon wherefore any thing is done. *Stat.* 5 *Ed.* 3. *c.* 3.

ENDEAVOUR. Where one who has the uſe of his reaſon *endeavours* to commit felony, *&c.* he ſhall be puniſhed by our laws, but not to that degree as if he had actually committed it: as if a man aſſault another on the highway, in order to a robbery, but takes nothing from him, this is not puniſhed as felony, becauſe the felony was not accompliſhed; though as a miſdemeanor, it is liable to fine and impriſonment. 3 *Inſt.* 68, 69, 161: 11 *Rep.* 98. And in this caſe, by *Stat.* 7 *Geo.* 2. *c.* 21, the offender ſhall be tranſported. See titles *Intendment*; *Robbery*.

ENDOWMENT, The beſtowing or aſſuring of *dower* on a woman. It is ſometimes uſed metaphorically for the ſettling a proviſion upon a parſon, or building of a *church* or chapel; and the ſevering a ſufficient portion of tithes, *&c.* for a vicar, towards his perpetual maintenance, when the benefice is appropriated. See *Stats.* 15 *R.* 2. *c.* 6: 4 *H.* 4. *c.* 12.

ENEMY, *inimicus*.] Is properly an alien or foreigner, who in a public capacity, and in an hoſtile manner, invades any kingdom or country; and whether ſuch perſons come hither by themſelves, or in company with *Engliſh* traitors, they cannot be puniſhed as traitors, but ſhall be dealt with by martial law. *H. P. C.* 10, 15. But the ſubjects of a foreign prince coming into *England*, and living under the protection of the King, if they take up arms, *&c.* againſt the government, they may be puniſhed as traitors, not as alien enemies. If a priſoner be reſcued by enemies, the gaoler is not guilty of an eſcape; as he would have been if ſubjects had made the reſcue, when he might have a legal remedy againſt them. See *Hawk. P. C.* and titles *Alien*; *Eſcape*; and as to adhering to and ſuccouring the King's enemies, ſee title *Treaſon*.

ENFRANCHISE, Fr. *enfranchir*.] To make free, or incorporate a man into any ſociety, *&c.* It is alſo uſed where one is made a free *denizen*, which is a kind of incorporation in the *Commonwealth*.

ENFRANCHISEMENT, *Fr.* from *franchiſe*, i. e. *libertas*.] Is when a perſon is incorporated into any ſociety or body politick; and it ſignifies the act of incorporating. He that by charter is made a *denizen*, or freeman of *England*, is ſaid to be *enfranchiſed*, and let into the general liberties of the ſubjects of the kingdom: and he who is made a citizen of *London*, or other city, or free burgeſs of any town corporate, as he is made partaker of thoſe liberties that appertain to the corporation, is in the common ſenſe of the word a perſon *enfranchiſed*. And when a man is *enfranchiſed* into the freedom of any city or borough,

rough, he hath a freehold in his freedom during life; and may not, for endeavouring any thing only againſt the corporation, loſe and forfeit the ſame. 11 *Rep.* 91. See title *Corporation*. A villein was ſaid to be *enfranchiſed*, when he was made free by his lord, and rendered capable of the benefits belonging to freemen.

ENGLECERY, or ENGLESCHIRE, *Engleceria.*] An old word ſignifying the being an *Engliſhman*. When *Canutus* the *Dane* came to be King of *England*, he at the requeſt of the Nobility ſent back his army into *Denmark*, but kept ſome *Danes* behind to be a guard to his perſon; and he made a law for the preſervation of his *Danes* (who were often privately made away with by the *Engliſh*) that if an *Engliſhman* killed a *Dane*, he ſhould be tried for the murder; or if he eſcaped, the town or hundred where the fact was done, was to be amerced *ſixty-ſix marks* to the King: ſo that after this law, whenever a murder was committed, it was neceſſary to prove the party ſlain to be an *Engliſhman*, that the town might be exempted from the amercement; which proof was called *Englecery*, or *Engleſchire*. And whereas if a perſon were privately ſlain, he was in ancient time accounted *Francigena*, which word comprehended every alien, eſpecially the *Danes*: it was therefore ordained, that where any perſon was murdered, he ſhould be adjudged *Francigena*, unleſs *Englecery* were proved, and that it was made manifeſt he was an *Engliſhman*. The manner of proving the perſon killed to be an *Engliſhman*, was by two witneſſes who knew the father and mother, before the Coroner, &c. *Bract. lib.* 3. *tract.* 2. *cap.* 15: *Fleta, lib.* 1. *cap.* 30: 7 *Rep.* 16. This *Englecery*, by reaſon of the great abuſes and trouble that afterwards were perceived to grow by it, was utterly taken away by *Stat.* 14 *Ed.* 3. *ſt.* 1. *c.* 4.—See 4 *Comm.* 195: and this Dict. title *Murder*.

ENGLISH. Pleas, records, bonds, and proceedings in courts of juſtice, to be in *Engliſh*. *Stat.* 4 *Geo.* 2. *c.* 26. And ſee *Stats.* 5 *Geo.* 2. *c.* 27: 6 *Geo.* 2. *c.* 14: and this Dict. titles *Pleading*; *Proceſs*, &c.

ENGLISHMEN, The names of, to be certified into the *Chancery* who are abroad in *Holland* and *Flanders*, &c. and to pay ſuch impoſitions as *aliens* do. *Stat.* 14 & 15 *H.* 8. *c.* 4.

ENGRAVERS, That ſhall invent, deſign and *engrave* prints, to have the ſole right of printing them for fourteen years, which ſhall be engraved with the names of the proprietors; and others copying, and ſelling ſuch prints, though by varying, &c. without their conſent, ſhall forfeit 5 *l.* for every print, and alſo the plates and ſheet, &c. *Stat.* 8 *Geo.* 2. *c.* 13.—See title *Literary Property*.

ENGROSSER, See *Ingroſſer*; *Foreſtaller*.

To ENHANCE. To raiſe the price of goods or merchandize. See title *Foreſtaller*.

ENPLEET, Anciently uſed for *implead*.—They may *enplect* and be *enplected* in all courts. *Mon. Ang. tom.* 2. *fo.* 412.

ENQUIRY, Writ of; See title *Writ*.

ENSIENT, or ENSEINT, The being with child. *Law Fr. Dict.*

ENSIENTURE, or *Enſiency*, Of any woman condemned for a crime, is no ground to ſtay judgment; but it may be afterwards alledged againſt execution. 2 *Hale's Hiſt. P. C.* 413.

ENTAIL. See title *Tail*.

ENTERPLEADER, See *Interpleader*.

ENTIERTIE, from the French *entierté*, entireneſs.] Is a contradiſtinction in our books to moiety, denoting the whole: and a bond, damages, &c. are ſaid to be *entire*, when they cannot be divided or apportioned.

ENTIRE TENANCY, Contrary to *ſeveral tenancy*, and ſignifying a ſole poſſeſſion in one man; whereas the other is a joint or common poſſeſſion in two or more. *Brook*.

ENTRY, Fr. *entrée*, i. e. *ingreſſus, introitus.*] Signifies the taking poſſeſſion of lands or tenements, where a man hath title of *entry*: and it is alſo uſed for a *writ of poſſeſſion*. This *entry* into lands, is where any man enters into or takes poſſeſſion of any lands, &c. in his proper perſon; and is an actual *entry* when made by a man's ſelf, or by attorney by warrant from him that hath the right; or it is an *entry in law*, for a *continual claim* is an *entry* implied by law, and has the ſame force with it. *Lit.* § 419. There is a *right of entry*, when the party claiming may for his remedy either enter into the land, or have an action to recover it: and a *title of entry*, where one hath lawful *entry* given him in the lands, which another hath, but has no action to recover till he hath entered. *Plowd.* 558: 10 *Rep.* 48: *Finch's Law* 105.

ENTRY, may be defined to be an extrajudicial and ſummary remedy, againſt certain ſpecies of injury by ouſter, uſed by the legal owner, when another perſon who hath no right, hath previouſly taken poſſeſſion of lands or tenements. In this caſe, the party entitled may make a formal but peaceable entry thereon, declaring that thereby he takes poſſeſſion; which notorious act of ownerſhip, is equivalent to a feodal inveſtiture by the lord: or he may enter on any part of it in the ſame county, declaring it to be in the name of the whole. *Lit.* § 417. But if it lies in different counties, he muſt make different entries; for the notoriety of ſuch entry or claim to the *pares* or freeholders of *Weſtmorland*, is not any notoriety to the *pares* or freeholders of *Suſſex*. Alſo if there be *two* diſſeiſors, the party diſſeiſed muſt make his entry on *both*; or if *one* diſſeiſor has conveyed the lands with livery to *two* diſtinct feoffees, entry muſt be made on *both*. *Co. Litt.* 252. For as their ſeiſin is diſtinct, ſo alſo muſt be the act which deveſts that ſeiſin. If the claimant be deterred from entering by menaces or bodily fear, he may make *claim* as near to the eſtate as he can, with the like forms and ſolemnities: which claim is in force for only a year and a day. *Litt.* § 422. And this claim, if it be repeated once in the ſpace of every year and day, (which is called *continual claim*) has the ſame effect with, and in all reſpects amounts to, a legal entry. *Ibid.* § 419, 23.—See this Dict. title *Claim*. Such an entry gives a man ſeiſin; or puts into immediate poſſeſſion, him that hath right of entry on the eſtate; and thereby makes him complete owner, and capable of conveying it from himſelf by either deſcent or purchaſe. *Co. Lit.* 15.

This remedy by entry takes place in three only of the five ſpecies of ouſter, *viz. Abatement*, *Intruſion*, and *Diſſeiſin*; for, as in theſe the original entry of the wrongdoer was unlawful, they may therefore be remedied by the mere entry of him who hath right. But, upon a *Diſcontinuance*, or *Deforcement*, the owner of the eſtate cannot enter, but is driven to his action: for herein the original entry being lawful, and thereby an apparent right of poſſeſſion being gained, the law will not ſuffer that

that right to be overthrown by the mere act or entry of the claimant. Yet a man may enter on his tenant by ſufferance: for ſuch tenant hath no freehold, but only a bare poſſeſſion; which may be defeated, like a tenancy at will, by the mere entry of the owner. But if the owner thinks it more expedient to ſuppoſe or admit ſuch tenant to have gained a tortious freehold, he is then remediable by writ of entry, *ad terminum qui præteriit.* 1 *Inſt.* 57, 237, 8.—See title *Diſſeiſin.*

On the other hand, in caſe of *Abatement*, *Intruſion*, or *Diſſeiſin*, where entries are generally lawful, this right of entry may be *tolled*, that is, *taken away*, by deſcent. Deſcents which take away entries, are when any one, ſeiſed by any means whatſoever of the inheritance of a corporeal hereditament, dies, whereby the ſame deſcends to his heir: in this caſe, however feeble the right of the anceſtor might be, the entry of any other perſon who claims title to the freehold is taken away; and he cannot recover poſſeſſion againſt the heir by this ſummary method, but is driven to his action to gain a legal ſeiſin of the eſtate. *Lit.* § 385; 413.

In general therefore, no man can recover poſſeſſion by mere entry on lands, which another hath by deſcent. Yet this rule hath ſome exceptions; eſpecially if the claimant were under any legal diſabilities, during the life of the anceſtor, either of infancy, coverture, impriſonment, inſanity, or being out of the realm: in all which caſes, there is no neglect or *laches* in the claimant, and therefore no deſcent ſhall bar, or take away his entry. *Co. Lit.* 246. And this title of taking away entries by deſcent, is ſtill farther narrowed by *Stat.* 32 *Hen.* 8. *c.* 33; which enacts, that if any perſon diſſeiſes or turns another out of poſſeſſion, no deſcent to the *heir* of the diſſeiſor ſhall take away the entry of him that has right to the land, unleſs the diſſeiſor had peaceable poſſeſſion five years next after the diſſeiſin. But the ſtatute, on feodal reaſons, does not extend to any *feoffee* or *donee* of the diſſeiſor, mediate or immediate. *Ibid.* 256.

By the ſtatute of limitations, 21 *Jac.* 1. *c.* 16, it is enacted, that no entry ſhall be made by any man upon lands, unleſs within 20 years after his right ſhall accrue. And by *Stat.* 4 & 5 *An. c.* 16, no entry ſhall be of force to ſatisfy the ſaid ſtatute of limitations, or to avoid a fine levied of lands, unleſs an action be thereupon commenced within one year after, and proſecuted with effect. See further title *Claim.*

This remedy by entry muſt be purſued, according to *Stat.* 5 *Ric.* 2. *ſt.* 1. *c.* 8, in a peaceable and eaſy manner; and not with force or ſtrong hand. For, if one turns or keeps another out of poſſeſſion *forcibly*, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate reſtitution; which puts the ancient poſſeſſor in *ſtatu quo*; the criminal injury or public wrong, by breach of the King's peace, is puniſhed by fine to the King. See this Dict. title *Forcible Entry.*

THE WRIT OF ENTRY is a poſſeſſory remedy which diſproves the title of the tenant or poſſeſſor, by ſhowing the unlawful means by which he entered, or continues poſſeſſion. *Finch. L.* 261. The writ is directed to the Sheriff, requiring him to, "Command the tenant of the land, that he render [in Latin, *præcipe quod reddat*] to the demandant the land in queſtion, which he claims to be his right and inheritance; and into which, as he ſaith, the ſaid tenant had not entry, but by (or after) a *diſſeiſin*, *intruſion*, or the like, made to the ſaid demandant, within the time limited by law for ſuch actions; or that upon refuſal he do appear in court on ſuch a day, to ſhew wherefore he hath not done it." This is the original proceſs, the *præcipe*, upon which all the reſt of the ſuit is grounded; wherein it appears, that the tenant is required, either to deliver ſeiſin of the lands, or to ſhow cauſe why he will not. This cauſe may be either a denial of the fact, of having entered by or under ſuch means as are ſuggeſted, or a juſtification of his entry, by reaſon of title in himſelf, or in thoſe under whom he makes claim; whereupon the poſſeſſion of the land is awarded to him who produces the cleareſt right to poſſeſs it.

The *Writs of entry* are of divers kinds, diſtinguiſhed into four degrees, according to which the writs are varied. The *firſt* degree is a writ of *entry ſur diſſeiſin*, that lieth for the diſſeiſee, againſt a diſſeiſor, upon a diſſeiſin done by himſelf; and this is called a writ of *entry* in the nature of an aſſiſe.

Second, a writ of *entry ſur diſſeiſin in le per*, againſt the heir by deſcent, who is ſaid to be in the *per*, as he comes in *by* his anceſtor; and ſo it is if a diſſeiſor make a feoffment in fee, gift in tail, &c. the feoffee and donee are in the *per* by the diſſeiſor.

Third, A writ of *entry ſur diſſeiſin in le per & cui*, where the *feoffee of a diſſeiſor* maketh a feoffment over to another; when the diſſeiſee ſhall have this writ of *entry ſur diſſeiſin*, &c. of the lands in which ſuch other had no right of *entry*, but *by* the feoffee of the diſſeiſor, *to whom* the diſſeiſor demiſed the ſame, who unjuſtly and without judgment diſſeiſed the demandant. 1 *Inſt.* 238.

Theſe three degrees thus ſtate the original wrong, and the title of the tenant, who claims under ſuch wrong. If more than two degrees, (that is two alienations or deſcents) were paſt, there lay no writ of entry at the Common-law. For, as it was provided for the quietneſs of men's inheritances, that no one, even though he had the true right of poſſeſſion, ſhould enter upon him who had the apparent right by deſcent or otherwiſe, but he was driven to his *writ of entry* to gain poſſeſſion; ſo, after more than two deſcents, or two conveyances were paſſed, the demandant, even though he had the right both of poſſeſſion and property, was not allowed this *poſſeſſory* action; but was driven to his *writ of right*, a long and final remedy, to puniſh his neglect in not ſooner putting in his claim while the degrees ſubſiſted; and for the ending of ſuits, and quieting of all controverſies. 2 *Inſt.* 153. But by the *Stat. of Marlbridge* 52 *Hen.* 3. *c.* 30, it was provided, that when the number of alienations or deſcents exceeded the uſual degrees, a new writ ſhould be allowed without any mention of degrees at all. And accordingly,

Fourthly, A new writ has been framed, called a writ of entry in the *poſt*, which only alledges the injury of the wrong-doer, without deducing all the intermediate title from him to the tenant; ſtating it in this manner; that the tenant had not entry, unleſs *after*, or ſubſequent to, the ouſter, or injury done by the original diſpoſſeſſor; and rightly concluding, that if the original title was wrongful, all claims derived from thence muſt participate of the ſame wrong. Upon the latter of theſe writs, it is, (the writ

of entry *ſur diſſeiſin* in the *poſt*,) that the form of our common recoveries of landed eſtates is uſually grounded. See title *Fine and Recovery*.

This remedial inſtrument, of writ of entry, is applicable to all the caſes of ouſter, except that of *Diſcontinuance* of tenant in tail, and ſome peculiar ſpecies of *Deforcements*. Such is that of the deforcement of dower by not aſſigning *any* dower to the widow within the time limited by the law; for which ſhe has her remedy by writ of *dower, unde nihil habet*. *F. N. B.* 147.—See title *Dower*.

But in general the writ of entry is the univerſal remedy to recover poſſeſſion, when wrongfully with-held from the owner. It were therefore endleſs to recount all the ſeveral diviſions of writs of entry, which the different circumſtances of the reſpective demandants may require, and which are furniſhed by the Laws of *England*, being plainly and clearly chalked out in that collection of legal forms, the *Regiſtrum omnium Brevium*, or Regiſter of ſuch writs as are iſſuable out of the King's Courts; upon which *Fitzherbert's Natura Brevium* is a comment; which ſee; and the ſeveral appropriate titles in this Dict.

In the times of our *Saxon* anceſtors, the right of poſſeſſion ſeems to have been recoverable only by writ of entry. *Gilb. Ten.* 42. This writ was then uſually brought in the County Court; and the proceedings in theſe actions were not then ſo tedious, (when the Courts were held, and proceſs iſſued from, and was returnable therein, at the end of every three weeks) as they became after the Conqueſt, when all cauſes were drawn into the King's Courts, and proceſs iſſued only from Term to Term. Hence a new remedy was invented in many caſes to do juſtice to the people, and to determine the poſſeſſion in the proper counties by the King's Judges; this was the remedy by *Aſſiſe*; as to which, See title *Aſſiſe* in this Dict. and fully on this ſubject 3 *Comm.* 174, 184.

Having ſaid thus much in general on the titles *Entry*, and *Writs of Entry*, ſubjects now in ſome meaſure rather unuſual than obſolete, the following obſervations, extracts, &c. may be of uſe to the enquiring Student: ſhould any of them ſeem a repetition of what has already been ſaid, it will be generally found they ſtate the point more at large, or on different authorities.

A *Writ of Entry* in the *per* and *cui*, ſhall be maintained againſt none, but where the tenant is in by purchaſe or deſcent; for if the alienation or deſcent be put out of the degree upon which no writ may be made in the *per* and *cui*, then it ſhall be made in the *poſt*. *Terms de Ley*.

There are *five* things which put the writ of *entry* out of the *degrees*, viz. *intruſion*; *diſſeiſin* upon *diſſeiſin*; *ſucceſſion* where the diſſeiſor was a perſon of religion, and his ſucceſſor enters; *judgment*, when a perſon hath had judgment to recover againſt the diſſeiſor; and *eſcheat*, on the diſſeiſor's dying without heir, or committing felony, &c. on which the lord enters, &c. In all theſe caſes, the diſſeiſee or his heir, ſhall not have a writ of entry within the degrees of the *per*, but in the *poſt*; becauſe they are not in by deſcent, or purchaſe. *Terms de Ley*.

Degrees as to *entries* are of two ſorts, either by *act in law*, as in caſe of a deſcent; or by *act* of the *party* by lawful conveyance. But no eſtate *gained by wrong* doth make a degree; ſo that *abatement*, *intruſion*, &c. work not a degree; nor doth every change by lawful title, as an eſtate of tenant by the curteſy, by judgment, &c. or of any others that come in the *poſt*; though a tenancy in dower by aſſignment of the heir doth work a degree, becauſe ſhe is in by her huſband: but an aſſignment of dower by a diſſeiſor, doth not, by reaſon ſhe is in the *poſt*. *Co. Lit.* 239.

Though *Entry on lands* is taken away by deſcent on *diſſeiſins*, or *diſcontinuance*, &c. yet a deſcent ſhall not take away the entry of leſſee for ſeven years, nor of tenant by *elegit*, &c. who have but a chattel, and no freehold; otherwiſe it is of any eſtate for life, or any higher eſtate. *Co. Lit.* 249.

If a diſſeiſor leaſes for years, and dies ſeiſed of the reverſion, the *entry* of the diſſeiſee is taken away, becauſe he died ſeiſed of the fee and freehold: but if he had leaſed for life, &c. the *entry* of the diſſeiſee would not be taken away. *Co. Lit.* 239. Where the diſſeiſor of an infant dies ſeiſed, and after the infant comes of age, and the heir of the diſſeiſor dies before *entry*; though he died not ſeiſed of an actual ſeiſin, but a ſeiſin in law; yet his dying ſeiſed takes away the *entry* of the diſſeiſee. *Ibid.* If a diſſeiſor makes a feoffment upon condition, and the feoffee dies ſeiſed, and the feoffor enters upon the heir for the breach of the condition, the diſſeiſee may enter upon him; for by the *entry* of the diſſeiſor, the deſcent is utterly defeated. *Lit. ſect.* 409.

The title of *entry* in a feoffor, &c. that hath but a condition, cannot be taken away by any deſcent, becauſe he has no remedy by action to recover the land; ſo that if a deſcent ſhould take away his *entry*, it would bar him of his right for ever: and the condition remains, and cannot be deveſted and put out of poſſeſſion, as the lands, &c. *Co. Lit.* 240. If a man recovers lands, and after a ſtranger to the recovery dies ſeiſed, this ſhall not take away the *entry* of the recoveror; as it was but a title. 2 *Danv. Abr.* 561. But where a perſon recovers againſt another, and enters and ſues execution, and after the recoveree diſſeiſes him, and dies ſeiſed; this deſcent ſhall take away the entry of the recoveror, for the recovery was executed. *Ibid.*

If after recovery againſt tenant for life, he dies, and he in remainder enters before execution, and dies ſeiſed, the *entry* of the recoveror is not taken away. *Co. Lit.* 238. The *entry* of the tenant for life, ſhall be good for him in remainder: and if tenant for life make a feoffment in fee, and a ſtranger enters for the forfeiture in the name of the reverſioner; this will be good to veſt the reverſion in him. *Lit.* 128: 9 *Rep.* 106. If an infant under age, makes a deed of feoffment, and after his full age the feoffee dies ſeiſed; or a leſſee for life aliens the land, and the alienee dies ſeiſed thereof; or a deviſe be of lands upon condition, and the heir of the diſſeiſor enters and dies ſeiſed: in theſe caſes the *entry* is gone, and the parties ſhall be put to their action. *Lit.* 96: 9 *H.* 6. 25.

If there be tenant for life, remainder to the right heir of *J. S.* and the tenant for life is diſſeiſed; a deſcent is caſt, and after *J. S.* dies, and tenant for life alſo dies: by this, the *entry* of the heir of *J. S.* is not taken away, for his remainder was *in cuſtodid legis*. 1 *Rep.* 134. Where an infant has cauſe of *entry*, and the deſcent happens while he is within age, it will not bar him of his *entry*: he that hath the right of *entry*, muſt be of age, within the four ſeas, of ſound memory; and if it be a woman, ſhe muſt be ſole; and if the party be under age, beyond the

ſeas,

ſeas, *non compos mentis*; in priſon, or a feme covert, at the time of the deſcent, it ſhall not bar. *Lit.* 147, 402: 21 *H.* 6. 17.

The whole time from a diſſeiſin is conſiderable; as where feme covert is diſſeiſed, and her huſband dieth, and ſhe takes another huſband, and then a deſcent is caſt; or if one *ultra mare* be diſſeiſed, and he return into *England*, and then go beyond ſea again, and there is a deſcent; here the deſcent will bar the *entry*, becauſe of the *interim*. 9 *H.* 7. 24: *Dyer* 143: 32 *H.* 8. *c.* 33.

A woman tenant in tail took huſband, who made a feoffment in fee, and died, and the wife without *entry* made a leaſe for years; and it was held, that the freehold was not reduced by the leaſe, without an *entry* made, 1 *Leon. ca.* 165. The *entry* of a diſſeiſee, when he duly makes it, ſhall avoid all the meſne charges by the diſſeiſor upon the land: but right of *entry* may be loſt divers ways; as by acceptance of rent, by him who hath it, and the like. 1 *Anderſon* 133: *Noy Rep.* 7. If a man is diſſeiſed of land whereunto a common is appendant, the diſſeiſee cannot uſe the common till he enters on the land to which the common is appendant; for if the diſſeiſee might uſe it, ſo might the diſſeiſor, which would be a double charge on the common: yet if a perſon be diſſeiſed of a manor, to which an advowſon is appendant, he may preſent to the advowſon before entry on the manor. *Co. Lit.* 122.

A diſſeiſee enters into the land, and continues therein with the diſſeiſor, and manures it with him, claiming nothing of his firſt eſtate; or if the diſſeiſee enters, and takes the profit, as leſſee, *&c.* of the diſſeiſor; it is ſaid theſe will be an entry that will reduce the firſt eſtate. 2 *Danv.* 790. If the diſſeiſee commands a ſtranger to put in the cattle of ſuch ſtranger in the land to feed there; this is an entry in law on the land. *Co. Lit.* 245.

Where entry may be made into land, or any thing, it ſhall not be in the party before *entry*: if entry cannot be made, but only *claim*, then it ſhall be in him by *claim*; and when neither *entry* nor *claim* can be made, it ſhall be in him by *act* of *law*. 1 *Plowd.* 133. In caſe the poſſeſſion of land is in no man, but the freehold in law is in the heir that enters, his general entry into one part reduces all into his actual poſſeſſion: but if an entry is to deveſt an eſtate, a general entry into parcel, is good only for that part. *Co. Lit.* 15. Where an entry is in any part, it muſt be in the name of all: if I enfeoff a perſon of an acre of ground upon condition, and of another acre on condition, and both conditions are broken; here entry into one in name of both acres is not good to reduce both: but if a man make a feoffment of divers parcels upon condition that is broken, there entry into part in name of all the reſt is ſufficient. *Co. Lit.* 252: 9 *H.* 7. 25.

A man hath right to enter into lands in divers villages in one county, if he enter upon part of it in one village in the name of all in that county; by this he ſhall have poſſeſſion of the whole. *Co. Lit.* 252: *Dyer* 227, 337. If a man diſſeiſe me of one acre at one time, and another acre at another time in the ſame county; my entry into one of them in the name of both is good: though it will not be good, if the diſſeiſin be by two ſeveral perſons, or if the acres lie in ſeveral counties; in which caſe there ought to be ſeveral entries and actions. *Co. Lit.* 252.

If he who hath right of entry into a freehold, enters into part of it, it ſhall be adjudged an entry into all poſſeſſed by one tenant; but if there be ſeveral tenants poſſeſſed of the freehold, there muſt be ſeveral entries on the ſeveral tenants. 1 *Lil. Abr.* 515, 516. Special entry into a houſe with which lands are occupied, claiming the whole, is a good entry as to the whole houſe and lands. *Ibid.* If a huſband enters to the uſe of his wife; or a man enters to the uſe of an infant, or any other, where the entry is lawful; this ſettles the poſſeſſion before agreement of the parties: though it is otherwiſe where a perſon enters to the uſe of one whoſe entry is not lawful; for this veſts nothing in him till agreement, and then he ſhall be a diſſeiſor. 2 *Danv.* 787. If two jointenants are diſſeiſed, and the diſſeiſor aliens, and one jointenant enters upon the alienee to the uſe of both; this ſettles the freehold in both of them. *Ibid.* 788. But if one coparcener, *&c.* enters eſpecially claiming the whole land, ſhe gains the part of her companion by abatement; and it ſhall not ſettle any poſſeſſion in the other. *Co. Lit.* 243.

The heir is to enter into lands deſcended to him, to entitle him to the profits. *Co. Lit.* 214. If a younger ſon enters on lands in fee, where the eldeſt ſon dies leaving iſſue; though many deſcents are caſt in his line, yet the heirs of the eldeſt ſon may make an entry on the lands; but if the youngeſt ſon convey away the lands in fee, and the feoffee dies ſeiſed, they may not enter; nor may they enter where the younger ſon diſſeiſes the eldeſt, and dies ſeiſed. *Co. Lit.* 237, 244: *Lit. ſect.* 397.

A tenant in tail hath iſſue two ſons, and the eldeſt dies, leaving his wife *privement enſient* of a ſon, and the younger brother enters, and then the wife of the eldeſt is delivered of a ſon, he may enter upon the younger brother. 2 *Danv.* 557. See title *Deſcent*.

An eſtate of freehold will not ceaſe, without entry or claim: alſo a remainder of an eſtate of freehold cannot ceaſe without entry, *&c.* no more than eſtate of freehold in poſſeſſion. *Cro. Eliz.* 360. A right of entry preſerves a contingent remainder. 2 *Lev.* 35. And a grantee of a reverſion, may enter for a condition broken. *Plowd.* 176.

A leſſee muſt enter into lands demiſed to him; and tho' the leſſor dies before the leſſee enters, yet he may enter: and if the leſſee dies before entry, his executors or adminiſtrators may enter. The leſſee may aſſign over his term before entry, having *intereſſe termini*; but he may not take a releaſe to enlarge his eſtate; or bring treſpaſs, *&c.* till actual entry. Though if there be words *bargain and ſell* in a leaſe, *&c.* for conſideration of money, the leſſee or bargainee is in poſſeſſion on executing the deed, to make a releaſe, *&c. Lit.* 59, 454: *Co. Lit.* 46, 57, 270.

Where a leſſor enters on his leſſee for years, the rent is ſuſpended. 1 *Leon.* 110. But without entry and expulſion, the leſſee is not diſcharged of his rent to the leſſor; unleſs it be where the leſſor is attainted of treaſon, *&c.* then the rent is to be paid to the King, who is in poſſeſſion without entry. *Sid.* 399: 1 *Nelſ. Abr.* 706.

There is no need of entry to avoid an eſtate in caſe of a limitation, becauſe thereby the eſtate is determined without entry or claim; and the law caſts it upon the party to whom it is limited. If *A.* deviſes lands to *B.* and his heirs, and dies, it is in the deviſee immediately; but till entry he cannot bring a poſſeſſory action: and where a poſſeſſion veſts without entry, a reverſion will veſt without claim. 2 *Mod. Rep.* 7, 8. A bare entry on another, without an expulſion, makes only a feiſin; ſo that

that the *law will adjudge him in poſſeſſion who hath the right*. 3 *Salk*. 135.

Where a perſon is in a houſe with goods, &c. the houſe may be entered when the doors are open, to make execution. *Cro. Eliz*. 759. But it muſt be averred that the goods were in the houſe. *Lutw*. 1428, 1434. And a man cannot enter into a houſe, the doors being open to demand a debt, unleſs he aver that the debtor is within the houſe at the ſame time. *Cro. El*. 6, 8. So entry may be made on a tenant where rent is in arrear, to take a diſtreſs, &c. See titles *Execution*; *Rent*; *Demand*.

In order to regain poſſeſſion of lands by entry, &c. the manner of entry is thus: If it be a houſe, and the door is open, you go into it, and ſay theſe words.—*I do here enter, and take poſſeſſion of this houſe*. But if the door be ſhut, then ſet your foot on the groundſel, or againſt the door, and ſay the before words: and if it be land, then go upon the land, and ſay, *I here enter and take poſſeſſion of this land*, &c. If another do it for you, he muſt ſay, *I do here enter*, &c. *to the uſe of* A. B. And it is neceſſary to make it before witneſſes, and that a *memorandum* be made of it. *Litt*. 385: *Co. Lit*. 237, 238.

Where an *ejectment* will lie, the *confeſſion* of leaſe, *entry*, and ouſter is ſufficient in all caſes, except in the caſe of a *fine with proclamations*, in which caſe it is neceſſary to prove an *actual entry*; and the leſſor of the plaintiff directing one to deliver a declaration to the tenant in poſſeſſion will not amount to ſuch an entry. See title *Ejectment*.

ENTRY AD COMMUNEN LEGEM. Is the writ of entry which lies where tenant for term of life, or for term of another's life, or by the curteſy, &c. aliens and dies; he in the reverſion ſhall then have this writ againſt whomſoever is in poſſeſſion of the land. *New Nat. Br*. 461.

ENTRY AD TERMINUM QUI PRETERIIT. A writ of entry anciently brought againſt tenant for years, who held over his term, and thereby kept out the leſſor; See. *New Nat. Brev*. 447, 8. But an ejectment is now the common mode of proceeding; and by *Stat*. 4 *Geo*. 2. *c*. 28, tenants for term of years, &c. *holding over after demand made*, are ſubject to *double rent*. See titles *Rent*; *Ejectment*; *Tenant*.

ENTRY IN CASU CONSIMILI. Is a writ that lies for him in reverſion by *Stat. W*. 2. *c*. 24, againſt tenant for life, or tenant by the curteſy, who aliens in fee, &c. See *Caſu Conſimili*.

ENTRY IN CASU PROVISO. Where a tenant in dower aliens in fee, or for term of life, or of another's life; then he in the reverſion ſhall have this writ, provided by the Stat. of *Glouc*. 6 *Ed*. 1. *cap*. 7; by which ſtatute it is enacted, "that if a woman alien her dower in fee, or for life, the next heir, &c. ſhall recover by writ of entry."—See title *Dower*. And the writ may be brought againſt the tenant of the freehold of the land, on ſuch alienation, during the life of the tenant in dower, &c. *New Nat. Br*. 456.

The above four writs of entry may all be brought either in the *per*, or in the *cui* or *poſt*.

ENTRY SINE ASSENSU CAPITULI. A writ of entry that lay where a biſhop, abbot, &c. aliened lands or tenements of the church, without the *aſſent* of the *Chapter* or Convent. *F. N. B*. 195.

ENURE. In law, to take place or be available; it is as much as *effectum*: as for example; a releaſe made to tenant for life, ſhall *enure*, and be of force and effect to him in the reverſion. *Lit*.

EODORBRICE, from the Sax. *eoder*, a hedge, and *brice*, *ruptura*.] Hedge-breaking: in which ſenſe it is mentioned in the laws of King *Alfred cap*. 45.

EORLE. Sax. for *earl*, &c. though made uſe of by the *Danes* for *barons*. See *Earl*.

EPIMENIA. Expences or gifts. *Blount*.

EPIPHANY. The day when the ſtar appeared to the wiſe men at *Chriſt*'s Nativity, generally called *Twelfth-Day*.

EPISCOPALIA. Synodals, or other cuſtomary payments from the clergy to their *biſhop* or dioceſan; which were formerly collected by the rural deans, and by them tranſmitted to the biſhop.—*Mon. Ang. tom*. 3. *pag*. 61. Theſe cuſtomary payments have been otherwiſe called *onus epiſcopale*; and were remitted by ſpecial privilege to free-churches and chapels of the King's foundation, which were exempt from epiſcopal juriſdiction. *Kcn. Gloſſ*.

EPISCOPUS PUERORUM. It was a cuſtom in former times, that ſome lay perſon about a certain feaſt ſhould plait his heir, and put on the garments of a *biſhop*, and in them exerciſe epiſcopal juriſdiction, and do ſeveral ludicrous actions, for which reaſon he was called *biſhop of the boys*: and this cuſtom obtained here long after ſeveral conſtitutions were made to aboliſh it. *Mon. Ang. tom*. 3. *pag*. 169.

EQUALITY. The law delights in *equality*; ſo that when a charge is made upon one, and divers ought to bear it, he ſhall have relief againſt the reſt. 2 *Rep*. 25. And where a man leaves a power to his wife to give an eſtate among three daughters, in ſuch proportions, as ſhe ſhall think fit: it has been held ſhe muſt divide it *equally*; unleſs good reaſon be given for doing otherwiſe. *Preced. Canc*. 256. See title *Contribution*.

In equity it is a *maxim*, that "EQUALITY IS EQUITY." See *Francis's Maxims*, *fol*. 9, &c.

EQUES AURATUS. *Lat*.] Is taken for a *knight*; becauſe anciently none but knights were allowed to beautify and gild their armour with *gold*: but this word is rather uſed by the *heralds* than lawyers; for *eques auratus* is not a word in our law for knight, but *miles*, and formerly *Chevalier*. 4 *Inſt*. 5.

EQUITY.

(SEE *generally title* CHANCERY.)

ÆQUITAS; *quaſi*, *æqualitas*.] Is defined to be a correction, or qualification of the law, generally made in that part wherein it faileth, or is too ſevere. In other words "the correction of that wherein the law, by reaſon of its univerſality, is deficient." 1 *Comm*. 62. It likewiſe ſignifies the extenſion of the words of the law to caſes unexpreſſed, yet having the ſame reaſon; ſo that where one thing is enacted by ſtatute, all other things are enacted that are of the like degree: for example; the ſtatute of *Glouc*. gives action of waſte againſt him that holds lands for life or years; and by the equity thereof, a man ſhall have action of waſte againſt a tenant that holds but for one year, or half-year, which is without the words of the act, but within the meaning of it; and the words that enact the one, by *equity* enact the other. *Terms de Ley*.

So

So that *Equity* is of two kinds; the one doth abridge and take from the letter of the law; and the other inlarge and add thereto. *Æquitas eſt perfecta quædam ratio, quæ jus ſcriptum interpretatur & emendat. Co. Lit.* 24. And ſtatutes may be conſtrued according to *equity*; eſpecially where they give *remedy for wrong*, or are for *expedition of juſtice, &c. Co. Lit.* 24, 54, 76: 2 *Inſt.* 106, 107. *&c.*

A Court of Equity cannot now be created by the King, but the ſame muſt be done by Act of Parliament. 4 *Inſt.* 84.

The diſtinction between *Law* and *Equity*, as adminiſtered in different courts, is not at preſent known, nor ſeems to have ever been known, in any other country than *England* at any time.—With us the *Aula regia* which was anciently the ſupreme court of judicature, undoubtedly adminiſtered equal juſtice according to the rules of both or either, as the caſe might chance to require: and, when that was broken to pieces, the idea of a Court of Equity, as diſtinguiſhed from a Court of Law, did not ſubſiſt in the original plan of partition. For though equity is mentioned by *Bracton l.* 2. *c.* 7. *pl.* 23, as a thing contraſted to ſtrict law, yet neither in that writer, nor in *Glanvill* or *Fleta*, nor yet in *Britton*, (compoſed under the auſpices and in the name of *Edward* I. and treating particularly of courts and their ſeveral juriſdictions,) is there a ſyllable to be found relating to the equitable juriſdiction of the Court of Chancery. It ſeems therefore probable, that when the courts of law, proceeding merely upon the ground of the King's original writs, and confining themſelves ſtrictly to that bottom, gave a harſh or imperfect judgment, the application for redreſs uſed to be to the King in perſon aſſiſted by his privy council; (from whence alſo aroſe the juriſdiction of the court of Requeſts, which was virtually aboliſhed by *Stat.* 16 *Car.* 1. *c.* 10;) and they were wont to refer the matter either to the Chancellor and a ſelect committee, or by degrees to the Chancellor only, who mitigated the ſeverity, or ſupplied the defects of the judgments pronounced in the courts of law, upon weighing the circumſtances of the caſe. This was the cuſtom not only among our Saxon anceſtors, before the inſtitution of the *Aula regia*, but alſo after its diſſolution, in the reign of King *Edward* I. and perhaps during it's continuance, in that of *Henry* II. *Ll. Ed. e.* 2: *Lamb. Arch.* 59.

When, about the end of the reign of *King Edward* III. uſes of land were introduced, and though totally diſcountenanced by the courts of Common law, were conſidered as fiduciary depoſits and binding in conſcience by the clergy, the ſeparate juriſdiction of the Chancery as a court of *equity* began to be eſtabliſhed. *Spelm. Gloſs.* 106: 1 *Lev.* 242; *John Waltham*, who was biſhop of *Saliſbury* and Chancellor to King *Richard* II. (by a ſtrained interpretation of the ſtatute of *Weſtm.* 2. [13 *E.* 1. *c.* 24,] enabling the clerks in chancery to form new writs according to the ſpecial circumſtances of each caſe,) deviſed the writ of *ſubpœna*, returnable in the court of Chancery only, to make the feoffee to uſes accountable to his *ceſtui que uſe*: which proceſs was afterwards extended to other matters wholly determinable at the Common law, upon fictitious ſuggeſtions; for which therefore the Chancellor himſelf is by *Stat.* 17 *Rich.* 2. *c.* 6, directed to give damages to the party unjuſtly aggrieved. But as the Clergy, had long attempted to turn their eccleſiaſtical courts into courts of equity, by entertaining ſuits *pro læſione fidei*, as a ſpiritual offence againſt conſcience, in caſe of non-payment of debts or any breach of civil contracts; till checked by the Conſtitutions of *Clarendon* (10 *Hen.* 2. *c.* 15); therefore probably the eccleſiaſtical chancellors, who then held the ſeal, were remiſs in abridging their own new acquired juriſdiction; eſpecially as the ſpiritual courts continued to graſp at the ſame authority as before, till finally prohibited by the unanimous concurrence of all the judges; however, it appears from the Parliament rolls, that in the reigns of *Henry* IV. and V. the Commons were repeatedly urgent to have the writ of *ſubpœna* entirely ſuppreſſed, as being a novelty deviſed againſt the form of the Common law. But though the ſtatute 4 *Hen.* 4. *c.* 23, was paſſed, whereby judgments at law are declared irrevocable, unleſs by attaint or writ of error, yet in *Edward* IV.'s time, the proceſs by bill and *ſubpœna* was become the daily practice of the Court, though it's juriſdiction was not then nearly ſo extenſive as at preſent. *Rot. Parl.* 14 *Ed.* 4. *no.* 33.

In the time of Lord Chancellor *Elleſmere*, (*A. D.* 1616) aroſe that notable diſpute between the Courts of law and equity, ſet on foot by Sir *Edward Coke*, then Chief Juſtice of the court of King's Bench; whether a Court of equity could give relief after or againſt a judgment at the Common law. This conteſt was ſo warmly carried on, that indictments were preferred againſt the ſuitors, the ſolicitors, the counſel and even a Maſter in chancery, for having incurred a *præmunire* by queſtioning in a Court of equity a judgment in the court of King's Bench, obtained by groſs fraud and impoſition. This matter being brought before the King, was by him referred to his learned counſel for their advice and opinion; who reported ſo ſtrongly in favour of the courts of equity, that his majeſty gave judgment on their behalf. *Whitelock* of *Parl.* 2, 390: 1 *Ch. Rep. Append.* 11.

Lord *Bacon* who ſucceeded Lord *Elleſmere*, reduced the practice of the court into a more regular ſyſtem; his ſucceſſors in the reign of *Charles* I. did little to improve upon his plan; till the appointment of Sir *Heneage Finch* in 1673, who became afterwards earl of *Nottingham*. He was a perſon of the greateſt abilities and moſt uncorrupted integrity; a thorough maſter and zealous defender of the laws and conſtitution of his country; and endued with a pervading genius that enabled him to diſcover and to purſue the true ſpirit of juſtice, notwithſtanding the embarraſſments raiſed by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redreſs which had poſſeſſed the courts of Equity. The reaſon and neceſſities of mankind, ariſing from the great change in property by the extenſion of trade and the abolition of military tenures, co-operated in eſtabliſhing his plan, and enabling him in the courſe of nine years to build a ſyſtem of juriſprudence and juriſdiction, upon wide and national foundations which have alſo been extended, and improved by many great men, who have ſince preſided in chancery. See 3 *Comm.* 50—56.

The ſame juriſdiction is exerciſed, and the ſame ſyſtem of redreſs purſued, in the Equity-Court of the Exchequer; with a diſtinction however as to ſome few matters, peculiar to each tribunal, and in which the other cannot interfere.

Upon

Upon the abolition of the court of Wards, the care, which the Crown was bound to take as guardian of its *Infant Tenants*, was totally extinguiſhed in every ſeodal view; but reſulted to the King in his court of Chancery, together with the general protection of all other *infants* in the kingdom. *F. N. B.* 27.—When therefore a fatherleſs child has no other guardian, the Court of Chancery has a right to appoint one, and from all proceedings relative thereto, an appeal lies to the Houſe of Lords. The Court of Exchequer can only appoint a guardian *ad litem*, to manage the defence of the infant if a ſuit be commenced againſt him; a power which is incident to the juriſdiction of every court of juſtice. *Cro. Jac.* 641: 2 *Lev.* 163: *T. Jon.* 90. But when the intereſt of a minor comes before the court judicially, in the progreſs of a cauſe, or upon a bill for that purpoſe filed, either tribunal indiſcriminately will take care of the property of the infant.

As to *Ideots* and *Lunaticks*, the king himſelf uſed formerly to commit the cuſtody of them to proper Committees, in every particular caſe; but now, to avoid ſolicitations and the very ſhadow of undue partiality, a warrant is iſſued by the King under his royal ſign manual to the Chancellor, to perform this office for him: and if he acts improperly in granting ſuch cuſtodies, the complaint muſt be made to the King himſelf in council. 3 *P. Wms.* 108: See *Reg. Br.* 267. But the previous proceedings on the commiſſion, to enquire whether or no the party be an ideot or a lunatick, are on the law-ſide of the Court of Chancery, and can only be redreſſed (if erroneous) by writ of error in the regular courſe of law.

The king, as *parens patriæ*, has the general ſuperintendence of all *Charities*; which he exerciſes by the Chancellor. And, therefore, when 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.

By *Stat.* 43 *Eliz. c.* 4, authority is given to the lord Chancellor, and to the Chancellor of the duchy of *Lancaſter*, reſpectively, to grant commiſſions under their ſeveral ſeals, to enquire 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. And as it is thus conſidered as an original cauſe throughout, an appeal lies of courſe from the Chancellor's decree to the Houſe of Peers, notwithſtanding any looſe opinions to the contrary. *Duke's Char. Uſes* 62, 128: 2 *Vern.* 118.

By the ſeveral ſtatutes relating to *Bankrupts*, a ſummary juriſdiction is given to the chancellor, in many matters conſequential or previous to the commiſſions thereby directed to be iſſued; from which the ſtatutes give no appeal.

The juriſdiction of the Court of Chancery doth not however extend to ſome cauſes, wherein relief may be had in the Exchequer. No information can be brought, in Chancery, for ſuch miſtaken charities as are given to the King by the ſtatutes for ſuppreſſing ſuperſtitious uſes. Nor can Chancery give any relief againſt the King, or direct any act to be done by him, or make any decree diſpoſing of or affecting his property; not even in caſes where he is a royal truſtee. Such cauſes muſt be determined in the Court of Exchequer, as a court of revenue; which alone has power over the King's treaſure, and the officers employed in its management, unleſs where it properly belongs to the duchy court of *Lancaſter*.

In all other matters, what is ſaid of the court of Equity in the Court of Chancery will be equally applicable to the other courts of Equity. Whatever difference there may be in the forms of practice, it ariſes from the different conſtitution of their officers.—See 3 *Comm.* 426—429.

The learned Commentator then enters into a brief but comprehenſive view of the general nature of Equity; to ſhew that in our courts it is not contrary to, but conſiſtent with, law; a poſition which perhaps will be beſt underſtood by further explanation of the juriſdiction exerciſed by courts of equity, either as *aſſiſtant to*, *concurrent with*, or *excluſive of* the juriſdiction of the courts of Common-law; which is here done in an abridgment from *Fonblanque's Treatiſe of Equity pp.* 10. *&c. in n.*

EQUITY is aſſiſtant to the juriſdiction of the Courts of law; 1ſt. By removing legal impediments to the fair deciſion of a queſtion depending in courts of law. 2dly. By compelling a diſcovery which may enable them to decide. 3dly. By perpetuating teſtimony, when in danger of being loſt, before the matter to which it relates can be made the ſubject of judicial inveſtigation. It may alſo be ſaid to be aſſiſtant, by rendering the judgments of courts of law effective, as by providing for the ſafety of property in diſpute pending a litigation; and by counteracting fraudulent judgments, *&c*; and by putting a bound to vexatious and oppreſſive litigation.—It exerciſes a concurrent juriſdiction with courts of law, in moſt caſes of fraud, accident, miſtake, account, partition, and dower. It claims an excluſive juriſdiction, in all matters of truſt, and confidence; and wherever, upon the principles of univerſal juſtice, the interference of a court of judicature is neceſſary to prevent a wrong, and the poſitive law is ſilent. See *Mitford's Treatiſe on the Pleadings in Chancery*.

To purſue this diviſion of the juriſdiction of Courts of Equity with that minuteneſs which is neceſſary to a particular acquaintance with its powers, would lead to an inveſtigation too extenſive. Some ſhort notice ſhall be taken of the general objection that is urged againſt the claims of Courts of Equity to a concurrence of juriſdiction in ſome caſes with Courts of law. This concurrence of juriſdiction may, in the greater number of caſes in which it is exerciſed, be juſtified by the propriety of preventing a multiplicity of ſuits; for as the mode of proceeding in courts of law requires the plaintiff to eſtabliſh his caſe, without enabling him to draw the neceſſary

ceſſary evidence from the examination of the defendant, juſtice could never be attained at law in thoſe caſes where the principal facts to be proved by one party are confined to the knowledge of the other party. In ſuch caſes, therefore, it becomes neceſſary for the party, in want of ſuch evidence, to reſort to the extraordinary powers of a Court of Equity, which will compel the neceſſary diſcovery; and the court having acquired cognizance of the ſuit, for the purpoſe of diſcovery, will entertain it, for the purpoſe of relief, in moſt caſes of fraud, account, accident, and miſtake; and for other reaſons will entertain ſuits for partition and dower, though diſcovery be not neceſſary to the plaintiff's caſe.

The caſe (and, it ſeems, the only caſe) in which fraud cannot be relieved againſt in equity, concurrently with courts of law, though diſcovery be ſought, is the caſe of fraud, in obtaining a will; which, ſince the caſe of *Kerrick* v. *Bransby*, 3 *Brown's Parl. Caſ.* 358, is conſtantly referred to a court of law in the ſhape of an iſſue, *deviſavit vel non*. That courts of equity have a concurrence of juriſdiction with courts of law, in all other matters of fraud; See *White* v. *Huſſey*, *Pre. Ch.* 14: *Hungerford* v. *Earle*, 2 *Vern.* 261: *Colt* v. *Woollaſton*, 2 *Pr. Wms.* 156: *Stent* v. *Baillis*, 2 *P. Wms.* 220: 2 *Comyns's Digeſt*, titles *Chancery*; *Fraud*.

The juriſdiction exerciſed by Courts of Equity in matters of account, is, in many caſes, bounded by the diſcovery: as where a ſuit is inſtituted for an account of waſte of timber, without praying an injunction, the plaintiff cannot have a decree for relief. *Jeſus College* v. *Bloome*, 3 *Atk.* 262: *Piers* v. *Piers*, 1 *Vez.* 521. But where the bill ſeeks an account of ore dug, the court will decree it, (*Biſhop of Wincheſter* v. *Knight*, 1 *P. Wms.* 406;) becauſe the working of a mine is a kind of trade. *Story* v. *Lord Windſor*, 2 *Atk.* 630. Yet, even in that caſe, the plaintiff muſt ſhew a poſſeſſion. *Sayer* v. *Pierce*, 1 *Vez.* 232. Neither will Equity, in all caſes, decree an account of meſne profits; for where a man has title to the poſſeſſion of lands, and makes an entry, whereby he becomes entitled to damages at law for the time that poſſeſſion was detained from him, he ſhall not after his entry, turn that action at law into a ſuit in equity, and bring a bill for an account of the profits, except in the caſe of an infant, or ſome other very particular circumſtances. *Tilly* v. *Bridges Pre. C.* 252: *Owen* v. *Apice*, 1 *Ch. Rep.* 17. The particular circumſtances excepted by the *Lord Keeper*, in laying down this rule, extend to all thoſe caſes, which involve an equity, which the plaintiff cannot make available at law. *Coventry* v. *Hall*, 2 *Ch. Rep.* 134: *Duke of Bolton* v. *Deane*, *Pre. Ch.* 5, 6: *Dormer* v. *Forteſcue*, 3 *Atk.* 129, 30: *Townſend* v. *Aſh*, 3 *Atk.* 336: *Norton* v. *Frecker*, 1 *Atk.* 524: See alſo *Curtis* v. *Curtis*, *Rolls*, 2 *Bro. C. R.* 622.

The juriſdiction exerciſed by our courts of equity, in moſt caſes of *accident*, preſents a very ſtriking inſtance of their anxiety to prevent innovation on the juriſdiction of courts of law: their interference being generally founded on ſome circumſtance, which prevents the party being relievable at law; as where a bond or other inſtrument or ſecurity, is loſt, equity will interfere, by compelling a diſcovery from the defendant, and will relieve upon ſuch diſcovery; but the plaintiff is not entitled to any relief, upon a mere ſuggeſtion that the bond, inſtrument, or ſecurity, is loſt; but is required, for the purpoſe of relief, to annex to his bill, an affidavit to ſuch effect. 3 *Atk.* 17: *Mitford's Treatiſe* 112. And, as a further ſecurity againſt innovation, it muſt appear that the loſs of the deed or inſtrument obſtructs the plaintiff in ſeeking relief at law: for the loſs of a deed is not always a ground to come into a Court of Equity for relief; if there was no more in the caſe, although he is entitled to have a diſcovery of that, whether loſt or not, courts of law, admit evidence of the loſs of a deed, proving the exiſtence of it and its contents, juſt as a Court of Equity does. There are two grounds to come into equity for relief, annexing an affidavit to the bill. Firſt, where the deed is deſtroyed or concealed by the defendant, and whenever that is the caſe, the plaintiff is intitled to have relief in this court, upon the reaſon in Lord *Hunſdon*'s caſe. *Hob.* 109. Another is, where the plaintiff cannot recover at law, without making profert of the deed in pleading at law. *Whitfield* v. *Fauſſet*, 1 *Vez.* 392: 2 *Atk.* 61.

The judgment of the Court of King's Bench in *Read* v. *Brookman*, (3 *Term Rep.* 151,) ſeems to have relieved the obligee from the neceſſity of coming into equity, upon the mere circumſtance of the bond or inſtrument being loſt; by allowing him to ſtate ſuch circumſtances in his declaration, as a reaſon for not making profert of it; but, upon this caſe being cited in Chancery as furniſhing an objection to the plaintiff's ſuit in equity, he being relievable at law, Lord *Thurlow* obſerved, that the Court of King's Bench having determined to give relief in a caſe formerly relievable only in equity was not a reaſon for excluding the ancient, peculiar, and at leaſt concurrent juriſdiction of courts of equity. *Atkinſon* v. *Leonard*, 3 *Bro. C. R.* 218. This concurrence of juriſdiction as to this kind of accident, may therefore be conſidered to extend to all caſes, in which the deed, or inſtrument has been deſtroyed, or is concealed by the defendant, or has been loſt by the plaintiff; though of the contents of ſuch inſtrument the plaintiff has other evidence, of which he might avail himſelf at law. But where the relief ſought in equity is upon the loſs of a bill of exchange, or promiſſory note, the plaintiff muſt, by his bill, offer to give ſecurity, as an indemnity to the defendant, againſt any demand being made upon him in reſpect of ſuch loſt bill or note. *Walmſley* v. *Child*, 1 *Vez.* 341.

To eſtabliſh the origin of any branch of legal or equitable juriſdiction is always difficult, and ſeldom neceſſary, provided the exerciſe of ſuch juriſdiction is ſanctioned by the dictates of reaſon, and found to be conducive to the ends of ſubſtantial juſtice; and ſuch will appear to be the nature and tendency of the juriſdiction exerciſed by our courts of equity, in caſes of *Partition*, upon a reference to the difficulties which obſtructed the mode of proceeding at Common-law: and though many of thoſe difficulties are removed by *Stat.* 8 & 9 *W.* 3. *c.* 31; yet ſtill, if the parties are in any degree complicated, it is extremely difficult to proceed at law, or where the tenants in poſſeſſion are ſeiſed of particular eſtates only; for the perſons entitled in remainder cannot be bound by the judgment, in a writ of partition. *Mitford's Treatiſe p.* 110. Neither can a feme covert be bound by partition by writ. *Co. Litt.* 166 *a.* which, it ſhould ſeem, ſhe may be by decree and commiſſion in equity. *Martyn* v. *Perryman*. 1 *Ch. Rep.* 125: On theſe conſiderations, and the almoſt conſtant occaſion that the parties have for a diſcovery, is founded this branch of

equitable jurisdiction; in the exercise of which our courts of equity are constantly governed by an anxious attention to the legal title of the plaintiff: for though, at law, it be sufficient to allege seisin, yet, in equity the plaintiff must shew his title. *Cartwright* v. *Pultney*, 2 *Atk.* 380. And if the defendant conteit the legal title, the court will dismiss the bill. *Bishop of Ely* v. *Konrick*. *Bunb.* 322. but see *Parker* v. *Gerrard*, *Ambler* 236. And as a further mean to prevent innovation and vexatious suits, courts of equity will never allow costs on bills of partition; courts of law allowing none on the proceeding by writ. *Metcalf* v. *Beckwith*. 2 *P. Wms.* 376.—*Mitford's Treatise* 111. And this rule prevails, notwithstanding the unequal interests of the parties. *Parker* v. *Gerard*, *Ambler* 236.—See on this subject of Partition in Equity also 1 *Inst.* 169 *b.* and the notes there; which are very ingeniously combated, we may say refuted, by Mr. *Fonblanque*; who sums up the result in the foregoing paragraph.

The jurisdiction of our courts of equity, in matters of *Dower*, for the purpose of assisting the widow with a discovery of the lands or title deeds, or of removing impediments to her rendering her legal title available at law, has never been doubted. But it has been questioned, whether equity could give relief in those cases, in which there appeared to be no obstacle to her legal remedy. *Wallis* v. *Everard*, 3 *Ch. R.* 87. It seems now, however to be settled, that the widow labours under so many disadvantages at law, from the embarrasments of trust terms, &c. that she is fully entitled to every assistance that a Court of Equity can give her, not only in paving the way for her, to establish her right at law, but also by giving complete relief when the right is ascertained. *Curtis* v. *Curtis*, 2 *Brown C. R.* 634: and *Lucas* v. *Calcraft*. there cited. And in the exercise of this jurisdiction, courts of equity will even enforce a discovery against a purchaser for valuable consideration without notice, *Williams* v. *Lambe*. 3 *Bro. Ch. Rep.* 264. And though the widow should die before she had established her right to dower, equity will, in favour of her personal representatives, decree an account of the rents and profits of the lands, of which she afterwards appeared dowable.

With respect to the exclusive jurisdiction exercised by our courts of equity, in matters of *trust*, and in those cases where the principles of substantial justice entitle the party to relief, but the positive law is silent, it seems impossible to define with exactness its boundaries, or to enumerate with precision its various principles. In the course of this work, however, a variety of instances appear, from which the wisdom of this branch of equitable jurisdiction will be fully and satisfactorily established, and to which at present it may be sufficient to refer. See particularly titles *Chancery*: *Fraud*: *Trust*, &c. &c.

The essential difference (says *Blackstone*) between Law and Equity principally consists in the different modes of administering justice in each, in the mode of *proof*, the mode of *trial*, and the mode of *relief*. Upon these, and upon two other accidental grounds of jurisdiction, *viz.* the true construction of *securities for money lent* and the form and effect of a *trust* or *second use*, hath been principally erected that structure of jurisprudence, which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the system of the courts of Common-law.

As to the mode of *proof*. When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction; and, that being once discovered, the judgment is the same, in equity as it would have been at law. But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account. 1 *Chan. C.* 57. As incident to accounts, they take a concurrent cognizance of the administration of personal assets. 2 *P. Wms.* 145; Consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. 2 *Chan. C.* 152. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto. 1 *Eq. C. Ab.* 367; of all dealings in partnership, 2 *Vern.* 277; and many other mercantile transactions; and so of bailiffs, receivers, factors and agents. *Ibid.* 638.

From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of *fraud*. 2 *Chan. C.* 46; all matters in the private knowledge of the party, which though concealed, are binding in conscience; and all judgments at law, obtained through such fraud or concealment. And this not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking an advantage of a judgment, obtained by suppressing the truth. 3 *P. Wms.* 148: *Year book*, 22 *Ed.* IV. 37. *p.* 21. See title *Discovery*.

The mode of *trial*, is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside. If therefore the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in *England*, the witnesses are abroad, or shortly to leave the kingdom; or if the witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction, which might have been exercised at law, if the witnesses could probably attend. See title *Depositions*.

With respect to the mode of *relief*. The want of a more specific remedy, than can be obtained in the courts of law, gives a concurrent jurisdiction to a Court of Equity in a great variety of cases. To instance in executory agreements. A Court of Equity will compel them to be carried into strict execution, unless where it is improper or impossible; instead of giving damages for their non-performance. *Eq. Ca. Ab.* 16. And hence a fiction is established, that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally; and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. 3 *P. Wms.* 215. So, of waste, and other similar injuries, a Court of Equity takes a concurrent cognizance, in order to prevent them by *injunction*. 1 *Ch. Rep.* 14: 2 *Ch. C.* 32. Over questions that may be tried at law, in a great multiplicity of actions, a Court of Equity assumes a jurisdiction, to prevent the expence and vexation of endless litigation and suits. 1 *Vern.* 308: *Pre. Ch.* 261: 1 *Pr. Wms.* 672: *Stra.* 404. In various

kinds of fraud it assumes a concurrent jurisdiction, not only for the sake of a discovery but of a more extensive and specific relief. 2 *P. Wms.* 156; as by setting aside fraudulent deeds, decreeing re-conveyances, or directing an absolute conveyance merely to stand as a security. 1 *Vern.* 32: 1 *P. Wms.* 239: 1 *Vern.* 237: 2 *Vern.* 84. and thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands, a Court of Equity holds plea of all debts, incumbrances, and charges, that may affect it or issue thereout. 1 *Eq. Ca. Ab.* 337.

As to the construction of *securities* for money lent; when courts of Equity held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum *bonâ fide* advanced with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it: but this ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called upon by the mortgagee, he does not redeem within a time limited by the Court; or he may, when out of possession, be barred, by length of time, by analogy to the statute of limitations. See also titles *Bond*; *Mortgage*; *Penalty*.

The form of a *Trust*, or second use, gives the courts of Equity an exclusive jurisdiction, as to the subject matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction: but the trust is governed by very nearly the same rules, as would govern the estate in a court of law, if no trustee was interposed; 2 *P. Wms.* 645, 668, 9, And, by a regular positive system established in the courts of Equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of Common-law. See 3 *Comm.* 436—440.

EQUITY OF REDEMPTION, on *mortgages*. If where money is due on a mortgage, the mortagee is desirous to bar the *equity of redemption*, he may oblige the mortgagor either to pay the money or to be foreclosed of his equity; which is done by proceedings in the court of Chancery. But the Chancery cannot shorten the time of payment of the mortgage money, where it is limited by express covenant; though it may lengthen it: and then upon non-payment, the practice is to foreclose the *equity of redemption* of the mortgagor. 2 *Vent.* 364.

To foreclose the *Equity*, a *bill in Chancery* is exhibited; to which an answer is put in, and a decree being obtained, a Master in Chancery is to certify what is due for principal, interest and costs, which is to be paid *at a time prefixed by the decree*, whereupon the premisses are to be reconveyed to the mortgagor; or, in default of payment, the mortgagor is ordered to be foreclosed from all *equity of redemption*, and to convey the premises absolutely to the mortgagee.

A fine or non-claim will bar *equity of redemption*: but in a common mortgage, a covenant to restrain it shall not be regarded in Chancery. 2 *Vent.* 365. If the condition of a mortgage is, that the mortgagor only should redeem during life, or that he and the heirs of his body shall do it; yet the general heir shall have the *equity of redemption*, for if the principal and interest be offered, the land is free. 1 *Vern.* 30, 190. And it is held, though a bond be conditioned, that if the money be not paid at such a time, then for a further sum the mortgagee shall have the land absolutely, as a purchasor, &c. in such case a man may also *redeem*. *Ibid.* 488.—See at large this Dict. title *Mortgage*.

EQUIVALENT, Commissioners are appointed by statute to examine and state the debts due to *Scotland* on the Union by way of *equivalent*; and provision is made for payment of the same by a yearly annuity, &c. *Stat.* 5 *Geo.* 1. *c.* 20. See title *Scotland*.

EQUUS COOPERTUS. A horse equipped with saddle and furniture. *Leg.* 16 *E.* 1.

ERIACH. By the *Irish* Brehon law, in case of murder, the brehon or judge compounded between the murderer and the friends of the deceased who prosecuted, by causing the malefactor to give unto them, or to the child or wife of him that was slain, a recompence, which was called an *eriach*. 4 *Comm.* 313.

ERMINE OR ERMINAGE STREET, See *Watling Street*.

ERMINS, From the Fr. *ermine*.] A fur of great value, much used in *robes of state*. See title *Customs*.

ERN, The names of places ending in *Ern*, are said to imply a *melancholy situation*; from the Sax. *Ern*, i. e. *Locus Secretus*.

ERNES. The loose scattered ears of corn, that are left on the ground, after the binding or cocking of it: It is derived from the old *Teutonic Ernde*, Harvest; *Ernten*, to cut or mow corn: hence to *earn* is in some places to *glean*. *Kennet's Gloss.*

ERRANT, *Itinerant*.] Is applied to justices of the circuit, and bailiffs at large, &c. See *Eyre*.

ERRATICUM. A waif, or stray; an *erring* or wandering beast. *Constit. Normann. A. D.* 1080.

ERROR. Fr. *Erreur*.]

Signifies something wrong in pleading or process, &c. whereupon a writ is brought for remedy thereof, called a *Writ of Error*; in *Latin*, *de errore corrigendo*.

A Writ of error is a commission to judges of a superior court, by which they are authorised to examine the record, upon which a judgment was given in an inferior court, and on such examination to affirm or reverse the same, according to law. *Jenk. Rep.* 25: 2 *Inst.* 40: *Yelv.* 202: *Hardw.* 340. But yet if by the writ of error the plaintiff therein may recover, or be restored to any thing, it may be released by the name of an action. *Co. Lit.* 288 *b*. See *Post. Div.* II. V. There is also a writ of error to reverse a fine, and which must be prosecuted within twenty years by *Stat.* 10 & 11 *W.* 3. *c.* 14. See titles *Fine* and *Recovery*.

A Writ of error to some superior Court of Appeal is the principal method of redressing erroneous judgments in the King's Courts of record, having power to hold plea of debt or trespass above 40*s*.—it lies for some supposed mistake in the proceedings of such Court; for, to amend errors in a base court, not of record, a writ of *false judgment* lies. *Finch L.* 484. The writ of error only lies upon matter of law, arising on the face of the proceedings; so that no evidence is required to substantiate or support it, there being no method of reversing an error in the determination of facts, but by an attaint or a new trial, to correct the mistakes of the former verdict. See 3 *Lev. P. C.* 8vo. ed. 515.

ERROR.

Formerly ſuitors were much perplexed by writs of error brought upon very ſlight and trivial grounds; as mis-ſpellings and other miſtakes of the clerks, all which are now effectually helped by the ſtatutes of amendment and jeofails; and particularly by *Stat.* 5 *Geo.* 1. *c.* 13, it is enacted, that all writs of error wherein there ſhall be any variance from the original record, or other defect, may be amended by the Court, and made agreeable to the record: and where any verdict hath been given in any action, ſuit, *&c.* in any of the Courts at *Weſtminſter* or other court of record, the judgment thereon ſhall not be ſtayed or reverſed for any defect or fault in form or ſubſtance in any bill, writ, *&c.* or for variance in any ſuch writs from the declaration and other proceedings; but this ſtatute not to extend, to any appeal of felony or proceſs, on indictment information and appeal. Such writ of error to be brought and proſecuted with effect within twenty years; by *Stat.* 10 & 11 *W.* 3. *c.* 14.—*Stat.* 16 & 17 *C.* 2. *c.* 8, enacts that in all actions, real, perſonal or mixt, the death of either party between verdict and judgment ſhall not be alledged for error.—By *Stat.* 25 *Geo.* 3. *c.* 80, impoſing a ſtamp-duty on warrants of attorney, it is provided that no action ſhall be ſtaid, nor any judgment, ſentence, *&c.* reverſed by reaſon of omiſſion or defect in the entring, or filing of record, the memorandum or minute directed. By theſe and other ſtatutes all trifling exceptions are ſo thoroughly guarded againſt, that writs of error cannot now be maintained but for ſome material miſtake aſſigned. See titles *Amendment*; *Judgment*.

If a writ of error be brought to reverſe any judgment of an inferior Court of record where the damages are leſs than 10*l*; or if it is brought to reverſe the judgment of any ſuperior court after verdict, he that brings the writ, or that is plaintiff in error muſt (except in ſome peculiar caſes) find ſubſtantial bail; to prevent delays by frivolous pretences of appeal; and for ſecuring payment of coſts and damages. See title *Coſts*. And as to bail in ſuch caſes, See *Stats.* 3 *Jac.* 1. *c.* 8: 13 *C.* 2. *ſt.* 2. *c.* 2: 16 & 17 *C.* 2. *c.* 8: 19 *Geo.* 3. *c.* 70.

A writ of error lies from the inferior courts of record in *England* into the King's Bench, and not into the Common Pleas. *Finch L.* 480: *Dy.* 250. And before *Stat.* 23 *Geo.* 3. *c.* 28, it lay from the King's Bench in *Ireland* to the King's Bench in *England*. It likewiſe may be brought from the Common Pleas at *Weſtminſter* to the King's Bench, and then from the King's Bench the cauſe is removable to the Houſe of Lords. From proceedings on the law ſide of the Exchequer, a writ of error lies into the Court of Exchequer-Chamber, before the Lord Chancellor, Lord Treaſurer, and the Judges of *K. B.* and *C. P.* and from thence it lies to the Houſe of Peers. From proceedings in *K. B.* in debt, detinue, covenant, account, caſe, ejectment or treſpaſs originally begun there by bill (except where the King is a party) it lies to the Exchequer-Chamber, before the Juſtices of *C. P.* and Barons of the Exchequer; and from thence alſo to the Houſe of Lords. *Stat.* 27 *Eliz.* *c.* 8.—But where the proceedings in *K. B.* do not firſt commence therein by bill, but by original writ ſued of out Chancery, this takes the caſe out of the general rule laid down by the ſtatute; ſo that the writ of error then lies without any intermediate ſtage of appeal directly to the Houſe of Lords, the dernier reſort for the ultimate deciſion of every civil action. 1 *Ro. Rep.* 264: 1 *Sid.* 424: 1 *Saund.* 346: *Carth.* 180: *Comb.* 295.—Each Court of Appeal in their reſpective ſtages may, upon hearing the matter of law in which the error is aſſigned, reverſe or affirm the judgment of the inferior courts; but none of them are final ſave only the Houſe of Peers, to whoſe judicial deciſions all other tribunals muſt therefore ſubmit and conform their own. See 3 *Comm.* 406—411.

In criminal caſes alſo, judgments may be reverſed by writ of error; which lies from all inferior criminal juriſdictions to the Court of *K. B.* and from *K. B.* to the Houſe of Peers: It may be brought for notorious miſtakes in the judgment or other parts of the record: as where a man is found guilty of perjury and receives the judgment of felony, or for other leſs palpable errors ſuch as any irregularity, omiſſion, or want of form in the proceſs of outlawry or proclamations; the want of a proper addition to the defendant's name, according to the ſtatute (ſee title *Abatement*); for not properly naming the ſheriff, or other officer of the court, or not duly deſcribing where his county court was held: for laying an offence committed in the time of the late King, to be done againſt the peace of the preſent; and for many other ſimilar cauſes, which (though allowed out of tenderneſs to life and liberty) are not much to the credit or advantage of national juſtice. See titles *Outlawry*: *Indictment*, &c.

Theſe writs of error to reverſe judgments in caſes of miſdemeanors, are not to be allowed of courſe, but on ſufficient probable cauſe ſhewn to the Attorney General; and then they are underſtood to be grantable of common right, *et ex debito juſtitiæ*. But writs of error to reverſe attainders in capital caſes are allowed only *ex gratiâ*; and not without expreſs warrant under the King's ſign manual, or at leaſt by the conſent of the Attorney General. 1 *Vern.* 170, 5. Thoſe therefore can rarely be brought by the party himſelf, eſpecially where he is attainted for an offence againſt the State; but they may be brought by his heir or executor after his death. But the eaſier and more effectual way, is to reverſe ſuch attainder by Act of Parliament. See titles *Attainder*; *Judgment*.

Having ſaid thus much generally, we may now proceed particularly to enquire,

I. 1. *By whom, againſt whom*; *and* 2. *at what Time, this Writ may be brought.*
II. 1. *In what Caſes it will lie*; *and* 2. *how it is to be brought.*
III. *In what Court it is to be brought.*
IV. *How Errors are to be aſſigned*; *and what may be aſſigned for Error.* See *ante* II. 1.
V. *What Defence may be made by a Defendant in Error.*
VI. *Of the Judgment to be given on a Writ of Error.*

I. 1. Any perſon damnified by *error* in record, or that may be ſuppoſed to be injured by it, may bring a writ of *error* to reverſe it, whether he be party or no; but principal and bail cannot join in a writ of *error*. And where there are ſeveral defendants, if one of them releaſe the *errors*, he may be ſummoned and ſevered, and the others may reverſe the judgment. 6 *Rep.* 26: *Hob.* 72.

Judgment againſt two, one brought a writ of *error*, and held it ſhould be quaſhed with coſts; that it could not be amended, and that if the other party would not join, the defendant

defendant who choſe to bring a writ of *error*, muſt proceed by ſummons and ſeverance. *Hardw.* 135, 136.

No perſon can reverſe a thing for *error*, unleſs the *error* be to his prejudice. 5 *Rep.* 38. One in remainder may have writ of *error* upon judgment given againſt tenant in tail: But he in reverſion or remainder ſhall not have writ of *error*, in the life-time of tenant for life, on judgment given againſt ſuch tenant, becauſe they cannot be parties grieved in his time. 2 *Nelſ. Abr.* 712.

No perſon can bring a writ of *error* to reverſe a judgment who was not party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reverſal thereof. 1 *Rol. Abr.* 747: *Dyer* 90.

So a writ of *error* does not lie againſt any but him, who is party or privy to the firſt judgment, his heirs, executors, or adminiſtrators. 1 *Rol. Abr.* 747: *Dyer* 90.

And therefore, on a judgment for recovery of land, the writ muſt be brought againſt him who was party to the judgment, although he hath nothing in the land, and not againſt the tenant; and on ſuch writ the judgment may be reverſed; but there muſt go a *ſcire facias* againſt all the tertenants. 1 *Rol. Abr.* 749: 1 *Rol. Rep.* 302:

Upon this rule, that none ſhall have a writ of *error* to reverſe a judgment, but he who is privy to, or hath ſome prejudice thereby, it hath been reſolved, that if one hath lands on the part of his mother, and loſeth them by erroneous judgment, and dies, the heir of the part of the mother ſhall have the writ of *error*. 1 *Leon.* 261: 2 *Sid.* 56: See *Owen*, 68: *Godb.* 377.

So the younger ſon, when intitled to the land by the cuſtom of *Borough-Engliſh*, ſhall bring the writ of *error*, and not the heir at Common-law: for this remedy deſcends with the land. *Owen*, 68: 1 *Leon.* 261: 4 *Leon.* 5.

So if there be an erroneous judgment, in the caſe of tenant in tail female, the iſſue female, and not the ſon, ſhall bring a writ of *error*. *Dyer* 90: 1 *Leon.* 261. 1 *Rol. Abr.* 747.

So if a man ſettles land to the uſe of himſelf and the heirs of his body, the remainder to his own right heirs, and dies, leaving iſſue only a daughter, who levies a fine, and dies without iſſue, and *J. S.* brings a writ of *error* as couſin and collateral heir of the daughter, yet he ſhall never reverſe the fine; for there could no right deſcend to him from the daughter, becauſe ſhe had but an eſtate tail, which determined by her death without iſſue; and it does not appear, that the remainder in fee was in the daughter as right heir, wherefore *J. S.* ſhall not reverſe the fine, *quia de non apparentibus & non exiſtentibus eadem eſt ratio*, eſpecially in a court of judicature, where the judges can take notice of nothing that does not come judicially before them, and appear in the pleading. *Dyer* 89: *Cro. Eliz.* 469: 3 *Lev.* 36.

If there be ſeveral parties to an erroneous fine, they ſhall all join with the party that is to enjoy the land, though they themſelves can have nothing; and this is ſaid to be neceſſary only by way of conformity. 1 *Rol. Abr.* 747: *Dyer* 89.

But if tenant for life, and he in remainder in fee, (being an infant) join in a fine, the infant alone may bring error for the error in reſpect of the perſon of the infant, which is the cauſe of the action for him, and for no other. 1 *Leon.* 31; 2 *Cro. Eliz.* 115.

A writ of *error* may be brought by him that is made party by the law, though he was not originally party to the ſuit, as he who comes in as a vouchee. 1 *Rol. Abr.* 748, 755.

If a man is indicted for felony, and thereupon a *capias* and *exigent* are awarded, but he dies before attainder, his adminiſtrators may have *error* upon this award of the *exigent*, becauſe by the award of the *exigent*, his goods were forfeited; and this is *ad grave damnum*, &c. though the principal judgment can never be given. 11 *Co.* 41. *b.*

Writ of *error* lies in *B. R.* to reverſe a *fine* levied in the *Common Pleas*, and to cancel the ſame if it be erroneous: And if there be not an original, or not proper writs of covenant, or if there be any fraud, &c. writ of *error* may be brought to make the fine void. *Co. Lit.* 9. See titles *Fine and Recovery*.

2. It was formerly holden, that a writ of *error* could not be brought before the judgment given; and if it bore *teſte* before, it was no *ſuperſedeas*, for the words of the writ are, *Si judicium redditum ſit*, &c. 1 *Rol. Abr.* 749. But it ſeems now agreed, that a writ of *error* that bears *teſte* before the judgment is good; and this is the uſual courſe for preventing and ſuperſeding execution; but the judgment muſt be given before the return of the writ. *March* 140: 1 *Vent.* 255: *Moor* 461: 3 *Keb.* 308: 1 *Vent.* 96: *Latch.* 133. and ſee 1 *Term Rep.* 279.

But a writ of *error*, that bears *teſte* before any plaint entered, is not good. *March* 140.

So where the defendant, upon an indictment of barretry, brought a writ of *error*, bearing *teſte* before the aſſiſe: it was diſallowed, becauſe if ſuch practice ſhould obtain, it would diſappoint all proceedings there. 1 *Vent.* 255: 3 *Keb.* 308.

A *writ of* error *cannot be brought* after twenty years. *Hardw.* 345. The ſtatute of limitations muſt be pleaded to a writ of *error*, as well as to an original action. *Id.* 346.

II. 1. Writ of *error* will not lie in the Exchequer chamber on judgment in replevin in *B. R.* nor on judgment in action of *ſcandalum magnatum*. 2 *Nelſ.* 708, 709. But on judgment in replevin in *C. B.* there may be writ of *error* brought in *B. R.* The *Stat.* 27 *Eliz. c.* 8, (ſee poſt. *Div.* III.) is only to relieve on the merits of the cauſe, as it ſtood on the firſt judgment.

Error *de recordo quod coram vobis reſidet* lies in the court of *B. R.* for *errors* in fact in the judgment of the ſame court; as nonage of the parties, want of an original, &c. which doth not proceed from the *error* of the judges; and this writ is allowed without bail. *Cro. Jac.* 254. And *errors* in fact may be corrected in *C. B.* the ſame term, without this writ, which lies not in the Exchequer chamber. *Ibid.* 620.

If judgment is given in *B. R.* in civil actions, a writ of *error* will not lie in the ſame court, only for *errors* in fact triable by a jury; but upon a judgment in criminal caſes, *error* will lie in *B. R.* whether the *error* be in fact or in law; though it lies alſo in Parliament. 3 *Salk.* 147.

Where a judgment in *C. B.* is affirmed upon a writ of *error* in *B. R.* and afterwards a *ſcire facias* is brought on that judgment, and the plaintiff hath judgment thereon; no writ of *error* lieth in the Exchequer Chamber, becauſe the

the record was not in *B. R* by bill, but by writ of *error*. 1 *Roll. Rep.* 264: 3 *Salk.* 148 —See 1 *Salk.* 263.

Writ of *error* cannot be brought on any record which is not a judgment. 1 *Salk.* 145.

The Court of *B. R.* having allowed the ſufficiency of a return to a writ of *mandamus*, and therefore refuſed to grant a peremptory writ, the party applying brought his writ of error in Parliament. Held that no writ of error lay in this caſe, it being merely an *award* of the court, and not a ſtrict formal *judgment*. 3 *Bro. P. C.* (8vo. *ed.*) 505.

The Court of *C. P.* have held, that, though writ of error may lie on a judgment of nonſuit, yet the Court will on motion to take out execution grant it, as ſuch writ of error muſt be evidently merely for the purpoſe of delay and vexation. 1 *H. Black. Rep.* 432.

No writ of *error* will lie of any judgment that is not given in a court of record; nor of a judgment given in an inferior court, as the county-court, *&c. Co. Lit.* 288 *b.* Nor of a decree or ſentence in Chancery proceeding according to equity. 37 *Hen.* 6: *Bro. Error* 95: 1 *Rol. Abr.* 744. But of a judgment given in the limited Court of Chancery, called the Petty-bag, which proceeds according to the Common-law, and holds plea of *ſcire facias* for repeal of the King's letters-patent, *&c.* a writ of *error* lies in *B. R.* 1 *Rol. Abr.* 744: *Dyer* 315: 4 *Inſt.* 80: *Flow.* 393.

Error lies for variance between the original writ and declaration; or want of an original: and where proceedings are ſo erroneous, as not to be amended; for faults in verdicts, executions, *&c.* or when any thing material is omitted in a judgment, writ of *error* lies, and the judgment ſhall be reverſed: ſo where the ſtiles of inferior courts are wrong or inſufficiently named, *&c.* their judgments may be reverſed. But where faults are ſmall, they ſometimes paſs as *vitium clerici*. 2 *Nelſ. Abr.* 714, 715, 721, *&c.* 728.

By the practice of the Court of *Common Pleas*, a defendant coming in by *capias utlagatum* the ſame term in which an *exigent* is returnable, may avoid the outlawry without a writ of *error*, by ſhewing that he purchaſed a *ſuperſedeas* out of the ſame court, and delivered it to the ſheriff before the *quinto exactus*, *&c*; or by ſhewing any other matter apparent on record, which makes the outlawry erroneous, as the want of an original, or the omiſſion of proceſs, or want of form in a writ of proclamation, *&c.* or a return by a perſon appearing not to be ſheriff, or a variance between the original and *exigent*, or other proceſs, or the want of ſuch addition as is required by *Stat.* 1 *H.* 5. *c.* 5: 2 *Hawk. P. C.* 659—661: 1 *Rol. Abr.* 742, 3.—And ſee *Stat.* 5 *Eliz. c.* 23. §§ 13, 14.

If one be attainted upon an erroneous indictment, he cannot be relieved but by writ of *error*, for the judgment being *quod ſuſpendatur*, *&c.* which is the judgment of law due for the offence, it muſt be preſumed to have been given, for that he was guilty of the offence; but if judgment of acquittal is given upon ſuch indictment, the King need bring no writ of *error*; but the offender may be newly indicted, for the judgment being *quod eat ſine die*, *&c.* may be given as well for the inſufficiency of the indictment, as for the party's innocence. 3 *Inſt.* 214.

Alſo any judgment whatſoever, given by perſons who had no good commiſſion to proceed againſt the perſon condemned, may be falſified, by ſhewing the ſpecial matter, without writ of *error*, becauſe it is void; as where a commiſſion authorizes to proceed on an indictment taken before *A. B. C.* and twelve others, and by colour thereof the commiſſioners proceed on an indictment taken before eight perſons only. 3 *Inſt.* 231: 2 *Hawk. P. C.* 459.

If one is attainted of felony, and after, by relation of a general pardon, the felony is pardoned, he ſhall be diſcharged, for he hath no remedy by writ of *error*, to reverſe the attainder. 6 *Co.* 5 *a.*

Wherever a new juriſdiction is erected by act of parliament, and the court or judge, that exerciſes this juriſdiction, acts as a court or judge of record, according to the courſe of the Common-law, a writ of *error* lies on their judgments; but where they act in a ſummary method, or in a new courſe different from the Common-law, there a writ of *error* lies not, but a *certiorari*. 1 *Salk.* 263. See title *Certiorari*.

2. *Error in the King's Bench* is thus proſecuted: the curſitor of the county makes out the writ of *error*, from a *præcipe* or copy of the declaration left with him; which is to be allowed with the clerk of the *errors*, and a certificate of the allowance of the writ muſt be ſerved on the defendant's attorney in *error*; alſo the plaintiff's attorney in the action, is to procure an original to warrant his judgment; and warrants of attorney muſt be filed, and bail put in, where required, *&c.* And then the proceedings are by *ſcire facias ad audiendum errores* againſt the plaintiff in the action, wherein judgment was obtained; and the writ of *error* being received by the ſheriff to whom directed, he is to give notice to the plaintiff in *error* to ſhew cauſe why execution ſhould not be on the judgment, and make a return to that purpoſe; then a rule is to be given with the clerk of the rules for the plaintiff in *error* to aſſign his errors by ſuch a day, which if he ſhall not do before the rule is out, the plaintiff in the original action may take out execution againſt him.

If the plaintiff in *error* aſſign *errors* in the record, then the defendant muſt plead *In nullo eſt erratum*, and thereupon enter the cauſe with the clerk of the papers, for the *errors* to be argued; and paper books for the counſel and judges, are to be made out, *&c.* If ſome part of the record be not returned, a *certiorari* muſt be prayed to bring it into court; and if matters of fact are alledged in *error*, as nonage, death of the plaintiff, *&c.* a proper plea muſt be made thereto, and iſſue thereupon taken and tried as in any other iſſue: but if only matters of law are aſſigned, the *errors* are argued by counſel on both ſides, and the judgment is either reverſed or affirmed: and when judgment is affirmed, the defendant in *error* may proceed againſt the defendant in the action, by taking out execution on the *affirmetur*, or bringing action of debt on the judgment; or he may proſecute the bail by *ſcire facias* upon their recogniſance. But it is ſaid by ſome, that an aſſignment of *errors* in *fact* and in *law*, is bad on demurrer; by others, that the aſſignment of *error* in law may ſtand, and the fact be conſidered as nothing. *Sed quere*, Where there is an *error* in fact, if the writ of *error* ought not to be *coram vobis reſidens*, i. e. in the court where the judgment was given. In this caſe, however, we muſt except the *want of warrants of attorney*, *&c.* which are *facts*; and it is every day's practice to aſſign ſuch, with *errors* in law; and the uſual courſe is, if defendant in *error* does not pray a *certiorari*, for the plaintiff to pray it.

When

When a judgment is reverſed or affirmed in the *Exchequer Chamber*, the tranſcript of the record thereof will be remitted back to the Court of *K. B.* to be entered up at the end of the judgment there: and if ſuch judgment ſhall be affirmed in the Exchequer Chamber, yet a writ of *error* may be brought thereupon returnable in parliament.

If you would bring a *writ of error in parliament* to reverſe a judgment in *B. R.* there muſt be a petition to the King for his warrant, which petition has the allowance of the Attorney-General, and then the King writes on the top of it *Fiat Juſtitia*; whereupon a writ of *error* is made out by the clerk of the *errors*. And then the Lord Chief Juſtice of *B. R.* carries the record, and a tranſcript thereof, up to the Houſe of Lords in full Parliament, and after they are examined there, leaves the tranſcript with the Lords, but brings back the record: and this being done, the attorney for the defendant in *error*, gets ſome Lord to move that the plaintiff in *error* may aſſign his *errors*; but if for the plaintiff, motion is to be made, that upon his aſſigning *errors*, the defendant may appear and make his defence, and counſel be heard on both ſides: then, after the judgment is either affirmed or reverſed, the clerk of the parliament remands the tranſcript of the record into *B. R.* with the affirmation or reverſal thereof, to be entered upon the record of the ſaid court, which court, if affirmed, awards execution, &c. *Dyer* 385.—See *Comp.* 843.

A writ of *error* in parliament is made returnable immediately; or on a prorogation to the next ſeſſion, and it doth not determine by a prorogation. But if a parliament is *diſſolved* before the *errors* are heard, it is otherwiſe. And on motion, execution hath been granted in *B. R.* on a judgment in ſuch a caſe, the record being never out of the court. *Raym.* 5: 2 *Nelſ. Abr.* 731.

Where a writ of error was brought in *B. R.* in the life-time of *Geo.* I. but was not argued till after the acceſſion of *Geo.* II. when the judgment was affirmed, on a writ of error in parliament, this judgment was reverſed; it being held that the firſt writ of error, *The King being ſole plaintiff in the cauſe*, was abſolutely abated. This was the caſe of the Deanery of *Armagh* in *Ireland*. 3 *Bro. P. C.* (8vo. ed.) 507.

When appeals lay to *England* to reverſe a judgment given in the *King's Bench* in *Ireland*, a writ was procured from the curſitor, directed to the Chief Juſtice of the Court of *B. R.* in *Ireland*, requiring him to ſummon the plaintiff in the action there, to appear in *K. B.* to anſwer the *errors*; whereupon a tranſcript of the record was ſent over, (not the record itſelf of the judgment, which remained in *Ireland*,) and when the *errors* were argued, if the judgment was reverſed, there went a writ to the Chief Juſtice of *Ireland* to reverſe it; ſo that the judgment was not actually reverſed here, but there. And where the judgment in *Ireland* was affirmed here, there could be no writ of execution granted here; but on affirmance of the judgment a writ went, reciting all the proceedings, directed to the judges of *B. R.* in *Ireland*, commanding them to iſſue proceſs of execution. *Cro. Car.* 368: 1 *Salk.* 321.

The party bringing the writ of *error* is to cauſe the roll where the judgment is entered, to be marked with the word *error* in the margin, that the other party may have notice on the record that the writ of *error* is brought, and this marking of the roll, on giving notice thereof, is as it were a *ſuperſedeas* in itſelf to hinder execution: Though a *ſuperſedeas* is to be made out, allowed and left with the ſheriff of the county: and the plaintiff's attorney is not obliged to ſearch the record, whether writ of *error* is brought or not; but may make out execution upon the judgment, if no *ſuperſedeas* be taken forth, or he hath no notice of the writ of *error*. *Trin.* 24 *Car. B. R.*

On a writ of *error* of a judgment in the Common Pleas, or other inferior court, in every adverſary ſuit, the record itſelf ſhall be removed, that it may remain as a precedent and evidence of the law in the like caſes. 1 *Rol. Abr.* 753: 5 *Co.* 39.

But in the caſe of a fine the tranſcript only is removed, for fines are only a more ſolemn acknowledgement or contract of the parties, and therefore are no memorials of the law, and need only be affirmed or vacated; if the former, the contract ſtands as it was; if the latter, the juſtices of *B. R.* may ſend for the fine itſelf, and reverſe it, or they may ſend a writ to the treaſurer and chamberlain to take it off the file; beſides, ſhould the record itſelf be removed and affirmed, it could not be ingroſſed for want of a chirographer in *B. R.* 1 *Rol. Abr.* 752: 1 *Bendl.* 51: *Dyer* 89: *Godb.* 248: 2 *Rol. Rep.* 233: *F. N. B.* 20.—See title *Fine and Recovery*.

If the Judges of the Common Pleas, or other judges upon a writ of *error*, will not certify all the record, the party that ſues the writ of *error* may alledge diminution of the record, and pray a writ to the juſtices that certified the record before, to certify the whole record. *F. N. B.* 25 *a.* But diminution cannot be alledged upon a writ of *error* brought upon a judgment in any inferior court. 1 *Sid.* 40.—Yet ſee *infra*.

By *Stat.* 3 *Jac.* 1. *c.* 8, he that brings writ of *error*, to reverſe a judgment in a *ſuperior* court, in all caſes *after a verdict*, or in any *action* of *debt*, upon *bond for payment of money only*, or on a *contract*, muſt put in good ſureties to proſecute his writ of *error* with effect, and pay the debt and damages if judgment be affirmed: and by *Stat.* 19 *Geo.* 3. *c.* 70. § 5, this is extended to writs of error to reverſe judgments in inferior courts where the damages are under 10*l.* If bail be not put in, on the writ of *error* brought upon a judgment in the courts at *Weſtminſter*, in thoſe caſes where bail is required, the writ of *error* is no *ſuperſedeas* to the execution; though ſuch writ is in being, until a *nolle proſequi* is entered, or judgment affirmed, &c. And it is the ſame where inſufficient bail is given, on rule to put in better bail, or juſtify thoſe put in, which if the plaintiff doth not do, execution is ordered upon the judgment, with a *non obſtante* to the writ of *error*, &c. *Mich.* 9 *W.* 3. *B. R.*

A plaintiff in *error* is, in the time appointed by the rule for that purpoſe, to certify the record into *B. R.* or the court will grant a *nolle proſequi* on the writ of *error*. *Mich.* 22 *Car. B. R.*—See *poſt* Div. V.

The court will not let the plaintiff in *error* quaſh his own writ of *error*; though they may grant leave to diſcontinue it. 5 *Mod.* 67. If a verdict is for a defendant in *error*, and judgment is affirmed, coſts are allowed by *Stat.* 3 *Hen.* 7. *c.* 10, on occaſion of the delay of execution. And by *Stat.* 4 & 5 *An. c.* 16, upon quaſhing writs of *error*, for defect or variance from the record, &c. the defendant is to have coſts as if judgment were affirmed. When a writ of *error* is not *in delay of execution*, as where

it

it is brought after the execution is executed, the plaintiff ſhall not have damages and coſts. *Cro. Jac.* 636.

When a writ of *error* is brought to reverſe a judgment in an inferior court, though the record is not certified as it ought, yet execution cannot be ſued; but on certificate of the neglect, &c. a writ of *execution of the judgment* may be iſſued. 1 *Lil. Abr.* 526. Upon a writ of *error*, if the clerk below will certify the record wrong, action on the caſe lies againſt him; and if he make no return, the plaintiff may have the writ of *execution* out of Chancery. *Mod. Caſ.* 245.

If erroneous judgment be for the defendant in an inferior court, and it is reverſed in *B. R.* and the merits appear for the plaintiff, he ſhall have judgment; but if the merits be againſt the plaintiff, the defendant ſhall have new judgment, in like manner as in the Exchequer Chamber; for the judges are to *reform*, as well as to affirm or reverſe. 7 *Mod.* 2, 3. If a writ of *error* to reverſe a judgment be diſcontinued for want of proſecution; execution cannot be had upon the judgment, until the diſcontinuance is certified from the court where diſcontinued. 1 *Lil.* 518. If a writ of *error* is brought to remove a record of a judgment given in *C. B.* and the plaintiff in *error* leaves the record there, without removing it before the return of the writ; or in caſe there be a longer return day than is convenient in the writ of *error*, as if it is purchaſed the beginning of *Michaelmas* term, and made returnable in *Hilary* term; the court may award execution, although the writ of *error* be delivered. *Jenk. Cent.* 180: *Dyer* 245.

III. Erroneous judgments given in the court of *B. R.* were only reformed by the parliament till *Stat.* 27 *Eliz. cap.* 8. By that ſtatute, a writ of *error* lies out of the Chancery upon all judgments given in the *King's Bench*, when the ſuit is by bill, (except the King is a party to the ſuit) returnable in the *Exchequer Chamber*, before the Judges of the Common Pleas, and Barons of the Exchequer, &c. who may examine the *errors*, and reverſe or affirm the judgment; other than for *errors*, concerning the juriſdiction of the court, or want of form in writs, pleadings, &c. and after the *errors* are examined, and judgment affirmed or reverſed, the record is ſent back to the *King's Bench*, to proceed and award execution; but if the ſuit is by original writ, or on *qui tam*, &c. where the King is party, writ of *error* lies only in parliament.

A *qui-tam* action of debt is a civil ſuit. *Comp.* 382. And a writ of *error* on it, lies from the *King's Bench* to the *Exchequer Chamber*. *Doug.* 353.—See title *Exchequer*.

Not only on reverſing or affirming a judgment, the Exchequer Chamber is to ſend back the record into *B. R.* but alſo if the plaintiff in the writ of *error* is nonſuit, or if the ſuit is diſcontinued in the Court of Exchequer Chamber, the record ſhall be ſent back: and the Court of Exchequer ſhall give coſts and damages to the plaintiff in the original action for his delay, &c. though if the plaintiff in *error* was plaintiff in the original action, there no coſts can be given. 2 *And.* 122: 2 *Nelſ. Abr.* 707.

Where a writ of *error* determines in the Exchequer Chamber, by abatement or diſcontinuance, the judgment is not again in *B. R.* till a *remittitur* is entered. 1 *Salk.* 261. The Exchequer Chamber doth not award a *ſci. fac. ad audiend. errores*; but notice is given to the parties concerned. 1 *Vent.* 34.

The court of parliament is the ſupreme court, where anciently cauſes of great conſequence, as between the *Magnates Regni*, were heard and determined; hence the *dernier* reſort is to the Houſe of Lords, to which a writ of *error* lies; and therefore, if a writ of *error* be brought of a judgment in the King's Bench into the Exchequer Chamber, and there the judgment is reverſed; yet a writ of *error* lies of ſuch judgment into parliament, and the lords may reverſe ſuch ſecond judgment. *Show. Parl. Caſ.* 24, 110: 1 *Vent.* 334: *Raym.* 330: 2 *Jon.* 99: 2 *Lev.* 232.

So a writ of *error* lies into parliament upon a judgment in *B. R.* either in a cauſe brought there by writ of *error*, or originally commenced there. 1 *Rol. Abr.* 745.

And though upon a judgment in the King's Bench, ſince the *Stat.* 27 *Eliz. cap.* 8, the party may elect either to bring a writ of *error* in the Exchequer Chamber, or in parliament; yet if the cauſe commenced in the King's Bench by *original writ*, there lies no writ of *error* but into parliament; alſo if he elects to bring *error* in the Exchequer Chamber regularly, he cannot after bring *error* in parliament upon the firſt judgment. 1 *Saund.* 346. *Carth.* 180. *S. P.*—See 2 *Rol. Abr.* 492: 2 *Lev.* 232.

To reverſe a judgment given in the Court of *Common Pleas*, the writ of *error* is made returnable in the King's Bench, and *error* is not to be brought in parliament: though where a writ of *error* is brought in *B. R.* upon a judgment given in *C. B.* and the judgment is reverſed or affirmed in *B. R.* the party grieved may have writ of *error* returnable in parliament. *Stat.* 31 *Eliz. c.* 1: 1 *Lil. Abr.* 519, 521. Erroneous judgment in the *Court of Exchequer*, is to be examined by the Lord Chancellor, &c. with ſome of the juſtices, and ſuch other ſage perſons as they think fit; and if any *error* be found, they ſhall correct the rolls, and ſend them into the Exchequer, in order to make execution, &c. *Stat.* 31 *Ed.* 3. *cap.* 12.

No writ of *error* lies *in Banco* or *Banco Regis*, upon a judgment given within the *five ports*; but by cuſtom ſuch judgment is examinable by bill in nature of a writ of error *coram domino cuſtode ſeu gardiano quinque portuum apud curiam ſuam de Shepway*. 4 *Inſt.* 224.—See title *Cinque-Ports*.

If a judgment be given in the court of ſtannaries of the Dutchy of *Cornwall*, no writ of *error* lies upon this *in Banco* or *Banco Regis*, becauſe it hath not been uſed; but of this there may be an appeal to the guardian of the Stannaries, and from him to the Prince; and when there is no Prince, to the King's Privy Council. 1 *Rol. Abr.* 745.—See 4 *Inſt.* 230: 2 *Danv. Abr.* 304.

Upon a judgment given in the *Huſtings* in *London*, a writ of *error* lies at *St. Martin's* before certain juſtices. 1 *Rol. Abr.* 745: 1 *Lev.* 309: 2 *Saund.* 253. *S. P.* and upon a judgment of the ſaid juſtices, a writ of *error* lies in parliament. See 2 *Leon.* 107.—See title *Diſſenters*.

In *Wales*, at the Great Seſſions, there a writ of *error* lay on *perſonal* actions to the council of the *Marches* of *Wales*; and if they gave an erroneous judgment, it was final; for *Stat.* 34 & 35 *H.* 8. *c.* 16, ordained this writ to the council there; and no writ of *error* was granted of ſuch erroneous judgment: upon *errors* in *real* or *mixed* actions however in *Wales*, writ of *error* lay into the *King's Bench*. *Jenk. Cent.* 71. And ſo now it does in *perſonal* actions by *Stat.* 1 *W.* & *M. c.* 27.—See title *Courts of Wales*.

In

In some cases a writ of *error* lies in the same court wherein the record is.

If upon a judgment in *B. R.* there be *error* in the process, or through the default of the clerks, it shall be reversed in the same court by writ of *error* sued there before the same justices. *F. N. B.* 21: *Poph.* 181: 1 *Rol. Abr.* 746.

So if one is indicted of treason or felony in *B. R.* or being indicted elsewhere, the indictment is removed in *B. R.* and by process of that court he is erroneously outlawed, and so returned; a writ of *error* may be brought in *B. R.* for the reversal thereof. 3 *Inst.* 214.

Also if an erroneous judgment in point of law be given in *B. R.* upon an indictment in *London*, a writ of *error* may be brought in the same court; for though in civil cases *error* does not lie in the same court, unless for a matter of fact; yet in criminal cases it lies as well for an *error* in law as fact. 1 *Sid.* 208.

But if an erroneous judgment be given, and the *error* lies in the judgment itself, and not in the process, a writ of *error* does not lie in *B. R.* of such judgment. 1 *Rol. Abr.* 746.

If a record is removed by writ of error out of the Common Pleas into the King's Bench, and the writ of *error* for insufficiency is quashed in the King's Bench, the plaintiff in *error* may have a writ *coram vobis residen'*. But such new writ is not a *superscdeas* in itself as the first writ was, and therefore he must move the court for a *supersedeas*, and put in bail thereon. *Carth.* 363, 9.

So if such second writ be quashed for insufficiency, yet the court will grant a new or second writ of error *coram vobis residen'*. As also a *supersedeas* on putting in bail; for such second writ being void, is as if there had been none before. *Carth.* 369, 370.

IV. The parties, upon the removal of the record by the writ of *error*, have no day in court given to either of them; so that if the plaintiff in *error* delay to sue forth his *fci. fac. ad audiend. errores*, the defendant hath no way to compel him, but by suing out a *scire facias quare executionem non*, &c. And if thereupon the plaintiff in *error* doth not plead that his *errors* are assigned, but suffer judgment to pass upon two *nihils*, no *errors* afterwards assigned shall prevent execution. *Carth.* 41. The *fci. fac. ad audiendum errores* is only used in *B. R.* In the Exchequer Chamber *notice* is given. It is said the usual practice is, that the defendant in the writ of *error*, by consent doth voluntarily take notice of the assignment of *errors*, and this consent is testified by his pleading *In nullo est errat'* and then there is no occasion for a *scire facias ad audiend. error'*. *Ibid.*

Errors are to be assigned in the term, or the writ of *error* will be quashed. 1 *Lil. Abr.* 524. When the record is in court by writ of *error*, the plaintiff in *error* is to assign his *errors*; and may have a *scire facias* before the record is entered: and the manner of assigning *errors*, according to the ancient practice, is to put a bill into court, and say in the bill, *in hoc erratum est*, &c. shewing in certain in what things. *F. N. B.* 20. The assignment of *error*, *in omnibus erratum* is not good; for the judgment is founded upon the original writ, count, pleading, issue, process, trial, and so is manifold. *Jenk. Cent.* 84. *Errors* in *law* not assigned in the record, may be assigned after a *scire facias ad audiend' errores*; as the record is in court; but it is not so of a warrant of attorney, which is an *error* in *fact*, and not upon record. *Ibid.* 140: 5 *Rep.* 37.

If one in execution brings *error*, he ought to assign the *errors* in his proper person: and in cases of outlawry for felony, *errors* sufficient must be certainly alledged in writing, before the writ of *error* is allowed. *Jenk. Cent.* 165, 179. Where a recovery is had, and *error* brought, if the original writ doth not abate by death; but is abateable only, as by entry into the land pending the writ, or coverture, acquisition of a dignity, a partial array returned, aid denied, &c. that should have been pleaded, and were not: these shall not be assigned for *error*; for they are waived. 9 *Rep.* 47: 21 *H.* 6. 29.

The assigning general *errors* is to say that the declaration, &c. is not sufficient in law: and that judgment was given for the plaintiff, where it ought to have been for the defendant: and the *errors* of a judgment are now to be assigned on the record, to appear with it to the court.

If the plaintiff in *error* assigns *errors* in *fact*, and *errors* in *law*, which are not assignable together, and the defendant in *error* pleads *in nullo est erratum*; this is a confession of the *error* in *fact*, and the judgment must be reversed, for he should have demurred for the *duplicity*. *Style* 69: 1 *Lev.* 76: *Salk.* 268: 6 *Mod.* 113, 206.

Also if an *error* in *fact* be well assigned, *in nullo est erratum* is a confession of it, for the defendant ought to have joined issue upon it, so as to have it tried by the country. 1 *Sid.* 93: *Raym.* 59. Because, in *nullo est erratum* is in the nature of a *demurrer*, which confesses the fact, if well pleaded, or well assigned.

But if an *error* in *fact* be ill assigned, *in nullo est erratum* is no confession of it; as if it be assigned, that such a one at the time of the return of the *venire* was not sheriff, and the record be removed into *B. R.* by *certiorari*, there *in nullo est erratum* is no confession of that *error*, because the record is not in court, that being no part of the record, for the plea is *in nullo est erratum in recordo*. *Cro. Jac.* 12, 29, 521: *Raym.* 231: *Cro. Car.* 421: 1 *Rol. Ab.* 758.

So if the plaintiff in *error* assigns an *error* in *fact*, viz. that the defendant, who was an infant, did not appear by guardian, but by attorney, and concludes with *hoc paratus est verificare*, instead of concluding to the country, as he ought to do, though the defendant in *error* pleads *in nullo est erratum*, yet it shall not amount to a confession, but shall be taken only for a *demurrer*. *Yelv.* 58.

Also if an *error* in *fact*, that is not assignable, be assigned, and *in nullo est erratum* be pleaded, it is no confession; as if it be assigned, that such a day there was no court of Common Pleas sitting, because that is against the record, and in such case *in nullo est erratum* is only a *demurrer*; so if a man says he did not appear, and the record says he did, *in nullo est erratum* is no confession, but a *demurrer*, because it is against the record. *Cro. Car.* 12, 29, 52: *Yelv.* 58: *Raym.* 231: 1 *Vent.* 252: 3 *Keb.* 259: 1 *Lev.* 76.

It has been held, that an *error* in *fact* cannot be assigned in the Exchequer Chamber: though by some authorities, *errors* in *fact* may be assigned as *errors* in *law*. 2 *Mod.* 194: 2 *Nels. Abr.* 708.

By *Stat.* 20 *Car.* 2. *c.* 6, In actions real, personal, and mixed, the death of either party between verdict and judgment, shall not be alledged for *error*.

It seems a general rule, that nothing can be assigned for *error* that contradicts the record; for the records of the courts of justice being things of the greatest credit,

cannot be queſtioned but by matters of equal notoriety with themſelves; wherefore, though the matter aſſigned for *error* ſhould be proved by witneſſes of the beſt credit, yet the judges would not admit of it. 1 *Rol. Abr.* 757.

An original writ of the ſame term, in which final judgment is given, will not warrant that judgment, if it appear upon the ſame record, that there have been proceedings of a preceding term. 1 *Wilſ.* 181.

Hence it is, that in a writ of *error* to reverſe a fine, the plaintiff cannot aſſign, that the *conuſor died before* the *teſte* of the *dedimus*, becauſe that contradicts the record of the conuſance taken by the commiſſioners, which evidently ſhews that the conuſor was then alive, becauſe they took his conuſance after they were armed with the commiſſion, and the *dedimus* iſſued. *Dyer* 89: 1 *Rol. Abr.* 757.—See title *Fine and Recovery.*

V. The defendant in *error* may plead a releaſe of all *errors*, or a releaſe of all ſuits, and theſe pleas, if found for him, will for ever bar the plaintiff in *error*. 1 *Rol. Abr.* 788.

So where by a writ of *error* the plaintiff ſhall recover, or be reſtored to any *perſonal* thing, as debt, damage, or the like, a releaſe of *all actions perſonal* is a good plea; and when *land* is to be recovered or reſtored in a writ of error, a releaſe of *actions real* is a good bar; but where by a writ of *error* the plaintiff ſhall *not* be reſtored to *any perſonal* or *real thing*, a releaſe of all actions *real* or *perſonal* is no bar. *Co. Lit.* 288 *b*: 8 *Co.* 152: 1 *Rol. Abr.* 788: 2 *Rol. Abr.* 405.

Alſo if a man loſes in a real action, and he releaſes all his right to the land, and ſo where there is a fine levied, this ſhall bar him of his writ of *error*; for no perſon can bring a writ of *error* to reverſe a judgment that is not intitled to the land, &c. for the courts of law will not turn out the preſent tenant, unleſs the demandant can make out a clear title; *poſſeſſion always carrying with it the preſumption of a good title, till the right owner appears.* 1 *Rol. Abr.* 747, 788: *Dyer* 90 *a*: 3 *Leo.* 36: *Cro. Eliz.* 469: 1 *Rol. Abr.* 789. If the tenant, pending a *præcipe* againſt him, aliens in fee, and after judgment is given againſt him, and he brings a writ of *error*; this feoffment is not any bar to the writ, becauſe he was privy to the judgment after. 1 *Rol. Abr.* 788: *Bridg.* 77: 1 *Rol. Rep.* 306. In a writ of *error* to reverſe a common recovery, it is no good plea, that the plaintiff pending the writ of *error* hath entered into part, for before the poſſeſſion was taken from him, he might have *error* to reverſe the judgment, though not to have reſtitution. 1 *Lev.* 72.—See title *Fine and Recovery.*

In a *ſci. fac.* againſt a tertenant, he may plead a releaſe of *error*, though he be not privy to the judgment. 9 *H.* 6. 43: *Bro.* 9. *S. C.*

But the tertenants cannot plead in abatement of the writ of *error*, but only in bar as a releaſe, &c. in maintenance of their title. 1 *Lev.* 72.

After *in nullo eſt erratum* pleaded, the party affirms the record to be perfect, and he is foreclоſed to ſay there is *error* in it: though the court is not reſtrained from examining into it. 1 *Salk.* 270. The judges are not bound to ſearch for *errors* in the record, which were not aſſigned; but may if they will; and if they find *error* they ought to reverſe the judgment. *Jenk. Cent.* 159.

VI. A judgment, *as being an intire thing*, cannot be reverſed in part, and ſtand good as to other part; or be reverſed as to one party, and remain good againſt the reſt: though if there be *error* in awarding execution, the execution only ſhall be reverſed, and not the judgment. *Hob.* 90: *Carth.* 235. If judgment is entered againſt joint defendants, when one of them is dead, the judgment ſhall be reverſed for *error* as to all of them; for in ſuch caſe the plaintiff ought to make a ſpecial entry of the death of the party, with *Nihil ulterius verſus eum fiat*, and then take judgment only againſt the others. *Ibid.* 149.

The Court of Exchequer Chamber have not any authority, but to reverſe or affirm the judgment, &c. for they cannot make execution. *Cro. Eliz.* 108. But where judgment is given for the defendant, and the plaintiff brings a writ of *error*; if the judgment is reverſed, the court which reverſes the judgment ſhall give judgment for the plaintiff, as the other court ought to have done. *Yelv.* 117, 118. In the Exchequer Chamber, after reverſal of a judgment, &c. in *B. R.* the court gave judgment, that the plaintiff recover, &c. but becauſe they wanted power to award a writ of inquiry which was neceſſary, being on a demurrer, therefore it was ſent back into *B. R.* for the execution of that writ, and thereupon to give final judgment: but if the judgment is againſt the plaintiff in *B. R.* upon a ſpecial verdict, and that judgment is reverſed in the Exchequer Chamber, there being no writ of inquiry requiſite, the Court of Exchequer Chamber doth not only give judgment of reverſal, but a compleat judgment for the plaintiff in the action. *Carth.* 181. If erroneous judgment be had by conſent of parties, it may be reverſed in the Exchequer Chamber; *for conſent of parties may not change the law*; but if the conſent is entered upon and made part of the record, it may be good. *Hob.* 5: *Cro. Eliz.* 664. The reverſal in the Exchequer Chamber, is *res judicata*: no writ of *error* lies upon ſuch judgment, except in parliament; and it is by ſix judges at leaſt, by *Stats.* 27 *Eliz. c.* 8: 31 *Eliz. c.* 1.

When judgment is given in *B. R.* for the plaintiff in *error*, there ſhall be only a *judicium revocetur*, &c. entered with coſts: if for the defendant in *error*, that the plaintiff *nil capiat per breve ſuum de errore.* The Chief Juſtice of *B. R.* &c. or the eldeſt judge ought to allow a writ of *error*, which is in judgment of law a *ſuperſedeas* until the *errors* are examined, and the judgment affirmed or reverſed. *Cro. Jac.* 534. As a plaintiff having erroneous judgment may reverſe it; and new judgment may be given for him, ſo if a judgment is reverſed, the plaintiff may bring a new action for the ſame cauſe. 1 *Lev.* 310. Where a judgment is pleaded in bar of another action, &c. and judgment given on that plea; writ of *error* may be had to reverſe the ſecond judgment. *Cro. Eliz.* 503: *Jenk. Cent.* 259. And debt lies upon a judgment in *B. R.* after a writ of *error* brought; which is only a *ſuperſedeas* to the execution. 1 *Lev.* 153. But the court will ſtay proceedings in ſuch action on giving judgment.

In a writ of *error* upon a judgment in treſpaſs againſt ſeveral, if the judgment be erroneous, becauſe one of the defendants was within age, and appeared by attorney, the judgment ſhall be reverſed *in toto* againſt all. 1 *Rol. Abr.* 776: *Cro. Jac.* 289, 303: *Allen* 74, 75: *Style* 121, 125, 406.

See further as to the proceedings on a Writ of Error. *Impey's Pract. K. B.*

ERTHMIOTUM, An ancient word for a meeting of the neighbourhood to compromiſe differences among themſelves; it is mentioned in *Leg. Hen.* 1. *c.* 57.

ESBRANCATURA, from the Fr. *eſbrancher.*] Cutting off branches or boughs in foreſts, *&c. Hoved.* 784.

ESCALDARE, To ſcald: *Escaldare porcos*, was one of our ancient *tenures in ſerjeanty*; as appears by the inquiſition of the ſerjeancies and knights fees in the 12th and 13th years of King *John*, within the counties of *Eſſex* and *Hertford. Lib. Rub. Scaccar' MS.* 137.

ESCAMBIO, derived from the Span. *cambier* to change.] Was a licenſe granted to make over bills of *exchange* to another beyond the ſea: for by the *Stat.* 5 *R.* 2. *c.* 2, no merchant ought to exchange or return money beyond ſea, without the King's licence. *Reg. Orig.* 194. See title *Exchange*; *Bill of Exchange*.

ESCAPE,

ESCAPIUM, from the Fr. *eſchapper*, i. e. *effugere*, to fly from.] A violent or privy evaſion out of ſome lawful reſtraint; as where a perſon is arreſted or impriſoned, and gets away before he is delivered by due courſe of law. *Staundf. P. C. cap.* 26, 27.—*Terms de Ley.*

Eſcapes are either (A) in *civil*, or (B) in *criminal*, caſes.

(A) As to ESCAPES in CIVIL CASES.

I. 1. *Where the party ſhall be ſaid to be* legally committed, *ſo that the ſuffering him to go at large will be adjudged an* Eſcape; 2. *What* degree *of* Liberty, *or* going *at* large, *ſhall be deemed an* Eſcape; 3. *What* Perſons *are* anſwerable *for an* Eſcape.

II. 1. *Of the Difference between* voluntary *and* negligent *Eſcapes*; *and* 2. *Between Eſcapes on* Meſne Proceſs *and* Execution.

III. 1. *Of the Nature of the* Action *to be brought for an* Eſcape; *and* 2. *Of the Manner of laying it.*

IV. *Of the* Party's Defence *ſued for the* Eſcape; *and therein of pleading* freſh Suit.

I. 1. It ſeems agreed as a general rule, that wherever a ſheriff or other officer hath a perſon in cuſtody, by virtue of an authority from a court which hath juriſdiction over the matter, that the ſuffering ſuch a perſon to go at large is an eſcape, for he cannot judge of the validity of the proceſs or other proceedings of ſuch court, and therefore cannot take advantage of any errors in them; hence the law allows him, in an action of falſe impriſonment, to plead ſuch authority, which will excuſe him, though it be erroneous; but if the court has no juriſdiction of the matter, then all is void, and conſequently the officer not puniſhable for ſuffering a perſon taken upon ſuch void authority to eſcape. *Moor* 274: *Dyer* 66, 175, 306: *Poph.* 203: 1 *Leon.* 30: 5 *Co.* 64: 8 *Co.* 141 *b*: *Cro. Jac.* 280, 289: 2 *Bulſt.* 64, 237, 256. If a *ca. ſa.* iſſue after a year and a day, without ſuing out a *ſcire facias*, this error will not excuſe the ſheriff in an eſcape. *Cro. Car.* 288: *Salk.* 273. But though a ſheriff may not take advantage of an erroneous proceſs; yet he ſhall of a void proceſs, on which it is no eſcape to let a priſoner go.

If at the petition of *A.* and the reſt of the creditors of *B.* a commiſſion under the ſtatutes againſt bankrupts is iſſued out againſt *B.* and thereupon the commiſſioners ſit and offer interrogatories to *C.* and he refuſes to be examined, and by them is thereupon committed to priſon, and the gaoler ſuffers him to eſcape, as the commiſſioners had ſufficient authority to commit, and *A.* was prejudiced by the eſcape, he may maintain an action againſt the gaoler. 1 *Rol. Rep.* 47: *Moor* 834, *pl.* 1123, *S. C.*

The ſheriff cannot be charged with an eſcape before he had the party in *actual* cuſtody by a legal authority; and therefore if an officer, having a warrant to arreſt a man, ſee him ſhut up in a houſe, and challenge him as his priſoner, but never actually have him in his cuſtody, and the party get free, the officer cannot be charged with an eſcape. *Bro. Eſcape* 22.

But if *A.* is arreſted, and in the *actual* cuſtody of the ſheriff, and afterwards another writ is delivered to him at the ſuit of *J. S.* upon the delivery of the writ, *A.* by conſtruction of law is immediately in the ſheriff's cuſtody, without an actual arreſt; and if he eſcapes, the plaintiff may declare, that he was arreſted by virtue of the ſecond writ, which is the operation it has by *law*, and not according to the *fact.* 5 *Co.* 89. But where the ſheriff, not having *actually* arreſted a defendant, but accepted the undertaking of an attorney to put in bail, who put in bail, and the ſheriff had returned a *cepi corpus*, held *per* Lord *Mansfield* at *Surry* aſſizes, ſummer 1775, in *Hodgson* and *Akerman*, Eſq. that the ſheriff was not liable, upon a writ of *non eſt inventus*, on another proceſs, to an action, either for an *eſcape* or a falſe return, or for negligence in not taking the defendant, no actual negligence being proved; and the plaintiff was non-ſuited.

Note, the writ returned *cepi corpus* was a *latitat*, returnable three or four days after the other proceſs, which was an original, but that difference was not, in this caſe, conſidered as material.

If a perſon out upon bail renders himſelf in diſcharge of his bail, and a *reddidit ſe* is entered in the judge's book, and a *committitur* filed in the office, and the priſoner afterwards eſcapes; yet if no notice was given to the marſhal of ſuch render, nor no entry made of the commitment in his book, the priſoner ſhall not be deemed in cuſtody ſo as to charge the marſhal with an eſcape; but it ſeems this matter cannot be inſiſted upon after trial. 1 *Salk.* 272, 3. *Vide poſt.*

It hath been held, that entering a *commitur* upon the roll was not ſufficient to charge the marſhal with any eſcape, without proving an actual impriſonment; but that proving the party to be actually in priſon, though there be no entry made in the marſhal's book is ſufficient. 1 *Sid.* 220: 1 *Keb.* 775.

And now, for the greater ſecurity of creditors, and the better to enable them to prove the actual cuſtody of the priſoner, it is enacted, by *Stat.* 8 & 9 *W.* 3. *c.* 27. §. 9, "That if any one, deſiring to charge any perſon with any action or execution, ſhall deſire to be informed by the marſhal or warden, or their reſpective deputies, or by any other keeper of any other priſon, whether ſuch perſon be a priſoner in his cuſtody, or not, the ſaid marſhal or warden, or ſuch other keeper, ſhall give a true note in writing thereof, to the perſon ſo requeſting the ſame, or to his lawful attorney, upon demand, at his office for that purpoſe, or, in default thereof, ſhall forfeit the ſum of 50*l.* and if ſuch marſhal or warden, or their reſpective deputy, *&c.* exerciſing the ſaid office, or other keeper, *&c.* of any other priſon, ſhall give a note in writing that

ſuch perſon is an actual priſoner in his or their cuſtody, every ſuch note ſhall be taken as a ſufficient evidence, that ſuch perſon was at that time a priſoner in actual cuſtody."

A *committitur* upon the roll is good evidence in eſcape, without an entry in the marſhal's book. *Ld. Raym.* 705.

2. Every perſon in priſon by proceſs of law is to be kept *in ſaltâ & arctâ cuſtodiâ*, in order to compel them the more ſpeedily to pay their debts, and make ſatisfaction to their creditors. *Plowd.* 36: 3 *Co.* 44: 2 *Inſt.* 381: 1 *Rol. Abr.* 805.

If therefore a defendant *being taken in execution*, be afterwards ſeen at large, for any the ſhorteſt time, even before the return of the writ, this is an eſcape. 2 *Ld. Rep.* 1048.

Perſons in the *King's Bench* and *Fleet* priſons, are to be actually detained within the ſaid priſons; and if they eſcape, action of debt lies againſt the warden, *&c.* 1 *R.* 2. *c.* 12. But now the marſhal or warden grant the liberty of the rules to ſuch as they think proper, (not criminally charged,) on proper ſecurity. Keepers of thoſe priſons ſuffering priſoners either upon contempt or meſne proceſs, or in execution, to be out of the rules (except on rule of court, *&c.*) are guilty of an *eſcape*; and perſons conniving at an *eſcape* ſhall forfeit 500*l. &c.* by 8 & 9 *W.* 3. *c.* 27. And by this ſtatute, where any priſoner in execution *eſcapes*, the creditor may have any other new execution againſt him.

If the bailiff of a liberty, who has the return and execution of writs, remove a priſoner taken in execution to the county gaol, ſituated out of the liberty, and there deliver him into the cuſtody of the ſheriff, this is an eſcape for which an action of debt lies. 2 *Term Rep.* 5.

By *Stat.* 5 *An. c.* 9, If any perſon in cuſtody, for *not performing any decree in Chancery, &c. eſcape*, the party for whom the money is decreed may have the ſame remedy againſt the ſheriff, as if the priſoner had been in cuſtody on *execution*. A priſoner in execution ſhould not be allowed to go out of the gaol; for if he goes out, though he returns again, it is an *eſcape*. 3 *Rep.* 43, 44: 2 *Inſt.* 260, 381. And yet in *London*, by ſpecial cuſtom there, in ſome caſes the priſoner may go abroad with his keeper, and it will be no *eſcape*. *Ibid.*—See *Hob.* 202. Where the Juſtice of the court, and plaintiff in the ſuit, agree that the priſoner ſhall be at liberty, and he go out and return at his time; it is no *eſcape*: but this may not be without the ſheriff's conſent. *Dyer* 275.

If a plaintiff by word licenſe the ſheriff to deliver the priſoner, no action will lie for this as an eſcape. 27 *H.* 8. 24.

If there be an *eſcape* by the plaintiff's conſent, when he did not intend it, the law is hard that the debt ſhould be thereby diſcharged; as where one was in execution in *B. R.* and ſome propoſals being made to the plaintiff in behalf of the priſoner, ſeeing there was ſome likelihood of an accommodation, the plaintiff conſented to a meeting in a certain place in *London*, and deſired the priſoner might be there, who came accordingly: this was held to be an *eſcape*, with the plaintiff's conſent, and he could never after be in execution at his ſuit for the ſame matter. 2 *Mod.* 136.

It hath been adjudged no *eſcape* to let a priſoner go where the ſheriff hath the priſoner in cuſtody, if it be before the return of the writ: it is ſufficient if the officer have the party at the return of the writ. *&c.* *Moor* 299: 1 *Salk.* 401: 2 *Nelſ.* 739, 740. Yet it hath been held, that where a *habeas corpus* is granted to bring a perſon into court, if the ſheriff on the way let him go at large in the county, or carry him round about a great way, *&c.* it will be an *eſcape*. 1 *Mod.* 116. And an *eſcape* in one place is an *eſcape* in all places; for a priſoner being once *eſcaped*, and at large, it ſhall be intended he is confined to no place. 1 *Lil. Abr.* 537. Committing the *marſhal* of the *Marſhalſea* to priſon, was held an *eſcape* in law of all the priſoners there. See *Style* 375.

If a woman, warden of the *Fleet* priſon, marries her priſoner, or if a ſheriff, *&c.* marries a woman in execution with him, in either caſe it will be deemed an eſcape in law. *Plowd.* 17.

If a man hath judgment againſt two perſons, and both are taken in execution, if the ſheriff ſuffer one of them to eſcape, he ſhall be anſwerable for the whole debt, though he hath one of them ſtill in cuſtody. 1 *Rol. Abr.* 810. But in an action on *the caſe*, tried before Lord *Mansfield*, in *Surry*, for an eſcape of one of two defendants, under very favourable circumſtances for the officer, his Lordſhip left it to the jury, whether they would find the whole of plaintiff's debt, in damages, or only half, and the jury found only half.

By *Stat.* 8 & 9 *Wil.* 3. *cap.* 27. *ſect.* 8, It is enacted, "That if the marſhal or warden for the time being, or their reſpective deputy or deputies, or other keeper or keepers of any other priſon or priſons, ſhall, after one day's notice in writing given for that purpoſe, refuſe to ſhew any priſoner committed in execution, to the creditor, at whoſe ſuit ſuch priſoner was committed or charged, or to his attorney, every ſuch refuſal ſhall be adjudged to be an *eſcape* in law."

3. In *civil actions* the ſheriff is to anſwer for the eſcape of his bailiff; as the bailiff is for that of his ſervant: and action on the caſe lies againſt the ſheriff for an eſcape upon meſne proceſs, *becauſe the plaintiff is prejudiced in his ſuit by it.* *Cro. Eliz.* 623, 625: 1 *Danv. Abr.* 183.—See alſo *Cro. Jac.* 419: *Dyer* 241.—See *Bull. Ni. Pri.* 59, 60. Where a perſon is in cuſtody on meſne proceſs, and being outlawed after judgment at the ſuit of another, the judgment creditor brings a warrant on a *capias utlagatum*, and delivers it to the ſheriff's officer, who hath him in cuſtody; if the officer afterwards permits the perſon to eſcape, though he refuſe to execute the warrant, the ſheriff is chargeable in action on the caſe. 5 *Rep.* 89.

Where one has the cuſtody of a gaol of freehold or inheritance, and commits it to another perſon, who is inſufficient, the ſuperior is anſwerable for all eſcapes ſuffered by his inferior; but if the inferior be ſufficient, the action ſhould be brought againſt him, and not againſt the ſuperior. See 9 *Co.* 98: 2 *Jon.* 60: 2 *Lev.* 158: 1 *Vent.* 314: 2 *Mod.* 119: 4 *Rep.* 98.

Alſo by *Stat.* 8 & 9 *W.* 3. *cap.* 27. *ſect.* 11, it is enacted, "That the offices of marſhal of the King's Bench priſon and warden of the *Fleet*, ſhall be executed by the ſeveral perſons to whom the inheritance of the priſons, priſon-houſes, *&c.* of the ſaid priſons, or either of them, ſhall then belong reſpectively, in his or their reſpective proper perſon, *&c.* or by their ſufficient deputies; for which deputies, and for all forfeitures, eſcapes, and other miſdemeanors in their offices by ſuch deputies permitted,

&c.

&c. the ſaid perſon in whom the aforeſaid inheritances reſpectively are, ſhall be anſwerable; and the profits and inheritances of the ſaid offices ſhall be ſequeſtered, &c. to make ſatisfaction for ſuch forfeitures, eſcapes, &c. reſpectively, as if permitted, &c. by the perſons themſelves, in whom the reſpective inheritance of the ſaid priſons ſhall then be."

A priſoner eſcapes out of the *King's Bench*, or *Marſhalſea*, or the *Fleet*; the keeper of the priſon out of which he eſcaped is to be charged with it; but if the eſcape be from either of the *Counters*, the action muſt be brought againſt the ſheriffs of *London*. *Dyer* 278: 3 *Rep.* 52.

Action of eſcape againſt the warden of the *Fleet* for an eſcape upon *meſne proceſs*; the priſoner returns to the *Fleet* the ſame day, and the plaintiff afterwards proceeds to final judgment againſt him, yet the action lies againſt the warden. 1 *Wilſ.* 294. In an eſcape upon meſne proceſs out of the borough court, brought in *B. R.* againſt the bailiff thereof, the defendant ſhall not take advantage in *B. R.* of any error in the proceſs below. 1 *Wilſ.* 255.

Action of eſcape will not lie againſt the executor or adminiſtrator of a ſheriff, &c. for an eſcape, becauſe it was *perſonal*, and *moritur cum perſona*: but it may be otherwiſe if there be a judgment recovered againſt the ſheriff before he died. *Dyer* 322. See poſt III. 2.

If there are two ſheriffs of the ſame place, and an action of eſcape is brought againſt them both, if one of them dies, yet the writ ſhall not abate; for it being in nature of a treſpaſs, and merely perſonal, the party can only have remedy againſt the ſurvivor. *Cro. Eliz* 625. But the death ſhould be ſuggeſted. By *Stat.* 8 & 9 *W.* 3. *c.* 11. *ſect.* 7, the death of one plaintiff or defendant, where the action will ſurvive *to*, or *againſt* the ſurvivor, ſhall not abate the ſuit. But the death muſt be ſuggeſted on the roll. See title *Abatement*.

An old ſheriff omits turning over a priſoner in execution to the new ſheriff, it is ſaid to be an *eſcape*; ſo where there are two executions againſt a man, and in the indenture of turning over mention is made but of one, &c. 3 *Rep.* 71.

II. There are two kinds of eſcapes; *voluntary* and *negligent*: *Voluntary*, is when one arreſts another for felony, or other crime, and lets him go by conſent; in which caſe the party that *permits the eſcape* is eſteemed guilty of the crime committed, and muſt anſwer for it: *Negligent eſcape*, is when one is arreſted, and afterwards eſcapes againſt the will of him that arreſted him, or had him in cuſtody; and is not purſued by freſh ſuit, and taken again before the party purſuing hath loſt ſight of him. *Cromp. Juſt.* 36. And for theſe negligent eſcapes, the gaoler, &c. is to be fined. One *negligent* eſcape will not amount to a forfeiture of a gaoler's office, as one *voluntary* one will; but many negligent eſcapes will do it: and the fine for ſuffering a negligent eſcape of a perſon *attainted*, was by the Common law of courſe 100*l.* and in other caſes at the diſcretion of the court. 3 *Lev.* 288: 2 *Lev.* 81.—See *poſt* as to *Eſcapes in Criminal Caſes*.

If any priſoner eſcapes who was in execution, his creditors may retake him by *cap. ad ſatisfac.* or bring action of debt on the judgment, or a *ſcire facias* againſt him, &c. 1 *Vent.* 269: 3 *Salk.* 160. If a man eſcapes, with the conſent of the gaoler in a civil caſe, he cannot retake him. 3 *Rep.* 32, 52: 1 *Sid.* 330. But the plaintiff may retake him at any time. *Stat.* 8 & 9 *W.* 3. *c.* 27.

If the plaintiff permit the priſoner to eſcape, he cannot afterwards retake him; and if the body and goods, &c. of a conuſor are taken in execution upon a ſtatute-merchant, if the conuſee agree that he ſhall go at large, it is a diſcharge of the whole execution, and the conuſor ſhall have his lands again: it is otherwiſe if the ſheriff had permitted him to eſcape, the execution on the lands would not be diſcharged. 2 *Nelſ. Abr.* 737.

A difference is to be obſerved between *permiſſive* and *negligent* eſcapes, *with reſpect to the ſheriff*; for if a ſheriff ſuffer a priſoner voluntarily to go at large, the ſheriff cannot retake him even upon freſh ſuit; and if he does, the priſoner may have an action of treſpaſs againſt him. *Carter* 212.

An eſcape from the rules of the King's Bench priſon, without the Marſhal's knowledge, is not a *voluntary* eſcape. 2 *Term Rep.* 126.

If the marſhal of the *King's Bench*, or warden of the *Fleet*, or any other who hath the keeping of priſons in fee, ſuffer a voluntary eſcape, it is a forfeiture of the office. 3 *Mod.* 146: *Carter* 212. And there is likewiſe a farther penalty of 500*l.* added by 8 & 9 *W.* 3. *c.* 27. above-mentioned.

There is this difference between an eſcape on *meſne proceſs* and *execution*; if the ſheriff arreſt a perſon on *meſne proceſs*, and he is reſcued by *J. S.* he may return the reſcue, and ſuch return is good, and no action of eſcape lies againſt him after ſuch return; but the court will iſſue proceſs againſt ſuch reſcuer, or fine him; for in this caſe, though the ſheriff may, yet he is not obliged to raiſe the *poſſe comitatûs*. 1 *Rol. Abr.* 807: 1 *Jon.* 207: 1 *Rol. Rep.* 388: 3 *Lev.* 46. But after judgment on a *capias ad ſatisfaciendum*, the ſheriff *cannot return a reſcue*, for in ſuch caſe the ſheriff is obliged to raiſe the *poſſe comitatûs*, if needful, and therefore, if he return a reſcue, an *action of eſcape* lies, or a new *capias*; for the return of an ineffectual execution is as none. 1 *Rol. Abr.* 807: *Cro. Car.* 240, 255: 8 *Co.* 42.—See *Ni. Pri.* 59, 60, and 6 *Rep.* 51: *Cro. Eliz.* 868. and this Dictionary title *Reſcue*.

III. 1. At Common law the plaintiff had no remedy againſt the ſheriff for an eſcape, whether upon meſne proceſs, or in execution, but by ſpecial action upon the caſe. 2 *Inſt.* 382: 1 *Show.* 176: 2 *Saund.* 54: *Hard.* 30.

But now, by an equitable conſtruction of *Weſtm.* 2, 13 *E.* 1. *cap.* 11, action of *debt* is given againſt the ſheriff; and by *Stat.* 1 *Rich.* 2. *cap.* 12, againſt the warden of the *Fleet*; (which extends to all gaolers and keepers of priſons though infants or feme coverts. 2 *Ind.* 382;) for eſcapes in *execution*.

The plaintiff, at his election, may maintain either an action *upon the caſe*, or *debt*, for an eſcape in *execution*. *Cro. Jac.* 361, 533, 619: *Cro. Eliz.* 877: *Dyer* 278 *b.* See 1 *Jon.* 144; 1 *Sid.* 364. *S. C.*

If a priſoner in cuſtody upon a *capias utlagatum* is ſuffered to eſcape, the plaintiff may either maintain an action *qui tam* againſt the ſheriff, or bring an action of debt againſt him in his own right. *Cro. Jac.* 361, 533, 619: *Cro. Eliz.* 877.

An action of eſcape is not a local action, and therefore if one eſcape out of the *Marſhalſea*, which is in *Surry*, the

the action may be laid in *Middlesex*. *Dyer* 278 *b*. See 1 *Jon*. 144: 1 *Sid*. 364. *S. C*.

It is usual now, on an escape on *mesne process*, to declare against the sheriff, &c. in *case*: on *execution*, in *debt*.

The distinction seems now to be thus settled —If a sheriff or gaoler suffers a prisoner, who is taken upon mesne process to escape, he is liable to an action *on the case*. *Cro. Eliz*. 625: *Comb*. 69.—But if, after judgment, a gaoler or sheriff permits a debtor to escape who is charged in execution for a certain sum; the debt immediately becomes his own, and he is compellable by action of *debt*, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand. 2 *Inst*. 382.

In debt against the sheriff or gaoler for an escape, the jury cannot give a less sum than a creditor would have recovered against the prisoner, *viz*. the sum indorsed on the writ, and the legal fees of execution. 2 *Term Rep*. 126.

2. In this action it is not necessary to set forth all the formalities required by law in other cases. *Cro. Eliz*. 877: See 2 *Show*. 424.

Therefore, if upon a judgment obtained by the testator, the executor brings a *scire facias*, and has judgment, whereupon a *capias ad satisfac*. issues, and *B*. is arrested, and suffered to escape, the plaintiff, in an action against the sheriff for this escape, may declare briefly upon the judgment in the *scire facias*, without shewing the gradual proceedings at length, as is usually done in an action of debt upon a judgment. *Carth*. 148, 149: 3 *Mod*. 324, *S. C*: *Cro. Eliz*. 877.

So if a defendant is arrested on a *special capias*, founded on an *original* returnable in *B. R*. in action for his escape, it is not necessary to set forth the original.

If the plaintiff declares that he sued out a writ of execution against *J. S*. without setting forth any judgment, and that the defendant suffered him to escape; this is an incurable fault; for by this means he lost the benefit of pleading *nul tiel record*, which he might do if the plaintiff had set forth the judgment. 1 *Saund*. 37, 38: 1 *Lev*. 191. and 1 *Sid*. 306. *S. C*. See title *Debt*.

If *A*. recovers against *B*. as executor, and has him in execution and the sheriff suffers him to escape, the action must be brought as executor in the *detinet* only, and not in the *debet* and *detinet*. 1 *Lutw*. 893: *Comb*. 114: *S. C*.

If the plaintiff declares, that the prisoner was committed, and escaped, but does not say, *prout patet per recordum*; yet upon a general demurrer this shall be good; for the gist of the action was the escape, and the commitment only inducement. 2 *Salk*. 565: 5 *Mod*. 8. *S. C*. See 3 *Lev*. 393.

If in escape the plaintiff declares, that he had *J. S*. and his wife in execution, and that the defendant suffered them to escape, and the jury find specially, that the husband only was taken in execution (it being for a debt due from the wife before coverture) and that he escaped; this is sufficient, and the plaintiff shall have judgment; for the substance of the issue is found, though not pursuant to the declaration. 1 *Sid*. 5.

So in an action on the case for the escape of *A*. where the jury found that *A*. was taken by *J. S*. the former sheriff, and not by the defendant, the present sheriff; but finding that he was legally in his custody, and that he suffered him to escape, the plaintiff had judgment. *Cro. Jac*. 380.

An administratrix may maintain an action in her own name against the marshall for the escape of a prisoner in execution on a judgment obtained by her as administratrix. 2 *Term Rep*. 126.

Under a count for a *voluntary* escape, the plaintiff may give evidence of a *negligent* escape: and the defendant may plead a re-taking on a fresh pursuit to such count without traversing the voluntary escape. *Id. Ibid*.

In debt for an escape against the sheriff, the indorsement of *non est inventus* on the *ca. sa*. is sufficient evidence of its having been delivered to him. But a legal arrest must be proved in such action. *Cowp*. 63.

By the *Stat*. 8 & 9 *W*. 3. *cap*. 27. *sect*. 12, it is enacted. "That it shall be lawful for any person, having cause of action against the warden of the *Fleet* prison, upon bill filed in the courts of Common Pleas or Exchequer against the warden, and a rule being given to plead thereto to be out eight days at most after filing such bill, to sign judgment against the warden, unless he plead to the bill within three days after such rule is out."

IV. If the prison takes fire, by means whereof the prisoners escape, this shall excuse the sheriff, and he may well plead it. 1 *Rol. Abr*. 808.

So if the prison is broke by the *King's enemies*, this shall excuse the sheriff, for he can have no remedy over against them. 4 *Co*. 84: 1 *Rol. Abr*. 808.

But if the prison was broke by *rebels* and *traitors*; the King's subjects, this shall not excuse him, for he may have his remedy over against these. *Ibid*.

When a prisoner tortiously escapes from the custody of the gaoler, he may be retaken; and the sheriff, &c. may pursue a person escaping into that or any other county; and if he retakes the prisoner on fresh pursuit before action brought, it shall excuse the sheriff, for there the prisoner shall be said to be in execution still. 3 *Rep*. 44: *Cro. Jac*. 657: 1 *Jon*. 144: 1 *Rol. Abr*. 808. And where the sheriff is to answer the debt and damages for such escape, he shall have his counter-remedy against the party escaping; and may take him at any time and place, and imprison him till he hath satisfied the sheriff as much as he hath paid to the plaintiff; or he may bring an action upon the case against the prisoner, and so relieve himself. 5 *Rep*. 52: *Cro. Eliz*. 393.

It was formely held that the sheriff, &c. might give fresh pursuit in evidence, and need not have pleaded it. See 1 *Mod*. 116: 1 *Sid*. 13.

But now, by *Stat*. 8 & 9 *W*. 3. *cap*. 27. *sect*. 6. it is enacted, "That no retaking on fresh pursuit shall be given in evidence, unless the same be specially pleaded; nor shall any special plea be allowed, unless oath be first made in writing by the defendant, and filed in the proper office of the respective courts, that the prisoner for whose escape such action is brought, did, *without his consent, privity or knowledge*, make such escape; and if such affidavit shall at any time afterwards appear to be false, and the defendant shall be convicted thereof by due course of law, he shall forfeit the sum of 500*l*." See title *Sheriff*.

A voluntary return of a prisoner, after an escape, before action brought is equivalent to a re-taking on a fresh pursuit: but it must be pleaded. 2 *Term Rep*. 126.

Next

(B). Next as to ESCAPES IN CRIMINAL CASES.

I. 1. *What ſhall be deemed an* Eſcape; 2. *where it ſhall be adjudged* Voluntary, *and where* Negligent.
II. *Where the Priſoner may be* re-taken *after an* Eſcape, *and where the* Eſcape *is excuſed by ſuch a* Re-taking; *or by* Killing *the Priſoner, if he cannot be re-taken.*
III. 1. *How the* Officer *ſuffering an* Eſcape *is to be* indicted, *and* 2. *how the* Eſcape *is to be* tried *and* adjudged.
IV. *Of the* Puniſhment *of* 1. voluntary, *and* 2. negligent Eſcapes; *and* 3. *Of Perſons* aiding *and* aſſiſting *Priſoners to attempt their Eſcape.*

I. 1. A man muſt be committed to priſon by lawful *mittimus*; or breach of priſon and eſcaping is not felony. If a party is committed for treaſon, to break priſon and eſcape is but felony; but if a priſoner let out traitors, it will be treaſon. *H. P. C.* 109: 2 *Inſt.* 590. Where one is impriſoned for petit larceny, or killing a man *ſe defendendo*, &c. to break priſon and eſcape is not felony; and if a priſon be ſet on fire, not by the privity of the priſoner he may break priſon for the ſafety of his life. 2 *Inſt.* 590. A gaoler refuſing to receive a perſon arreſted by the conſtable for felony, whereby he is let go, is guilty of an eſcape; but there muſt be an actual arreſt, which arreſt muſt be juſtifiable, to make an eſcape; for if it be for a ſuppoſed crime, where no crime was committed, and the party is neither indicted nor appealed, &c. it is no eſcape to ſuffer a perſon to go at large. *Fitz. Coron.* 224: *Bro. Eſca.* 27, 28. If a private perſon arreſt another for ſuſpicion of felony, he is to deliver him to a public officer, who ought to have the cuſtody of him; for if he let him go, it will be an eſcape. 2 *Hawk. P. C. c.* 19. And if no officer will receive him, he is to deliver him to the townſhip where arreſted; or get him bailed.

A. a mere private man, knows *B.* to have committed felony, and thereupon arreſts him; he is lawfully in cuſtody of *A.* until he be diſcharged, by delivering him to a conſtable or common gaol; and therefore if he voluntarily ſuffers ſuch perſon to eſcape, though he were no officer, nor *B.* indicted, it is felony in *A.* But it is otherwiſe if he never takes him nor attempts it, and lets him go. 1 *Hale's Hiſt. P. C.* 594. Juſtices of peace in their ſeſſions are empowered to inquire of eſcapes of perſons arreſted, and impriſoned for felony. *Stat.* 1 *R.* 3. *c.* 3.

2. There can be no doubt, but that where-ever an officer, who hath the cuſtody of a priſoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to ſave him, either from his trial or execution, he is guilty of a voluntary eſcape, and thereby involved in the guilt of the ſame crime of which the priſoner was guilty and ſtood charged with. And it ſeems to be the opinion of Sir *Matthew Hale*, that in ſome caſes an officer may be adjudged guilty of ſuch eſcape, who hath not ſuch intent, but only means to give his priſoner that liberty which by the law he hath no colour of right to give him.

Thus, to bail a perſon not bailable by law is a negligent eſcape. *Plowd.* 476. And it is ſaid that the crime is equal in a juſtice of peace, for taking a felon out of priſon, without bail; or ſuffering him to go at large without committment, &c. where the offender confeſſeth the felony, as it is in the caſe of a gaoler's permiting an eſcape. *Dalt.* 382.

If the gaoler ſo cloſely purſue the priſoner, who flies from him, that he retake him without loſing ſight of him, the law looks on the priſoner ſo far in his power all the time, as not to adjudge ſuch a flight to amount at all to an eſcape; but if the gaoler once loſe ſight of the priſoner, and afterwards retake him, he ſeems in ſtrictneſs to be guilty of an eſcape; and *à fortiori* therefore, if he kill him in the purſuit, he is in like manner guilty, tho' he never loſt ſight of him, and could not otherwiſe take him, not only becauſe the King loſes the benefit he might have had from the attainder of the priſoner, by the forfeiture of his goods, &c. but alſo becauſe the public juſtice is not ſo well ſatisfied by the killing him in ſuch an extrajudicial manner. 2 *Hawk. P. C. c.* 19. See *poſt. Div.* II.

II. It ſeems to be clearly agreed by all the books, that an officer making a freſh purſuit after a priſoner, who hath eſcaped through his negligence, may retake him at any time after, whether he find him in the ſame or in a different county. And it is ſaid generally in ſome books, that an officer who hath negligently ſuffered a priſoner to eſcape, may retake him where-ever he finds him, without mentioning any freſh purſuit; and indeed, ſince *the liberty gained by the priſoner is wholly owing to his own wrong*, there ſeems to be no reaſon he ſhould take any manner of advantage from it. But where a gaoler hath *voluntarily* ſuffered a priſoner to eſcape, it is ſaid by ſome that he can no more juſtify the retaking him, than if he had never had him in cuſtody before, becauſe by his own free conſent he hath admitted, that he hath nothing to do with him.

Wherever a priſoner, by the negligence of his keeper, gets ſo far out of his power that the keeper loſes ſight of him, the keeper is finable at the diſcretion of the court, notwithſtanding he retook him immediately after; for it ſeems agreed, that this is to be adjudged a negligent eſcape, which implies an offence, and conſequently that it muſt be puniſhable. It is true indeed, that in an action againſt a gaoler for ſuffering one arreſted in a civil action to eſcape, it is a good excuſe for the gaoler, that, before the action brought, he took the priſoner upon *freſh ſuit*, which is well maintained by ſhewing that he purſued him *immediately* after notice of the eſcape, though it were ſome hours after it, and retook him; but it does not from hence follow, that the like excuſe will ſerve for the negligent eſcape of a *criminal*, becauſe this is an offence againſt the publick, but the other is only a private damage to the party: neither will it be an hardſhip to the officer, to be expoſed to ſuch puniſhment as the court, in diſcretion, ſhall think fit to impoſe upon him for the negligent eſcape of a criminal, as it would be to be liable to an action of eſcape, for ſuffering a perſon in his cuſtody, in a civil action, to eſcape; for that in the former caſe the court would moderate his fine according to the circumſtances of the whole matter, and would certainly mitigate, if not wholly excuſe it, if he ſhould appear to have taken all reaſonable care: but in the other caſe, if he ſhould be liable to an action, his judgment would not lie in the diſcretion of the court, but he would be bound to pay the whole debt, for which the party was in cuſtody,

if the eſcape ſhould be adjudged againſt him. However it is certain, that it will be no advantage to a gaoler to re-take his priſoner, after he has been fined for the eſcape, as is ſhown in the precedent ſection of *Hawk. P. C.* alſo it is clear that he cannot excuſe himſelf by killing a priſoner in the purſuit, though he could not poſſibly retake him; but muſt, in ſuch caſe, be contented to ſubmit to ſuch fine as his negligence ſhall appear to deſerve. 2 *Hawk. P. C. c.* 19.

III. 1. The indictment muſt expreſsly ſhew, that the party was actually in the defendant's cuſtody for a crime, action, or commitment for it; and that it is not ſufficient to ſay, that he was in the defendant's cuſtody, and charged with ſuch a crime; for that a perſon in cuſtody may be ſo charged, and yet not be in cuſtody by reaſon of ſuch charge: and it ſeems alſo, that every ſuch indictment muſt expreſsly ſhew that the priſoner went at large. Alſo it ſeems neceſſary, to ſhew the time when the offence was committed, for which the party was in cuſtody, not only that it may appear, that it was prior to the eſcape, but alſo that it was ſubſequent to the laſt general pardon. Alſo it ſeems clear, that every indictment for a voluntary eſcape muſt alledge that the defendant *felonicè & voluntariè A. B. ad largum ire permiſit*; and muſt alſo ſhew the ſpecies of the crime for which the party was impriſoned; for it is not ſufficient to ſay in general, that he was in cuſtody for felony, *&c.*

The crime of the priſoner eſcaping, for which the gaoler is anſwerable, muſt be ſuch as it was at the time of the eſcape; as where a perſon is commited for dangerouſly wounding another, it is treſpaſs only, and not felony, till the party wounded is dead: and he who ſuffers another to eſcape who was in cuſtody for felony, cannot be arraigned for ſuch eſcape as for felony, until the principal is attainted, but he may be indicted and tried for miſpriſion before the attainder of the principal. And in high treaſon it is ſaid the eſcape is immediately puniſhable, whether the party eſcaping be ever convicted or not. 2 *Hawk. P. C. c.* 19. See poſt. IV. 1.

2. Where perſons, being preſent in a court of record, are committed to priſon by ſuch court, the keeper of the gaol is bound to have them always ready, whenever the court ſhall demand them of him; and if he ſhall fail to produce them at ſuch demand, the court will adjudge him guilty of an eſcape, without any further inquiry, unleſs he have ſome reaſonable matter to alledge in his excuſe; as that the priſon was ſet on fire, or broke open by enemies, *&c.* for he ſhall be concluded, by the record of the commitment, to deny that the priſoners were in his cuſtody. 2 *Hawk. P. C. c.* 19.

As to other priſoners who are not ſo committed, but are in the cuſtody of a gaoler, ſheriff, conſtable, or other perſon, by any other means whatſoever, it ſeems agreed, that the perſon who has them in cuſtody is in no caſe puniſhable for their eſcape, except in ſome ſpecial caſes, until it be preſented; for by *Stat. Weſt.* 1. *c.* 3, it is enacted that "Nothing be demanded nor taken, nor levied by the ſheriff, nor by any other, for the eſcape of a thief, or felon, until it be judged for an eſcape by the juſtices in eyre; and that he who does otherwiſe, ſhall reſtore to him or them that have paid it, as much as he or they have taken or received, and as much alſo unto the King."

It hath been adjudged, that this ſtatute reſtrains not the court of King's Bench from receiving ſuch preſentments; for that its juriſdiction includes in it that of juſtices in eyre, and this court is itſelf the higheſt court of eyre. 2 *Hawk. P. C. c.* 19.

It is farther enacted by *Stat.* 31 *Ed.* 3. *c.* 14, "That the eſcape of thieves and felons, and the chattels of felons, and of fugitives, and alſo eſcapes of clerks convicts, out of their ordinary's priſon, from thenceforth to be judged before any of the King's juſtices, ſhall be levied from time to time, as they ſhall fall, as well of the time paſt as time to come." By which it ſeems to be implied, that other juſtices, as well as thoſe in eyre, may take cogniſance of eſcapes; and it is certain, that juſtices of gaol-delivery may puniſh juſtices of peace for a negligent eſcape, in admitting perſons to bail, who are not bailable. 2 *Hawk. P. C. c.* 19.

And it is farther enacted, by *Stat.* 1 *Rich.* 3 *cap.* 3, "That juſtices of peace ſhall have authority to inquire, in their ſeſſions, of all manner of eſcapes of every perſon arreſted and impriſoned for felony."

Wherever an eſcape is finable, the preſentment of it is traverſable; but where the offence is amerciable only, there the preſentment is of itſelf concluſive; ſuch amercements being reckoned among thoſe *minima de quibus non curat lex*; and this diſtinction ſeems to be well warranted by the old books. 2 *Hawk. P. C. c.* 19.

IV. 1. *A voluntary eſcape* amounts to the ſame kind of crime, and is puniſhable in the ſame degree, as the offence of which the party was guilty, and for which he was in cuſtody, whether it be treaſon, felony, or treſpaſs; and whether the perſon eſcaping were actually committed to ſome gaol, or under an arreſt only, and not committed; and whether he were attainted, or only accuſed of ſuch crime, and neither indicted nor appealed: and it is ſaid to be no excuſe of ſuch eſcape, that the priſoner had been acquitted on an indictment of death, and only committed till the year and day be paſſed, to give the widow or heir of the deceaſed, an opportunity of bringing their appeal, 1 *Hawk. P. C. c.* 19.

But the officer cannot be thus puniſhed till the original delinquent hath actually received judgment, or been attainted upon verdict, confeſſion, or outlawry of the crime for which he was ſo committed or arreſted: otherwiſe it might happen that the officer might be puniſhed for treaſon or felony, and the perſon arreſted and eſcaping might be acquitted of the charge againſt him. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and impriſoned for a miſdemeanor. 1 *Hal. P. C.* 588, 9: 2 *Hawk. P. C. c.* 19.

Alſo ſuch an eſcape, ſuffered by one who wrongfully takes upon him the keeping of a gaol, ſeems to be puniſhable in the ſame manner as if he were never ſo rightfully intitled to ſuch cuſtody; for that the crime is in both caſes of the very ſame ill conſequence to the public; and there ſeems to be no reaſon that a wrongful officer ſhould have greater favour than a rightful, and that for no other reaſon, but becauſe he is a wrongful one. 2 *Hawk. P. C. c.* 19.

Alſo if the warrant of a committment do plainly and expreſsly charge the party with treaſon or felony, but in ſome other reſpect be not ſtrictly formal, yet it ſeems, that

that it may be probably argued, that the gaoler ſuffering an eſcape, is as much puniſhable, as if the warrant were perfectly right. 2 *Hawk. P. C. c.* 19.

None ſhall ſuffer capitally for the crime of another; ſo that a principal gaoler is only finable for a voluntary eſcape ſuffered by his deputy. 2 *Hawk. P. C. c.* 19.

2. Whoever *de facto* occupies the office of gaoler is liable to anſwer for a *negligent eſcape*; and it is no way material whether his title to the office be legal or not. 2 *Hawk. P. C. c.* 19. A ſheriff is as much liable to anſwer for an eſcape ſuffered by his bailiff, as if he had actually ſuffered it himſelf, and the court may charge either the ſheriff or bailiff for ſuch an eſcape; and if a deputy gaoler be not ſufficient to anſwer a negligent eſcape, his principal muſt anſwer for him; but if the gaoler who ſuffers an eſcape, have an eſtate for life, or years in the office, it is not agreed how far he in reverſion is liable to be puniſhed. 2 *Hawk. P. C. c.* 19.

Wherever a perſon is found guilty, upon an indictment, or preſentment, of a negligent eſcape of a criminal actually in his cuſtody, he ought to be condemned in a certain ſum to be paid to the King, which ſeems moſt properly to be called a Fine.

It hath been holden, that a *negligent* eſcape may be pardoned by the King before it happens, but that a *voluntary* one cannot ſo be pardoned. 2 *Hawk. P. C. c.* 19.

And it ſeems by the Common law, the penalty for ſuffering the negligent eſcape of a perſon attainted, was of courſe 100*l.* and for ſuffering ſuch eſcape of a perſon indicted, and not attainted, was 5*l.* but if the perſon eſcaping were neither attainted nor indicted, it ſeems that it was left to the diſcretion of the court to aſſeſs ſuch a reaſonable forfeiture as ſhould ſeem proper; and if the party had twice eſcaped, it ſeems, that the penalties above mentioned were of courſe to be doubled; yet it ſeems, that the forfeiture was to be no greater for ſuffering a priſoner, committed on two ſeveral accuſations, to eſcape, than if he had been committed but on one. 2 *Hawk. P. C. c.* 19.

As to the manner offences of this kind are puniſhable by ſtatute, it is recited by *Stat.* 5 *Ed.* 3. *c.* 8, "That perſons indicted of felonies in times paſt, had removed the indictments before the King and there yielded themſelves, and by the marſhals of the King's Bench had been incontinently let to bail, and after had done many evil deeds. *&c.*" And thereupon it is enacted, "That if any ſuch priſoner be found wandering out of priſon, by bail, or without bail, and that he be found at the King's ſuit, or at the ſuit of the party, the marſhal which ſhall be found thereof guilty, ſhall have half a year's impriſonment, and be ranſomed at the King's will; and the juſtices ſhall thereof make inquiry when they ſee time; and as to the marſhals, it ſhall be done within the verge that which reaſon will. And in caſe that the marſhals ſuffer by their aſſent ſuch priſoners to eſcape, they ſhall be at law, as before the time of the ſtatute they had been. And the King intendeth not by this ſtatute to loſe the eſcape, where he ought to have the ſame."

Alſo it is enacted by *Stat.* 19 *H.* 7. *c.* 10. "That every ſheriff have the cuſtody of the King's common gaols, during the time of his office, except all gaols whereof any perſon or perſons have the keeping of eſtate of inheritance.—And that all letters patent made for term of life, or years, of the keeping of the ſaid gaols, *&c.* ſhall be annulled and void."—The penalties for eſcapes inflicted by the ſubſequent part of this ſtatute, have been expired above 200 years. See *Ruffhead's Statutes*: 1 *Burn's Juſt.* and *Leach's Hawk. P. C.* ii. *c.* 20. § 35. *p.* 207.

3. By *Stat.* 16 *Geo.* 2. *c.* 31, It is enacted, That perſons who any ways aſſiſt a priſoner, committed for *treaſon*, or *felony*, to attempt his eſcape from any gaol, ſhall be adjudged guilty of *felony* and be *tranſported*; and if the priſoner be committed for any other crime; or upon proceſs for 100*l.* debt, *&c.* the offenders are liable to fine and impriſonment. And where any perſon *conveys any arms, inſtrument or diſguiſe*, to a priſoner in gaol for *felony*, *&c.* or for his uſe, in order to an eſcape, it is likewiſe *felony* and *tranſportation*. Alſo if one aſſiſt any priſoner to eſcape from any conſtable, or other officer or perſon in whoſe cuſtody he is, by virtue of a warrant of commitment for felony, it is declared to be the like offence.

See alſo *Stat.* 6 *Geo.* 1. *c.* 23. § 5: 24 *Geo.* 3. *c.* 56; where to aſſiſt felons convict to make their eſcape from the perſons to whom they are delivered to be tranſported is felony without clergy. See 3 *P. Wms.* 439.

The indictment on the above *Stat.* 16 *Geo.* 2. *c.* 31, muſt ſtate that the inſtruments were conveyed to the priſoner, with a deſign to effectuate his eſcape. But no indictment can be maintained on this ſtatute for contributing to the eſcape of a priſoner committed on ſuſpicion only. See *Leach's Hawk. P. C.* ii. *c.* 21. § 11.

See further, relative to this ſubject of aſſiſting priſoners to eſcape, this Dict. title *Reſcue*: and 2 *Hawk. P. C. c.* 21.

See further as connected with the general ſubject of Eſcape, titles *Priſon-breaking*, *Priſoner*.

ESCAPE-WARRANT. If any perſon committed or charged in cuſtody in the *King's Bench* or *Fleet priſon*, in execution, or on meſne proceſs, *&c.* go at large; on oath thereof before a judge of the court where the action was brought, an *eſcape-warrant* ſhall be granted, directed to all ſheriffs, *&c.* throughout *England*, to retake the priſoner, and commit him to gaol where taken, there to remain till the debt is ſatisfied: and a perſon may be taken on a *Sunday* upon an *eſcape-warrant*. *Stat.* 1 *Ann. c.* 6. And the judges of the reſpective courts may grant warrants, upon oath to be made before perſons commiſſioned by them to take affidavits in the country, (ſuch oath being firſt filed) as they might do upon oath made before themſelves. 5 *Ann. c.* 9.

A ſheriff ought not to receive a perſon taken on *eſcape-warrant*, *&c.* from any but an officer; not from the rabble, *&c.* which is illegal. 3 *Salk.* 149. A perſon being arreſted and carried to *Newgate* by virtue of an *eſcape-warrant*, moved to be diſcharged, becauſe he ſaid he was abroad by a day-rule when taken; but it appearing by *affidavit*, that he was taken upon the *eſcape-warrant* before the court of *B. R.* ſat that morning, they refuſed to ſet him at liberty. 2 *Ld. Raym.* 927.

ESCAPIO QUIETUS. He that by charter is *quietus de eſcapio*, is delivered from that puniſhment which by the laws of the foreſt lieth upon thoſe whoſe beaſts are found within the land where forbidden. *Crompt. Juriſd.* 196.

ESCAPIUM. Hath been uſed for what comes by chance or accident. *Cowel.*

ESCEPPA, A *ſcepp*, or meaſure of corn. *Mon. Ang. tom.* 1. *p.* 283. See *Sceppa.*

ESCHEAT. *Eſcaeta*: from the old French *eſcheoir* to fall, or happen.] The caſual deſcent, in the nature of forfeiture, of lands and tenements within his manor to a lord; either on failure of iſſue of the tenant dying ſeiſed, or on account of the felony of ſuch tenant. See this Dict. title *Tenure*, II. 7: and 2 *Comm.* 251—256.

By attainder, for treaſon or other felony, the blood of the perſon attainted is ſo corrupted, as to be rendered no longer inheritable. Great care muſt be taken to diſtinguiſh between forfeiture of lands to the King, and this ſpecies of eſcheat to the lord; which, by reaſon of their ſimilitude in ſome circumſtances, and becauſe the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. But in fact eſcheat operates in ſubordination to this more antient and ſuperior law of forfeiture. 2 *Inſt.* 64: *Salk.* 85: See title *Forfeiture*; *Tenure.*

The doctrine of eſcheat upon attainder, taken ſingly, is this; that the blood of the tenant, by the commiſſion of any felony; (under which denomination all treaſons were formerly compriſed. 3 *Inſt.* 15: *ſt.* 25 *Ed.* 3. *c.* 2. § 12;) is corrupted and ſtained, and the original donation of the feud is thereby determined. Upon the thorough demonſtration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the eſtate inſtantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguiſhed and blotted out for ever. In conſequence of which corruption and extinction of hereditary blood, the land of all felons would immediately reveſt in the lord, but that the ſuperior law of forfeiture intervenes, and intercepts it in it's paſſage; in caſe of treaſon for ever, in caſe of other felony, for only a year and a day. 2 *Inſt.* 36: See title *Tenure* II. 7.

It has been holden, that a ſaving againſt the *corruption of blood* in a ſtatute concerning *felony*, doth by conſequence ſave the land to the heir, ſo as not to *eſcheat*; becauſe the *eſcheat* to the lord for *felony* is only *pro defectu tenentis*, occaſioned by the corruption of blood: but it hath been adjudged, that a ſaving againſt the corruption of blood, in a ſtatute concerning *treaſon*, doth not ſave the land to the heir: for in *treaſon* the land goes to the King by way of *immediate forfeiture*. 3 *Inſt.* 47: 1 *Salk.* 85.

Inheritances of things not lying in tenure, as of rents, commons, &c. cannot *eſcheat* to the lord, becauſe there is *no tenure*: nor *deſcend*, by reaſon the *blood is corrupted*: though they are forfeited to the *King* by an *attainder* of *treaſon*, and the *profits* of them ſhall be alſo *forfeited* to the *King* on *attainder* of *felony*, during the life of the offender; and after his death it is ſaid the *inheritance ſhall be extinguiſhed*. 2 *Hawk. P. C. c.* 49. which ſee.

In caſes of eſcheat, the blood of the tenant being utterly corrupted and extinguiſhed, it follows, not only that all that he has at the time of his offence committed ſhall eſcheat from him, but alſo that he ſhall be incapable of inheriting any thing for the future. This farther illuſtrates the diſtinction between forfeiture and eſcheat. If therefore a father be ſeiſed in fee, and the ſon commits treaſon and is attainted, and then the father dies: the land ſhall eſcheat to the lord, becauſe the ſon by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life, but nothing ſhall be forfeited to the King, for the ſon never had any intereſt in the lands to forfeit. *Co. Litt.* 13. In this caſe the eſcheat operates, and not the forfeiture; but in the following inſtance the forfeiture works, and not the eſcheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the caſe) that it ſhall not extend to corruption of blood: here the lands of the felon ſhall not eſcheat to the lord, but yet the profits of them ſhall be forfeited to the King for a year and a day, and ſo long after as the offender lives. 3 *Inſt.* 47. See titles *Attainder*; *Forfeiture.*

Huſband and wife, tenants in ſpecial tail; the huſband is attained of treaſon and executed, leaving iſſue; on the death of the wife the lands ſhall *eſcheat*, becauſe the iſſue in tail ought to make his conveyance by father and mother, and from the father he cannot by reaſon of the attainder. *Dyer* 322. If tenant in fee-ſimple is attainted of treaſon, and executed, upon his death the fee is veſted in the King, without office found; yet he muſt bring a *ſcire facias* againſt the tertenants; lands ſhall never *eſcheat* to a lord of whom they are holden, until office found. 3 *Rep.* 10.

Eſcheat ſeldom happens to the lord for want of an heir to an eſtate; but when it doth, before the lord enters, the *homage jury* of the lord's court ought to *preſent* it. 2 *Inſt.* 36. Land ſhall *eſcheat* to the lord, where heirs are born *after attainder* of *felony*, 3 *Rep.* 40. Though if the King pardons a felon *before* conviction, the lord ſhall not have his lands by *eſcheat*; for the lord hath no title *before attainder*. *Owen* 87: 2 *Nelſ. Abr.* 744. If on *appeal* of death or other felony, proceſs is awarded againſt the party, and pending the proceſs he conveyeth away the land, and after is outlawed, the conveyance is good to defeat the lord of his *eſcheat*: but if where a perſon is *indicted* of felony, pending the proceſs againſt him, he conveys away his land, and afterwards is outlawed, the conveyance ſhall not prevent the lord of his *eſcheat*. *Co. Lit.* 13. See further this Dict. titles *Attainder*; *Corruption of Blood*; *Forfeiture.*

As a conſequence of this doctrine of eſcheat, all lands of inheritance immediately reveſting in the lord, the wife of the felon was liable to loſe her dower, till the *Stat.* 1 *Ed.* 6. *c.* 12: and ſtill by *Stat.* 5 & 6 *Ed.* 6. *c.* 11, the wife of one attaint of high treaſon ſhall not be endowed. See title *Dower.*

There is one ſingular inſtance in which lands held in fee-ſimple are not liabe to eſcheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the caſe of a Corporation; for if that comes by any accident to be diſſolved, the donor or his heirs ſhall have the land again in reverſion, and not the lord by the eſcheat; which is perhaps the only inſtance where a reverſion can be expectant on a grant in fee ſimple abſolute. See title *Corporation.*

ESCHEATOR, *eſcaetor.*] Was an officer appointed by the *Lord Treaſurer*, &c. in every county, to make inqueſts of titles by *eſcheat*; which inqueſts were to be taken by good and lawful men of the county, impanelled by the ſheriff. *Stats.* 14 *Ed.* 3. *c.* 8: 34 *Ed.* 3. *c.* 13: 8 *H.* 6. *c.* 16. Theſe *eſcheators* found offices after the death of the King's tenants,

tenants, who held by knight-ſervice, or otherwiſe of the King; and certified their inquiſitions into the Exchequer; and *Fitzherbert* called them officers of record. *F. N. B.* 100. No *eſcheator* could continue in his office above one year: and whereas before the ſtatute of *Weſtm.* 1. *c.* 24, *Eſcheators*, ſheriffs, *&c.* would ſeize into the King's hands the freehold of the ſubjects, and thereby diſſeiſe them; by this act it is provided that *no ſeizure* can be made of lands or tenements into the King's hands, *before office found.* 2 *Inſt.* 206. And *no lands can be granted before* the King's title is *found by inquiſition. Stat.* 18 *H.* 6. *c.* 6. The *office of eſcheator* is an ancient office, and was formerly of great uſe to the crown; but having its chief dependance on the *court of wards*, which is taken away by act of parliament, it is now in a manner out of date. 4 *Inſt.* 225. There was anciently an officer called *Eſcheator of the Jews. Clauſ.* 4 *Ed.* 1. *m.* 7.

ESCHECCUM. A jury or inquiſition. *Matt. Paris. Anno.* 1240.

ESCHIPARE. To build or equip.—*Du Cange.* See *Eſkippamentum.*

ESCROW. A deed delivered to a third perſon, to be the deed of the party making it, upon a *future* condition, when a certain thing is *performed*; and then it is to be delivered to the party to whom made. It is to be delivered to a ſtranger, mentioning the condition; and has relation to the firſt delivery. 2 *Rol. Abr.* 25, 26: *Co. Lit.* 31. A delivery as an *eſcrow* ſignifies, in fact, as a *ſcrowl* or writing, which is not to take effect as a *deed*, till the condition be performed. *Co. Lit.* 36. See title *Deed* III. 7.

ESCUAGE. See title *Tenure* II. 8.

ESCURARE. To ſcour or cleanſe. *Charta Antiqua.*

ESGLISE. *Fr.*] A church; in the old books a diviſion containing the law relative to *advowſons*, *churchwardens*, *&c. L. Fr. Dict.*

ESSINGÆ. The *Kings of Kent*, ſo called from the firſt King *Ochta*, who was ſurnamed *Eſe*: he was grandfather of King *Ethelbert.*

ESKETORES. from the Fr. *eſcheir.*] Robbers or deſtroyers of other men's lands and fortunes.—*Plac. Parl.* 20 *Ed.* 1.

ESKIPPAMENTUM. *Skippage*, tackle or ſhip furniture: *Sir Rob. Cott.*

ESKIPPER. *Fr.*] To ſhip, and *eſkipped* is uſed for ſhipped. *Cromp. Jur. Cur.*

ESKIPPESON. Shipping or paſſage by ſea. *Humphrey Earl of Bucks*, in a deed dated 13 *Feb.* 22 *H.* 6, covenants with Sir *Philip Chetwind*, his lieutenant of the caſtle of *Calais*, to give him allowance for his ſoldiers, *ſkippeſon* and *re ſkippeſon*, *viz.* paſſage and re-paſſage by ſhip.

ESLISORS. See *Eliſors.*

ESNECY. *æſnecia*, *dignitas primogeniti.*] A private prerogative allowed to the eldeſt *coparcener*, where an eſtate is deſcended to daughters for want of heir male, to chooſe firſt after the inheritance is divided. *Fleta*, *lib.* 5. *c.* 10. *Jus æſneciæ* is *jus primogenituræ*; in which ſenſe it may be extended to the eldeſt ſon, and his iſſue, holding firſt: In the ſtatute of *Marlebridge*, *cap.* 9, it is called, *initia pars hæreditatis. Co. Litt.* 166. See title *Election.*

ESPERONS. Spurs, *eſperons de or*, gilt ſpurs. 7 *Co. Rep.* 13.

ESPERVARIUS. Fr. *eſpervier.*] A ſparrow-hawk. *Chart. Foreſt. cap.* 4.

ESPLEES. *expletiæ*, from *explco.*] The products which ground or land yield; as the hay of the meadows, the herbage of the paſture, corn of the arable; rent and ſervices, *&c.* And of an advowſon, the taking of tithes in groſs by the parſon; of wood, the ſelling of wood; of an orchard, the fruits growing there; of a mill, the taking of toll, *&c.* Theſe and ſuch like iſſues are termed *eſplees.* And it is obſerved, that in a writ of right of land, advowſon, *&c.* the demandant ought to alledge in his count, that he or his anceſtors took the *eſplees* of the thing in demand; otherwiſe the pleading will not be good. *Terms de Ley.* Sometimes this word hath been applied to the farm, or lands, *&c.* themſelves.—*Plac. Parl.* 30 *Ed.* 1.

ESPOUSALS, *ſponſalia.*] Are a contract or mutual promiſe between a man and a woman to marry each other; and where marriages may be conſummated, *eſpouſals* go before them. Marriage or matrimony is ſaid to be an *eſpouſal de præſenti*, and a conjunction of man and woman in a conſtant ſociety. *Wood's Inſt.* 57. See title *Marriage.*

ESQUIRE. from the Fr. *Eſcu.* and the Lat. *Scutum*, in Greek σκυτος which ſignifies an hide of which *ſhields* were anciently made and afterwards covered.] An *Eſquire* was originally he who attending a knight in the time of war, did carry his *ſhield*, whence he was called *Eſcuier* in *French*, and *Scutifer* or *Armiger*, (*i. e.* armour-bearer) in *Latin.*

Hotoman ſaith, that thoſe whom the *French* call *Eſquires* were a military kind of vaſſals, having *jus ſcuti*, *viz.* liberty to bear a ſhield, and in it the enſigns of their family, in token of their gentility or dignity: but this addition hath not now for a long time had any relation to the office or employment of the perſon to whom it hath been attributed, as to carrying of arms, *&c.* but has been merely a title of dignity, and next in degree to a knight.

A ſheriff of a county being a ſuperior officer, retains the title of *Eſquire* during his life; in reſpect of the great truſt he has in the common-wealth. The chief of ſome ancient families are *eſquires* by preſcription. *Blount.*

Eſquires and Gentlemen are confounded together by Sir *Edward Coke*, 2 *Inſt.* 668. He there obſerves that every Eſquire is a Gentleman, and a gentleman is defined to be one *qui arma gerit*, who bears coat armour; the grant of which adds gentility to a man's family. It is indeed a matter ſomewhat unſettled what conſtitutes the diſtinction, or who is a real Eſquire; for it is not an eſtate, however large, that confers this rank upon its owner. *Camden* who was himſelf a herald, diſtinguiſhes them the moſt accurately. And he reckons up four ſorts of them. 1. The eldeſt ſons of knights, and their eldeſt ſons in perpetual ſucceſſion. 2. The eldeſt ſons of younger ſons of peers, and their eldeſt ſons in like perpetual ſucceſſion; both which ſpecies of eſquires *Spelman* calls *armigeri natalitii*; as he denominates the ſons themſelves of peers *armigeri honorarii.*—3. Eſquires created by the King's letters patent or other inveſtiture, and their eldeſt ſons; ſee poſt *Eſquires of the King.* 4. Eſquires by virtue of their offices; as juſtices of the peace and others who bear any office of truſt under the crown: [if ſtiled Eſquires by the King in their commiſſions and appointments.] To theſe may be added eſquires of Knights of the Bath, each of whom conſtitutes three at his inſtallation; and all

foreign, nay *Iriſh* peers; for not only theſe but even the eldeſt ſons of peers of *Great Britain*, though frequently titular lords, are only eſquires in law, and muſt ſo be named in all legal proceedings.—Barriſters at law ſeem alſo now in full poſſeſſion of the title of Eſquire, though originally, as it ſhould ſeem, attained by uſurpation; and being perhaps nearly the ſame kind of unneceſſary addition to their ſuperior degree, as if it were to be annexed or prefixed to that of *M. A.* or *L. L. D.*

The Court of *C. P.* however refuſed to hear an affidavit read, becauſe a Barriſter named in it was not called Eſquire. 1 *Wilſ.* 224.—See 1 *Comm.* 406; and the notes there. *Spelm. Gloſſ.* 43. and this Dict. title *Precedency*.

ESQUIRES OF THE KING. Are ſuch who have the title by *creation*: theſe, when they are created, have put about their necks a collar of *S. S.* and a pair of *ſilver ſpurs* is beſtowed on them: and they were wont to bear before the Prince in war, a *ſhield* or lance. There are four *eſquires of the King's body*, to attend on his Majeſty's perſon. *Camd.* 111.—Theſe are now diſuſed.

ESSENDI QUIETUM DE TOLONIO. A writ to be quit of *toll*; it lies for citizens and burgeſſes of any city or town that by charter or preſcription ought to be exempted from *toll*, where the ſame is exacted of them. *Reg. Orig.* 258. See titles *Toll*; *Corporation*; *London*.

ESSOIGN or ESSOIN. *Eſſonium*, Fr. *Eſſoine*.] An excuſe for him that is ſummoned to appear and anſwer to an action, or to perform ſuit to a court baron, &c. by reaſon of ſickneſs and infirmity, or other juſt cauſe of abſence. It is a kind of imparlance, or craving of a longer time, that lies in real, perſonal and mixed actions: and the plaintiff as well as the defendant ſhall be *eſſoigned* to ſave his default. *Co. Litt.* 131. For the mode of entring an Eſſoin, See *Raſt.* 520.

The cauſes that ſerve to *eſſoin*, and the *eſſoins* are divers under theſe heads. 1. *Eſſoin de ultra mare* whereby the defendant ſhall have forty days. 2. *De terrâ ſanctâ*, where defendant ſhall have a year and a day. 3. *De malo veniendi*, which is likewiſe called the *common eſſoin*. 4. *De malo lecti*, wherein the defendant may by writ be viewed by four knights. 5. *De ſervitio Regis*: *Bract. lib.* 5: *Britton*, *cap.* 122: *Fleta. lib.* 6. And beſides the common *eſſoign de malo veniendi*, *i. e.* by falling ſick in coming to the court, and other *eſſoins* abovementioned, there were ſeveral other excuſes, to ſave a default in *real* actions; as conſtraint of enemies, the falling among thieves, floods of water, and breaking down of bridges, &c. 2 *Co. Inſt.* 125.

After iſſue joined in dower, *quare impedit*, &c. one *eſſoin* only ſhall be allowed. *Stat.* 52 *H.* 3. *c.* 13. And in writs of aſſiſe, attaints, &c. after the tenant hath appeared, he ſhall not be *eſſoined*; but the inqueſt ſhall be taken by default. *St.* 3 *Ed.* 1. *c.* 42. *Eſſoin ultra mare* will not be allowed, if the tenant be within the four ſeas; but it ſhall be turned to a default, *c.* 44. There is no *eſſoin* permitted for an appellant. *St.* 13 *Ed.* 1. *c.* 28. Nor doth *eſſoin* lie where any judgment is given; or the party is diſtrained by his lands; the ſheriff is commanded to make him appear; after the party is ſeen in court, &c. 12 *Ed.* 2. *ſt.* 2.

An *eſſoin de ſervitio Regis* lies not when the party is a woman; in a writ of dower; where the party hath an attorney in his ſuit, &c. *Ibid.* The *eſſoign day* in court is regularly the firſt day of the term; but the fourth day after is allowed of favour. 1 *Lill.* 540, 569: 1 *Inſt.* 135.

A corporation is not entitled to an eſſoin. And the court diſcourages eſſoins, and will be glad to uſe any means to prevent ſuch delay of the defendant. 2 *Term Rep.* 16: 2 *Wilſ.* 164.—An eſſoin lies not on a capias to arreſt; and the plaintiff may declare and ſign judgment, if no plea. 2 *Str.* 1194.

ESSOIN DAY OF THE TERM. The firſt return in every term, is, properly ſpeaking, the firſt day in that term: And thereon the court ſits to take *eſſoins*, or excuſes for ſuch as do not appear according to the ſummons of the writ: wherefore this is uſually called the *eſſoin day* of the term. But the perſon ſummoned hath three days' grace, beyond the return of the writ in which to make his appearance, and if he appears on the *fourth* day inclusive, the *quarto die poſt*, it is ſufficient. 3 *Comm.* 277: See title *Term*.

ESSOIN DE MALO VILLÆ. Is when the defendant is in court the firſt day; but gone without pleading, and being afterwards ſurpriſed by *ſickneſs*, &c. cannot attend, but ſends two *eſſoiners*, who openly proteſt in court that he is detained by ſickneſs in ſuch a *village* that he cannot come, *pro lucrari & pro perdere*; and this will be admitted, for it lies on the plaintiff to prove whether the *eſſoin* is true or not.

ESSOINS AND PROFFERS. Words uſed in the ſtatute 38 *H.* 8. *c.* 21. See *Profer*.

ESTABLISHMENT OF DOWER. Is the aſſurance or ſettlement of *dower*, made to the wife by the huſband, on marriage: And *aſſignment of dower*, ſignifies the ſetting it out by the heir afterwards, according to the eſtabliſhment. *Brit. cap.* 102, 103. See title *Dower*.

ESTACHE. From the Fr. *Eſtacher*, to faſten.] A bridge, or ſtank of ſtone and timber. *Cowel*.

ESTANDARD, or *Standard*. An enſign for horſemen in war. See *Standard*.

ESTATE.

Fr. *Eſtat*. Lat. *Status*.] That title or intereſt which a man hath in lands or tenements, &c.

An *Eſtate* in lands, tenements and hereditaments, (ſays *Blackſtone*) ſignifies ſuch intereſt as the tenant hath therein; ſo that if a man grants all *his eſtate* in *Dale* to *A.* and his heirs, every thing that he can poſſibly grant ſhall paſs thereby. *Co. Litt.* 345. It ſignifies the [*ſtate*] condition, or circumſtance, in which the owner ſtands, with regard to his property. And, to aſcertain this with preciſion and accuracy, eſtates may be conſidered in a threefold view: firſt, with regard to the *quantity of intereſt* which the tenant has in the tenement; ſecondly, with regard to the *time* at which that quantity of intereſt is to be enjoyed; and, thirdly, with regard to the *number* and *connections* of the tenants.

Firſt with regard to the *quantity of intereſt* which the tenant has in the tenement, this is meaſured by its duration and extent. Thus, either his right of poſſeſſion is to ſubſiſt for an uncertain period, during his own life, or the life of another man; to determine at his own deceaſe, or to remain to his deſcendants after him; or it is circumſcribed within a certain number of years, months, or days; or, laſtly, it is infinite and unlimited, being veſted in him and his repreſentatives for ever. And this occaſions the primary diviſion of eſtates, into ſuch as are *freehold*, and ſuch as are *leſs than freehold*.

An

ESTATE.

An eſtate of freehold, *liberum tenementum*, or frank-tenement, is defined by *Britton c.* 32, to be "the *poſſeſſion* of the ſoil by a freeman." And St. *Germyn*, (*Dr. & Stud. b.* 2. *d.* 22,) tells us "that the poſſeſſion of the land is called in the law of *England* the frank-tenement, or freehold." Such eſtate therefore, and no other, as requires actual poſſeſſion of the land, is legally ſpeaking *freehold*: which actual poſſeſſion can, by the courſe of the Common-law, be only given by the ceremony called livery of ſeiſin, which is the ſame as the feodal inveſtiture. And from theſe principles we may extract this deſcription of a *freehold*; that it is ſuch an eſtate in lands as is conveyed by livery of ſeiſin; or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by *Littleton* § 59, that where a freehold ſhall paſs, it behoveth to have livery of ſeiſin. As therefore eſtates of inheritance and eſtates for life could not by Common-law be conveyed without livery of ſeiſin, theſe are properly eſtates of freehold; and, as no other eſtates were conveyed with the ſame ſolemnity, therefore no others are properly freehold eſtates. 2 *Comm.* 103, 4.

Mr. *Chriſtian*, in his note on the above paſſage ſays; a *freehold eſtate*, ſeems to be any eſtate of inheritance, or for life, in either a corporeal or incorporeal hereditament, exiſting in or ariſing from real property of free tenure; that is, now, of all which is not copyhold. The learned Commentator himſelf has elſewhere informed us, that "tithes and ſpiritual dues are freehold eſtates, whether the land out of which they iſſue are bond or free; being a ſeparate and diſtinct inheritance from the lands themſelves." And, in this view, they muſt be diſtinguiſhed and excepted from other incorporeal hereditaments, iſſuing out of lands, as rents, &c. which in general will follow the nature of their principal, and cannot be freehold, unleſs the ſtock from which they ſpring be freehold alſo. 1 *Blackſt. Tracts*, 116.

Eſtates of freehold, may then be conſidered, either as eſtates *of inheritance*, or eſtates *not of inheritance*.—The former are again divided into inheritances *abſolute*, otherwiſe called *fee-ſimple*, and inheritances *limited*; one ſpecies of which is uſually called *fee-tail*.

As to eſtates and tenants in fee-ſimple, See this Dict. titles *Fee, and Fee-ſimple*.

Limited fees, or ſuch eſtates of inheritance as are clogged and confined with conditions or qualifications of any ſort may be divided into two kinds. 1. *Qualified* or *baſe fees*. 2. *Fees conditional*, ſo called at the Common-law; and afterwards *fees-tail* in conſequence of the ſtatute *de donis*. As to theſe latter ſee this Dict. titles *Tail and Fee-Tail*.—A baſe or qualified Fee is ſuch a one as has a qualification ſubjoined thereto, and which muſt be determined whenever the qualification annexed to it is at an end. As in the caſe of a grant to *A.* and his heirs *tenants of the manor of Dale*; in this inſtance whenever the heirs of *A.* ceaſe to be tenants of that manor, the grant is entirely defeated.—This eſtate is a fee, becauſe by poſſibility it may endure for ever in a man and his heirs; yet as that donation depends upon the concurrence of collateral circumſtances which qualify and debaſe the purity of the donation, it is therefore a qualified or baſe fee. 2 *Comm.* 109. See 1 *Inſt.* 27.

Of eſtates of freehold, not of inheritance but, *for life* only, ſome may be called *conventional*, as being expreſsly created by the act of the parties; others are merely legal, or created by conſtruction and operation of law. As to eſtates for life expreſsly created by deed or grant, ſee this Dict. title *Life Eſtate*.—As to the eſtate of tenant in tail after poſſibility of iſſue extinct, ſee titles *Tail and Fee-Tail*.—As to tenant by the *Curteſy* and tenant in *Dower*, ſee thoſe titles.

Of *eſtates leſs than freehold* there are three ſorts; 1. Eſtates for years: 2. Eſtates at will: as to both which ſee this Dict. title *Leaſe*: 3. Eſtates by ſufferance: as to which ſee this Dict. title *Sufferance*.

Beſides theſe ſeveral diviſions of eſtates, in point of intereſt, another ſpecies may be mentioned, *viz. Eſtates upon condition*; as to which ſee at large title *Condition*; and titles *Mortgage*; *Statute Merchant*; *Statute-Staple*; *Elegit*.

According to the above diviſion Eſtates are conſidered ſolely with regard to their duration or the *quantity of intereſt* which the owners have therein. With regard to *the time of their enjoyment*, when the actual receipt of the rents and profits begins, Eſtates may be conſidered as either in *poſſeſſion* or *expectancy*;—Of expectancies, there are two ſorts; one created by the act of the parties, called a *Remainder*; the other by act of law, called a *Reverſion*.—Of eſtates in poſſeſſion, (which are ſometimes called eſtates executed, whereby a preſent intereſt paſſes to and abides in the tenant, not depending on any ſubſequent circumſtance or contingency, as in the caſes of eſtates *executory*) little or nothing is to be peculiarly obſerved; all the eſtates already ſpoken of, and treated of under the titles referred to, are of this kind. But the doctrine of eſtates in expectancy, contains ſome of the niceſt and moſt abſtruſe learning in the *Engliſh* law.—And as to ſo much of it as relates to *Remainders* and *Reverſions*, ſee this Dict. under thoſe titles, and titles *Executory Deviſe*; *Limitation*.

Eſtates, with regard to the certainty and the time of the enjoyment of them, are diſtinguiſhed by *Fearne* in the introduction to his Eſſay on Contingent Remainders and Executory Deviſes, into. 1. Eſtates *veſted in poſſeſſion*. 2. Eſtates *veſted in intereſt*; as reverſions; veſted remainders; ſuch executory deviſes, future uſes, conditional limitations and other future intereſts as *are not* referred to, or made to depend on, a period or event that is *uncertain*. 3. Eſtates *contingent*; as Contingent Remainders; and ſuch executory deviſes, future uſes, conditional limitations and other future intereſts as *are* referred to, or made to depend on an event that is *uncertain*.—An eſtate is *veſted*, when there is an *immediate fixed right* of preſent or future enjoyment.—An eſtate is *veſted in poſſeſſion*, when there exiſts a *right* of *preſent enjoyment*.—An eſtate is *veſted in intereſt* when there is a *preſent fixed right* of *future* enjoyment.—An eſtate is contingent when a *right* of enjoyment is to accrue, on an event which is *dubious* and *uncertain*.

With reſpect to the number and connections of their owners, the tenants who occupy and hold them, Eſtates of any quantity or length of duration, whether in actual poſſeſſion or expectancy may be held in four different ways; in *ſeveralty*; in *joint tenancy*; in *coparcenary*; in *common*.—He that holds lands in ſeveralty, or is ſole tenant thereof, is he that holds them in his own *right* only, without any other being joined or connected with him in point of intereſt during his eſtate therein. This is the moſt common and uſual way of holding an eſtate; and all eſtates are ſuppoſed to be of this ſort, unleſs

unleſs where they are expreſsly declared to be otherwiſe; and in laying down general rules and doctrines, they are uſually applied to ſuch eſtates as are held in ſeveralty. As to eſtates in joint-tenancy, in coparcenary and in common, ſee titles *Joint-tenants*: *Parceners*.

As to the title to eſtates, ſee this Dict. *Title*; and the references there; and as to the different nature of eſtates according to their ſeveral tenures, ſee this Dict. tit. *Tenure*.

Eſtates are acquired divers ways, *viz.* by *deſcent* from a father to the ſon, *&c.* *Conveyance*, or grant from one man to another; by *gift* or *purchaſe*; *deed* or *will*: And a fee-ſimple is the largeſt *eſtate* that can be in law. 1 *Lil.* 541.

Eſtates are *real*, of lands, *&c.* or *perſonal*, of goods or chattels; otherwiſe diſtinguiſhed into *freeholds*, that deſcend to the heir, and chattels which go to the executors: Some *eſtates* are made by the words of *deeds*, and others made by *law*; as an *eſtate* in *frank-marriage* given to a couſin, makes a gift in tail.

Alſo there is an *eſtate* that is *implied*, where tenant in tail bargains and ſells his land to a man and his heirs; by this he hath an *eſtate deſcendible*, and determinable upon the death of the tenant in tail. *Co. Lit*: 10 *Rep.* 97. If I give lands in *Dale* to a certain perſon for life, and after to his *heirs* or *right heirs*, he hath the *fee ſimple*; and if it be to his *heirs males*, he will have an *eſtate-tail*. 1 *Rep.* 66. A man grants to one and his heirs and aſſigns for his life, and a year over; this is an *eſtate* for life only. 39 *E.* 3. 25: *Lit.* 46. If a leaſe be made, and not expreſſed for what number of years, it is an *eſtate* at *will*. 2 *Shep. Abr.* 81.

The word *eſtate* generally in *deeds*, grants, and conveyances, comprehends the whole in which the party hath an intereſt or property, and will paſs the ſame. 3 *Mod.* 46. A perſon in *poſſeſſion* of an *eſtate* mortgaged in *fee*, by will gave it to his two daughters, and their heirs; one of them married, and then died: And it being a queſtion, whether her ſhare ſhould be held *real* or *perſonal eſtate*, and go to the heir, or her huſband adminiſtrator? It was adjudged for the heir; for here the mortgaged lands ſhall deſcend as other lands of inheritance, and be ſubject to the ſame rules. *Preced. Canc.* 266. In ſuch caſe, if the mortgage in *fee* be paid off, the money ſhall be conſidered as land, and belong to his heirs, as the *eſtate* in the land would have done. *Ibid.* See title *Mortgage*.

Perſonal eſtate was deviſed by a man to his wife for life, and what ſhe left at her death to be divided between his kindred: He died, and the widow married again; this deviſe over was held good in equity, on a bill brought to have an inventory taken of the *eſtate*, and ſecurity given not to imbezzle it. But if the ſame were of ſmall value, that the widow could not live thereupon, without ſpending the ſtock, it would be otherwiſe. See titles *Will*; *Executory Deviſe*.

How far the Acceptance of one Eſtate ſhall deſtroy another.

If a leſſee for term of twenty years, *accepts* of a leaſe of the ſame land for ten years, by the leſſee's *acceptance* of the new leaſe, the term of twenty years is determined in law. 2 *Roll. Abr.* 469.

Leaſe for years to *R. B.* rendering rent; the next year a leaſe was made of the ſame lands to the lady *P.* for ninety-nine years; the next year the ſame lands were demiſed to the ſaid *R. B.* for forty-one years, who accepted the leaſe, but that did not extinguiſh his firſt leaſe; becauſe the leſſor by making the intermediate leaſe to the lady *P.* had only a reverſion, and could not afterwards give any intereſt to *R. B.* But if it had not been for this intermediate leaſe, then the acceptance of the ſecond leaſe for forty-one years had been a ſurrender of the firſt. *Hutt.* 104.

If a man hath a leaſe for years, which is good in law, and afterwards accepts a new leaſe of the ſame lands, which is void in law, this is no ſurrender in law of the good leaſe. *Hutt.* 105. *Baker* v. *Willoughby*; *Mills* v. *Whitewood*, *ibid.* S. P.

A man, in conſideration of a marriage to be had with *M. R.* made an eſtate to her for life of certain lands in full ſatisfaction of her dower: afterwards they married, and the huſband died, and the widow brought a writ of dower againſt the heir, who pleaded in bar the acceptance of the eſtate for life: adjudged no good plea; for ſuch acceptance did not bar her of her dower at the Common-law, becauſe ſhe had no title of dower when the acceptance was made; and beſides no collateral acceptance can bar any right of inheritance or freehold. See 4 *Rep.* 1. *Vernon*'s caſe, and this Dict. title *Dower*.

A man made a leaſe of a manor for thirty years, excepting the wood, *&c.* and afterwards made a leaſe of the woods to the ſame leſſee for ſixty years, and a third leaſe to him of the manor for thirty years, without any exception; reſolved, that by the acceptance of this future leaſe, the leaſe for ſixty years was ſurrendered; becauſe by ſuch acceptance the leſſee had affirmed, that the leſſor had authority to make a new leaſe. 5 *Rep.* 11: *Ives*'s caſe.

In a ſpecial verdict in treſpaſs, the caſe was, a leaſe was made to huſband and wife for their lives, and afterwards they accepted a new leaſe for themſelves and their ſon: *habendum* to all three of them, *a die datûs indenturæ*, for the term of their lives with a letter of attorney to make livery: adjudged, that the acceptance of a ſecond leaſe, to commence *a die datûs*, was a ſurrender of the firſt, and this by the expreſs agreement in writing of the leſſees themſelves; for otherwiſe the leſſor had no power to make a new leaſe. *Moor* 636.

ESTOPPEL, From the Fr. *Eſtouper*, i. e. *Oppilare*, *obſtipare*.] An impediment or bar to a right of action ariſing from a man's own act: or where he is forbidden by law, to ſpeak againſt his own deed; for by his act or acceptance he may be *eſtopped* to alledge or ſpeak the truth. *F. N. B.* 142; *Co. Lit.* 352. If a perſon is bound in an obligation by the name of *A. B.* and is afterwards ſued by that name on the obligation; now he ſhall not be received to ſay in abatement, that he is miſnamed, but ſhall anſwer according to the obligation, though it be wrong; and foraſmuch as he is the ſame perſon that was bound, he is *eſtopped* and forbidden in law to ſay contrary to his own deed; otherwiſe he might take advantage of his own wrong, which the law will not ſuffer. *Terms de Ley*. If a man enters into a bond, with condition to give to another all the goods which are deviſed to him by the father; in this caſe the obligor is eſtopped to plead that the father made no will, but he may plead that he had not any goods deviſed to him by his father. 1 *Nelſ. Abr.* 751.

In a deed, all the parties are eſtopped to ſay any thing againſt what is contained in it: it eſtops a leſſee to ſay that

that the leſſor had nothing in the land, &c. And parties and privies are bound by *eſtoppel*. *Lit.* 58: *Co. Lit.* 352: 4 *Rep.* 53. None but privies and parties ſhall regularly have advantage by *eſtoppels*: But if a man makes a leaſe of part of a term whereby he is eſtopped; and after aſſign away the term, the aſſignee will be eſtopped alſo. 30 *H.* 6. 2: 4 *Rep.* 56. In *eſtoppels*, both parties muſt be eſtopped; and therefore, where an infant or feme covert makes a leaſe, they are not eſtopped to ſay *that it is not their deed*, becauſe they are not bound by it; and *as to them* it is void. *Cro. Eliz.* 36. See title *Deed*. And though *eſtoppels* conclude parties to deeds to ſay the truth; yet jurors are not concluded, who are ſworn *ad veritatem de & ſuper præmiſſis dicendam*: For they may find any thing that is out of the record; and are not eſtopped to find truth in a ſpecial verdict. 4 *Rep.* 53: *Lut.* 570.

An *eſtoppel* ſhall biud only the heir, who claims the right of him to whom the *eſtoppel* was. 8 *Rep.* 53. Acceptance of rent from a diſſeiſor by the diſſeiſee, may be an *eſtoppel*: And a widow accepting leſs than her thirds for dower, is an *eſtoppel*, &c. 2 *Danv. Abr.* 130, 671.

Our books mention three kinds of *eſtoppel*, *viz.* By matter of *record*, by matter in *writing*, and by matter in *pais*. *Co. Lit.* 352. If a feoffment be made to two, and their heirs, and the feoffor afterwards levies a fine to them, and the heirs of one of them; this will be an *eſtoppel* to the other to demand fee-ſimple according to the deed; *for the fine ſhall enure as a releaſe*. 6 *Rep.* 7, 44. Tenant in tail ſuffers a recovery, that his iſſue may avoid; he himſelf ſhall be eſtopped and concluded by it, and may not demand the land againſt his own recovery. 3 *Rep.* 3.

The taking of a leaſe by indenture of a man's own land, whereof he is ſeiſed in fee, is an *eſtoppel* to claim the fee during the term. *Moor, Ca.* 323: *And.* 121. A leaſe is made to one man for eighty years, and then to another by deed indented for the ſame term, this ſecond leaſe may be good by way of *eſtoppel*: And if the firſt determine by ſurrender, forfeiture, &c, the ſecond leſſee ſhall have the land. *Co. Rep.* 155. If a leſſor at the time of making the leaſe hath nothing in the land, but after he gets it by purchaſe or deſcent, it is a good leaſe by *eſtoppel*. *Dyer* 256: *Plowd.* 344: *Co. Lit.* 47. A recital in a deed ſhall not eſtop a perſon, unleſs it be of a particular fact, or where it is material; when it may be an *eſtoppel*. *Cro. Eliz.* 362.

The lord, by deed indented, reciting that his tenant holds of him by ſuch ſervices, whereas he doth not, confirms to the tenant, ſaving the ſervices; it is no *eſtoppel* to the tenant. 35 *H.* 6. 33: *Plowd.* 130. If one make a deed by *dureſs* of impriſonment, and when he is at large makes a defeaſance to it; he is eſtopped to ſay it was *per dureſs*. *Bro. Defeaſ.* 17. Where the condition of a bond is in the *particularity*, as to infeoff *J. S.* of the manor of *D.* or to pay ſuch a ſum of money as he ſtands bound to pay to *W. S.* or to ſtand to the ſentence of *J. S.* in a matter of tithes in queſtion between them; here the party is eſtopped to deny any of theſe things, which in the condition he did grant: But if a condition be in the *generality*, to enfeoff one of all his lands in *D.* or to be nonſuit in all actions, &c. it is no eſtoppel. *Dyer* 196: 18 *Ed.* 4. 54.

If a man in pleading confeſs the thing he is charged with, be cannot afterwards deny it: Though a plaintiff ſhall not be eſtopped to alledge any thing againſt that which before he hath ſaid in his writ, or declaration; and one may not be eſtopped by the record upon which he was non-ſuited. 21 *H.* 7. 24: 2 *Leon.* 3. 17.

An *eſtoppel* ought to be *certain and affirmative*, and a matter alledged that is not traverſable, ſhall not eſtop; one may not be eſtopped by acceptance, before his title accrued; an *eſtoppel* muſt be inſiſted and relied on; and where there is *eſtoppel* againſt *eſtoppel*, it puts the matter at large. *Co. Lit.* 352: *Hob.* 207. *Eſtoppels* are to be pleaded relying on the *eſtoppel*; without demanding judgment *ſi actio*, &c. 4 *Rep.* 53. See title *Pleading*.

ESTOVERS, See title *Common of Eſtovers*. This word hath been taken for any kind of ſuſtenance; as *Bracton* uſes it, for that ſuſtenance or allowance, which a man committed for felony is to have out of his lands or goods for himſelf and his family during his impriſonment. *Bract. lib.* 3. *tract* 2. *cap.* 18. And the *Stat.* 6 *Ed.* 1. *cap.* 3, applies it to an allowance in meat, clothes, &c. In which ſenſe it has been uſed for a wife's alimony.

ESTOVERIIS HABENDIS, Writ *de*. A writ at Common law, for a woman divorced from her huſband, *à menſâ & thoro*, to recover her *alimony*, ſometimes called her *eſtovers*. 1 *Lev.* 6. See title *Baron and Feme*.

ESTRAY, *Extrahura*, from the old Fr. *Eſtrayeur*.] Is any beaſt that is not wild, found within a lordſhip, and whoſe owner is not known. In which caſe if it be tried and proclaimed according to law in the church and two neareſt market-towns on two market-days, and is not claimed by the owner within a year and a day, it belongs to the king; and now moſt commonly, by grant of the crown to the lord of the liberty. *Brit. cap.* 17. Any beaſts may be eſtrays, that are by nature tame or reclaimable, and in which there is a valuable property as *ſheep*, *oxen*, *ſwine* and *horſes*.—But animals upon which the law ſets no value, as a dog or cat; and animals *feræ naturæ*, as a bear or wolf cannot be conſidered as eſtrays. 1 *Comm.* 289. Swans may be *eſtrays*, but no other fowl, and are to be proclaimed, &c. 1 *Rol. Abr.* 878. If the beaſt ſtray to another lordſhip within the year, after it hath been an *eſtray*, the firſt lord cannot re-take it, for, until the year and day be paſt, and proclamation made as aforeſaid, he hath no property; and therefore the poſſeſſion of the ſecond lord is good againſt him. *Cro. Eliz.* 716: *Finch L.* 177. If the cattle were never proclaimed, the owner may take them at any time: And where a beaſt is proclaimed as the law directs, if the owner claims it in a year and a day, he ſhall have it again; but muſt pay the lord for keeping. 1 *Rol. Abr.* 879: *Finch* 177.

An owner may ſeize an *eſtray*, without telling the marks, or proving the property, (which may be done at the trial, if conteſted,) and tendering amends generally is good in this caſe, without ſhewing the particular ſum; becauſe the owner of the *eſtray* is no wrong-doer, and knows not how long it has been in the poſſeſſion of the lord, &c. which makes it different from treſpaſs, where a certain ſum muſt be tendered. 2 *Salk.* 686. In caſe of an *eſtray* the lord ought to make a demand of what the amends ſhould be for the keeping; and then if the party thinks the demand unreaſonable, he muſt tender ſufficient amends; but if what he tenders is not enough, the lord ſhall take iſſue, and it is to be ſettled by the jury. *Noy* 144. A beaſt *eſtray* is not to be uſed in any manner, except in caſe of neceſſity; as to milk a cow, or the like, but not to ride an horſe. *Cro. Jac.* 148: 1 *Rol.* 673. *Eſtrays of the*

the Foreſt are mentioned in the ſtatute of 27 *H.* 8. *cap.* 7. The *King's cattle* cannot be *eſtrays* or forfeited, *&c.*

ESTREAT, *Extractum.*] The true copy or note of ſome original writing or record, and eſpecially of *fines, amercements, &c.* impoſed on the rolls of a court, to be levied by the bailiff or other officer. *F. N. B.* 57, 76. *Stat. Weſtm.* 2. *c.* 8.—Juſtices, commiſſioners, *&c.* are to deliver their *eſtreats* into the *Exchequer* yearly after *Michaelmas*: And fines to have writs, which ſhall be entered in the *eſtreat*, in order as they are entered in the Chancery Rolls, *&c.* *Stats.* 51 *H.* 3. *ſtat.* 5: 16 *Ed.* 2. Theſe *eſtreats* relate to fines for crimes and offences, defaults and negligences of parties in ſuits and officers, non-appearance of defendants, and jurors, *&c.* And all forfeited recognizances are to be firſt *eſtreated* in the Exchequer, by ſheriffs of counties; on which proceſs iſſues to levy the ſame to the uſe of the King. *Stat.* 22 & 23 *Car.* 2. *cap.* 22.

Eſtreats are to be levied on the right perſons: And ſheriff's *eſtreats* muſt be in two parts, indented and ſealed by the ſheriff, and two juſtices of the peace; who are to view them, and one of them is to remain with the ſheriff, and the other with the juſtices. *Stat.* 11 *H.* 7. *c.* 15. The *eſtreats* of fines, at the quarter-ſeſſions, are to be made by the juſtices; and to be double, one whereof is to be delivered to the ſheriff by indenture. *Stat.* 14 *R.* 2. *cap.* 11. Fines, poſt fines, forfeitures, *&c.* muſt be *eſtreated* into the Exchequer twice a year, on pain of 50*l.* And officers are to deliver in their returns of *eſtreats* upon oath. *Stats.* 22 & 23 *Car.* 2. *c.* 22: 4 & 5 *W.* & *M. c.* 24. It is the courſe of the court of *B. R.* to ſend the *eſtreats* twice a year into the Exchequer, *viz. on the laſt day of the two iſſuable terms*; but in extraordinary caſes there may be a rule to *eſtreat* them ſooner. 1 *Salk.* 45. Amerciaments are not uſually diſcharged on motion, and there ought to be a *conſtat* of the *eſtreat*; though the court may give leave to the ſheriff to compound them. *Ibid.* 54: 1 *Nelſ. Abr.* 207: See *Stats.* 3 *Ed.* 1. *c.* 45: 27 *Ed.* 1. *ſt.* 1. *c.* 2: 5 *H.* 7. *c.* 1: 3 *Geo.* 1. *c.* 15. *ſ.* 12: and further titles *Sheriff*; *Juſtices of Peace.*

ESTRECIATUS, *Streightened*, applied to roads. *R. Hoveden, p.* 783.

ESTREPE, Fr. *Eſtropier.*] To make ſpoil in lands to the damage of another, as of the reverſioner, *&c.*

ESTREPEMENT, *Eſtrepamentum* from the Fr. *Eſtropier, mutilare*, or from the Lat. *Extirpare.*] Any ſpoil made by tenant for life, upon any lands or woods, to the prejudice of him in reverſion; It alſo ſignifies the making land barren by continual ploughing. *Stat.* 6 *Ed.* 1. *cap.* 13. It ſeems by the derivation, that *eſtrepement* is the unreaſonable drawing away the heart of the ground, by ploughing and ſowing it continually, without manuring or other good huſbandry, whereby it is impaired: And yet *eſtropier* ſignifying *mutilare*, may no leſs be applied to the cutting down trees, or lopping them further than the law allows. In ancient records, we often find *vaſtum & eſtrepamentum facere*; to make ſtrip and waſte.

This word is uſed for a writ, which lies in two caſes; the one, by the *Stat. of Glouc.* 6 *E.* 1. *c.* 13, when a perſon having an action depending, as a *formedon*, writ of right, *&c.* ſues to prohibit the tenant from making waſte, during the ſuit; the other is for the demandant, who is adjudged to recover ſeiſin of the land in queſtion, after judgment and before execution ſued by the writ of *habere facias poſſeſſionem*, to prevent waſte being made till he gets into poſſeſſion. *Reg. Orig.* 76: *Reg. Judic.* 33: *F. N. B.* 60, 61: 3 *Inſt.* 328.

In ſuing out theſe two writs, this difference was formerly obſerved; that in actions merely proſſeſſory where no damages are recovered, a writ of *Eſtrepement* might be had at any time *pendente lite*, nay, even at the time of ſuing out the original writ or firſt proceſs: but in an action where damages were recovered, the demandant could only have a writ of *eſtrepement*, if he was apprehenſive of waſte, after verdict had; for with regard to waſte done before the verdict was given, it was preſumed the jury would conſider that in aſſeſſing the damages. *F. N. B.* 60, 1. But now it ſeems to be held by an equitable conſtruction of the *Stat. of Glouc.* and in advancement of the remedy, that a writ of *eſtrepement* to prevent waſte, may be had in every ſtage, as well of ſuch actions wherein damages are recovered, as of thoſe wherein only poſſeſſion is had of the lands; for perhaps the tenant may not be able to ſatisfy the demandant his full damages. *Ib.* 61. And therefore now in an action of waſte itſelf to recover the place waſted, and alſo damages, a writ of *eſtrepement* will lie as well before as after judgment. For the plaintiff cannot recover damages for more waſte than is contained in his original complaint: neither is he at liberty to aſſign or give in evidence any waſte made after ſuing out the writ: it is therefore reaſonable that he ſhould have this writ of *preventive* juſtice, ſince he is in his preſent ſuit debarred of any further remedy. 5 *Rep.* 115.

If a writ of *eſtrepement* forbidding waſte be directed and delivered to the tenant himſelf, as it may be, and he afterwards proceeds to commit waſte, an action may be carried on upon the foundation of this writ, wherein the only plea of the tenant can be, *non fecit vaſtum contra prohibitionem*; and if upon verdict it be found that he did, the plaintiff may recover coſts and damages; or the party may proceed to puniſh the defendant for the contempt. *Moor* 100.

As a writ of *eſtrepement* may be directed either to the tenant and his ſervants, or to the ſheriff; if it be directed to the tenant and his ſervant, and they are duly ſerved with it, if they afterwards commit waſte, they may be committed to priſon for this contempt of the writ. But it is ſaid not to be ſo, when directed to the ſheriff, becauſe he may raiſe the *poſſe comitatûs* to reſiſt them who make waſte. *Hob.* 85. Though it hath been adjudged, that the ſheriff may likewiſe impriſon offenders, if he be put to it; and that he may make a warrant to others to do it. 5 *Rep.* 115: 2 *Inſt.* 329.

The writ of *eſtrepement* lies properly where the plaintiff in a real action ſhall not recover damages by his action; and as it were ſupplies damages; for damages and coſts may be recovered for waſte, after the writ of *eſtrepement* is brought. See *Moor* 100: 2 *Inſt.* 328. If tenants commit waſte in houſes aſſigned a feme for dower, on her bringing action of dower, writ of *eſtrepement* lies. 5 *Rep.* 115: See *Cro. Eliz.* 114: *Moor* 622. But pending a *writ of partition between coparceners*, if the tenant commit waſte, this writ will *not* be granted; becauſe there is *equal intereſt between the parties*, and the writ will not lie, but where the intereſt of the tenant is to be diſproved. *Goldſb.* 50: 2 *Nelſ. Abr.* 754.

In the Chancery, on filing of a bill, and before anſwer, the court will grant an injunction to ſtay waſte, *&c.* 1 *Lil.* 547. See titles *Chancery*; *Waſte.*

ETHELING or ÆTHELING, *Sax.*] Signifies noble, and among the Engliſh *Saxons*, it was the title of the Prince, or the King's eldeſt ſon. *Camden.* See *Adeling.*

EVASION, *Evaſio.*] A ſubtle endeavouring to ſet aſide truth, or to eſcape the puniſhment of the law; which will not be indured. If a perſon ſays to another that he will not ſtrike him, but will give him a pot of ale to ſtrike firſt, and accordingly he ſtrikes, the returning of it is puniſhable; and if the perſon firſt ſtriking be killed, it is murder; *for no man ſhall evade the juſtice of the law, by ſuch a pretence to cover his malice.* 1 *H. P. C.* 81. No one may plead ignorance of the law to *evade* it, *&c.*

EVENINGS, The delivery at *even* or night of a certain portion of graſs or corn, *&c.* to a cuſtomary tenant, who performs the ſervice of cutting, mowing, or reaping for his lord, given him as a gratuity or encouragement. *Kennet's Gloſſ.*

EVESDROPPERS, See *Eaves-droppers.*

EVICTION, From *evinco* to overcome.] A recovery of land, *&c.* by form of law. If land is evicted, before the time of payment of rent on a leaſe, no rent ſhall be paid by the leſſee. 10 *Rep.* 128. Where lands taken on extent are evicted or recovered by better title, the plaintiff ſhall have a new execution. 4 *Rep.* 66. If a widow is evicted of her dower or thirds, ſhe ſhall be endowed in the other lands of the heir. 2 *Danv. Abr.* 670. And if on an exchange of lands, either party is evicted of the lands given in exchange, he may enter on his own lands. 4 *Rep.* 121.

EVIDENCE,

Evidentia.] Proof by teſtimony of witneſſes, on oath; or by writings or records.

It is called *Evidence*, becauſe thereby the point in iſſue in a cauſe to be tried, is to be made *evident* to the jury; for *probationes debent eſſe* evidentes *& perſpicuæ. Co. Lit.* 283. The *evidence* to a jury ought to be upon the oath of witneſſes; or upon matters of record, or by deeds proved, or other like authentical matter, 1 *Lil. Abr.* 547. And *evidence* containeth teſtimony of witneſſes, and all other proofs to be given and produced to a jury for the finding of any iſſue joined between parties. *Co. Lit.* 283.

The ſyſtem of evidence, as now eſtabliſhed in our courts of Common-law, is very full, comprehenſive and refined; a ſummary of the law on the ſubject is here preſented.

The nature of the preſent work will not allow room for the numberleſs niceties and diſtinctions of what is, or is not, legal *evidence* to a jury. A few of the general heads and leading maxims, relative to this point, as well in civil, as criminal caſes, together with ſome obſervations on the manner of giving Evidence, are firſt ſelected.

Evidence, as has been already remarked, ſignifies that which demonſtrates, makes *evident* or clear, or aſcertains the truth of the very fact or point in iſſue, either on the one ſide or on the other; and no evidence ought to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of *non eſt factum*, and the iſſue is, whether it be the defendant's deed or no, he cannot give a releaſe of this bond in Evidence, for that does not deſtroy the bond, and therefore does not prove the iſſue which he has choſen to rely upon, *viz.* that the bond has no exiſtence.

Again; Evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge.—As to the latter ſee title *Jury.*—The former, or *Proofs*, (to which in common ſpeech the name of Evidence is uſually confined) are either written; or *parol*, that is by word of mouth. Written proofs, or Evidence, are, 1, Records; and 2, Ancient deeds of 30 years ſtanding, which prove themſelves; but 3, Modern deeds; and, 4, Other writings, muſt be atteſted and verified by parol evidence of witneſſes. And the one general rule that runs through all the doctrine of trials is this, that the beſt evidence the nature of the caſe will admit of ſhall always be required, if poſſible to be had; but if not poſſible, then the beſt evidence that can be had ſhall be allowed. For if it be found there is any better evidence exiſting than is produced, the very not producing it is a preſumption, that it would have detected ſome falſehood that at preſent is concealed. Thus, in order to prove a leaſe for years, nothing elſe ſhall be admitted, but the very deed of leaſe itſelf, if in being; but if that poſitively be proved to be burnt or deſtroyed, (not relying on any looſe negative, as that it cannot be found, or the like,) then an atteſted copy may be produced; or *parol* evidence given of it's contents. So, no evidence of a diſcourſe with another will be admitted, but the man himſelf muſt be produced; yet in ſome caſes, (as in proof of any general cuſtoms, or matters of common tradition or repute,) the courts admit of *hearſay* evidence, or an account of what perſons deceaſed have declared in their life-time: but ſuch evidence will not be received of any particular facts. So too, books of accounts, or ſhop-books, are not allowed of themſelves to be given in evidence for the owner, but a ſervant who made the entry may have recourſe to them to refreſh his memory: and, if ſuch ſervant (who was accuſtomed to make thoſe entries) be dead, and his hand be proved, the book may be read in evidence. *Bull. N. P.* 282, 3: *Salk.* 285. But as this kind of evidence, even thus regulated, would be much too hard upon the buyer at any long diſtance of time, the *Stat.* 7 *Jac.* 1. *c.* 12, (the penners of which ſeem to have imagined that the books of themſelves were evidence at Common-law) confines this ſpecies of proof to ſuch tranſactions as have happened within one year before the action brought; unleſs between merchant and merchant in the uſual intercourſe of trade. For accounts of ſo recent a date, if erroneous, may more eaſily be unravelled and adjuſted.

With regard to *parol* Evidence, or *Witneſſes*; there is a proceſs to bring them in by writ of *ſubpœna ad teſtificandum*; which commands them, laying aſide all pretences and excuſes, to appear at the trial on pain of one hundred pounds, to be forfeited to the king; to which the *Stat.* 5 *Eliz. c.* 9, has added a penalty of 10*l.* to the party aggrieved, and damages equivalent to the loſs ſuſtained by want of his evidence. But no witneſs, unleſs his reaſonable expences be tendered him, is bound to appear at all; nor if he appears, is he bound to give evidence till ſuch charges are actually paid him: except he reſides within the bills of mortality, and is ſummoned to give evidence within the ſame. This compulſory proceſs, to bring in unwilling witneſſes, and the additional terrors of an attachment in caſe of diſobedience, are of excellent uſe in the thorough inveſtigation of truth.

EVIDENCE.

All witneſſes of whatever religion or country, that have the uſe of their reaſon, are to be received and examined, except ſuch as are *infamous*, or ſuch as are *intereſted* in the event of the cauſe. All others are *competent* witneſſes; though the jury from other circumſtances will judge of their *credibility*. Infamous perſons are ſuch as may be challenged as jurors, *propter delictum*; and therefore ſhall never be admitted to give evidence to inform that jury, with whom they were too ſcandalous to aſſociate. Intereſted witneſſes may be examined upon a *voir dire*, if ſuſpected to be ſecretly concerned in the event; or their intereſt may be proved in court. Which laſt is the only method of ſupporting an objection to the former claſs; for no man is to be examined to prove his own infamy. And no counſel, attorney, or other perſon, intruſted with the ſecrets of the cauſe by the party himſelf, ſhall be compelled, or perhaps allowed, to give evidence of ſuch converſation or matters of privacy, as came to his knowledge by virtue of ſuch truſt and confidence: but he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being intruſted in the cauſe. *Bull. N. P.* 284: 1 *Vent.* 97.

One witneſs (if credible) is *ſufficient* evidence to a jury of any ſingle fact; though undoubtedly the concurrence of two or more corroborates the proof. Yet our law conſiders that there are many tranſactions to which only one perſon is privy; and therefore does not *always* demand the teſtimony of two, as the civil law univerſally requires.

Poſitive proof is always required, where from the nature of the caſe it appears it might poſſibly have been had. But, next to *poſitive* proof, *circumſtantial* evidence or the doctrine of *preſumptions* muſt take place: for when the fact itſelf cannot be demonſtratively evinced, that which comes neareſt to the proof of the fact, is the proof of ſuch circumſtances which either *neceſſarily*, or *uſually* attend ſuch facts; and theſe are called preſumptions, which are only to be relied upon till the contrary be actually proved. *Stabitur præſumptioni donec probetur in contrarium.* *Co. Litt.* 373. Violent preſumption is many times equal to full proof; for there thoſe circumſtances appear, which *neceſſarily* attend the fact. *Ibid.* 6. As if a landlord ſues for rent due at *Michaelmas* 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a ſubſequent time, in full of all demands, this is a violent preſumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without ſuch payment; and it therefore induces ſo forcible a preſumption, that no proof ſhall be admitted to the contrary. *Gilb. Evid.* 161. *Probable* preſumption ariſing from ſuch circumſtances as *uſually* attend the fact, hath alſo its due weight: as if, in a ſuit for rent due in 1754, the tenant proves the payment of the rent due in 1755; this will prevail to exonerate the tenant; (*Co. Litt.* 373;) unleſs it be clearly ſhewn that the rent of 1754, was retained for ſome ſpecial reaſon, or that there was ſome fraud or miſtake: for otherwiſe it will be preſumed to have been paid before that in 1755, as it is moſt uſual to receive firſt the rents of longeſt ſtanding. *Light*, or raſh preſumptions have no weight or validity at all.

The oath adminiſtered to the witneſs, is not only that what he depoſes ſhall be true, but that he ſhall alſo depoſe the *whole* truth: ſo that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the preſence of the parties, their attorney, the counſel, and all by-ſtanders; and before the judge and jury: each party having liberty to except to it's competency, which exceptions are publickly ſtated, and by the judge are openly and publickly allowed or diſallowed, in the face of the country. And if either in his directions or deciſions he mis-ſtates the law by ignorance, inadvertence, or deſign, the counſel on either ſide may require him publickly to ſeal a *bill of exceptions*; ſtating the point wherein he is ſuppoſed to err: See title *Bill of Exceptions.*—Or if the legal effect of a record or other evidence is doubted, this may be tried on a *Demurrer to Evidence*; See that title.—3 *Comm.* 367—372.

The true theory of Evidence is admirably explained in *Bull. Ni. Pri.* part VI. from *Gilbert's Law of Evidence*; and it concludes with taking a view of all the general Rules of Evidence together, from whence the following abſtract is given.

1. The firſt general rule is that the beſt evidence muſt be given that the nature of the thing is capable of. The true meaning of this rule is that no ſuch evidence ſhall be brought as *ex naturâ rei* ſuppoſes ſtill a greater evidence behind; in the party's poſſeſſion or power, for ſuch evidence is altogether inſufficient and proves nothing. But if it is proved that an original deed, will, *&c.* is in the hands of the adverſe party, or is deſtroyed without default of the party who ought to produce it, a copy will be admitted; becauſe then ſuch copy is the beſt evidence.

2. No perſon intereſted in the *queſtion* can be a witneſs. There is no rule in more general uſe and none that is ſo little underſtood. See 1 *Term Rep.* 302. And there are ſome exceptions to it. *e. g.* 1. A party intereſted will be admitted in a criminal proſecution in moſt inſtances; 2. he may be admitted for the ſake of trade and the common uſage of buſineſs; as porters, apprentices, *&c.* to prove delivery of goods, *&c.* though it tend to clear themſelves of neglect. See 3 *Term Rep.* 29: *Str.* 647, 1083. 3. Where no other evidence is reaſonably to be expected. 4. Where he acquires the intereſt by his own act, after the party who calls him as a witneſs has a right to his evidence. 5. Where the poſſibility of intereſt is very remote. See 1 *Term Rep.* 163, 4, and more at length, this title, Div. II. 1.

3. The third general rule is, that hearſay is no evidence.—For no evidence is to be admitted but what is upon oath and if the firſt ſpeech were without oath, another oath that there was ſuch a ſpeech makes it no more. Beſides, if the ſpeaker be living, it is not the beſt evidence. But hearſay has been admitted in corroboration of a witneſs's teſtimony.

4. In all caſes where a general character or behaviour is put in iſſue, evidence of particular facts may be admitted; but not where it comes in collaterally.

5. *Ambiguitas verborum latens verificatione ſuppletur, nam quod ex facto oritur ambiguum, verificatione facti tollitur.*

6. In every iſſue the affirmative is to be proved. A negative cannot regularly be proved, and therefore it is ſufficient to deny what is affirmed until it be proved: but

but when the affirmative is proved, the other party may conteſt it with oppoſite proofs, of ſome matter or propoſition totally inconſiſtent with what is affirmed.

7. No evidence need be given of what is agreed by the pleadings. For the jury are only ſworn to try the matter in iſſue between the parties, ſo that nothing elſe is properly before them.

8. Whenſoever a man cannot have the advantage of the ſpecial matter by pleading, he may give it in evidence on the general iſſue. See title *Pleading*.

9. If the ſubſtance of the iſſue be proved, it is ſufficient. As to this, ſee alſo titles *Pleading*; *Modo et Forma*.

The doctrine of evidence IN CRIMINAL CASES is, in moſt reſpects, the ſame as that upon civil actions. There are however a few leading points, wherein by ſeveral ſtatutes and reſolutions a difference is made between civil and criminal evidence.

1. In all caſes of high treaſon, petit treaſon, and miſpriſion of treaſon, by *Stats.* 1 *Ed.* 6. *c.* 12, and 5 & 6 *Ed.* 6. *c.* 11, *two* lawful witneſſes are required to convict a priſoner; unleſs he ſhall willingly and without violence *confeſs* the ſame. By *Stat.* 1 & 2 *P.* & *M. c.* 10, a farther exception is made as to treaſons in counterfeiting the King's ſeals or ſignatures, and treaſons concerning coin current within this realm; and more particularly by *c.* 11, the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The *Stats.* 8 & 9 *W.* 3. *c.* 25: 15 & 16 *Geo.* 2. *c.* 28, in their ſubſequent extenſions of this ſpecies of treaſon do alſo provide, that the offenders may be indicted, arraigned, tried, convicted and attainted, by the like evidence, and in ſuch manner and form, as may be had and uſed againſt offenders for counterfeiting the King's money. But by *Stat.* 7 *W.* 3. *c.* 3, in proſecutions for theſe treaſons to which that act extends, the ſame rule (of requiring *two* witneſſes) is again enforced; with this addition, that the *confeſſion* of the priſoner, which ſhall countervail the neceſſity of ſuch proof, muſt be in *open court*. In the conſtruction of which act it hath been holden, that a confeſſion of the priſoner, taken out of court, before a magiſtrate or perſon having competent authority to take it, and proved by two witneſſes; is ſufficient to convict him of treaſon. *Foſter* 240, 4. But haſty unguarded confeſſions, made to perſons having no ſuch authority, ought not to be admitted as evidence under this ſtatute. And indeed, even in caſes of felony at the Common-law, they are the weakeſt and moſt ſuſpicious of all teſtimony; ever liable to be obtained by artifice, falſe hopes, promiſes of favour, or menaces; ſeldom remembered accurately, or reported with due preciſion; and incapable in their nature of being diſproved by other negative evidence. By the ſame *Stat.* 7 *W.* 3. *c.* 3, it is declared that both witneſſes muſt be to the ſame overt act of treaſon; or one to one overt act, and the other to another overt act of the ſame ſpecies of treaſon, and not of diſtinct heads or kinds: and no evidence ſhall be admitted to prove any overt act not expreſsly laid in the indictment. See 2 *State Trials* 144: *Foſter* 235. And therefore in Sir *John Fenwick*'s caſe, in King *William*'s time, where there was but one witneſs, an act of parliament, (*Stat.* 8 *W.* 3. *c.* 4,) was made on purpoſe to attaint him of treaſon, and he was executed. 5 *State Trials* 40. But in almoſt every other accuſation, one poſitive witneſs is ſufficient; except in caſes of indictments for perjury, where one witneſs is not ſufficient, becauſe then there is only one oath againſt another. 10 *Mod.* 194.

2. From the reverſal of colonel *Sydney*'s attainder by act of parliament in 1689, (8 *State Trials* 472,) it may be collected that the *mere ſimilitude* of hand-writing in two papers ſhewn to a jury, without other concurrent teſtimony, is no evidence that both were written by the ſame perſon. 2 *Hawk. P. C.* 431; yet undoubtedly the teſtimony of witneſſes, well acquainted with the party's hand, that they believe the paper in queſtion to have been written by him, is evidence to be left to a jury. *Lord Preſton's caſe*, *A. D.* 1690. 4 *State Trials* 463: *Francia's caſe A. D.* 1716, 6 *State Trials* 69: *Layer's caſe A. D.* 1722, *Ibid.* 279: *Henzey's caſe*, *A. D.* 1758: 4 *Burr.* 644.

3. By the *Stat.* 21 *Jac.* 1. *c.* 27, a mother of a baſtard child, concealing its death, muſt prove by one witneſs that the child was born dead; otherwiſe ſuch concealment ſhall be evidence of her having murdered it. See title *Baſtard*.

4. All preſumptive evidence of felony ſhould be admitted cautiouſly: for the law holds, that it is better that ten guilty perſons eſcape, than that one innocent ſuffer. And Sir *Matthew Hale* in particular lays down two rules moſt prudent and neceſſary to be obſerved. 1. Never to convict a man for ſtealing the goods of a perſon unknown, merely becauſe he will give no account how he came by them, unleſs an actual felony be proved of ſuch goods: and, 2. Never to convict any perſon of murder or manſlaughter, till at leaſt the body be found dead: on account of two inſtances he mentions, where perſons were executed for the murder of others, who were then alive, but miſſing. 2 *Hal. P. C.* 200.

Laſtly it was an antient and commonly received practice, (1 *State Trials paſſim*,) that as counſel was not allowed to any priſoner accuſed of a capital crime, ſo neither ſhould he be ſuffered to exculpate himſelf by the teſtimony of any witneſſes. And therefore it deſerves to be remembered to the honour of *Mary* I, that ſhe firſt deſired ſuch evidence to be received in a court of juſtice. Afterwards in one particular inſtance (when embezzling the queen's military ſtores was made felony by *Stat.* 31 *Eliz. c.* 4,) it was provided that any perſon, impeached for ſuch felony, "ſhould be received and admitted to make any lawful proof that he could, by lawful witneſs or otherwiſe, for his diſcharge and defence;" and in general the courts grew ſo heartily aſhamed of a doctrine ſo unreaſonable and oppreſſive, that a practice was gradually introduced of examining witneſſes for the priſoner, but not upon oath. 2 *Lulſt.* 147: *Cro. Car.* 292. The conſequence of this ſtill was, that the jury gave leſs credit to the priſoner's evidence, than to that produced by the Crown. Sir *Edward Coke* proteſts very ſtrongly againſt this tyrannical practice: declaring that he never read in any act of parliament, book, caſe, or record, that in criminal caſes the party accuſed ſhall not have witneſſes ſworn for him; and therefore there is not ſo much as *ſcintilla juris* againſt it. 3 *Inſt.* 79. See alſo 2 *Hal. P. C.* 283, and his Summary 264. And the Houſe of Commons were ſo ſenſible of this abſurdity, that, in the bill for abolishing hoſtilities between *England* and *Scotland*, (*Stat.* 4 *Jac.* 1. *c.* 1,) when felonies committed by *Engliſhmen* in *Scotland* were ordered to be tried

in one of the three Northern counties, they inſiſted on a clauſe and carried it againſt the efforts of both the Crown and the Houſe of Lords, againſt the practice in the courts of *England*, and the expreſs law of *Scotland*, "that in all ſuch trials for the better diſcovery of the truth, and the better information of the conſciences of the jury and juſtices, there ſhall be allowed to the party arraigned the benefit of ſuch credible witneſſes, to be examined upon oath as can be produced for his clearing and juſtification." At length by *Stat.* 7 *W.* 3. *c.* 3, the ſame meaſure of juſtice was eſtabliſhed throughout all the realm, in caſes of treaſon within the act: and it was afterwards declared by *Stat.* 1 *Ann. ſt.* 2. *c.* 9, that in *all caſes* of treaſon and felony, all witneſſes *for* the priſoner ſhould be examined upon oath, in like manner as the witneſſes *againſt him*. 4 *Comm.* 356—360.

Having given the foregoing general view, more minute information on this ſubject may be thus claſſed,

I. Of written *Evidence*: *Wherein of Matters of Record as alſo of Writings under Seal, and other Writings and Depoſitions in Chancery or other Courts.*

II. Unwritten Evidence: *Wherein*—

1. *Who may be Witneſſes.*
2. *Of the Number of Witneſſes, and of compelling them to appear; as alſo of the Manner of their giving Evidence.*
3. *Of parol, preſumptive, and hear-ſay Evidence.*

I. *Evidence by records and writings*, Is where acts of parliaments, ſtatutes, judgments, fines and recoveries, proceedings of courts, and deeds, *&c.* are admitted as *evidence*. A general act of parliament may be given in *evidence*; and need not be pleaded; and of theſe the printed ſtatute-book is good *evidence*: But in the caſe of a private act, a copy of it is to be examined by the records of parliament, and it is to be pleaded. *Trials per pais* 177, 232. Journals and other proceedings in the Houſe of Commons have been held to be no *evidence*. *State Trials, vol.* 3. 470; Though it is otherwiſe, *vol.* 3. 800. A hiſtory of *England*, or printed trial, may not be read as *evidence*. 1 *Lil.* 557. *Camden's Britannia* was not allowed as *evidence*: But it has been held, that an hiſtory may be *evidence* of the general hiſtory of the realm, though not of a particular cuſtom, *&c.* *Skinner's Rep.* 623.

An exemplification of the inrolment of letters patent under the great ſeal, may be pleaded in *evidence*. 3 *Inſt.* 173. This exemplification is a copy or tranſcript of *letters patent* made from the inrollment thereof, and ſealed with the great ſeal. But neither an exemplification nor *conſtat* was pleadable at Common-law, becauſe there was only the tenor of an enrollment; and the tenor of a record is not pleadable; but they are now pleadable by *Stats.* 3 & 4 *E.* 6. *c.* 4: 13 *Eliz. c.* 6.

A patent may be exemplified under the great ſeal in Chancery; and alſo any record or judgment in any of the courts at *Weſtminſter*, under the proper ſeal of each court: all which exemplifications may be given in evidence to a jury. 1 *Lil.* 583: *Shep.* 134. A rule made, or writ filed, in any court at *Weſtminſter*, may be exemplified in the court where made or filed. But nothing but matter of record ought to be exemplified. 3 *Inſt.* 173.

Records and inrolments prove themſelves; and a copy of a record or inrolments ſworn to, may be given in *evidence*. *Co. Lit.* 117, 262. A tranſcript of a record in another court, may be given in *evidence* to a jury. 1 *Lil. Abr.* 551. There is a difference between pleading a record, and giving the record in *evidence*; if it be pleaded, it muſt be *ſub pede ſigilli*, or the judges cannot judge thereof: Though where it is given in *evidence*, if it be not under the ſeal, the jury may find the ſame, if they have other good matter of inducement to prove it. *Style's Rep.* 22.

A fine or recovery may be given in *evidence*, without vouching the roll of the recovery; for the part indented is the uſual *evidence* that there is ſuch a fine: But it is ſaid *the fine ought to be ſhewn with the proclamations under ſeal.* 10 *Rep.* 92: 2 *Rol. Abr.* 574.

By *Stat.* 14 *Geo.* 2. *c.* 20, where any perſon has purchaſed or ſhall purchaſe for a valuable conſideration, any eſtate, whereof a recovery was neceſſary to complete the title, ſuch perſon, and all claiming under him, having been in poſſeſſion from the time of ſuch purchaſe, ſhall and may after the end of 20 years from the time of ſuch purchaſe, produce in *evidence* the deed, making a tenant to the *præcipe*, and declaring the uſes; and the deed ſo produced (the execution thereof being duly proved) ſhall be deemed ſufficient evidence, that ſuch recovery was duly ſuffered, in caſe no record can be found of ſuch recovery, or the ſame ſhould appear not regularly entered. Provided the perſon making ſuch deed had a ſufficient eſtate, and power to make a tenant to the *præcipe*, and to ſuffer ſuch common recovery.

A record of an inferior court, hath been rejected in *evidence*, and the party put to prove what was done: And proceedings of county courts, courts baron, *&c.* may be tried by a jury; for it hath been adjudged, that they cannot be proved by the rolls, but by witneſſes. *Lit.* 75. But court-rolls of a court baron, when ſhewn, are good *evidence*; and in many caſes, *copies* of the court-rolls are allowed as *evidence*. *Trials per pais* 178, 228.

Inrolment of a deed is proved on certifying it by an examined atteſted copy; though inrolment of a deed which needs no inrolment, or by which the eſtate does not paſs, is only evidence to ſome purpoſes. 3 *Lev.* 387.

By *Stat.* 10 *An. c.* 18, where any bargain and ſale inrolled is pleaded with a *profert*, the party to anſwer ſuch profert may produce a copy of the inrollment.

With reſpect to the production of *Deeds* in evidence, the general rule is, that the deed itſelf muſt be given in evidence, and muſt be proved by one witneſs at the leaſt. But if the oppoſite party produce the deed on notice, it ſhall be read without any proof of the execution. *Bull. N. P.* 254: 2 *Term Rep.* 41.

An ancient deed proves itſelf, where poſſeſſion has gone accordingly: But later deeds muſt be proved by witneſſes. *Co. Lit.* 6. If all the witneſſes to a deed are dead, continual and quiet poſſeſſion is preſumptive *evidence* of the truth of it; yet it may receive farther credit by compariſon of hands and ſeals. *Wood's Inſt.* 599. When witneſſes to deeds are dead, their hand-writing muſt be proved, 2 *Inſt.* 118. And where there are ſeveral witneſſes to a deed, and they are all dead but one, a *ſubpœna* muſt be taken out againſt the living witneſs, and ſtrict inquiry made after him, and affidavit is to be made that he cannot be found, before the hand-writing of the deceaſed witneſſes are to be proved. 1 *Lill.* 556.

An old deed proved to have been found among deeds and *evidences* of lands, may be given in *evidence* to a jury; though the executing of it cannot be proved and made out.

out. 3 *Salk.* 153. A deed may be good *evidence*, though the ſeal is broken off: And where a deed is burnt, &c. the judges may allow it to be proved by witneſſes, that there was ſuch a deed, and this be given in *evidence*. 1 *Lev.* 25. But the court will not allow the jury, on a trial at bar, to carry deeds, writings or books with them out of court, as *evidence* to conſider of, *but ſuch as have been proved*: Though by the aſſent of parties, or by aſſent of the court without the parties, they may be delivered to the jurors. *Cro. Eliz.* 421. All deeds or writings under ſeal, and given in *evidence*, they may have; and nothing which was not given in *evidence*, for the court gives their direction to the jury upon the *evidence* given in court. 1 *Lil.* 313.

It is dangerous to ſuffer any, who by law ought to ſhew forth any deed, to prove in *evidence*, that there was ſuch a deed, which they had ſeen or read, &c. For there might be imperfections in the deed, or it may be on condition, with limitation, &c. 10 *Rep.* 92. A deed, though ſealed and delivered, if not ſtamped according to act of parliament, cannot be pleaded or given in *evidence* in any court. See *Stat.* 5 & 6 *W. & M. cap.* 21, and ſeveral ſubſequent ſtatutes; the latter of which extend to bills, notes, receipts, agreements, &c. And theſe ſtamps have been frequently the means of detecting forgeries; for the Stamp-office put ſecret marks on the ſtamps, which from time to time are varied: ſo that where a deed is forged of a date antecedent, it may eaſily be diſcovered by ſtamps being upon it, not in uſe at the time it bears date. A deed cannot be proved by a counterpart of it or copy, if the original is in being, and may be had; though it may be when the original cannot be procured. *Co. Lit.* 225: 10 *Rep.* 92. The counterpart of an ancient deed hath been allowed to be given in *evidence*. *Mod. Caſ.* 225. But it hath been held that the counterpart of a deed, without other circumſtances, is not ſufficient *evidence*; unleſs in caſe of a fine, when a counterpart is good *evidence* of itſelf. 1 *Salk.* 287.

Where a deed was *cancelled* by fraud, that being proved, it was allowed to be *evidence* in an action under the deed. *Hetl.* 138. The recital of a deed is no *evidence* without ſhewing the deed; or proving that there was ſuch a deed, and it is loſt. *Co. Lit.* 352: *Vaugh.* 74. Recital of a leaſe, in a deed of releaſe, is good *evidence*, that there was ſuch a leaſe againſt the releaſor, and thoſe claiming under him; but not againſt others, except there be proof that there was ſuch a leaſe. 1 *Salk.* 286. A ſettlement ſet forth in a bill in Chancery, and admitted in the anſwer; and where it was proved that the deed was in the poſſeſſion of ſuch a one, &c. hath been adjudged a good *evidence* of the deed of ſettlement where not to be found. 5 *Mod.* 384.

The probate of a will, when it concerns perſonal eſtate only, may be given in *evidence*: But where title of lands is claimed under a will, the original will muſt be ſhewn, not the probate: Though if the will be proved in the Chancery, copies of the proceedings there will be *evidence*. 2 *Rol. Abr.* 687: *Trials per pais* 234: 1 *Salk.* 286: and *Raym.* 335. In certain caſes the Ledger-book of the Eccleſiaſtical Court in which the will is entered, is ſufficient evidence, being a roll or record of the court. *Bull. N. P.* 245, 6.

A bill in Chancery has been admitted as ſlight *evidence* againſt the complainant: An anſwer in Chancery is *evidence* againſt the defendant himſelf, though not againſt others. 1 *Vent.* 66: *Trials per pais* 167. But when a party gives an anſwer in Chancery in *evidence* at a trial, though he inſiſt to read only ſuch a part of it; yet the other ſide may require to have the whole read. 5 *Mod.* 10. As in caſe of a writing permitted to be read to prove one part of an *evidence*, which may be read to prove any other part of the *evidence* given to the jury.

Depoſitions of witneſſes in Chancery between the ſame parties, may be given in *evidence* at law, if the witneſſes are dead, and the bill and anſwer proved. *Trials per pais* 167, 207, 234. Regularly depoſitions in Chancery, of a witneſs, may not be given in *evidence*, if he be alive; unleſs he be in another kingdom, not ſubject to the dominion of our King. *Ibid.* 359. But depoſitions in Chancery, after anſwer, between the ſame parties, may be read as *evidence*, though the witneſſes are not dead, if they cannot be found on ſearch. *Shower* 3: 1 *Salk.* 278. Depoſitions in Chancery *in perpetuam rei memoriam*, are not to be given in *evidence*, ſo long as the parties are living. 1 *Salk.* 286. And it hath been adjudged, that theſe depoſitions to perpetuate teſtimony, on a bill exhibited, ſhall not be admitted as *evidence* at a trial at law, except an anſwer be put in. *Raym.* 335. If depoſitions are taken out of the realm, he who makes them is ſuppoſed there ſtill, and they ſhall be read as *evidence*; but if it appears he is in *England*, they cannot be read, but he muſt come in perſon. 1 *Lil.* 555. Things done beyond ſea may be be given in *evidence* to a jury; and the teſtimony of a public notary of things done in a foreign country, will be good *evidence*. 6 *Rep.* 47.

Depoſitions cannot be given in evidence againſt any perſon who was not party to the ſuit; and the reaſon is, becauſe he had not liberty to croſs-examine the witneſſes; and it is againſt natural juſtice that a man ſhould be concluded in a cauſe to which he never was a party. *Hardr.* 22, 472: *Bunb.* 50. *pl.* 84—91: *pl.* 148—321. *pl.* 403: 9 *Mod.* 229: *Carth.* 181: *Vern.* 113: *Gilb. Evid.* 62: *Ch. Prec.* 212. See this Dict. title *Depoſitions*.

Depoſitions in the Eccleſiaſtical courts may not be given in *evidence* to a jury at a trial; but a ſentence may in a cauſe of tithes, &c. And the ſentence of the Spiritual court is concluſive *evidence* in cauſes *within their juriſdiction*. 1 *Salk.* 290: 2 *Nelſ. Abr.* 761.

Depoſitions before a coroner are admitted as *evidence*, the witneſſes being dead. 1 *Lev.* 180: Likewiſe they have been admitted where a witneſs hath gone beyond ſea. 2 *Nelſ. Abr.* 760. The confeſſion of a priſoner before a magiſtrate, &c. may be given in *evidence* againſt him: See 2 *Hawk. P. C. c.* 46. and the notes there. The examination of an offender need not to be on oath, but muſt be ſubſcribed by him, if he confeſſes the fact; and then be given in *evidence* upon oath by the juſtice of the peace who took the ſame. The examination of others muſt be on oath, and proved by the juſtice, or his clerk, &c. as to their *evidence*, if they are dead, unable to travel, or kept away by the priſoner. *H. P. C.* 19, 162: *Kel.* 18, 55: *Wood's Inſt.* 647.

The examination of an informer before a juſtice, taken on oath, and ſubſcribed, may be given in *evidence* on a trial if he be dead, or not able to travel, &c. which is to be made out on oath. 2 *Hawk. P. C. c.* 46.

By *Stats.* 1 & 2 *P. & M. c.* 13: 2 & 3 *P. & M. c.* 10, Juſtices of peace ſhall examine perſons brought before them

them for felony, and those who brought them, and certify such examination to the next gaol-delivery: but the examination of the prisoner shall be without oath, and the others upon oath; and these examinations shall be read against an offender upon an indictment, if the witnesses be dead. *Bull. N. P.* 242.

A verdict against one, under whom either the plaintiff or defendant claims, may be given in *evidence* against the party so claiming; but not if neither claim under it. *Mich.* 1656. *B. R.* In ejectment where the plaintiff hath title to several lands, and brings action of ejectment against several defendants, if he recovers against one, he shall not give that verdict in *evidence* against the rest. 3 *Mod.* 141.

In a court of common law, a decree in Chancery is no *evidence*. Letters may be produced as *evidence* against a man, in treason, &c. Although a witness swear to the hand and contents of a letter, if he never saw the party write, he shall not be allowed as *evidence*. *Skin.* 673. In general cases the witness should have gained his knowledge from seeing the party write; but under some circumstances, that is not necessary; as where the hand-writing to be proved is of a person residing abroad, one who has frequently received letters from him in a course of correspondence, would be admitted to prove it though he had never see him write.—So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write. On an indictment for writing a treasonable libel, proof of the hand-writing is sufficient, without proof of the actual writing. *Bull. N. P.* 236.

Since no witnesses are present when goldsmiths' notes or promissory notes are given, such notes are allowed as *evidence* of the receipt of money, or other thing. 1 *Salk.* 283. A church-book some writers say is not to be admitted as *evidence*; though others say it may. *Cro. Eliz.* 411. It is said copies of public books of corporations, &c. shall be *evidence*. 1 *Lev.* 25: 1 *Lil.* 551. But as to books of corporations, where things are entered not of record, the originals are to be produced as *evidence*.

A pedigree drawn by a herald at arms, will not be admitted for *evidence*, without shewing the records or ancient books from whence taken; for the entries in the herald's office are no records, but only circumstantial *evidence*: But a copy of an inscription on a grave-stone, has been given in *evidence* in such a case. 2 *Rol. Abr.* 686, 687. An almanack wherein the father had writ the day of the nativity of his son was allowed in *evidence* to prove the nonage of the son. *Raym.* 84.

Matter in law ought not to be given in *evidence* at a trial, but only matters of fact, unless it be in case of a special verdict; matter in law is disputable, and reserved to be spoken to in arrest of judgment. *Vaugh.* 143. 147. In debt the defendant may give in *evidence*, that he paid money on an obligation before the day, &c. 2 *Nels. Abr.* 755. And a release may be given in *evidence* on *nil debet*. 5 *Mod.* 18. Though in *indebitatus assumpsit* the plaintiff shall not give any specialty in *evidence* to prove his debt, as a bond, indenture, &c. because he may bring action of debt upon that specialty. *Moor* 340.

Entry and expulsion may be given in *evidence* in debt for rent: Coverture may be given in *evidence* to avoid a deed, &c. *Mod. Cas.* 230. Usurious contracts, &c. may be given in *evidence*. 2 *Nels.* 756. Fraud may be given in evidence, *on the general issue*: And tampering with witnesses may be given in evidence against a party &c. 5 *Rep.* 60. But many things are to be pleaded; as justifications without title, in trespass, &c. and cannot be given in evidence upon Not guilty. *Trials per pais* 404. If in trespass *Not guilty* be pleaded; a licence may not be given in *evidence* to excuse the trespassor; for it must be pleaded. *Kel.* 59. And if the issue in detinue is *non detinet*, it shall not be given in evidence that the goods were pledged for money, and the money not paid; this is not good without pleading it: But a gift of the goods by the plaintiff may be given in evidence. *Co. Lit.* 283. But in an action of *trover*, for goods, evidence that they were pledged, for money lent or owing, and the money not being paid, or tendered, is a good bar to the action.

So in an issue in waste, *no waste done*, the defendant may give in evidence, that it came by lightning, tempest, or enemies; but that he *repaired before action brought*, must be specially pleaded, &c. 1 *Inst.* 282. If an issue be taken on the cutting of twenty oaks, evidence may be for ten; because either is a breach of covenant not to do waste. 2 *Shep. Abr.* 142. In *ejectione firmæ*, the plaintiff declares for 100 acres of land, and gives evidence only for forty, it will be good for so much. *Cro. Eliz.* 13. But if the point in issue be the sealing and delivery of a lease, and the witnesses prove it sealed and delivered, but did not know the lessor that sealed it: Or where proof is not made of *livery and seisin*, on issue of a lease for life: Or if on an issue upon a taking by *capias ad satisfaciendum*, and evidence be of taking by *capias utlagatum*, &c; in all these cases *the evidence will not be good to maintain the issue*. *Plowd.* 14: *Kelw.* 55, 59: *Hob.* 55. See further titles *Pleading*: *General Issue*: *Copy*.

II. 1. The King cannot be a witness under his sign manual, &c. 2 *Rol. Abr.* 686. Though it has been allowed he may, in relation to a promise made in behalf of another. *Hob.* 213. A peer produced as an evidence, ought to be sworn. 3 *Keb.* 631. It is no exception to an evidence, that he is a judge, or a juror, to try the person; for a judge may give evidence going off from the Bench. 2 *Hawk. P. C. c.* 46. And a juror may be an evidence as to his particular knowledge; but then it must be on examination in open court, not before his brother jurors. 1 *Lill.* 552. Members of corporations shall be admitted or refused to give evidence in actions brought by corporations, as their interest is small or great; whereby it may be judged whether they will be partial or not. 2 *Lev.* 231, 241. But they will not generally be admitted; though inhabitants not free of the corporation may be good witnesses for the corporation, as their interest is not concerned; and members may be *disfranchised* on these occasions. *Ibid.* 236.

In actions against church-wardens and overseers of the poor for recovery of money mis-spent on the parish account, the evidence of the parishioners, not receiving alms, shall be allowed. *Stat.* 3 & 4 *W. & M. cap.* 11. In informations or indictments for not repairing highways and bridges, the evidence of the inhabitants of the town, corporation, &c. where such highways lie, shall be admitted. *Stat.* 1 *Ann. cap.* 18.

By *Stat.* 27 *Geo.* 3. *c.* 29, In actions on penal statutes, inhabitants of any place are witnesses to prove an offence, though

though the penalty be given to the poor, or otherwiſe for the benefit of the ſaid pariſh or place, provided the penalty does not exceed 20*l*.

Kinſmen, though never ſo near, tenants, ſervants, maſters, attornies for their clients, and all others that are not infamous, and which want not underſtanding or are not parties in intereſt, may give *evidence* in a cauſe; though the credit of ſervants is left to the jury. 2 *Rol. Abr.* 685: 1 *Vent.* 243. A counſellor, attorney, or ſolicitor, is not to be examined as an *evidence* againſt their clients, becauſe they are obliged to keep their ſecrets; but they may be examined, as to any thing of their own knowledge before retained, not as counſel or attorney, *&c.* 1 *Vent.* 97.

The bail cannot be an *evidence* for his principal. If the plaintiff makes one a defendant in the ſuit, on purpoſe to impeach his teſtimony, under a pretence of his being a party in intereſt, he may nevertheleſs be examined *de bene eſſe*; and if the plaintiff prove no cauſe of action againſt him, his *evidence* ſhall be allowed in the cauſe, 2 *Lill. Abr.* 701. But in civil ſuits, and indictments for treſpaſſes, *&c.* the plaintiff or proſecutor uſually goes through his evidence, and thoſe defendants who are not affected, are ſometimes by direction of the judge, acquitted, and then give evidence for the other defendant or defendants, and ſometimes they have been examined, without the form of an acquittal. If a man makes himſelf a party in intereſt, after a plaintiff or defendant has an intereſt in his *evidence*, he may not by this deprive them of the benefit of his teſtimony. *Skin. Rep.* 586.

One that hath a legacy given him by will, is not a good witneſs to prove the will; but if he releaſe his legacy, he may be a good *evidence*. *Skin.* 704. It is the ſame of a deed; he that claims any benefit by it, may not be an *evidence* to prove that deed, in regard of his intereſt: And a perſon any ways concerned in the ſame title of land in queſtion, will not be admitted as *evidence*. *Ibid.* 705. But it has been held, that an heir apparent may be a witneſs concerning a title of land; and yet a remainder-man, who hath a preſent intereſt, cannot. 1 *Salk.* 385. If a legatee is permitted to be ſworn and examined, the counſel cannot afterwards except againſt his *evidence*. 1 Ld. *Raym.* 730.

To obviate all difficulties and inconveniences, it is enacted by *Stat.* 25 *Geo.* 2. *c.* 6, That any deviſe to a perſon being witneſs to any will or codicil, ſhall be void: And ſuch perſon ſhall be admitted as a witneſs—And that any creditor atteſting a will or codicil, by which his debt is charged upon land, ſhall be admitted as a witneſs to the execution, notwithſtanding ſuch charge—The *credit* of every ſuch witneſs being left to the conſideration of the court and jury.

Witneſſes competent at law, are competent to prove a nuncupative will by *Stat.* 4 *Ann c.* 16. *ſ.* 14: The ſon of a legatee is no witneſs to a will in the ſpiritual court; nevertheleſs it is held, he may be a good *evidence* to prove a nuncupative will, within the intent of the ſtatute of frauds. 1 *L. Ray.* 85. See title *Will.*

A grantee who is a bare truſtee, it is ſaid, is a good witneſs to prove the execution of the deed made to himſelf. 1 *P. Wil.* 290: If an action is brought againſt many perſons for taking of goods, one of them concerned may be admitted as an *evidence* againſt the reſt. *Comberb.* 367, See 1 *Mod.* 282: In criminal caſes, as of robbery on the highway, in action againſt the hundred; in rapes of women, or where a woman is married by force, *&c.* a man or a woman may be an *evidence* in their own cauſe. 1 *Vent.* 243. And in private enormous cheats, a perſon may give *evidence* in his own cauſe, where no body elſe can be a witneſs of the circumſtances of the fact, but he that ſuffers. 1 *Salk.* 286. Upon an information on the ſtatute againſt uſury, he that borrows the money, after he hath paid it, may be an *evidence*; but not before. *Raym.* 191.

An alien infidel, may not be an *evidence*; but a *Jew* may, and be ſworn on the *Old Teſtament*. 1 *Inſt.* 6. A quaker ſhall not be permitted to give *evidence* in any criminal cauſe, (unleſs he will take an oath): Though on other occaſions, his ſolemn affirmation ſhall be accepted inſtead of an oath. *Stat.* 7 & 8 *W.* 3. *cap.* 34. See title *Quaker*.—The oath of a *Gentoo* ſworn according to the circumſtances of his religion, has been admitted in a civil matter. 1 *Atk.* 21. And by *Willes*, C. J. an infidel in general, is an admiſſible witneſs, for the term does not imply that he is an atheiſt; but wherever it appears that a witneſs has no idea of a God or religion, he ſhall not be permitted to give his teſtimony. 1 *Atk.* 40, 45.

Perſons *non ſanæ memoriæ*; thoſe that are attainted of conſpiracy, or in a *præmunire* upon the ſtatute 5 *Eliz. c.* 1; *Popiſh* recuſants convict, on the *Stat.* 3 *Jac.* I. *c.* 5, are diſabled to give *evidence*; but ſee contra 1 *Hawk. P. C. c.* 12. *ſ.* 6. So perſons convicted of felony, perjury, *&c.* And if one by judgment hath ſtood on the pillory, or been whipped; for his infamy he ſhall not be admitted to give *evidence*, whilſt the judgment is in force: But the record of conviction muſt be produced, on objecting againſt his teſtimony; and the witneſs ſhall not be aſked any queſtion to accuſe himſelf, though his credit may be impeached by other *evidences*, as to his character in general, ſo as not to make proof of particular crimes, whereof he hath not been convicted. 3 *Inſt.* 108, 219: 3 *Lev.* 426. If after a man hath ſtood in the pillory, *&c.* he be pardoned, he may be an *evidence*: And notwithſtanding judgment of the pillory infers infamy at common law; by the civil and canon law it imports no infamy, unleſs the cauſe for which the perſon was convicted was infamous; and therefore ſuch may be a good witneſs to a will, if not convicted of any infamous act. 3 *Lev.* 426, 427. It has been held, that it is not ſtanding in the pillory, diſables a perſon to give *evidence*; *but ſtanding there upon a judgment for an infamous crime, as forgery*, &c. If for a libel, a man may be a witneſs. 5 *Mod.* 74: 3 *Nelſ. Abr.* 557.

Perſons excommunicated cannot be witneſſes, becauſe being excluded out of the church, they are ſuppoſed not to be under the influence of any religion. But perſons outlawed may be witneſſes, becauſe they are puniſhed in their properties and not in the loſs of their reputation, and the outlawry has no manner of influence on their credibility. *Bull. N. P.* 292, 3.

A man is convicted of felony, and afterwards pardoned, he may be a good *evidence*. *Raym.* 369. So where burnt in the hand, which is *quaſi* a ſtatute pardon; and it is ſaid this burning in the hand reſtores the offender to his credit. *Ibid.* 330. A perſon who was condemned to be hanged for burglary, but having a pardon for tranſportation, hath been allowed to be a good *evidence*. 5 *Mod.* 18. One outlawed for treaſon and pardoned may be an evidence.

State

State Trials, vol. 3. 515. Perſons acquitted, or guilty of the ſame crime, (while they remain unconvicted) may be *evidence* againſt their fellows. *Kel.* 17. Though no *evidence* ought to be given of what an accomplice hath ſaid, who is not in the ſame indictment. *State Trials, vol.* 2. 414. An informer may be a witneſs, though he is to have part of the forfeiture, where no other witneſſes can be had. *Wood's Inſtit.* 598. Members of either Houſe of Parliament may be witneſſes on impeachments. *State Trials, vol.* 2. 632.

Ideots, madmen, and children, are excluded from giving evidence for want of ſkill and diſcernment.

2. In addition to what has been already ſaid as to the number of witneſſes, we may mention that it is required by *Stat.* 29 *Car.* 2. *cap.* 3, "That all deviſes of *lands* ſhall be atteſted and ſubſcribed in the preſence of the teſtator, by *three* or four credible witneſſes, or elſe ſhall be void." See title *Will.*

If a witneſs, ſerved with a proceſs in a civil cauſe, refuſe to appear, being tendered reaſonable charges, and having no lawful excuſe, action on the caſe lies againſt him, whereon damages ſhall be recovered: And a feme covert not appearing, action may be brought againſt the huſband and her. *Stat.* 5 *Eliz. cap.* 9: 1 *Leon.* 112.

If there is a doubt that a witneſs will not attend, the beſt way is to ſerve him with the original *ſubpœna*, keeping a copy, and if he is at any diſtance from the place of trial, tender reaſonable charges: if he does not appear at the trial, call him three times on his *ſubpœna*, and then, if occaſion requires, the party may bring his action, or move for an attachment.

In a criminal cauſe, if a witneſs refuſe to appear and give *evidence*, being ſerved with proceſs, the court will put off the trial, and grant attachment againſt him; and, as refuſing to give *evidence* is a great contempt, the party may be committed and fined. 1 *Salk.* 278.

Preventing *evidence* to be given againſt a criminal, is puniſhable by fine and impriſonment; and a perſon was fined one thouſand marks in ſuch a caſe. *Hill.* 1663. *B. R.* Perſons diſſuading a witneſs from giving *evidence*, *&c.* and jurors or others diſcloſing *evidence* given, are likewiſe offences puniſhed by fine and impriſonment. 2 *Hawk. P. C. c.* 22.

By *Stat.* 26 *Geo.* 3. *c.* 71. § 16, (made to prevent *horſe-ſtealing*, and which ſee under that head,) The juſtice before whom complaint ſhall be made for any offence againſt the act, may ſummon any perſon, other than the party complained againſt, to appear before him to give evidence; and in caſe ſuch perſon ſhall wilfully refuſe or neglect to attend or give evidence, he ſhall forfeit 10*l.* and in default of payment, or in caſe of inability ſhall ſtand committed to gaol, for not more than two months, nor leſs than one. And ſimilar puniſhments are inflictedby other ſtatutes.

Where neceſſity requires, witneſſes may be examined apart in court, till they have given all they have to ſay in evidence; ſo that what one has depoſed, may not induce another to give his evidence to the ſame effect. *Forteſc.* 54.

A witneſs ſhall not be examined where his evidence tends to clear or accuſe himſelf of a crime. *State Trials, vol.* 1. 557. Nor is he bound to give any anſwer by which he confeſſes or accuſes himſelf of any crime. And a witneſs ſhall not be croſs-examined till he hath gone through the evidence on the ſide whereon produced. *Ibid. vol.* 2. 772. The court in criminal caſes, is to examine the witneſſes, and not the priſoner or proſecutors. *Ibid. vol.* 1. 143. Though in eaſe of the court, counſel are frequently admitted to examine the evidence. An evidence ſhall not be permitted to read his evidence, but he may look on his notes to refreſh his memory. *Ibid. vol.* 4. 45. An evidence may not recite his evidence to the jury, after gone from the bar, and he hath given his evidence in court; if he doth, the verdict may be ſet aſide. *Cro. Eliz.* 159. One that is to be an evidence at a trial, ought not to be examined before the trial, but by the conſent of both parties, *and a rule of court for that purpoſe.*

No evidence ought to be produced againſt a man in a trial for his life, but what is given in his preſence. *State Trials, vol.* 4. 227. And evidence ſhall not be given againſt the priſoner for any other crime than that for which proſecuted. *Ibid. vol.* 3. 947. A priſoner may bring evidence to prove that the witneſſes gave a different teſtimony before a juſtice of peace, or at another trial: though he may not call witneſſes to diſprove what his own witneſſes have ſworn. *Ibid. vol.* 2. 623, 792. And no objection can be made to the evidence after verdict given. *vol.* 4. 35. It is juſtifiable to maintain or ſubſiſt an evidence, but not to give him any reward; for this, if proved, will avoid his teſtimony. *Ibid. vol.* 2. 470.

A witneſs ſhall not be examined to any thing that does not relate to the matter in iſſue. *Ibid. vol.* 2. 343. And where an iſſue is not perfect, no evidence can be applied, nor can the juſtices proceed to trial. *Brownl.* 42, 47, 435. If evidence doth not warrant and maintain the ſame thing that is in iſſue, the evidence is defective, *and may be demurred upon*; but proving the ſubſtance is ſufficient. *Trials per Pais* 425. Evidence may be given of facts before and after the time they are laid in the indictment. And where a place is laid only for a *venue* in an indictment, or an appeal, (and not made part of the deſcription of the fact) proof of the ſame crime may be made at any other place in the ſame county; and after a crime hath been proved in the county where laid, evidence may be given of other inſtances of the ſame crime, in another county, to ſatisfy the jury. 2 *Hawk. P. C. c.* 46.

But *where a certain place is made part of the deſcription of the fact againſt the defendant*, the leaſt variation as to ſuch place between the evidence and indictment is fatal. 2 *Hawk. P. C. c.* 46. It hath been alſo adjudged, that where an indictment ſets forth all the ſpecial matter, in reſpect whereof the law implies malice, variance between the indictment and evidence as to the *circumſtances of the fact*, doth not hurt; ſo that the *ſubſtance of the matter* be found by the evidence. *Ibid.*

The burthen of proving lies on the plaintiff; and the preſumption ſhall ſtand, until the contrary appear: though that which plainly appeareth, need not be given in evidence. 7 *Rep.* 40: *Co. Lit.* 233. The defendant's counſel is to conclude by way of anſwer to the evidence given to the jury by the plaintiff's: but he who doth begin to maintain the iſſue to be tried, ought to conclude and ſum up the evidence given, which is no more than to put the jury in mind how he hath proved his cauſe. 1 *Lill.* 551. When a witneſs hath been fully examined by the party producing him, and croſs examined by counſel for the adverſe party, the court will ſometimes aſk a queſtion or two of the witneſs, when the jury may put any queſtions they think proper to the judge, for him to put to the witneſs, after which counſel on either ſide

ſide cannot aſk a ſingle queſtion of the witneſs, without leave of the court; and in fact the uſual method is to pray the court, if not improper, to aſk ſuch a queſtion, or to examine to ſuch a fact, &c. which may have dropped from the witneſs, after both counſel had finiſhed their examination of him. If it is proper and neceſſary, the court will do it, otherwiſe not.

3. It ſeems to have been agreed, as a general rule, (even before the ſtatute of *frauds and perjuries*,) that no parol evidence could be admitted to controul what appeared on the face of a deed or will, not only from the danger of perjury, but *from a preſumption, that whatſoever the parties at that time had in contemplation, was reduced into writing*. 5 Co. 68 *a*. *b*: 8 Co. 155 *a*: Kelw. 49.

But this rule has received a relaxation, eſpecially in the courts of equity, where a diſtinction has been taken between evidence, that may be *offered to a jury*, and ſuch as may be uſed only to *inform the conſcience of the court*; *viz.* that in the *firſt* caſe no ſuch evidence ſhould be admitted; becauſe the jury might be inveigled thereby; but that in the *ſecond* it could do no hurt, becauſe the court were judges of the whole matter, and could diſtinguiſh what weight and ſtreſs ought to be laid on ſuch evidence. 2 *Vern.* 98, 337, 625.

Alſo to aſcertain a fact, parol evidence hath been admitted to explain the intent of the teſtator: as where the teſtator had two ſons both named *John*, and he deviſed lands to his ſon *John*; here parol evidence was admitted to ſhew which of his ſons he meant; and it being proved, that one of his ſons of that name had been abſent ſeveral years beyond ſea, and that the teſtator apprehended that he was dead, the deviſe was held good, and that the other ſhould take; for without ſuch evidence the will muſt be void. 2 *Vern.* 98, 337, 625. So parol evidence may be admitted to explain the intent of a teſtator in cancelling a will. *Cowp.* 53.

Parol evidence to prove that a bond was given, in lieu of dower, refuſed. 1 *Wilſ.* 34. *Parol* proof admitted that the teſtator intended his wife *executrix* ſhould have the reſidue undiſpoſed of. *Id.* 313. Debt upon bond with condition for payment of money to *Lydia Dovey*, who is a third perſon, ſhe declares the defendant owes her nothing, and upon proof thereof, a verdict was for the defendant; ſuch declaration was properly given in evidence, for *Lydia Dovey* is to be conſidered as the real plaintiff. *Id.* 257.

Parol evidence ſhall not be admitted to annul or ſubſtantially vary a written agreement. 3 *Wilſ.* 275: *Str.* 794: 3 *Teren Rep.* 590. So parol evidence ſhall not be received, to prove an additional rent payable by a tenant, beyond that expreſſed in the written agreement for a leaſe. 2 *Bl. Rep.* 1249.

Parol evidence may be admitted to prove *other* conſiderations than thoſe mentioned in a deed; as where the conditions mentioned in the deed were 10,000*l.* *and* natural love and affection, and the premiſes were worth 30,000*l.* an iſſue was directed to try whether natural love and affection made any part of the conſideration; and it being found that they did not, the deed was ſet aſide. 7 *Bro. P. C.* 70: *cited* 3 *Term Rep.* 473.

By the ſtatute of frauds, ſeveral things muſt be evidenced by writing, of which, before that ſtatute, parol evidence had been ſufficient. See this Dict. title *Fraud.*

Sometimes violent preſumption will be admitted for evidence without witneſſes; as where a perſon is run through the body in a houſe, and one is ſeen to come out of the houſe with a bloody ſword, &c. But on this the court ought not to judge haſtily. 1 *Inſt.* 6, 673. And though preſumptive and circumſtantial evidence may be ſufficient in felony, it is not ſo in treaſon. *State Trials, vol.* 4. *p.* 307.

Perſons once in being ſhall be intended ſtill living, if the contrary is not proved. 2 *Rol. Rep.* 461. But now by *Stat.* 19 *Car.* 2. *c.* 6, it is enacted, "That if any perſon or perſons, for whoſe life or lives eſtates have been, or ſhall be granted, ſhall remain beyond the ſeas, or elſewhere abſent themſelves in this realm, *by the ſpace of ſeven years together*, and no ſufficient and evident proof made of the life or lives of ſuch perſon or perſons reſpectively, in any action commenced for the recovery of ſuch tenements by the leſſors or reverſioners, in every ſuch caſe the perſon or perſons, upon whoſe life or lives ſuch eſtate depended, ſhall be accounted as naturally dead; and in every action brought for the recovery of the ſaid tenements, by the leſſors or reverſioners, their heirs or aſſigns, the judges, before whom ſuch action ſhall be brought, ſhall direct the jury to give their verdict, as if the perſon ſo remaining beyond the ſeas, or otherwiſe abſenting himſelf, *were dead.*" See title *Life-Eſtate.*

As to hearſay evidence, it ſeems agreed, that what another has been heard to ſay, is no evidence, becauſe the party was not on oath; alſo, becauſe the party, who is affected thereby, had not an opportunity of croſs-examining; but ſuch ſpeeches or diſcourſes may be made uſe of by way of inducement or illuſtration of what is properly evidence. 1 *Mod.* 383: *Skin.* 402.

Alſo what a witneſs hath been heard to ſay at another time, may be given in evidence, in order either to *invalidate* or *confirm* the teſtimony he gives in court. 2 *Hawk. P. C. c.* 46. So what a perſon accuſed of a crime hath been heard to ſay at another time, may be given in evidence at his trial, for or againſt him. *Id. ib.*

A witneſs by hearſay of a ſtranger ſhall not be allowed, except perhaps to confirm the evidence of a witneſs that ſpoke of his knowledge. *Wood's Inſtit.* 644.

If a perſon who gave evidence in a former trial, be dead; upon proof of his death, any perſon who heard him give evidence, may be admitted to give the ſame evidence between the ſame parties; but a copy of the record of the trial when the evidence was given ought to be produced. 3 *Inſt.* 2: *Lill. Abr.* 705.

And evidence given at one trial in criminal caſes, has been held not to be evidence at another's trial. 2 *State Trials*, 863.

As to evidence in paſſing a *bill of attainder*, ſee 5 *State Trials*, 114, 124, 132, 676. But the ſame evidence is requiſite on an impeachment in parliament, as in private courts.

See further as to Evidence, *New Abr. v.* 2. tit. *Evidence*: *Vin. vol.* 3. *paſſim*: 3 *Com. Dig.* tit. *Evidence*, and *v.* 5. tit. *Teſtmoigne*: *Gilbert's Law of Evidence*: *Bull. Ni. Pri*: *Eſpinaſſe's Ni. Pri.* &c. &c. 2 *Hawk. P. C. c.* 46: this Dict. tit. *Baron* and *Feme*, I. 2; *Treaſon*; and other appoſite titles.

EWAGE, from the Fr. *eau*, water.] Toll paid for water-paſſage; ſee *Aquage.*

EWBRICE, Sax. *ew*, i. e. *conjugium*, and *bryce*, *fractio*.] Adultery or marriage-beaking: from this *Saxon* word *ew*, marriage, we derive our preſent Engliſh *woo*, to court.

EWE, *ewa*.] A *German* word ſignifying law; it is mentioned in *Leg. W.* 1.

EXACTION, is defined to be a wrong done by an officer, or one in pretended authority, by taking a reward or fee for that which the law allows not. The difference between *exaction* and *extortion* is this: *extortion* is where an officer extorts more than his due, when ſomething is due to him; and *exaction* is, when he wreſts a fee or reward, where none is due; for which the offender is to be fined and impriſoned, and render to the party twice as much as the money he ſo takes. *Co. Lit.* 368: 10 *Rep.* 100; ſee title *Extortion*.

EXACTOR REGIS, The King's exactor or collector of Taxes; ſometimes taken for the *ſheriff*. *Niger Liber Scacc. par.* 1. *cap. ult.*

EXAMINATION, *examinatio*.] A ſearching by, or cognizance of a magiſtrate. See this Dict. titles *Commitment*; *Evidence*; *Juſtice*.

With reſpect to *examinations* touching church benefices, ſee title *Benefice*.

EXAMINERS IN THE CHANCERY, *examinatores*.] Two officers of that court, who examine upon oath, witneſſes produced by either ſide, in *London*, or near it, on ſuch interrogatories as the parties to any ſuit exhibit for that purpoſe; and ſometimes the parties themſelves are, by particular order, likewiſe examined by them. In the country, witneſſes are examined by *commiſſioners*, (uſually attornies not concerned in the cauſe,) on the parties joining in commiſſion, &c. See title *Depoſitions*.

EXANNUAL ROLL. In the old way of exhibiting *ſheriff's accounts*, the illeviable fines and deſperate debts were tranſcribed into a *roll* under this name; which was yearly read, to ſee what might be gotten. *Hale's Sher. Acco.* 67.

EXCAMBIATORES, A word uſed anciently for *exchangers* of land: but *Cowel* ſuppoſes them to be ſuch as we now call *brokers*, that deal upon the *Exchange* between merchants.

EXCEPTION, *exceptio*.] Is a ſtop or ſtay to an action; and divided into *dilatory* and *peremptory*. Bract. lib. 5. tract. 5. In law proceedings, it is a denial of a matter alledged in bar to the action; and in Chancery it is what is alledged againſt the ſufficiency of an anſwer, &c. The counſel in a cauſe are to take all their *exceptions* to the record at one time; and before the court hath delivered any opinion thereon. 1 *Lil. Abr.* 559. And on an indictment for treaſon, &c. *exception* is to be taken for miſnaming, falſe *Latin*, &c. before any evidence is given in court; or the indictment ſhall be good. *Stat.* 7 *W.* 3. *c.* 3. See titles *Indictment*; *Treaſon*.

Where, by a general pardon, any particular crime is excepted; if a perſon be attainted, &c. of that offence, he ſhall have no benefit of the pardon. 6 *Rep.* 13: 2 *Nelſ. Abr.* 765. And when a pardon is with an *exception* as to perſons, the party who pleads it ought to ſhew, that he is not any of the parties excepted. 1 *Lev.* 26. A negative expreſſion may be taken to enure to the ſame intent as an *exception*; for an *exception* in its nature is but a denial of what is taken to be good by the other party, either in point of law or pleading. And *exceptio in non exceptis firmat regulam*. 1 *Lill.* 559.

EXCEPTION TO EVIDENCE, &c. See this Dict. title *Bill of Exceptions*.

EXCEPTION IN DEEDS AND WRITINGS, Keeps the things from paſſing thereby; being a ſaving out of the deed, as if the ſame had not been granted: but it is to be a *particular* thing out of a *general* one, as a room out of an houſe, ground out of a manor, timber out of land, &c. And it muſt not be of a thing expreſsly granted in a deed: alſo it muſt be of what is *ſeverable* from, and *not inſeparably incident* to, the grant. *Co. Lit.* 47: 1 *Lev.* 287: *Cro. El.* 244.

Where an *exception* goeth to the whole thing granted or demiſed, the *exception* is void. *Cro. El.* 6. A man makes a leaſe of a manor, excepting all courts, &c. the *exception* is void as to the courts; for having leaſed the manor, it cannot be ſuch without courts. *Hob.* 108: *Moor* 870. A leaſe was made of all a man's lands in *L.* excepting his manor of *H.* and he had no lands in *L.* but the ſaid manor; it was adjudged that the manor paſſed, and that the *exception* was void. *Hob.* 170: 2 *Nelſ. Abr.* 764. A leaſe of an houſe and ſhops, except the ſhops; though this may extend to other ſhops, it is void as to the ſhops belonging to the houſe demiſed, becauſe it is repugnant to the leaſe. *Dyer* 265.

If an *exception* croſſes the grant, or is repugnant to it, the ſame is void: and if there be a ſaving or *exception* out of an *exception*, it may make a particular thing as if never excepted; as if a leaſe be made of a rectory, excepting the parſonage-houſe, ſaving to the leſſee a chamber; this chamber not being excepted out of the leaſe, ſhall paſs by the leaſe of the rectory. *Hob.* 72. 170: *Cro. El.* 372: *Owen* 20.

By *exception* of trees, the ſoil is not excepted, but only ſufficient nutriment for the trees: for the leſſee ſhall have the paſture growing under them, though the leſſor ſhall have all the benefit of the trees, maſt, fruit, &c. and the trees are parcel of the inheritance. 5 *Rep.* 11: 11 *Rep.* 48, 50. But it has been adjudged, that, by an exception of woods, underwood and coppices, the ſoil of the coppices is excepted. *Poph.* 146: *Cro. Jac.* 487. If a leſſee for years aſſign over his term, excepting the trees, &c. the exception is not good; becauſe no one can have a ſpecial property in the trees, but the owner of the land. 2 *Nelſ.* 764. Though where leſſee for life makes a leaſe for years excepting the wood, &c. this may be a good exception, although he hath not any intereſt in it but as a leſſee, in regard he is chargeable in waſte, &c. and hath not granted his whole term. *Cro. Jac.* 296: 1 *Lill. Abr.* 560. Theſe exceptions are commonly in leaſes for life and years; and muſt be always of a thing *in eſſe*. *Co. Lit.* 47. See titles *Grant*: *Deed*: *Leaſe*: *Condition*.

EXCHANGE, *Excambium* or *cambium*; with the Civilians, *permutatio*.] The *King's Exchange*, is the place appointed by the King for *exchange* of plate or bullion for the King's coin, &c. Theſe places have been divers heretofore; but now there is only one, *viz.* the *Mint* in the *Tower*. See *Stats.* 25 *Ed.* 3. *ſt.* 5. *c.* 12: 5 & 6 *Ed.* 6. *c.* 19. and this Dict. titles *Coin*: *Money*.—There is alſo a *Royal Exchange of Merchants* in *London*.

Exchange among merchants is a commerce of money, or a bartering or exchanging of the money of one city or

country for that of another: money in this ſenſe, is either real or imaginary; real, any real ſpecies current in any country at a certain price, at which it paſſes by the authority of the State, and of its own intrinſic value: and by imaginary money is underſtood, all the *denominations* made uſe of to expreſs any ſum of money, which is not the juſt value of any real ſpecies. *Lex Mercatoria.*

The methods of exchange for money uſed in *England* ought to be *par pro pari*, according to value for value: and our exchange is grounded on the weight and fineneſs of our own money, and the weight and fineneſs of that of other countries, according to their ſeveral ſtandards, proportionable in their valuation; which being truly and juſtly made, reduces the price of the exchange of money of any nation or country to a certainty. But this courſe of exchange is of late abuſed, and money is become a merchandiſe, that riſes and falls in its price in regard to the plenty and ſcarcity of it. At *London*, all exchanges are made upon the pound ſterling of 20 *s.* In the *Low Countries*, *France* and *Germany*, upon the *French* crown; *Spain* and *Italy*, &c. upon the ducat; and at *Florence*, *Venice*, and other places in the *Streights*, by the dollar and florin. See title *Bill of Exchange.*

Exchanges of Goods and Merchandise, Were the original and natural way of commerce, precedent to buying; *for there was no buying till money was invented*; though in exchanging, both parties are as buyers and ſellers, and both equally warrant. 3 *Salk.* 157.

Exchange of Lands. A mutual grant of equal intereſt in lands or tenements, the one in conſideration of the other: and is uſed peculiarly in our Common-law for that compenſation which the *warrantor* muſt make to the *warrantee*, value for value, if the land warranted be recovered from the warrantee. *Bract. lib. 2. cap.* 16: *Accomp. Conv.* 1 *vol.* 170. Alſo there is a tacit condition of reentry in this deed, on the lands given in exchange, in caſe of eviction; and on the warranty to vouch and recover over in value, &c. For if either of the parties is evicted, even of a part, the exchange is defeated. 4 *Rep.* 121: *Cro. Eliz.* 903.

The word *Exchange* is ſo individually requiſite and appropriated by law to this caſe, that it cannot be ſupplied by any other word, or expreſſed by any circumlocution. 1 *Inſt.* 50, 51. The eſtates exchanged muſt be equal in *quantity of intereſt*, value is immaterial; as fee-ſimple for fee-ſimple, a leaſe for 20 years for a leaſe for 20 years, and the like. *Litt.* § 64, 5. And the exchange may be of things that lie either grant or in livery. But no livery of ſeiſin, even in exchanges of freehold, is neceſſary to perfect the conveyance; for each party ſtands in the place of the other, and occupies his right, and each of them hath already had corporal poſſeſſion of his own land. *Litt.* § 62.—Entry however muſt be made on both ſides; for if either party die before entry, the exchange is void for want of ſufficient notoriety. 1 *Inſt.* 50.

An exchange may be made of lands in fee-ſimple, fee-tail, for life, &c. The eſtates granted are to be equal, as fee-ſimple for fee-ſimple, &c. though the lands need not be of equal value, or of the like nature: for a rent in fee iſſuing out of land, may be exchanged for land in fee; *Lit.* 63, 64: *Co. Lit.* 50, 51. If an exchange be made between tenant for life, and tenant in tail after poſſibility of iſſue extinct, the exchange is good; becauſe their eſtates are equal. 11 *Rep.* 80: *Moor* 665.

An exchange made between tenant in tail, and another, of unequal intereſt, may be good during his life; but his iſſue, when of full age, ſhall avoid it. And exchanges made by infants; by perſons *non ſanæ memoriæ*; a huſband of the wife's lands, &c. are not void, but voidable only; by the infant at his full age, the heir of the perſon *non ſanæ memoriæ*, and the feme after the death of the huſband, who may waive the poſſeſſion and diſagree to them. *Perk.* § 277, 281.

Two jointenants and two tenants in common may exchange their *lands*: and by this deed, freeholds paſs without livery and ſeiſin; but the word *exchange* is to be uſed; and there muſt be execution of the exchange, by *entry* on the lands in the life of the parties, or the exchange will be void. 1 *Inſt.* 51: 1 *Mod.* 91.

Littleton expreſſes himſelf concerning an exchange as of a tranſaction between *two*; and in the caſe of *Eton College*, 2 *Wilſ. part* 3. *p.* 483, the court held, that an exchange in the ſtrict legal ſenſe of the word, cannot be between three; the principles of it not being applicable to more than two *diſtinct* contracting parties, for want of the mutuality and reciprocity on which its operation ſo intirely depends; and the caſe, above mentioned, of tenants in common exchanging with jointenants is not irreconcileable to this rule; becauſe though *four* perſons may be named, yet they conſtitute only *two* diſtinct *parties*; and conſequently there is the ſame reciprocity as if the tranſaction were between two perſons only.—And this applies to any number of perſons, if ſo conjoined, as to make only two diſtinct relative parties. 1 *Inſt.* 50 *b.* 51 *a. in notis.*

Sometimes lands intended to paſs by exchange, not having the qualities and incidents of exchanged lands, may paſs by way of gift or grant; as if two perſons are ſeiſed of two acres of land, and one of them by deed gives his acre to the other, and the other his acre to him, and each of them gives livery of ſeiſin upon his acre given in exchange; here the acres will paſs from one to the other, but not in a way of exchange, becauſe there was no word of exchange in the deed. *Litt. ſect.* 62: *Perk.* 253.

A man grants to another lands in fee-ſimple, for lands in tail by way of exchange; or land in tail, for lands for life, &c. theſe deeds will not take effect *as exchanges*. *Fitz. Exchange* 15, 64: *Co. Lit.* 64. If tenant in tail give his land in exchange, for other land of the ſame eſtate tail, the iſſue in tail may make it good if he will, or avoid the exchange. 1 *Rep.* 96. A feoffment is made to *A.* and *B.* and the heirs of *A.* and they exchange the land for other lands; this will be good, and they ſhall hold the lands in the ſame nature that the land given in exchange was held. *Perk.* § 277.

If a lord releaſe to the tenant his ſervices in tail, in exchange of land given to the lord in exchange in tail alſo, it is ill: but if leſſee for life of one acre, give another acre to his leſſor in tail, in exchange for a releaſe from him of that acre, *habendum* in tail in like manner, it is a good exchange. *Perk.* § 219, 276, 283. In caſe two perſons make an exchange of land, and limit no eſtate; each ſhall have an eſtate for life, *by implication*: but if an expreſs eſtate be limited to one for life, and none to the other, it will be void. 19 *H.* 6. 27. And to make a good exchange, both the things muſt be in *eſſe* at the time of the exchange. *Co. Lit.* 50: 3 *Ed.* 4. 10.

But an exchange may be made to take effect in *future*, as well as preſently; for if it be, that after the feaſt of *Eaſter A. B.* ſhall have ſuch lands in *D.* in exchange for his lands in *S.* this is good. *Perk.* § 265.

By a ſpecial kind of agreement, an exchange may be of unequal eſtates. *Moor*, *c.* 209. The condition and warranty in exchanges run to the *parties in privity*; not to an *aſſignee*, *&c.* And if after two have exchanged lands, one of them releaſes to the other the warranty in law, it will not deſtroy the exchange. 4 *Rep.* 122: 1 *Rol. Abr.* 815. The parties themſelves, and all privies and ſtrangers for the moſt part may take advantage of exchanges void by any defect or accident: *contra*, if they are voidable, *&c.* 1 *Rep.* 105: *Dyer* 285.

EXCHANGE OF CHURCH LIVINGS. Theſe exchanges are now ſeldom uſed, except that parſons ſometimes exchange their *churches*, and reſign them into the biſhop's hands: and this is not a perfect exchange till the parties are inducted; for if either dies before they both are inducted, the exchange is void. *Wood's Inſt.* 284: 2 *Comm.* 323.

By *Stat.* 31 *El. c.* 6. § 8, If any incumbent of any benefice with cure of ſouls, ſhall corruptly reſign or exchange the ſame; or corruptly take for or in any reſpect of the reſigning or exchanging the ſame, directly or indirectly, any penſion, ſum of money, or other benefit whatſoever; as well the giver as the taker, ſhall loſe double the value of the ſum; half to the Crown, and half to him that ſhall ſue for the ſame. See this Dict. titles *Simony*: *Advowſon*.

If two parſons by one inſtrument agree to exchange their benefices, and in order thereto reſign them into the hands of the Ordinary, ſuch exchange being executed on both parts, is good; and each may enjoy the other's living: but the patrons muſt preſent them again to each living; and if they refuſe to do it, or the Ordinary will not admit them reſpectively, then the exchange is not executed; and in ſuch caſe either clerk may return to his former living, even though one of them ſhould be admitted, inſtituted and inducted to the benefice of the other; which is expreſſed in the exchange itſelf, and the *proteſtation* uſually added to it. 2 *Rep.* 74: *Rol. Abr.* 814.

EXCHANGEORS. Thoſe that return money by *bills of exchange*. See *Excambiatores*. 5 *R.* 2. *c.* 2.

EXCHEQUER.

SCACCARIUM, from the Fr. *eſchequier*, i. e. *abacus*, *tabula luſoria*, or from the Germ. *ſchatz*, viz. *theſaurus*.] An *ancient Court of record*, wherein all cauſes touching the revenue and rights of the crown are heard and determined; and where the revenues of the crown are received. *Camden* in his *Britan. p.* 113, ſaith, This court took its name *à tabulâ ad quam aſſidebant*, the cloth which covered it being party coloured, or *chequered*: we had it from the *Normans*, as appears by the *Grand Cuſtumary*, *cap.* 56; where it is deſcribed to be an aſſembly of high juſticiers, to whom it appertained to amend that which the inferior juſticiers had miſdone, and unadviſedly judged, and to do right to all as from the Prince's mouth; and this ſeems the origin of the Court of *Exchequer-Chamber*.

The Court of *Exchequer* is inferior in rank, not only to the court of King's Bench, but to the Common Pleas alſo; it is a very ancient court of record, ſet up by *William* the Conqueror, as a part of the *aula regia*, though regulated and reduced to it's preſent order by king *Edward* I; and intended principally to order the revenues of the crown, and to recover the king's debts and duties. 4 *Inſt.* 103—116. It is called the Exchequer, *ſcaccarium*, from the chequed cloth, reſembling a cheſs-board, which covers the table there; and on which when certain of the king's accounts are made up, the ſums are marked and ſcored with counters. It conſiſts of two diviſions: the receipt of the Exchequer, which manages the royal revenue; and the court or judicial part of it; which latter is again ſub-divided into a court of Equity, and a court of Common-law.

The Court of Equity is held in the Exchequer Chamber before the Lord Treaſurer, the Chancellor of the Exchequer, the chief baron, and three *puiſne* Barons. Theſe Mr. *Selden* conjectures (title *Hon.* 2, 5, 16,) to have been anciently made out of ſuch as were Barons of the kingdom or parliamentary barons; and thence to have derived their name; which conjecture receives great ſtrength from *Bracton*'s explanation of *Magna Carta*, *c.* 14, which directs that the earls and barons be amerced by their peers; that is, ſays he, by the barons of the Exchequer *l.* 3. *tr.* 2. *c.* 1. § 3.

The primary and original buſineſs of this court is to call the King's debtors to account, by bill filed by the attorney general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. So that by their original conſtitution the juriſdiction of the courts of Common Pleas, King's Bench, and Exchequer, was entirely ſeparate and diſtinct: the Common Pleas being intended to decide all controverſies between Subject and Subject; the King's Bench to correct all crimes and miſdemeanors that amount to a breach of the King's peace; and the Exchequer to adjuſt and recover the King's revenue. See this Dict. titles *Courts*: *King's Bench*: *Common Pleas*. But as, by a fiction, almoſt all ſorts of civil actions are now allowed to be brought in the King's Bench, in like manner, by another fiction, all kinds of perſonal ſuits may be proſecuted in the court of Exchequer. For as all the officers and miniſters of this court have, like thoſe of other ſuperior courts, the privilege of ſuing and being ſued only in their own court; ſo alſo the King's debtors and farmers, and all accomptants of the exchequer, are privileged to ſue and implead all manner of perſons in the ſame court of equity, that they themſelves are called into. They have likewiſe privilege to ſue and implead one another, or any ſtranger, in the ſame kind of Common-law actions (where the perſonalty only is concerned) as are proſecuted in the court of Common Pleas.

This gives origin to the *Common-law* part of their juriſdiction; which was eſtabliſhed merely for the benefit of the King's accomptants; and is exerciſed by the barons only of the Exchequer, and not the treaſurer or chancellor. The writ upon which all proceedings here are grounded is called a *quo minùs*: in which the plaintiff ſuggeſts that he is the King's farmer or debtor, and that the defendant hath done him the injury or damage complained of; *quo minùs ſufficiens exiſtit*, (*by which* he is *the leſs* able,) to pay the King his debt or rent. And theſe ſuits are expreſsly directed, by what is called the ſtatute of *Rutland*, 10 *E.* 1. *c.* 11, to be confined to ſuch matters only,

only, as ſpecially concern the King or his miniſters of the Exchequer. And by the *articuli ſuper cartas*, 28 *Ed.* 1. *c.* 4, it is enacted, that no Common Pleas be thenceforth holden in the Exchequer, contrary to the form of the great charter. But now, by the ſuggeſtion of privilege, any perſon may be admitted to ſue in the Exchequer; as well as the King's accomptant. The ſurmiſe of being debtor to the King, is therefore become matter of form and mere words of courſe, and the court is open to all the nation equally. The ſame holds with regard to the equity ſide of the court: for there any perſon may file a bill againſt another upon a bare ſuggeſtion that he is the King's accomptant; but whether he is ſo, or not, is never controverted.

In this court on the equity ſide, the clergy have long uſed to exhibit their bills for the non-payment of tithes, in which caſe the ſurmiſe of being the King's debtor is no fiction, they being bound to pay him their firſt fruits, and annual tenths. But the Chancery has of late years obtained a large ſhare in this buſineſs. See this Dict. titles *Chancery*: *Equity*.

An appeal from the equity ſide of this court lies immediately to the Houſe of Peers; but from the Common-law ſide, in purſuance of the *Stat.* 31 *E.* 3. *c.* 12, a writ of error muſt be firſt brought into the court of Exchequer Chamber. And from the determination there had, there lies in the *dernier reſort*, a writ of error to the Houſe of Lords. 3 *Comm.* 44. See this Dict. titles *Decree*: *Equity*: *Error*.

Some perſons think there was an Exchequer under the *Anglo-Saxon* Kings; but our beſt hiſtorians are of opinion, that it was erected by King *William* the Firſt, its model being taken from the tranſmarine *Exchequer*, eſtabliſhed in *Normandy* long before that time. *Madox's Hiſt. Exchcq.*

In the reign of *Hen.* the Firſt, there was an Exchequer, which has continued ever ſince: and the judges of the court were at that time ſtiled *Barones Scaccarii*, and adminiſtred juſtice to the ſubjects. In ancient times the Barons of the Exchequer dealt in affairs relating to the ſtate, or public ſervice of the crown and realm: and were greatly concerned in the preſervation of the prerogative, as well as the revenue of the crown; for at the Exchequer it was the care of the Treaſurer and Barons to ſee that the rights of the crown were no ways invaded. *Lex Conſtitutionis* 198.

On account of the authority and dignity of the court of Exchequer, anciently it was held in the King's palace; and the acts thereof were not be examined or controlled in any other of the King's ordinary courts of juſtice: the Exchequer was the great repoſitory of records, wherein the records of the other courts at *Weſtminſter*, &c. were brought to be laid up in the Treaſury there. And writs of the Chancery were ſometimes made forth at the Exchequer; writs of ſummons to aſſemble parliaments, &c. *Ibid.*

The Exchequer has been commonly held at *Weſtminſter*, the uſual place of the King's reſidence; but it hath been ſometimes holden at other places, as the King pleaſed; as at *Wincheſter*, &c. And in the Exchequer there are reckoned ſeven courts, *viz.* the court of *Pleas*; the court of *Accounts*; the court of *Receipts*; the court of the *Exchequer-Chamber* (being the aſſembly of all the judges of *England* for difficult matters in law); the court of *Exchequer-Chamber* for *Errors* in the court of *Exchequer*; for *Errors* in the *King's Bench*; and the court of *Equity* in the *Exchequer* Chamber. 4 *Inſt.* 119.

But, according to the uſual diviſion for the diſpatch of all common buſineſs, the Exchequer is divided (as has been already noticed) into two parts; one whereof is converſant eſpecially in the judicial hearing and deciding of cauſes pertaining to the Prince's coffers, anciently called *Scaccarium Computorum*; the other is the *Receipt of the Exchequer*, which is properly employed in the receiving and payment of money. And it has been obſerved, that about the time of the Conqueſt there was very little money in ſpecie in the realm; for then the tenants of knights' fees anſwered their lords by military ſervices: and till the reign of King *Hen.* I. the rents or farms due to the King were generally rendered in proviſions and neceſſaries for his houſhold; but in that reign the ſame were changed into money; and afterwards, in ſucceeding times, the crown revenue was changed or paid into the Exchequer chiefly in gold and ſilver. *Lex Conſtitutionis*, *p.* 208.

By ſtatute, all ſheriffs, bailiffs, &c. are to account in the Exchequer before the Treaſurer and Barons: and annual rolls are to be made of the profits of counties, &c. Alſo inquiſitors ſhall be appointed in every county, of debts due to the King. 51 *H.* 3. *ſt.* 5: 10 *Ed.* 1. *Stat. Rutl.* And all fines of counties for the whole year are to be ſent into the Exchequer. *Stat. de Vicecom.* 14 *Ed.* 2. *c.* 1. Perſons impeached in the Exchequer, may plead in their own diſcharge; and there ſhall be writs for diſcharging perſons, &c. 5 *R.* 2. *c.* 10, 14. The officers of the receipt may receive and take for their fees 1 *d.* in the pound for ſums iſſued out, &c. 5 & 6 *W.* & *M.* *cap.* 20.

Officers of the Exchequer are without delay to receive money brought thither: and the money on the receipt is to be kept in cheſts under three different locks and keys, kept by three ſeveral officers, &c. 8 & 9 *W.* 3. *c.* 28.

In the Court of Equity the proceedings are by *Engliſh bill* and anſwer, agreeable to the practice of the High Court of Chancery.

In this court the Attorney General brings bills for any matters concerning the King; and any perſon grieved in any cauſe proſecuted againſt him on behalf of the King, may bring his bill againſt the Attorney General to be relieved in equity, in which caſe the plaintiff muſt attend the King's Attorney with a copy of the bill, and procure him to anſwer the ſame; and Mr. Attorney may call any that are intereſted in the cauſe, or any officer or others, to inſtruct him in the making of his anſwer, ſo as the King be not prejudiced thereby; and his anſwer is to be put in without oath. 4 *Inſt.* 109, 112, 118.

The Exchequer is now ſaid to be the laſt of the four courts at *Weſtminſter*; governed by the Chancellor of the Exchequer, the *Lord Chief Baron*, and three other *Barons*, who are the ſovereign auditors of *England*, and the judges of the court. There alſo ſits in this court a *Curſitor Baron*, who adminiſters the oath of all high-ſheriffs, under-ſheriffs, bailiffs, auditors, receivers, collectors, controllers, ſurveyors, and ſearchers of all the cuſtoms in *England*.

The *Chancellor* or *Under Treaſurer* hath the cuſtody of the ſeal of this court. The King's *Attorney General* is made privy to all manner of pleas that are not ordinary and of courſe,

courſe, which riſe upon the proceſs of the court; and he puts into court in his own name, informations of concealments of cuſtoms, ſeizures, &c. And alſo for intruſions, waſtes and incroachments upon any of the King's lands; or upon penal ſtatutes, forfeitures, &c.

The *Remembrancers* keep the records of the court betwixt the King and his ſubjects, and enter the rules and orders there made: one is called the King's Remembrancer, and the other the Lord Treaſurer's Remembrancer: The *Remembrancer for the King* hath all manner of informations upon penal ſtatutes uſed in his office only; and he calls to account, in open court, all the great Accountants of the Crown, Collectors of Cuſtoms, &c. he makes out writs of privilege, enters judgments of pleas; and all matters upon *Engliſh bill* are remaining in his office.

The *Remembrancer for the Lord Treaſurer* makes out all the eſtreats; he ſets down in his book the debts of all ſheriffs, and takes their foreign accounts; and iſſues out writs and proceſs in many caſes, &c. And theſe Remembrancers have ſeveral *attornies* to do buſineſs under them; who by ſtatute are not to iſſue out of the Remembrancer's office, any writs upon ſuppoſition, but upon juſt grounds, &c. 1 *Jac.* 1. *c.* 26.

There are two *Chamberlains* that keep the keys of the Treaſury, where the records lie, with the book of Domeſday, &c. They may ſit in court if they pleaſe, but not intermeddle with any thing; unleſs it be relating to the ſheriffs, in the pricking whereof they have a vote. See poſt *Stat.* 23 *Geo.* 3, at the end of this article. And beſides the Chamberlains, there is a *Clerk of the Pipe*, in whoſe cuſtody are conveyed out of the King's and Treaſurer's Remembrancer, &c. as water through a pipe, all accounts and debts due to the King.

The *Controller of the Pipe*; who is ſaid to be the Chancellor of the Exchequer. The *Clerk of the Eſtreats*, who receives the eſtreats from the Remembrancer's office, and writeth them out to be ſerved for the King, &c. The *Foreign Opposer*, who oppoſes or makes a charge on all ſheriffs, &c. of their green wax, *i. e.* fines, iſſues, amerciaments, recogniſance, &c. certified in eſtreats annexed to the writ, under the ſeal in green wax, and delivereth the ſame to the Clerk of the Eſtreats to be put in proceſs. The *Auditors*, that take the accounts of the King's Receivers, Collectors, &c. and perfect them. The four *Tellers*, whoſe buſineſs to receive and pay all money is well known. The *Clerk of the Pells*, from his parchment rolls, called *Pellis Receptorum*. The Clerk of the *Nibils*, who makes a roll of ſuch ſums as the ſheriff upon proceſs returns *Nihil*, &c. The *Clerk of the Pleas*, in whoſe office all officers and privileged perſons are to ſue and be ſued; and here are divers *Under Clerks* employed in ſuits commenced or depending in this court. There is a *Clerk of the Summons*; *Secondaries* in the offices of the *Remembrancers*; *Secondaries* of the *Pipe*: *Marſhal*, &c.

By *Stat.* 23 *Geo.* 3. *c.* 82, The offices of the two Chamberlains, the Tally-cutter, Uſher of the Exchequer, and the ſecond Clerks to each Teller, ſhall, after the death, ſurrender, forfeiture or removal of the perſons intereſted in them, *be aboliſhed*. § 1, 4.

Upon the death, &c. of the two Chamberlains, inſtead of the tally now uſed to denote the receipt of money, there ſhall be ſubſtituted an indented cheque receipt. § 2.—And upon the death, &c. of the Uſher, the chief officer in each office ſhall ſupply his place. § 3.

After the death, &c. of the preſent Auditor, Clerk of the Pells, either of the four Tellers, or two Chamberlains, the payment of all ſalaries, fees and emoluments *to the ſaid officers*, ſhall ceaſe, and in lieu thereof, certain annual ſalaries are made payable, *viz.* To the Auditor 4200*l.* his chief Clerk 1000*l.* Clerk of the Pells 3000*l.* his firſt Clerk 1000*l.* The four Tellers each 2700*l.* Each of their firſt Clerks 1000*l.* Theſe are to appoint ſuch other clerks and officers as they think fit, to be approved of by the Treaſury. § 5.

All fees as heretofore (See *Stat.* 26 *Geo.* 3. *c.* 99,) to be received by the firſt Clerk to the Clerk of the Pells; [200*l.* of whoſe ſalary is on that account;] two thirds thereof to be applied to the ſinking fund, and one-third to pay the above ſalaries. § 9.

The houſes of the Auditor, four Tellers and Uſher, ſhall after the death, &c. of the preſent poſſeſſors be veſted in his Majeſty, and not annexed to the offices. § 10.—And no office in the receipt of the Exchequer may be granted either in poſſeſſion or reverſion, in any other manner than ſubject to this act. § 11.

The Court of Exchequer-Chamber was firſt erected by ſtatute 31 *Ed.* 3. *c.* 12; to determine cauſes upon writs of error from the Common-law ſide of the Court of Exchequer. And to that end it conſiſts of the Lord Chancellor, and Lord Treaſurer, taking unto them the juſtices of the King's Bench, and Common Pleas. In imitation of which, a ſecond Court of Exchequer-Chamber was erected by *Stat.* 27 *Eliz. c.* 8, conſiſting of the Juſtices of the Common Pleas, and the Barons of the Exchequer; before whom writs of error may be brought to reverſe judgments in certain ſuits originally begun in the court of King's Bench. See this Dict. title *Error*: 3 *Comm.* 56.

Into the court alſo of Exchequer-Chamber, (which then conſiſts of all the judges of the three ſuperior courts, and ſometimes the Lord Chancellor alſo,) are ſometimes adjourned from the other courts ſuch cauſes, as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below. 4 *Inſt.* 119: 2 *Bulſtr.* 146.

In the abovementioned court of Exchequer-Chamber, eſtabliſhed under *Stat.* 27 *Eliz. c.* 8, there are no more than two return-days in every term; one is called the general *affirmance day*, being appointed by the judges, to be held a few days after the beginning of every term, for the general affirmance or reverſal of judgments: the other is the adjournment day, which is uſually held a day or two before the end of every term. On the firſt of theſe days, judgments are affirmed, or reverſed, or writs of error non-proſſed; the intent of the latter is, to finiſh ſuch matters as were left undone at the former; on which laſt day alſo (as well as on the firſt) judgments may be affirmed, or reverſed, or writs of error non-proſſed, on paying a fee extraordinary to the clerk of the Errors, and ſetting down the cauſe for affirmance two days before the adjournment day. *Impey K. B.* 678.

Exchequer Bills. See titles *National Debt*; *Forgery*.

EXCISE.

From the Belg. *acciiſſe* tributum.] An inland impoſition paid, ſometimes on the conſumption of the commodity, or frequently upon the retail ſale, which is the laſt ſtage before the conſumption.

This

EXCISE.

This is doubtleſs, (ſays *Blackſtone*, 1 *Comm.* 318,) impartially ſpeaking, the moſt œconomical way of taxing the ſubject; the charges, of levying collecting and managing the exciſe duties being conſiderably leſs in proportion than in other branches of the revenue. It alſo renders the commodity cheaper to the conſumer than charging it with cuſtoms to the ſame amount would do. But at the ſame time the rigour and arbitrary proceedings of exciſe laws, ſeem hardly compatible with the temper of a free nation. For the frauds that might be committed in this branch of the revenue, unleſs a ſtrict watch is kept, make it neceſſary wherever it is eſtabliſhed, to give the officers a power of entering and ſearching the houſes of ſuch as deal in exciſeable commodities, at any hour of the day; and in many caſes, of the night likewiſe And (for the ſame reaſons) the proceedings in caſe of tranſgreſſions are ſummary and ſudden, to the excluſion of the trial by jury.

Its original eſtabliſhment was in 1643, when it was introduced by the Parliament then in rebellion againſt King *Charles* I. Its progreſs was gradual, being at firſt laid upon thoſe perſons and commodities where it was ſuppoſed the hardſhip would be leaſt perceivable *viz.* The makers and venders of beer, *ale*, *cyder* and *perry*; and was afterwards impoſed on ſuch a multitude of commodities that it might fairly be denominated general.

Upon the reſtoration of *Charles* II, it having then been long eſtabliſhed, and its produce well known, ſome part of it was given to the crown by way of purchaſe for the feodal tenures and other oppreſſive parts of the hereditary revenue. And notwithſtanding the objections eternally raiſed againſt it, by the intereſted or the patriotic, it has from time to time been impoſed on a vaſt variety of articles.

Brandies and other *ſpirits* are now exciſed at the diſtillery: *Printed ſilks* and *linens* at the printer's.—*Starch* and *hair-powder* at the maker's.—Gold and ſilver *wire*, at the wire-drawer's.—*Plate* in the hands of the vendor, who pays yearly for a licence to ſell it.—Lands and goods ſold by *auction*, for which a pound rate is payable by the auctioneer who is alſo charged with an annual duty for his licence; *coaches* and other wheel carriages, for which the occupier is exciſed; though not with the ſame circumſtances of arbitrary ſtrictneſs, as in moſt other inſtances.—To theſe we may add *coffee* and *tea*, *chocolate* and *cocoa paſte*, for which the duty is paid by the retailer.—All artificial (home-made) wines commonly called *Sweets*.—*Paper* and *paſteboard* firſt when made, and again if ſtained or printed. *Malt*.—*Vinegars*.—And the manufacture of *glaſs*; for all which the duty is paid by the manufacturer.—*Hops*, for which the perſon that gathers them is anſwerable.—*Candles* and *Soap*, which are paid for at the maker's.—*Malt liquors* brewed for ſale, which are exciſed at the brewery.—*Cyder* and *Perry* at the vendor's.—And *leather* and *Skins* at the tanner's.—A liſt which no friend to his country would wiſh to ſee further increaſed.—1 *Comm. c.* 8. *p.* 320.

To the above liſt however are now to be added.—*Foreign Wines*; in the hands of the importer, merchant or conſignee.—*Coaches*, on being built, at the coach maker's, who muſt alſo have a licence.—*Tobacco* and *Snuff* at the manufacturer's.—And *bricks* and *tiles*; See title *Bricks*.

It has been very judiciouſly obſerved, that the grievances of the exciſe exiſt more, perhaps, in apprehenſion than in reality.—Actions and proſecutions againſt officers, commiſſioners and juſtices for miſconduct in exciſe caſes are very rarely heard of in courts of law. It is certainly an evil, that a fair dealer cannot have the benefit of any ſecret improvement in the management of his trade or manufactory; yet it ſeems more than equivalent to the Public at large, that by the ſurvey of the exciſe, the commodity is preſerved from many ſhameful adulterations; as experience has fully proved ſince *wine* was made ſubject to the exciſe laws.

The exciſe, like the cuſtoms, is neceſſarily regulated by a multiplicity of ſtatutes; the abridgment of which would form no ſmall volume; See title *Cuſtoms*.—The following ſhort extracts from *Burn's Juſtice* title *Exciſe*, where this ſubject is more fully ſtated, will convey the information moſt uſeful to the ſtudent.

One principal head office of Exciſe is to be kept in *London*, or within ten miles thereof, to which all other offices in the kingdom ſhall be ſubordinate and accountable; which ſaid office ſhall be managed by ſuch commiſſioners as the King ſhall appoint. *Stats.* 12 *Car.* 2. *c.* 24. § 46: 5 *W. c.* 20. § 16.

And all the places within the bills of Mortality ſhall be under the immediate care and management of the ſaid head-office; and ſuch and ſo many ſubordinate commiſſioners and ſub-commiſſioners, and other officers ſhall be appointed by the King in other places, as he ſhall think fit. *Stat.* 12 *Car.* 2. *c.* 24. § 48.

The exciſe office in all places where it ſhall be appointed, ſhall be kept open from 8 in the morning, till 2 in the afternoon. *Stat.* 23 *Geo.* 2. *c.* 26. § 12.

The commiſſioners or ſub-commiſſioners ſhall appoint under their hands and ſeals, ſuch perſons as they ſhall think needful in each market town, to be there upon every market day, in ſome known and public place; for receiving entries and duties, and performing all other things touching the revenue of exciſe: and if ſuch office be not ſo kept in each market town, the commiſſioners or others neglecting or refuſing, ſhall for every market day forfeit 10*l.* And ſuch perſon as ſhall come to ſuch market town to make his entry or payment, and tender the ſame accordingly, and be able to prove ſuch tender by oath of one witneſs, ſhall not be liable to any penalty for ſuch weekly or monthly entries or payments, as ſhould have been made or paid on ſuch market day. *Stat.* 15 *Car.* 2. *c.* 11. § 10.

The kingdom of *England* and *Wales* (excluſive of the bills of Mortality) is divided into about 50 *collections*; ſome called by names of particular counties; others by the names of great towns; where one county is divided into ſeveral collections, or where a collection comprehends the contiguous parts of ſeveral counties, every collection is ſubdivided into ſeveral *diſtricts*, within which there is a *Superviſor*; and each diſtrict is parcelled into *out-rides* and *foot walks*, within each of which there is a *Gauger* or ſurveying officer. *Gilb. Exch. Append.*

The commiſſioners or ſub-commiſſioners, in their reſpective circuits and diviſions, ſhall conſtitute under their hands and ſeals, ſuch and ſo many gaugers as they ſhall find needful. *Stat.* 12 *Car.* 2. *c.* 24. § 33.

In order to which, he who would be made a gauger, muſt procure a certificate, that he is above 21, and under 30 years of age; that he underſtands the four firſt rules of arithmetick; that he is of the communion of the church

church of *England*; how he has been employed, or what buſineſs he hath followed; that he is not incumbered with debts; whether ſingle or married; and if married how many children he has, for if he has above two, he cannot (by the rules of the office) be admitted. *Gilb. Exch. App.*

He muſt alſo nominate two perſons to be his ſureties, and it muſt be certified that they are of ſufficient ability; and that the ſaid certificate is of his own hand-writing: ſuch certificate, written by him, muſt be ſigned by the ſupervisor of exciſe where the party applying lives. *id.*

At the bottom of his certificate muſt be his affidavit, that neither he nor any elſe to his knowledge, hath, directly, or indirectly, given or promiſed to give any treat, fee, gratuity, or reward, for his obtaining or endeavouring to obtain an order for his being inſtructed. *id.*

When an order for inſtruction is granted, it is directed to an experienced officer, who receives ſuch perſon as his pupil: and the like books, as officers have, being delivered to ſuch pupil, he goes with and attends the officer, who inſtructs him, and he takes ſurveys, and in his own book makes the like entries as if he was an officer, until the inſtructor certifies that he is fully inſtructed. *id.*

After he is thus certified for, and until he is employed, he is called an *expectant*, being to wait till a vacancy happens. *id.*

No perſon ſhall be capable of intermeddling with any office relating to the Exciſe, until he ſhall, before two juſtices in the county where his employment ſhall be, or before a baron of the Exchequer, take the oaths of allegiance and ſupremacy, together with an oath of office which is to be certified to and recorded by the next Quarter-Seſſions. *Stat.* 12 *C.* 2. *c.* 24. § 47, 48. and ſee *Stat.* 15 *C.* 2. *c.* 11. § 57.

The buſineſs of the *Supervisor* is to be continually ſurveying the houſes and places of the perſons within his diſtrict liable to duties: and to obſerve and ſee whether the officers duly make their ſurveys, and make due entries thereof in their books and in their ſpecimen-papers; and every ſupervisor is in his own book to enter what he himſelf does each day and part thereof; and alſo ſet down the behaviour, good and bad, the diligence or negligence, of the ſeveral officers of his diſtrict: and at the end of every ſix weeks to draw out a diary of every day's buſineſs, and of the remarks made each day of the ſeveral officers in his diſtrict, and to tranſmit ſuch diary at the end of every ſix weeks to the chief office. *Gilb. Exch. Append.*

Each commiſſioner takes and peruſes a proportion of theſe diaries; and when he meets with any remarkable complaint againſt any officer, he communicates it to the reſt, who thereupon come to an agreement, either to *admoniſh*, *reprimand*, *reduce*, or *diſcharge*. For ſmall faults, officers are admoniſhed; for great ones reprimanded; for greater, reduced: but for the greateſt diſcharged. The commiſſioner who peruſes the diary writes in the margin, *admoniſh*, *reprimand*, or as the caſe is. *id.*

Theſe diaries, after having been thus written upon are delivered to the clerk of the diaries, who in a book, called the reprimand book, places the admonitions, reprimands and the like, to each officer's account, and writes every offender word thereof. Which reprimand book is reſorted to upon diſcovering new faults; and if it is there found that the officer has before been admoniſhed and reprimanded ſo often, that there are no hopes of his amending, he is then diſcharged. The ſaid book is likewiſe reſorted to, when application is made for advancing or preferring an officer into a better poſt. Frequent admonitions or reprimands, are a bar to preferment, unleſs they are of old ſtanding; but if for three years laſt he ſtands pretty clear of admonitions and reprimands, thoſe of elder date are not much regarded. *id.*

The *Collector*'s buſineſs is, every ſix weeks to go his rounds, and in the intervals of rounds, he is to be aſſiſting in proſecuting offenders before the juſtices; he is alſo to peruſe the ſupervisor's diaries, and where he finds an officer complained of, is to examine him and the ſupervisor, and having heard both, is in the margin to write his opinion of each fact; he is alſo to have an eye how the ſupervisors and officers of his collection perform their duties, and from the vouchers he tranſcribes into his book, the charge on each particular perſon in his collection. *id.*

For faults, gaugers are *reduced*, either to be only aſſiſtants, or from foot walks to out-rides; ſupervisors are reduced to be again only gaugers: and collectors are reduced to be ſupervisors. *id.*

In ſome inſtances, diſcharged officers, after having for a competent time been thereby kept out of pay, are again reſtored; but if twice diſcharged are never again reſtored, unleſs one of the diſcharges appears to have been occaſioned by a miſrepreſentation of the caſe. *Id.*

EXCLUSA, EXCLUSAGIUM, A ſluice for the carrying off water; and the payment to the lord for the benefit of ſuch a ſluice. *Et duo molendina in eodem manerio cum aquis* excluſagiis, *&c.* Mon. Ang. tom. 1. p. 398, 587.

EXCOMMENGEMENT, *Law French.*] *Excommunition.* Stat. 23 Hen. 8. c. 3.

EXCOMMUNICATION, *Excommunicatio.*] An eccleſiaſtical cenſure, divided into the greater and the leſſer; by the latter a perſon is excluded from the communion of the church only; by the former from that communion, and alſo from the company of the faithful; and incapacitated from performing any legal act.

The ſentence of excommunication was inſtituted originally for preſerving the purity of the church; but eccleſiaſtics did not ſcruple to convert it into an engine for promoting their own power, and inflicted it on the moſt frivolous occaſions. *Robertſ. Hiſt. Emp. Charles* V. 2 *vol.* 109, &c.

If the judge of any ſpiritual court excommunicates a man for a cauſe, of which he hath not the legal cognizance, the party may have an action againſt him at common law; and he is alſo liable to be indicted at the ſuit of the King. 1 *Inſt.* 134: 2 *Inſt.* 527, 623.

An excommunicated perſon is diſabled to do any act that is required to be done by one that is *probus* and *legalis homo.* He cannot ſerve upon juries, cannot be a witneſs in any court, and which is the worſt of all, cannot bring an action either real or perſonal to recover lands or money due to him. *Litt.* §. 201. And on forty days' contumacy, the defendant is liable to be taken on a writ of *Excommunicato capiendo* and impriſoned till he is reconciled to the church, when he may be freed by a writ of *Excommunicato deliberando.* 2 *Inſt.* 189: 8 *Rep.* 68. See more fully thoſe titles *Poſt.* In caſe of ſubtraction of tithes a more ſummary and expeditious aſſiſtance is given

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by the ſtatutes 27 *H.* 8. *c.* 20: 3 *H.* 8. *c.* 7, which enact that on complaint by the eccleſiaſtical judge of any contempt or miſbehaviour of a defendant, in any ſuit for *tithes*, any privy councillor or any two juſtices of the peace, (or in caſe of diſobedience to a definitive ſentence any two juſtices of the peace,) may commit the party to priſon without bail or mainprize, till he enters into a recognizance with ſufficient ſureties to give a due obedience to the proceſs and ſentence of the court.

As to pleading excommunication in a plaintiff, ſee title *Abatement*, I. 2. *b.*

We may next proceed to conſider more particularly,

I. *In what Caſes, and by whom, Perſons may be Excommunicated.*

II. *Of the Proceedings in Excommunications; and how the Excommunicated are abſolved.*

Excommunication is generally for contempt in not appearing, or not obeying a decree, &c. And in other reſpects the cauſes of it are many; as for matters of hereſy, refuſing to receive the ſacrament, or to come to church; incontinency, adultery, ſimony, &c. A man may not be excommunicated for matter of defamation, &c.

In ſome caſes perſons incur excommunication *ipſo facto* by act of parliament; but they are to be firſt convicted of the offence by law, and the conviction is tranſmitted to the Ordinary. *Dyer* 275: 1 *Ventr.* 146.

By *Stat.* 5 and 6 *Ed.* 6. *c.* 4, "If any perſon ſhall ſmite, or lay violent hands upon any other, either in any church or church-yard, then *ipſo facto* every perſon ſo offending ſhall be deemed excommunicate, and be excluded from the fellowſhip and company of *Chriſt*'s congregation."

And it is further enacted by the ſaid ſtatute, "That 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 with the ſame weapon, then every perſon ſo offending ſhall ſtand *ipſo facto* excommunicated as aforeſaid." See title *Church*.

By the *Stat.* 3 *Jac.* 1 *cap.* 5. §§ 11 & 12, it is enacted, "That every popiſh recuſant convict ſhall ſtand to all intents and purpoſes diſabled, as a perſon lawfully excommunicated." See this Dict. title *Papiſt*.

None but the biſhop is to certify excommunication, unleſs the biſhop be beyond ſea, or *in remotis*; or except the certificate be by one that hath ordinary juriſdiction, &c.

Anno 38 *H.* 3, *Boniface* archbiſhop of *Canterbury*, and the other biſhops, with burning tapers in their hands, in *Weſtminſter-Hall* before the King, and the other Eſtates of the realm, denounced a curſe and excommunication againſt the breakers of the liberty of the church: and by *Stat.* 9 *E.* 3, Biſhops may excommunicate, not only all perturbers of the peace of the church, but alſo felons, and other offenders, &c. And by the eccleſiaſtical laws, excommunicated perſons are not permitted to have Chriſtian burial.

The biſhop's certificate, if he die before the return of the writ, ſhall not be received, for his ſucceſſor ſhall certify; the *ſignificavit* muſt mention that the party lived within the dioceſe where he was excommunicated, and by what biſhop; if it be pleaded, the time when is to be ſhewn; and excommunication muſt be declared in the eccleſiaſtical court before they proceed, &c. 8 *Rep.* 68. *Cro. Jac.* 82: *Moor, Ca.* 667: *Latch.* 174: *Hetley* 86. See this Dict. title *Abatement*, I. 2. 6.

It hath been adjudged, that the ſpiritual court hath not power to meddle with the body of any perſons whatſoever, or to ſend proceſs to take them; for if a perſon is excommunicated for contempt, &c. they ought to certify it into the Chancery, whence it is ſent into *B. R.* and thence iſſues proceſs. *Cro. Eliz.* 741. See *poſt.* title *Excommunicato Capiendo*.

If a perſon be unjuſtly excommunicated for a matter of which the ſpiritual court hath not conuzance, and he is taken on a writ of *excommunicato capiendo*, the party grieved ſhall have a writ out of Chancery to the ſheriff, to deliver him out of priſon. 2 *Inſt.* 623: 12 *Co.* 76: *F. N. B.* 141.

So if the ſpiritual court proceeds *inverſo ordine*; as if they refuſe a copy of the libel, &c. a prohibition ſhall go, with a clauſe to abſolve and deliver the party injured. 1 *Sid.* 232.

Alſo if a man be excommunicated, and offers to obey and perform the ſentence, and the biſhop refuſeth to accept it, and to *aſſoil* him, he ſhall have a writ to the biſhop, requiring him, upon performance of the ſentence, to *aſſoil* him; and the reaſon thereof is, for that by the excommunication the party is diſabled to ſue any action, or to have any remedy for any wrong done unto him, ſo long as he ſhall remain excommunicate; and alſo the party grieved may have his action upon his caſe againſt the biſhop, in like manner as he may when the biſhop doth excommunicate him for a matter which belongeth not to the eccleſiaſtical conuſance; alſo the biſhop, in thoſe caſes, may be indicted at the ſuit of the King. 2 *Inſt.* 623.

But if the excommunication be for a juſt cauſe, the party muſt make preſent ſatisfaction before he can be abſolved, or he muſt put in caution, that he will hereafter perform that which the biſhop ſhall reaſonably and according to law enjoin him; which caution, in the Civil law, is of three ſorts. 1. *Fidejuſſoria*, as when a man bindeth himſelf with ſureties to perform ſomewhat. 2. *Pignoratio*, or *realis cautio*, as when a man engageth goods or mortgageth lands for the performance. 3. *Juratoria*, when the party who is to perform any thing, taketh a corporal oath to do it; which laſt is now the moſt frequent method.

This method of taking caution was held to be againſt law. 1 *Bulſt.* 122.——But was afterwards on great debate held to be good; and that the biſhop having a diſcretionary power herein, it was as much in his option to take caution by obligation as by either of the two other methods. 2 *Lev.* 36: *Raym.* 225.

If after a perſon is excommunicated, there comes a general act of pardon, which pardons all contempts, &c. it ſeems that this offence is taken away without any formal abſolution. See *Cro. Car.* 199: *Cro. Jac.* 212: 8 *Co.* 68: 1 *Jon.* 227: 2 *Lev.* 36: *Gibſ. Cod.* 1110.

EXCOMMUNICATIO CAPIENDO. A writ directed to the ſheriff for apprehending him who ſtands obſtinately excommunicated. If within *forty days* after ſentence of excommunication has been publiſhed in the Church, the offender does not ſubmit and abide by the ſentence of the Spiritual Court, the biſhop may *ſignify*, i. e. certify, ſuch contempt to the King in Chancery. Upon which there iſſues out this writ to the ſheriff of the county, called, from the biſhop's certificate, a *ſignicavit*: or, from

its effect, a writ de *excommunicato capiendo*. And the sheriff shall thereupon take the offender and imprison him in the county gaol till he is reconciled to the church, and such reconciliation certified by the bishop. *F. N. B.* 62. By the *Stat.* 5 *Eliz. c.* 23, Writs *de excommunicato capiendo* shall issue out of the court of Chancery in term-time, and be returnable in *B. R. &c.* They shall be brought sealed into the *King's Bench*, and there opened and delivered of record to the sheriff, and there must be twenty days between the *teste* and the return: and if the sheriff return a *non est inventus* on the writ, a *capias* with proclamation is to be granted for the party to yield his body to gaol under the penalty of 10*l.* And if he do not appear on the first *capias* and proclamation, a second is to go forth, and he is to forfeit 20*l. &c.*

But, by this statute, if in the *excommunicato capiendo*, the party excommunicated hath not a sufficient addition, as to his place of dwelling, *&c.* according to 1 *H.* 5. *c.* 5; or if in the *significavit* it is contained, that the excommunication proceeds upon a cause of contempt, or some original matter of heresy; for refusing to have a child *baptized*, to receive the *sacrament*, to come to *divine service*, or for *error* in matters of *religion* and doctrine, for *incontinency*, *usury*, *simony*, *perjury* in the ecclesiastical courts, or *idolatry*; he shall not incur the penalties in this act, for his contempt in not rendering himself prisoner upon the *capias*, *&c.* So that the statute doth not require the *capias* with proclamations, and the penalties in other cases, besides the ten cases mentioned. 2 *Inst.* 661.

And it has been adjudged, where a person has been excommunicated, and none of those causes were contained in the *significavit*, that the person excommunicate should be discharged of the penalties; but not of the excommunication. 3 *Mod.* 89. It has also been held, that for any of the causes expressed in the statute there ought to go a *capias* with a penalty, and be an addition to the writ: in other cases it is not necessary; and if then the *capias* be with a penalty, the court will not discharge the party, but the penalty only: but for want of addition, in cases where that is required, the party shall be discharged upon motion. 1 *Salk.* 294, 295.

EXCOMMUNICATO DELIBERANDO, A writ to the sheriff for delivery of an excommunicate person out of prison, upon certificate from the ordinary of his conformity to the ecclesiastical jurisdiction. *F. N. B.* 63: *Reg. Orig.* 67. And where a man is unduly excommunicated, he may be delivered in some cases by an *habeas corpus*; and sometimes by pleading, as well as by an *excommunicato deliberando*: also sometimes by prohibition, *&c.* And on a general pardon, the party may have a writ to the bishop to absolve him. 12 *Rep.* 76: *Latch.* 205: *Godb.* 272. If a plaintiff in an action be excommunicate, and after he gets letters of *absolution*; on shewing them in court, he may have a re-summons, *&c.* upon his original. 1 *Inst.* 133.

EXCOMMUNICATO RECIPIENDO, or rather *Re-capiendo.*] A writ whereby persons excommunicated being for their obstinacy committed to prison, and unlawfully delivered, before they have given *caution* to obey the authority of the church, are commanded to be sought after, *retaken*, and imprisoned again. *Reg. Orig.* 67.—If a person after his commitment escapes, and the sheriff has not returned his writ, a *capias excommunicatum de novo* shall go, otherwise if the writ be returned. *Mod. Ca.* 78.

EXECUTION. EXECUTIO.] Signifies the last performance of an act, as of a judgment, *&c.* It is the obtaining possession of any thing recovered by judgment of law. 1 *Inst.* 289.

Sir *Edw. Coke*, in his Reports, makes two sorts of executions; one *final*, another with a *quousque*, tending to an end: an execution *final* is that which makes money of the defendant's goods, or extends his lands, and delivers them to the plaintiff, which he accepts in satisfaction, and is the end of the suit, and all that the king's writ requires to be done; the other writ with a *quousque*, though it tendeth to an end, is not final: as in case of a *capias ad satisfaciendum*, which is not a final execution, but the body of the party is to be taken, to the intent the plaintiff be satisfied his debt, *&c.* and the imprisonment of the defendant not being absolute, but until he do satisfy the same. 6 *Rep.* 87.

EXECUTION, in the usual legal sense of the word, is a judicial writ grounded on the judgment of the court from whence it issues: and is supposed to be granted by the court at the request of the party at whose suit it is issued, to give him satisfaction on the judgment which he hath obtained: and therefore an execution cannot be sued out in one court, upon a judgment obtained in another. *Impey. K. B.*

This Execution, or putting the law in force, is performed in different manners according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

If the plaintiff recovers in an action real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution shall be an *Habere facias seisinam*, or writ of seisin of a freehold; or an *Habere facias possessionem*, or writ of possession of a chattel interest. *Finch L.* 470. See this *Dict.* those titles. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered: in the execution of which the sheriff may take with him the *posse comitatûs*, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. See *post.* III. 3. But if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of a door in the name of seisin, is sufficient execution of the writ. 3 *Comm.* 412.

Upon a presentation to a benefice recovered in a *quare impedit*, or assise of *darrein presentment* the execution is by a writ *de clerico admittendo*; directed not to the sheriff, but to the bishop or archbishop, and requiring him to admit and institute the clerk of the plaintiff. See titles *Admittendo clerico*: *Advowson.*

In other actions, where the judgment is that something special be done or rendered by the defendant, then in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff according to the nature of the case. As upon an assise of nuisance or *quod permittat prosternere*, where one part of the judgment is that the nusance be removed, a writ goes to the sheriff to abate it at the charge of the party; which likewise issues in case of an indictment. *Comb.* 10. See title *Nusance.*

Upon a replevin the writ of execution is the writ *de retorno habendo*; to have a return of the cattle distrained; and if the distress be eloigned, the defendant shall have

a *Capias*

a *Capias in Withernam*; but on the plaintiff's tendering the damages and ſubmitting to a fine, the proceſs in *Withernam* ſhall be ſtayed. 2 *Leon.* 174. See titles *Replevin*: *Diſtreſs*: *Withernam*. In detinue, after judgment the plaintiff ſhall have a *diſtringas* to compel the defendant to deliver the goods by repeated diſtreſſes of his chattels: (1 *Ro. Ab.* 737: *Raſt. Ent.* 215:) or elſe a *ſcire facias* againſt any third perſon in whoſe hands they may happen to be, to ſhew cauſe why they ſhould not be delivered: and if the defendant ſtill continues obſtinate, then (if the judgment be by default or on demurrer) the ſheriff ſhall ſummon an inqueſt to aſcertain the value of the goods and the plaintiff's damages: which (being either ſo aſſeſſed, or by the verdict in caſe of an iſſue; *Bro. Ab.* tit. *Damages*, 29,) ſhall be levied on the perſon or goods of the defendant. See title *Detinue*. So that after all, in *Replevin* and *Detinue*, the only actions for recovering the ſpecific poſſeſſion of perſonal chattels, if the wrong-doer be very perverſe, he cannot be compelled to the reſtitution of the identical thing taken or detained; but he has ſtill his election to deliver the goods or their value. *Keilw.* 64.

Executions, in actions where money only is recovered, as a *debt* or *damages*, are of five ſorts. 1. Againſt the body of the defendant. 2. Againſt his goods and chattels.—3. Againſt his goods and the *profits* of his lands. 4. Againſt his goods and the *poſſeſſion* of his lands. 5. Againſt all three, his body, lands, and goods.

1. The firſt of theſe ſpecies of execution is by writ of *capias ad ſatisfaciendum*; (ſhortly called a *Ca. ſa.*) to *take* and impriſon the body of the debtor till *ſatisfaction* be made for the debt, coſts and damages. See this Dict. title *Capias*. Sir *Edward Coke* gives a ſingular inſtance where a defendant in 14 *E.* 3, was diſcharged from a *capias* becauſe he was of ſo advanced an age that he could not undergo the pain of impriſonment. 1 *Inſt.* 289. This writ is an execution of the higheſt nature, inaſmuch as it deprives a man of his liberty till he makes the ſatisfaction awarded; and therefore when a man is once taken in execution upon this writ, no other proceſs can be ſued out againſt his lands or goods. Only by *Stat.* 21 *Jac.* 1. *c.* 24, if the defendant dies while charged in execution upon this writ, the plaintiff may after his death ſue out a new execution againſt his lands, goods, or chattels.

If a *Ca. Sa.* is ſued out, and a *non eſt inventus* is returned thereon, the plaintiff may ſue out a proceſs againſt the bail, if any were given; who ſtipulate in this triple alternative, that the defendant ſhall, if condemned in the ſuit, ſatisfy the plaintiff his debt and coſts; or ſurrender himſelf a priſoner; or that they will pay it for him: as therefore the two former branches of the alternative are neither of them complied with, the latter muſt immediately take place. *Lutw.* 1269, 1273. In order to which a writ of *ſcire facias* may be ſued out againſt the bail, commanding them to ſhew cauſe why the plaintiff ſhould not have execution againſt them for his debt and damages: and on ſuch writ if they ſhew no ſufficient cauſe, or the defendant does not ſurrender himſelf on the day of the return, or of ſhewing cauſe, the plaintiff may have judgment againſt the bail; and take out a writ of *Ca. Sa.* or other proceſs of execution againſt them. See titles *Bail*; *Scire Facias*.—poſt. II.

2. The next ſpecies of execution is againſt the goods and chattels of the defendant; and is called a writ of *Fieri Facias*; from the words in it where the ſheriff is commanded that he *cauſe to be made* of the goods and chattels of the defendant, the ſum or debt recovered. This lies as well againſt privileged perſons, peers, &c. as other common perſons: and againſt executors or adminiſtrators with regard to the goods of the deceaſed. The ſheriff may not break open any outer doors to execute either this writ or the writ of *Ca. Sa*; but muſt enter peaceably; and may then break open any inner door belonging to the defendant in order to take the goods. 5 *Rep.* 92: *Palm.* 54. See *poſt.* III. 3. And the ſheriff may ſell the goods and chattels of the defendant, even an eſtate for years which is a chattel real, (8 *Rep.* 171,) till he has raiſed enough to ſatisfy the judgment and coſts: firſt paying the landlord of the premiſes, upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole. *Stat.* 8 *Anu. c.* 14. See titles *Diſtreſs*: *Rent*. If part only of the debt be levied on a *Fieri Facias*, the plaintiff may have a *Ca. Sa.* for the reſidue. 1 *Ro. Ab.* 904: *Cro. Eliz.* 344. See further this Dict. title *Fieri Facias*.

3. A third ſpecies of execution is by writ of *Levari facias*; which affects a man's goods and the *profits* of his lands by commanding the ſheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the ſheriff may ſeize all his goods, and receive the rents and profits of his lands, till ſatisfaction be made to the plaintiff. *Finch L.* 471. Little uſe is now made of this writ; the remedy by *elegit* which takes poſſeſſion of the lands themſelves, being much more effectual. But, as a ſpecies of this *levari facias*, may be conſidered a writ of execution proper only to eccleſiaſticks: which is given when the ſheriff upon a common writ of execution ſued, returns that the defendant is a beneficed clerk, having no lay fee. In this caſe a writ goes to the biſhop of the dioceſe, in the nature of a *levari* or *fieri facias* to levy the debt and damages *de bonis eccleſiaſticis* which are not to be touched by lay hands: and thereupon the biſhop ſends out a *ſequeſtration* of the profits of the clerk's benefice, directed to the churchwardens to collect the ſame, and pay them to the plaintiff till the full ſum be raiſed. *Reg. Orig.* 300: *Burn. E. L.* 329: 2 *Inſt.* 472: *Jenk.* 207. See further title *Levari Facias*.

4. The fourth ſpecies of execution is by the writ of *Elegit*, which is a judicial writ given by *Stat. W.* 2. 13 *E.* 1. *c.* 18, either upon judgment for a debt or damages; or upon the forfeiture of a recognizance taken in the King's court. By the common law, a man could only have ſatisfaction of goods, chattels, and the preſent profits of lands by the two writs of execution laſt mentioned, (2 and 3.); but not the poſſeſſion of the lands themſelves; which was a natural conſequence of the feodal principles prohibiting alienation of lands. See this Dict. title *Tenure*.

By this writ of *Elegit*, the defendant's goods and chattels are not ſold, but only appraiſed; and all of them, except oxen and beaſts of the plough, are delivered to the plaintiff, at ſuch reaſonable appraiſement and price, in part of ſatisfaction of his debt. If the goods are not ſufficient, then the moiety or one half of his freehold lands, which he had at the time of the judgment given, whether held in his own name, or any other in truſt for him are alſo to be delivered to the plaintiff: to hold till out of the rents and profits thereof the debt be levied, or till

the defendant's intereſt be expired; as till the death of the defendant, if he be be tenant for life, or in tail. 2 *Inſt.* 395: *Stat.* 29 *Car.* 2. *c.* 3.

It is upon feodal principles alſo, that copyhold lands are not liable to be taken in execution upon a judgment. 1 *Ro. Ab.* 888. But in caſe of a debt to the King, it appears by *Magna Charta*, *c.* 8, that it was allowed by the common law for him to take poſſeſſion of the lands till the debt was paid.

This execution or ſeizing of lands by *elegit* is of ſo high a nature, that after it the body of the defendant cannot be taken: but if execution can only be had of the goods becauſe there are no lands, and ſuch goods are not ſufficient to pay the debt, a *Ca. Sa.* may then be had after the *elegit*; for ſuch *elegit* is in this caſe no more in effect than a *fieri facias*. *Hob.* 58.

Thus it appears that *body* and *goods* may be taken in execution; or land and *goods*; but not body and land too upon any judgment between ſubject and ſubject, in the courſe of the common law; But

5. Upon ſome proſecutions given by ſtatute; as in the caſe of recognizances or debts acknowledged on *Statute Merchant*, or *Statute Staple*; (purſuant to *Stat.* 13 *E.* 1. *de Mercatoribus*: 27 *E.* 3. *c.* 9; See this Dict. thoſe titles;) upon forfeiture of theſe the body lands and goods may all be taken at once in execution to compel the payment of the debt. The proceſs hereon is uſually called an *Extent* or *extendi facias*; becauſe the ſheriff is to cauſe the lands, &c. to be appraiſed to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how ſoon the debt will be ſatisfied. *F. N. B.* 131. See this Dict. title *Extent*.

By *Stat.* 33 *H.* 8. *c.* 39, all obligations made to the King ſhall have the ſame force, and of conſequence the ſame remedy to recover them, as a ſtatute ſtaple: though indeed before this ſtatute, the King was entitled to ſue out execution againſt the body lands and goods of his accountant or debtor. 3 *Rep.* 12. And his debt ſhall in ſuing out execution be preferred to that of every other creditor who hath not obtained judgment before the King commenced his ſuit. *Stat.* 33 *H.* 8. *c.* 39, § 74.

The King's judgment alſo affects lands which the King's debtor hath at, or after the time of contracting his debt, or which any of his officers mentioned in *Stat.* 13 *Eliz. c.* 4, hath at or after the time of his entering on the office: ſo that if ſuch officer of the Crown aliens for a valuable conſideration, the land ſhall be liable to the King's debt, even in the hands of a *bonâ fide* purchaſer: though the debt due to the King was contracted by the vendor many years after the alienation. 10 *Rep.* 55, 6: 8 *Rep.* 171. And ſee *Stat.* 25 *Geo.* 3. *c.* 35; which enables the court of Exchequer on application by the Attorney General, by motion, to order the eſtate of any debtor to the King, and of the heirs and aſſigns of ſuch debtor, in any lands extended, to be ſold as the court ſhall direct; the conveyance to be made by the remembrancer of the court, by Bargain and Sale, to be inrolled in that court.

Judgments between ſubject and ſubject related, even at common law, no farther back than the firſt day of the Term in which they were recovered, in reſpect of the lands of the debtor; and did not bind his goods and chattels but from the date of the writ of execution: and now by the ſtatute of frauds 29 *Car.* 2. *c.* 3, the judgment ſhall not bind the land in the hands of a *bonâ fide* purchaſer, but only from the day of actually ſigning the ſame, which is directed by the ſtatute to be punctually entered on the record: nor ſhall the writ of execution bind the goods in the hands of a ſtranger or a purchaſer, (*Skin.* 257,) but only from the actual delivery of the writ to the ſheriff or other officer, who is therefore ordered to indorſe on the back of it the day of his receiving the ſame. See further this Dict. title *Judgment*: and as to the prerogative of the crown, Poſt. IV. 2; and on the ſubject in general, 3 *Comm. c.* 26.

The reader may now purſue his enquiries under the following diviſions:

I. *Of the Nature and ſeveral Kinds of Executions, and what Things were liable thereto at Common-law, &c.*

II. *Of the Judgments on which the ſeveral Executions may be taken out, and where the Party ſhall be concluded by the Election of one of them, &c.*

III. 1. *By whom, againſt whom.* 2. *At what Time, Executions may be ſued.* 3. *By whom, and how they ſhall be Executed.* 4. *How they are to be releaſed and diſcharged.*

IV. 1. *To what Time Executions ſhall relate, ſo as to avoid Alienation*; 2. *Of the King's Prerogative in reſpect of Executions.*

V. 1. *Of the Party's Remedy againſt irregular Executions*; 2. *Of the Offence of obſtructing Execution.*

I. The writs of execution at Common-law were only a *fieri facias* on the goods and chattels, and a *levari facias* to levy the debt or damages upon the land and chattels: The *ca. ſa.* was given by conſtruction of the *Stat.* 25 *Ed.* 3. *c.* 17; And the *elegit* by *Stat. Weſm.* 2. *c.* 18: which makes the body liable, and the future profits of lands &c. 1 *Inſt.* 154: 2 *Inſt.* 394.

The reaſon why by the Common-law, where a ſubject had execution for debt or damages, he could not have the body of the defendant, or his lands in execution, (unleſs it were in ſpecial caſes) was, that the defendant's body might be at liberty, not only to follow his own affairs and buſineſs, but alſo to ſerve his King and country; and taking away the poſſeſſion of his lands would hinder the following of his huſbandry and tillage. 2 *Inſt.* 394.

Though neither the body nor lands of the debtor on a judgment could be taken in execution at Common-law, but only his goods; yet in action of debt againſt an heir, upon the bond of his anceſtor, his land which he had by diſcent was ſubject to be taken in execution. 3 *Rep.* 11. In action of debt againſt the heir upon his anceſtor's band, there was judgment by *nihil dicit*: and it was held that the plaintiff ſhould have execution againſt the heir, of any of his own lands or goods. *Dyer* 89, 149. Judgment was had againſt the heir by *nil dicit*, and a *ſcire facias* being brought againſt him to have execution, he pleaded *riens per diſcent*; it was adjudged that this plea was too late after the judgment by *nil dicit*, and the execution ſhall be on his own lands. *Dyer* 344.

But there is a difference between a *ſcire facias* and an *action of debt* brought againſt an heir upon a bond of his anceſtor, in which the heir is named. *Poph.* 193. On a judgment for the debt of an anceſtor, where the heir hath made over lands deſcended to him, execution may be taken againſt ſuch heir to the value of the land, &c. for the debt of his anceſtor, as if it were his own debt. *Stat.* 3 & 4 *W.* & *M. c.* 14, § 5. See title *Fraud*.

If a perſon have judgment given againſt him for debt or damages, or be bound in a recognizance and dieth, and his heir be within age, no execution ſhall be ſued of the lands during the minority; and againſt an heir within age, no execution ſhall be ſued upon a ſtatute merchant or ſtaple, &c. 1 *Inſt.* 290.

No execution for damages recovered in a real action, ſhall be had by *capias ad ſatisfaciendum*: but where a man hath judgment to recover lands and damages, he may have execution of both together. 8 *Rep.* 141.

Whatever may be *aſſigned* or *granted* may be taken on an execution. Nothing can be taken in execution that cannot be *ſold*, as deeds, writings, &c. *Bank-notes*, &c. cannot be taken in execution; as they remain, in ſome meaſure, *choſes in action*. *Hardw.* 53.

If there are chattels ſufficient, the ſheriff ought not to take the lands; nor may things fixed to the freehold, goods bought *bonâ fide*, goods pawned, &c. be taken in execution. 8 *Rep.* 143, And if a defendant hides his goods in ſecret places, ſo that the plaintiff cannot take them in execution, it is ſaid no action will lie againſt him. 5 *Rep.* 92, 93.

The ſheriff cannot take the goods of a ſtranger, for he is to take the goods of the party only at his peril. And if a bailiff on a *fi. fa.* againſt the goods of *A.* take thoſe of *B.* an action of treſpaſs lies againſt the ſheriff. *Doug.* 40. If on execution againſt one of two partners, the partnerſhip effects be taken and ſold, the court will order the ſheriff to pay over to the other, a ſhare of the produce, proportioned to his ſhare in the partnerſhip effects, to be aſcertained by the maſter. *Doug.* 650. *Eddie* v. *Davidſon*.

If the plaintiff cannot find ſufficient effects to ſatisfy his judgment, the court will order the ſheriff to retain for his uſe money which he has levied in an action at the ſuit of the defendant. *Doug.* 231.—See further *Com. Dig.* title *Execution*, (C.) 4.

II. When a judgment is ſigned, execution may be taken out immediately upon it, and need not be delayed till it is entered, it being a perfect judgment of the court before entered. *Co. Lit.* 505. And if the judges of the court of *B. R.* ſee one againſt whom there is a judgment of that court walk in *Weſtminſter* hall, they may ſend an officer to take him up, if the plaintiff deſire it, without a writ of execution. 7 *Mod.* 52. If execution be not ſued *within a year and a day* after judgment, where there is no fault in the defendant, as if writ of error be not brought, &c. there muſt be a *ſcire facias* to revive the judgment, which in that time may be had without moving the court; but if it be of longer ſtanding, the court is to be moved for it. 1 *Inſt.* 290: 2 *Inſt.* 771. But if the defendant be *outlawed* after judgment, (as he may where he cannot be taken in execution, or hath no lands or goods to pay the debt, &c. when the ſuit is commenced by original,) the plaintiff need not renew the judgment by *ſcire facias* to obtain execution after a year. 1 *Inſt.* 290.

It hath been adjudged, that by the Common-law, if a man was outlawed after judgment in debt, the plaintiff was at the end of his ſuit, and he could have no other proceſs after that perſonally; but was put to his new original, &c. 2 *Neſſ. Abr.* 772. If one be arreſted upon proceſs in *B. R.* and puts in bail; and afterwards the plaintiff recovers, and the defendant renders not himſelf according to law, in ſafe-guard of his bail, the plaintiff may at his election take execution againſt the principal, or his bail after judgment againſt them; but if he takes the bail, he ſhall never afterwards meddle with the principal. *Cro. Jac.* 320.

If one recovers jointly againſt two in debt, the execution muſt be joint againſt them: the court cannot divide an execution, which is intire, and grounded on the judgment. *Mich.* 24 *Car. B. R.*

A man and his wife recovered in an action of debt againſt the defendant 100*l.* and damages; then the wife died, and the huſband prayed to have execution upon this judgment: the court at firſt inclined, that it ſhould not ſurvive to the huſband, but that adminiſtration ought to be committed of it, as a thing in action; but at laſt they agreed that the huſband might take out execution, for that by the judgment it became his debt due to him in his own right. *Cro. Car.* 608: 1 *Mod. Rep.* 179, 180. See titles *Baron* and *Feme*.

If judgment be againſt two, on the death of one, the plaintiff ſhall have execution by *ſcire facias* againſt the ſurvivor; and though he pleads, that the other defendant has an heir alive, &c. it will not prevent it. *Raym.* 26. And where two perſons recover in debt, and before execution one of them dies; it has been held that execution may be ſued in both their names by the ſurvivor, and it will be no error; which may be done without a *ſcire facias*. *Ney.* 150. An execution may be executed after the death of the defendant; for his executor being privy, is bound as well as the teſtator: and where execution is once begun, it cannot be delayed, unleſs there appears irregularity; and *audita querela* is no *ſuperſedeas* to it, nor ſhall any thing ſtop the ſheriff from ſelling, &c. *Cro. Eliz.* 73: *Comberb.* 33, 389.

Though a man can have but one execution; yet it muſt be intended *an execution with ſatisfaction*, and the body of the defendant is no ſatisfaction, only a pledge for the debt. 5 *Rep.* 486. When therefore a perſon dies in execution, it is without ſatisfaction; ſo that the plaintiff may have a *fieri facias* againſt the goods, or *elegit* againſt the lands. This was not ſo at Common-law. *Hob.* 57; but it is given by *Stat.* 21 *Jac.* 1. *c.* 24. Where a perſon however was taken on a *capias utlagatum*, and died in priſon, the plaintiff having choſen this execution, which is the higheſt in law; it has been held that the defendant dying, the law will adjudge it a ſatisfaction. *Cro. Eliz.* 850.

If an execution be executed and filed, the party can have no other execution upon that judgment; becauſe there can be but one execution with ſatisfaction upon one judgment: But if the execution be not returned and filed, another execution may be had: and if only part of the debt be levied on a *fieri facias*, another writ of execution may be ſued out for the reſidue thereof. 1 *Lill. Abr.* 565. If one take out any writs of execution, and they have no effect, he may have other writs on their failure. *Hob.* 57.

In caſe any priſoner committed in execution ſhall eſcape, any creditor, at whoſe ſuit he ſtands charged, may retake him by a new *capias ad ſatisfaciendum*, or ſue forth any other kind of execution, as if the body of ſuch priſoner had never been taken in execution. *Stat.* 8 & 9 *W.* 3. *c.* 27. See title *Eſcape*. Where two are bound *jointly*, and

and severally, and judgment is had against both of them, if one in execution escapes, the creditor may take out execution against the other; but if he go by licence of the creditor, then the other will be discharged. *Cro. Car.* 53. If one in execution be delivered by privilege of parliament, when the privilege ceases, the plaintiff may sue out a new execution against him. *St.* 1 *Jac.* 1. *c.* 13.

III. 1. No person is intitled to, or can sue out execution, who is not privy to the judgment, or intitled to the thing recovered, as heir, executor, or administrator to him who has judgment. 1 *Rol. Abr.* 889.

If one have judgment to recover lands, and die before execution, his heir shall have it; and where tenant in tail recovers and dies before the execution without issue, he in remainder may sue out execution: an heir is to have execution for lands, and the executor or administrator for damages. *Co. Litt.* 251: *Dyer* 26. The executors of executors may sue out execution of a judgment; but an administrator getting judgment in behalf of the intestate, and then dying, neither his executor, or administrator shall take out the execution, but the administrator *de bonis non administratis* of the first intestate. 5 *Rep.* 9. And see *Stat.* 17 *Car.* 2. *c.* 8.

But if an administrator, *durante minori ætate* of an executor, recovers in debt, and before execution the executor comes of age, he shall have a *scire facias* on this judgment; for carrying on the suit in right of the executor, made the executor privy thereto. 1 *Rol. Abr.* 888-9.

If a man has judgment for the arrears of rent, and dies, his executor shall sue out execution, and not the heir; for by the recovery it becomes a chattel vested, to which the executor is intitled. 1 *Rol. Abr.* 880.

If a statute be entered into, to husband and wife, and the husband dies, the wife shall take out execution. 1 *Rol. Abr.* 889. So if husband and wife recover lands and damages, and the husband dies, the wife shall have execution of the damages, and not the executors of the husband. 1 *Rol. Abr.* 342, 889, 890. See tit. *Baron and Feme.*

If there be judgment in debt against two, and one dies, a *scire facias* lies against the other alone, reciting the death; and he cannot plead, that the heir of him that is dead has assets by descent, and demand judgment, if he ought to be charged alone; for at Common-law, the charge upon a judgment, being personal, survived, and the statute of *Westm.* 2, that gives the *elegit*, does not take away the remedy of the plaintiff at Common-law; and therefore the party may take out his execution which way he pleases; for the words of the statute are, *sit in electione*; but if he should, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or else by *audita querela*. *Raym.* 26: 1 *Lev.* 30: 1 *Keb.* 92, 125. S. C.

By the Common-law, if judgment be given against a man for debt, or damages, and the defendant dies before execution sued, his heir within age is not liable to execution during his minority; but *the parol must demur* (*i. e.* the plea must stand still) in such case till he comes of age. *Co Lit.* 290 *a*: 1 *Rol. Abr.* 140.

And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as if there be father and two daughters, and judgment be given for debt against the father, who dies, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution. *Co. Lit.* 290 *a*.

There can be no execution taken out against a member of parliament during privilege of parliament: also no *capias* can issue against a peer; for even in the case of a private person at Common-law, the body was not liable to creditors; and the statute of *Ed.* 3, which subjects the body, does not extend to peers, because their persons are sacred: the law also supposes, that persons thus distinguished by the King, have wherewithal otherwise to satisfy their creditors. 6 *Co.* 52: *Hob.* 61: *Cro. Car.* 205.

A *capias ad satisfaciendum* may be executed upon a prisoner in prison for felony; and if he be acquitted of the felony, the sheriff is to keep him. 1 *Lil. Abr.* 567. But where a person is in prison for criminal matters, he ought not to be charged with a civil action without leave of the court; yet if he be charged, he shall not be discharged. *Raym.* 58. See 7 *Mod.* 153; and this Dict. title *Prisoner*.

A *ca. sa.* will lie against a man who is outlawed for felony, and he may be taken in execution at the suit of a common person. *Owen* 69. And if he was taken upon a *capias utlagat.* which was at the King's suit, he shall be in execution at the suit of the party, if he will. *Moor* 566. But this is not without prayer of the party: and if after a judgment given, the judges of their own heads, or at the request of any person, without prayer of the plaintiff, commit the defendant to prison; by this he shall not be said to be in execution for the plaintiff. *Dyer* 297. If one arrested be in prison for debt, and judgment is had against him; though it be in arrest on a *latitat* or *capias*, he shall not be in execution upon the judgment, unless the plaintiff prays it of record; or sues a *capias ad satisfaciendum*, and delivers it to the sheriff. *Dyer* 197, 306: *Jenk. Cent.* 165.

2. At Common-law, in *real* actions, where land was recovered, the demandant, after the year, might take out a *scire facias* to revive his judgment; because the judgment being particular in the real action, *quoad* the lands with a certain description, the law required, that the execution of that judgment should be entred *upon the roll, that it might be seen, whether execution was delivered of the same thing of which judgment was given*: a *scire facias* issued to shew cause, why execution should not be. 2 *Inst.* 471: 5 *Co.* 88: *Cro. Eliz.* 416: 6 *Mod.* 288.

But if the plaintiff, after he had obtained judgment in any *personal* action, had lain quiet, and had taken no process of execution within the year, he was put to a new original upon his judgment, and no *scire facias* was issuable at law on the judgment, because there was not a judgment for any *particular thing in the personal action*, with which the execution could be compared; therefore after a reasonable time, which was a year and a day, it was presumed to be executed, and the law allowed him no *scire facias* to shew cause why there should not be execution; but if the party had slipped his time, he was put to his action on the judgment, and the defendant was obliged to shew how that debt, of which the judgment was an evidence, was discharged. 2 *Inst.* 469: *Carth.* 30, 31: 1 *Sid.* 351.

To remedy this, and to make the forms of proceeding more uniform in both actions, the ſtatute of *Weſtm.* 2. *cap.* 45, gave the *ſcire facias* to the plaintiff to revive the judgment, where he had omitted to ſue execution within the year after judgment obtained.

A *ſcire facias* lies on a judgment in ejectment; for the words of the act are, *Sive ſervitia, ſive conſuetudines, ſive alia quæcunque irrotulata*, which comprehend all judgments, and give the like remedy on them by *ſcire facias*, as the demandant had on a judgment in a real action at Common law. 1 *Sid.* 351: 2 *Salk.* 600.

But though the general rule be, that the plaintiff cannot take out execution after the year and day without a *ſcire facias*, yet the rule muſt be underſtood with ſome reſtrictions.

If a *Fi. fa*; *Ca. ſa*; or *Elegit*, be taken out within the year and returned and awarded on the roll, the ſame may be continued from term to term to the time of the execution thereof, although after the year: and be as effectual as if the judgment had been revived by *ſcire facias*. *N. on R. E.* 5 *Geo.* 2. But a *Fi. fa.* muſt be left with the proper officer before he will make the entry on the roll returned by the ſheriff. *Imp. K. B.*

If the defendant brings a writ of error, and thereby hinders the plaintiff from taking his execution within the year, and the plaintiff in error is nonſuit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *ſcire facias*, becauſe the writ of error was a *ſuperſedeas* to the execution, and the plaintiff muſt acquieſce till he hears the judgment above; beſides while the cauſe is ſtill *ſub judice*, it is not known whether the plaintiff ſhall recover, or not, and the year for the execution ought to be accounted from the *final* judgment given. *Cro. Jac.* 364: *Yelv.* 7: 1 *Rol. Abr.* 899: 4 *Leon.* 197: 5 *Co.* 88: *Carth.* 236-7: 6 *Mod.* 288.

So if the plaintiff hath a judgment, with ſtay of execution for a year, he may, after the year, take out his execution without the *ſcire facias*, becauſe the delay is by conſent of parties, and in favour of the defendant; and *the indulgence of the plaintiff ſhall not turn to his prejudice*, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage, and at his inſtance. 6 *Mod.* 288: 1 *Rol. Rep.* 104.

But if the defendant had been tied up by an injunction out of Chancery for a year, yet he cannot take out execution without a *ſcire facias*, becauſe the courts of law do not take notice of Chancery injunctions, as they do of writs of error; beſides, in that caſe it had been no breach of the injunction to have taken out the execution within the year, and continued it down by *vic' non miſit breve*, which cannot be done in the caſe of a writ of error, *becauſe that removes the record out of the court where the judgment* was; and therefore there can be no proceedings below till it be affirmed, and returned to the inferior courts. 1 *Salk.* 322: 6 *Mod.* 288. *S. C.*

In debt, if defendant acknowledge the action for part, and as to the remainder pleads to iſſue, and the plaintiff hath judgment for that he confeſſeth; here he may not have execution till the iſſue is tried for that which he is to recover damages: though if he releaſes the damages, he may have execution preſently for the reſt. *Rol.* 897.

3. All judgments of *inferior courts* in debt are to be executed in the *peculiar juriſdictions* where given, and cannot be removed to be executed by the *ſuperior courts*. *Cro. Car.* 34.

Now by *Stat.* 19 *Geo.* 3. *c.* 70. § 4, where final judgment ſhall be obtained in any ſuit in any inferior court of record, any of the courts at *Weſtminſter* on affidavit thereof, and that execution has iſſued againſt the defendant's perſon or effects, and that they are not to be found within the juriſdiction of ſuch inferior court, may cauſe the record of the judgment to be removed into ſuch ſuperior court, to iſſue execution thereon, in the ſame manner as in judgment obtained in the ſaid ſuperior courts.

If a judgment given in another court be affirmed, or reverſed for error in *B. R.* becauſe the proceedings in the court below are entered upon record in the *King's Bench*, the party ſhall have execution in that court: And ſo if a judgment of debt, *&c.* in the *Common Pleas* be affirmed in *B. R.* on a writ of error. 5 *Rep.* 88. Though where the record of a judgment given in *C. B.* is removed into *B. R.* the party cannot take out execution upon it, without a *ſcire facias quare executionem habere non debeat*. 1 *Lill. Abr.* 562. And where a writ of error is brought in the *Exchequer Chamber*, to reverſe a judgment in *B. R.* if the judgment is affirmed there, yet that court cannot make out execution upon the judgment affirmed; but the record muſt be tranſmitted back to the court of *King's Bench*, where execution muſt be done. 1 *Lill.* 565. See title *Error*.

As an execution is an entire thing, he who begins muſt end it; a new ſheriff may diſtrain an old one to ſell the goods on a *diſtringas nuper vicecom'* and to bring the money into court, or ſell and deliver the money to the new ſheriff; and the authority of the old ſheriff continues by virtue of the firſt writ, ſo that when he hath ſeized, he is compellable to return the writ, and liable to anſwer the value according to the return; likewiſe by the ſeizure the property of the goods, *&c.* is diveſted out of the defendant, and he is diſcharged, whereby no further remedy can be had againſt him. 1 *Salk.* 322: 3 *Salk.* 159.

A ſheriff ſhall have his fees for executions, upon a writ of *capias ad ſatisfaciendum* for the whole debt; upon a *fieri fac.* according to the ſum levied; and on an *elegit* it is held by ſome, that he ſhall have fees according to what is levied, and by others for the whole debt recovered, becauſe the plaintiff may keep the land till he is ſatisfied the intire debt. 1 *Salk.* 333. Where the ſheriff hath a *fieri facias* or *ca. ſa.* againſt a man, and before execution, he pays him the money, execution may not be done afterwards; if it be, treſpaſs or falſe impriſonment lies. 5 *Rep.* 93: 12 *Car. B. R.* See title *Sheriff*.

It is laid down as a general rule in our books, that the ſheriff in executing any judicial writ, cannot break open the door of a dwelling-houſe; this privilege, which the law allows to a man's habitation, ariſes from the great regard the law has to every man's ſafety and quiet, and therefore protects them from the inconveniences which muſt neceſſarily attend an unlimited power in the ſheriff and his officers in this reſpect; hence, every man's houſe is called his caſtle. 5 *Co.* 91, *&c.*: 3 *Inſt.* 162: *Moor* 668: *Yelv.* 28: *Cro. Eliz.* 908: *Dalt. Sher.* 350.

Yet in favour of executions, which are the life of the law, and eſpecially in caſes of great neceſſity, or where:

where the ſafety of the King and Commonwealth are concerned, this general caſe hath the following exceptions.

1ſt. That whenever the proceſs is at the ſuit of the King, the ſheriff or his officer may, after requeſt to have the door opened, and refuſal, break and enter the houſe to do execution, either on the party's goods, or take his body, as the caſe ſhall be. 5 *Co.* 91 *b.*

2dly. So in a writ of ſeiſin or *habere facias poſſeſſionem* in ejectment, the ſheriff may juſtify breaking open the door, if denied entrance by the tenant: for the end of the writ being to give the party full and actual poſſeſſion, conſequently the ſheriff muſt have all power neceſſary for this end; beſides, in this caſe the law does not, after the judgment, look upon the houſe as belonging to the tenant, but to him who has recovered. 5 *Co.* 91.

3dly. Alſo this privilege of a man's houſe relates only to ſuch execution as affects himſelf; and therefore if a *fieri facias* be directed to the ſheriff to levy the goods of *A.* and it happens that *A.*'s goods are in the houſe of *B.* if after requeſt made by the ſheriff to *B.* to deliver theſe goods, he refuſes, the ſheriff may well juſtify the breaking and entring his houſe. 5 *Co.* 93 *a*: 1 *Sid.* 186.

4thly. It hath been adjudged, that the ſheriff, on a *fieri facias* may break open the door of a barn, ſtanding at a diſtance from the dwelling houſe, without requeſting the owner to open the door; in the ſame manner as he may enter a cloſe, *&c.* 1 *Sid.* 186: 1 *Keb.* 698. *S. C.*

5thly. So on a *fieri facias*, when the ſheriff or his officers are once in the houſe, they may break open any chamber-door or trunks for the compleating execution. 2 *Show.* 87.

6thly. So if the ſheriff's bailiffs enter the houſe, the door being open, and the owner locks them in, the ſheriff may juſtify breaking open the door, for the ſetting at liberty the bailiffs; for if, in this caſe, he were obliged to ſtay till he could procure a *homine replegiando*, it might be highly inconvenient; alſo it ſeems, that in this caſe, the locking in the bailiffs is ſuch a diſturbance to the execution, that the court will grant an attachment for it. *Palm.* 52: *Cro. Jac. p.* 555. *S. C*: 2 *Roll. Rep.* 132: *S. C.*

7thly. That if the ſheriff in executing a writ, breaks open a door, where he has no authority for ſo doing by law, yet the execution is good, and the party has no other remedy but an action of treſpaſs againſt the ſheriff. 5 *Co.* 93 *a.*

If the ſheriff refuſes to execute any judicial writ; this is a contempt to the court, for which an attachment will be granted. 1 *Salk.* 323.

So if he executes the writ, and makes a falſe return, the party injured may have *an action on the caſe* againſt him. 1 *Salk.* 323.

4. By a releaſe of *all ſuits*, execution is gone; for no one can have execution without prayer and ſuit, but the King only, in whoſe caſe the judges ought to award execution *ex officio*, without any ſuit: And a releaſe of *all executions* bars the King. By releaſe of *all debts or duties*, the defendant is diſcharged of the *execution*, becauſe the debt or duty on which it is founded is diſcharged: But if the body of a man be taken in *execution*, and the plaintiff releaſe *all actions*, yet he ſhall remain in *execution*. *Co. Lit.* 291. If a judgment is given in action of debt, and the defendant taken in *execution*, the plaintiff releaſeth the *judgment*, the body ſhall be diſcharged of the *execution*. And if the plaintiff after judgment releaſeth *all demands*, the *execution* is diſcharged. *Ibid.* where one is in *execution* at my ſuit, and I bid the ſheriff let him go; this is a good diſcharge and releaſe both to the party and ſheriff. *Popb.* 207.

But if the plaintiff make a releaſe to the defendant *being in execution*, or other act amounting to a diſcharge; it will not be a diſcharge *ipſo facto*, but by this means he may have the ſame. 5 *Rep.* 86: *Dyer* 152.

By *Stat.* 32 *Geo.* 2. *c.* 28, if a defendant charged in execution for any debt not exceeding 100 *l.* (extended by *Stat.* 26 *Geo.* 3. *c.* 44, for five years to 200 *l.*) will, ſurrender all his effects to his creditors (except his apparel, bedding and tools of his trade not amounting in the whole to the value of 10 *l.*) and will make oath of his punctual compliance with the ſtatute, ſuch priſoner may be diſcharged unleſs the creditor inſiſts on detaining him; in which caſe he ſhall allow him 2 *s.* 4 *d. per* week to be paid on the firſt day of every week, and on failure of regular payment the priſoner ſhall be diſcharged, Yet the creditor may at any future time have execution againſt the lands and goods of ſuch defendant though never more againſt his perſon. And on the other hand the creditors may as in caſe of bankruptcy, *compel* under pain of tranſportation for ſeven years, ſuch debtor to make a diſcovery and ſurrender of all his effects for their benefit; whereupon he is alſo entitled to the like diſcharge of his perſon. See further tit. *Priſoner*: *Inſolvent.*

Perſons thus charged in *execution* in order to take the benefit of theſe acts are to exhibit a petition to the court whence the proceſs iſſued, with an account of their whole eſtate upon oath, praying to be diſcharged, *&c.* And thereupon the court ſhall order the priſoner to be brought up, and his creditors ſummoned at a certain day, when the court in a ſummary way is to examine into the ſame, *&c.* and order the eſtate and effects of the priſoner to be aſſigned to the creditors by indorſement on the back of the petition. § 13.

The priſoners (except in *London* and *Weſtminſter*) before they petition any of the courts, from whence the proceſs iſſued, for a rule to be brought up, are to give notice to their creditors in writing, that they deſign to petition, and alſo a true copy of the account or ſchedule of their whole eſtates which they intend to deliver into the court, *&c.* And then, upon ſuch petition, the priſoners ſhall have a rule of court to be brought to the next aſſizes for the county, at an expence not exceeding 12 *d.* a mile, to be paid to the officer out of the effects of the priſoners, *&c.* And the creditors muſt be ſummoned to appear at the ſaid aſſiſes by order ſerved on them, or left at their houſes thirty days before; and at the aſſiſes, the judges on examination ſhall determine the matter, and give judgment and relief; a record of which judgment is to be returned and certified to the court whence the proceſs iſſued, on which the priſoners were taken in execution. No perſon charged in execution, ſhall be allowed to exhibit a petition to any court at law to be diſcharged, purſuant to the above acts, unleſs it be done before the end of the next term after he is charged; and thoſe ſtatutes ſhall not relate to any one taken on a *capias* for running cuſtomable goods, *&c.* § 14, 15.

IV.

IV. 1. Writs of execution bind the property of *goods* only from the time of the *delivery of the writs* to the ſheriff; who upon receipt thereof indorſes the day of the month when received: But *land* is bound from *the day of the judgment*. *Stat.* 29 *Car.* 2. *c.* 3: *Cro. Car.* 149. But the judgment *muſt be docketed* according to the directions of *Stat.* 4 & 5 *W.* & *M. c.* 20; by which for the greater ſecurity of purchaſers, it is enacted, that the clerk of the eſſoins of the court of *C. B.* the clerk of the doggets of the court of King's Bench, and the maſter of the office of pleas in the court of Exchequer, ſhall make and put into an alphabetical dogget, by the defendant's names, a particular of all judgments by confeſſion, *non ſum informatus*, *nihil dicit*, &c. entered in their ſeveral courts, *&c.* and that no judgment not doggeted, and entered in the books as aforeſaid, ſhall affect any lands or tenements as to purchaſers or mortgagees, or have any preference againſt heirs, executors or adminiſtrators, in their adminiſtration of their anceſtors, teſtators, or inteſtate's eſtates. See title *Judgment*.

Notwithſtanding this ſtatute, if after the writ delivered to the ſheriff, and *before execution is executed*, the defendant becomes *bankrupt*, that will hinder execution. 3 *Salk.* 159. See title *Bankrupt*.

The plaintiff takes out execution by *fieri facias* againſt the defendant; all the goods and chattels that he had at the time of the execution, will be liable to it: And where debt or damages are recovered, the plaintiff ſhall have execution of any land the defendant had *at the time of the judgment*; not of the lands he had the day when the firſt writ was purchaſed. *Rol. Abr.* 892. By *Stat.* 29 *C.* 2. *c.* 3, Sheriffs may deliver in execution all lands whereof others ſhall be ſeiſed in truſt for him againſt whom execution is had, on a judgment, *&c.*

The ſale of goods for a valuable conſideration, after judgment, and before execution awarded, is good: And if judgment be given againſt a leſſee for years, and afterwards he ſelleth the term before execution, the term aſſigned *bonâ fide* is not liable; alſo if he aſſign it by fraud, and the aſſignee ſells it to another for a valuable conſideration, it is not liable to execution in the hands of the ſecond aſſignee. *Godb.* 161: 2 *Nelſ. Abr.* 783. If a perſon has a bill of ſale of any goods, in nature of a ſecurity for money, he ſhall be preferred for his debt to one who hath obtained a judgment againſt the debtor before thoſe goods are ſold; for till execution lodged in the ſheriff's hands, a man is owner of his goods, and may diſpoſe of them as he thinks fit, and they are not bound by the judgment. *Preced. Ch.* 286. But where a man generally keeps poſſeſſion of goods after ſale, it will make the ſame void againſt others, by the ſtatute of fraudulent conveyances. And where on an execution, the owner of the goods by agreement was to have the poſſeſſion of them upon certain terms; afterwards another got judgment againſt the ſame perſon, and took thoſe goods in execution: It was adjudged they were liable, and that the firſt execution was by fraud, and void againſt any ſubſequent creditor; becauſe there was no change of the poſſeſſion, and ſo no alteration of property. *Ibid.* 287. See title *Fraud*.

A *fieri facias* being executed fraudulently, a *fieri facias* at the ſuit of another perſon afterwards ſhall ſtand good, and be preferred; and on trial, it is a matter proper to be left to a jury. 1 *Wilſ.* 44.

Where two writs of *fieri facias* againſt the ſame defendant are delivered to the ſheriff on different days; and no ſale is actually made of the defendant's goods, the firſt execution muſt have the priority, even though the ſeizure was firſt made under the ſubſequent execution. 1 *Term Rep.* 729.—But where the ſheriff has given a bill of ſale to the perſon claiming under the ſecond execution, this entitles the latter to ſecure his debt, and the ſheriff is liable to the plaintiff who delivered the firſt writ. *Ib.* 731.

Execution may be made of lands that the defendant hath by purchaſe after the judgment; although he ſell the ſame before execution. *Roll.* 892.

The *Stat.* 8 *An. c.* 14, directs that where there is an execution againſt goods or chattels, of a tenant for life, or years, the plaintiff before removal of the goods by the execution is to pay the landlord the rent of the land, *&c.* ſo as there be not above a year due; and if more be due, paying a year's rent, the plaintiff may proceed in his execution, and the ſheriff ſhall levy the rent paid, as well as the execution money.

But a ground-landlord cannot come in for a year's rent in the caſe of an execution againſt an under-leſſee: for the ſtatute only extends to the immediate landlord. *Str.* 787. And the landlord muſt give the ſheriff notice, or he is not bound. 1 *Str.* 97. Vide 2 *Wilſ.* 140.

2. The King by his prerogative, may have execution of the body, lands, or goods of his debtor, at his election. *Hob.* 60: 2 *Inſt.* 19: 2 *Rol. Abr.* 472.

As to the King's execution of *goods*, the ſame relates to the time of the awarding thereof, which is the *teſte* of the writ, as it was in the caſe of a common perſon at law; for though by the 29 *Car.* 2. *cap.* 3, no execution ſhall bind the property of goods, but from the time of the delivery of the writ to the ſheriff; yet as this act does not extend to the King, an *extent* of a *later teſte* ſuperſedes an *execution* of the goods by a *former* writ; becauſe by the King's prerogative at Common-law, if there had been an execution at the ſubject's ſuit, and afterwards an extent, the execution was ſuperſeded till the extent was executed, becauſe the Public ought to be preferred to private property. 2 *New. Abr.* 365.

If the King's debt be *prior on record*, it binds the lands of the debtor, into whoſe hands ſoever they come, becauſe it is in the nature of an original charge upon the land itſelf, and therefore muſt ſubject every body that claims under it; but if the lands were aliened in whole, or in part, as by granting a jointure before the debt contracted, ſuch alienee claims prior to the charge, and in ſuch caſe the land is not ſubject. See 2 *Roll. Abr.* 156-7: *Moor* 126: 3 *Leon.* 239, 240: 4 *Leon* 10.

Execution for the *King's debt*, or *prerogative execution*, is always preferred before any other executions. 7 *Rep.* 20. And if a defendant is taken by *capias ad ſatisfaciendum*, and before the return thereof a *prerogative* writ iſſues from the *Exchequer*, for the debt of the King, teſted a day before he was taken, here he ſhall be held in execution for the King's debt and that of the ſubject. *Dyer* 197. Lands *intailed* in the hands of the iſſue in tail, when ſubject to the King's extent, and where not, ſee 7 *Rep.* 21. See alſo this Dict. titles *King*; *Extent*.

V. 1. An execution may be ſet aſide as irregular, by *ſuperſedeas*; and the party have reſtitution, *&c.* *Carthew* 460, 461, 468. It hath been reſolved, that a writ of

error is a *ſuperſedeas* from the time of the allowance: though if a writ of execution be executed before the writ of error is allowed, it may be returned afterwards. 1 *Salk.* 321. No writ of execution ſhall be ſtayed by any writ of error or *ſuperſedeas*, *after verdict and judgment*, in any action upon the caſe for payment of money, covenant, detinue, treſpaſs, *&c.* until recognizance be entered into as directed by 3 *Jac.* 1. *cap.* 8. *&c.* Judgment was had againſt a perſon at *Briſtol*, and his goods attached there; and the court of *B. R.* being moved to ſtay the execution until a writ of error brought ſhould be determined, they granted a *habeas corpus*, but nothing to ſtay the execution. 1 *Bulſt.* 268. See title *Error*.

A defendant cannot plead to any writ of execution, (tho' he may in bar of execution to a *ſcire facias* brought;) but if he hath any matter after judgment to diſcharge him of the execution, he is to have *audita querela*. *Co. Lit.* 290. Or, move the court for relief, which is now the uſual method.

If huſband and wife are taken in *execution* for the debt of the wife, the wife ſhall be diſcharged; for the huſband being in execution, the wife ſhall not be ſo alſo, and becauſe the wife hath nothing liable to the execution. 1 *Lev.* 51.

The execution of a *liberate* is good without being returned; and where a man is taken upon a *ca. ſa.* the execution is good, though the writ is not returned: And ſo in all caſes where no inqueſt is to be taken, but only lands delivered, or ſeiſin had, *&c.* which are only matters of fact. 4 *Rep.* 67: 5 *Rep.* 89.

2. There were anciently caſtles, fortreſſes and liberties, where they reſiſted the ſheriff in executing the King's writs, which creating great inconvenience, the ſtatute of *Weſtm.* 2. *cap.* 39. (13 *Ed.* 1.) hindered the ſheriff from returning reſcuers to the King's writ of execution, and directed him to take the *poſſe comitatûs*. See the *Stat.* and 2 *New Abr.* 368.

The judges conſtrued the words of the ſtatute to extend only to *executions*, and not to writs on meſne proceſs; that the ſheriff was not obliged to carry the *poſſe comitatûs* where the man was bailable, for they did not preſume, that in ſuch caſes the King's writ would be diſobeyed. 2 *New Abr.* 368.

The original of commitment for contempts ſeems to be derived from this ſtatute; for ſince the ſheriff was to commit thoſe who reſiſted the proceſs, the judges who awarded ſuch proceſs muſt have the ſame authority to vindicate it; hence, if any one offers any contempt to his proceſs, either by word or deed, he is ſubject to impriſonment during pleaſure, *viz. from whence they ſhall not be delivered without the King's ſpecial commandment*; 2 *New Abr.* 368. See titles *Debt*; *Error*.

See further on *Executions* in civil caſes, in general *Com. Dig.* that title, *&c.*

EXECUTION OF CRIMINALS, Muſt in all caſes as well capital as otherwiſe, be performed by the ſheriff or his deputy; whoſe warrant for ſo doing was anciently by precept under the hand and ſeal of the judge, as is ſtill practiſed in the court of the Lord High Steward upon the execution of a peer. 2 *Hale* 409. Though in the court of the peers in parliament it is done by writ from the King; afterwards it was eſtabliſhed, that in caſe of life the judges may command execution to be done without any writ. *Finch* 478. And now the uſage is for the judge to ſign the calendar, a liſt of all the priſoners' names with the ſeparate judgments in the margin which is left with the ſheriff: the ſheriff on receipt of this warrant is to do execution within a convenient time, which in the country is left at large: in *London*, the Recorder, after reporting to the King in perſon the caſe of the ſeveral priſoners, and receiving his royal pleaſure that the law muſt take its courſe, iſſues his warrant to the ſheriffs directing them to do execution at the day and place aſſigned. See 4 *State Trials* 332: *Foſt.* 43: 4 *Comm.* 403.

It is held by *Coke* (3 *Inſt.* 52,) and *Hale* (2 *H. P. C.* 272, 412,) that even the King cannot change the puniſhment of the law by altering hanging (or burning when uſed) into beheading; tho' when beheading is part of the ſentence, the King may remit the reſt. And notwithſtanding ſome examples to the contrary, *Coke* maintains that *judicandum eſt legibus, non exemplis*. But others have thought, and more juſtly, that this prerogative being founded in mercy, and immemorially exerciſed by the crown, is part of the Common-law. *Foſt.* 270: *F. N. B.* 241 *b*: 19 *Rym. Fœd.* 284: For hitherto, in every inſtance all theſe exchanges have been for more merciful kinds of death; and how far this may alſo fall within the King's power of granting conditional pardons, (*viz.* by remitting a ſeverer kind of death, on condition that the criminal ſubmits to a milder,) is a matter that may bear conſideration. 4 *Comm.* 404.—There are ancient precedents wherein men condemned to be hanged for felony have been beheaded by force of a ſpecial warrant from the King. *Bract.* 104: *Staundf.* 13.

Subſequent juſtices have no power by the *Stat.* 1 *Ed.* 6. *c.* 7, to award execution of perſons condemned by former judges; but if judgment has not been paſſed on the offenders, the other juſtices may give judgment and award execution, *&c.* 2 *Hawk. P. C.* Execution ought to be in the ſame county where the criminal was tried and convicted; except the record of the attainder be removed into *B. R.* which may award execution in the county where it ſits. 3 *Inſt.* 31, 211, 217.

If, upon a record removed, an outlawed perſon confeſs himſelf to be the ſame perſon, execution ſhall be had; but if he deny it, and the King's Attorney confeſſes he is not, he ſhall be diſcharged; though if the Attorney-General take iſſue upon it, the ſame ſhall be tried. 2 *Hale's Hiſt. P. C.* 402, 463. If a perſon, when attainted, ſtands mute to a demand why execution ſhall not go againſt him, the ordinary execution ſhall be awarded. 2 *Hawk. P. C.* In caſe a man condemned to die, come to life after he is hanged, as the judgment is not executed till he is dead, he muſt be hung again. *Finch* 389: 2 *Hal. P. C.* 412: 2 *Hawk. P. C*: 4 *Comm.* 406. And ſo was the law of old; for if a criminal thus eſcaped and fled to ſanctuary he was not permitted to abjure the realm. *Fitz. Ab.* title *Corone.* 335.

The body of a traitor or felon is forfeited to the King by the execution; and he may diſpoſe of it as he pleaſes. The execution of perſons under the age of diſcretion is uſually reſpited, in order to obtain a pardon. 1 *Hawk. P. C. c.* 1. § 8.

By the *Stat.* 25 *Geo.* 2. *c.* 37, perſons convicted of murder are to be executed the day next but one after ſentence; [unleſs that happens to be *Sunday*; for which reaſon murderers are generally tried on a *Friday* to afford them a merciful reſpite of one day more to prepare for eternity;] and their bodies delivered to ſurgeons to be anatomiſed. The judge may ſtay the ſentence, and appoint the body

to

to be hung in chains or anatomiſed, but not buried.—And, by the ſaid ſtatute, to reſcue the body of any ſuch malefactor from the cuſtody of the ſheriff after *execution*, is made felony, puniſhable by tranſportation for ſeven years.—And to reſcue ſuch criminal going to, or during execution, is felony without benefit of clergy. See this Dict. title *Reſcue*. Under this act the time and place of the execution are part of the judgment, but in no other caſe whatever. 4 *Comm.* 404. See further title *Murder*; and as to theſe executions in general, titles *Treaſon*, *Felony* and other proper titles.

Execution may be avoided by a *reprieve* or a pardon; whereof the former is only temporary, the latter (as to which, ſee this Dict. title *Pardon*) is permanent.

A REPRIEVE, from *reprendre* to take back, or more immediately from the participle *repris*;] Is the withdrawing of a ſentence for an interval of time; whereby the execution is ſuſpended. This may be *ex arbitrio judicis*, either before or after judgment; as where the judge is not ſatisfied with the verdict, or the evidence is ſuſpicious, or the indictment is inſufficient, or he is doubtful whether the offence be within clergy; or ſometimes if it be a ſmall felony, or any favourable circumſtances appear in the criminal's character in order to give room to apply to the crown for either an abſolute or conditional pardon. Theſe arbitrary reprieves may be granted or taken off by the juſtices of gaol delivery, although their ſeſſion be finiſhed and their commiſſions expired; but this rather by common uſage than of ſtrict right. 2 *Hal. P. C.* 412.

Reprieves may alſo be *ex neceſſitate legis*.

If a woman quick with child be condemned either for treaſon, or felony, ſhe may alledge her being with child in order to get the execution reſpited; and thereupon the ſheriff, or marſhal ſhall be commanded to take her into a private room, and to impanel a jury of matrons to try and examine whether ſhe be quick with child or not; and if they find her quick with child, the execution ſhall be reſpited till her delivery. But it is agreed, that a woman cannot demand ſuch reſpite of execution by reaſon of her being quick with child more than once; and that ſhe can neither ſave herſelf by this means from pleading upon her arraignment, nor from having judgment pronounced againſt her upon her conviction. Alſo it is ſaid, both by *Staundford* and *Coke*, that a woman can have no advantage from being found with child, unleſs ſhe be alſo found *quick* with child. 2 *Hawk. P. C. c.* 51. § 9, 10.

Another cauſe of regular reprieve is if the offender become *non compos* between the judgment and the award of execution. 1 *Hal. P. C.* 370. For regularly though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he ſhall not be indicted; if after indictment, he ſhall not be convicted; if after conviction, he ſhall not receive judgment; if after judgment, he ſhall not be ordered for execution: for the law knows not but he might have offered ſome reaſon, if in his ſenſes, to have ſtayed theſe reſpective proceedings. It is therefore an invariable rule when any time intervenes between the attainder and the award of execution, to demand of the priſoner what he hath to alledge why execution ſhould not be awarded againſt him; and if he appears to be inſane, the Judge, in his diſcretion, may and ought to reprieve him.

The party may alſo plead in bar of execution; which plea may be either pregnancy; (of which above;) the King's pardon, an act of grace; (See title *Pardon*;) or laſtly diverſity of perſon *viz.* that he is not the ſame that was attainted and the like. In this laſt caſe a jury ſhall be impanelled to try this collateral iſſue, namely the identity of his perſon; and not whether guilty or innocent; for that has been decided before; and in theſe collateral iſſues the trial ſhall be *inſtanter*, and no time allowed the priſoner to make his defence or produce his witneſſes unleſs he will make oath that he is not the perſon attainted. 1 *Sid.* 72: *Foſt.* 42. Neither ſhall any peremptory challenges of the jury be allowed the priſoner; though formerly ſuch challenges were held to be allowable whenever a man's life was in queſtion. 1 *Lev.* 61: *Foſt.* 42, 6.—*Staundf. P. C.* 163: *Co. Litt.* 157: *Hal. Sum.* 259.

Every Judge who hath power to order execution, hath power to grant a reprieve; and execution is often ſtaid on condition of tranſportation. See *Stat.* 8 *Geo.* 3. *c.* 15, for a power given to judges of aſſiſe to reprieve for the purpoſe of obtaining a conditional pardon. See alſo this Dict. titles *Tranſportation*: *Felony*: *Clergy*. 2 *Hawk. P. C. c.* 51.—But no priſoner convicted of any felony, for which he cannot have his clergy, at the Seſſions at the *Old Bailey* for *London* and *Middleſex*, *&c.* ought to be reprieved but in open Seſſions; and reprieves are not to be granted otherwiſe but by the King's expreſs warrant. *Kel.* 4.

EXECUTION OF STATUTES. The court of *Star-Chamber* erected in the reign of King *Hen.* 7. was ſaid to be for the *execution of ſtatutes*, &c. *Stat.* 3 *Hen.* 7. *c.* 1.

EXECUTIONE FACIENDA. A writ commanding execution of a judgment, and diverſly uſed. *Reg. Orig.*

EXECUTIONE FACIENDA IN WITHERNAMIUM. A writ that lies for taking his cattle, who hath conveyed the cattle of another out of the county, ſo that the ſheriff cannot replevy them. *Reg. Orig.* 82. See title *Replevin*.

EXECUTIONE JUDICII. Is a writ directed to the judge of an inferior court to do execution upon a judgment therein, or to return ſome reaſonable cauſe wherefore he delays the execution. *F. N. B.* 20. If execution be not done on the firſt writ, an *alias* ſhall iſſue, and a *pluries* with this clauſe, *vel cauſam nobis ſignifices quare*, *&c.* And if upon this writ execution is not done, or ſome reaſonable cauſe returned why it is delayed, the party ſhall have an attachment againſt him who ought to have done the execution, returnable in *B. R.* or *C. B. New Nat. Br.* 43. If the judgment be in a court of record, this writ ſhall be directed to the *juſtices* of the court where the judgment was given, and not unto the *officer* of the court; for if the officer will not execute the writs directed unto him, nor return them as he ought, the judges of the court may amerce him. *Ibid.* See title *Execution* III. 3, and the *Stat.* 19 *Geo.* 3. *c.* 70. there mentioned.

One may have a writ *de executione judicii* out of the Chancery to execute a judgment, in an inferior court, although a writ of error be brought to remove the record, and reverſe the judgment: if he that brings the writ of error do not take care to have the record tranſcribed, and the writ of error returned up in due time. 1 *Lil. Abr.* 562.

EXECUTIVE POWER. The ſupreme executive power of theſe kingdoms is veſted by our laws in a ſingle perſon, the King, or Queen, for the time being. 1 *Comm.* 190, *&c.* See title *King*.

EXECUTOR. *Lat.*] One appointed by a man's laſt will and teſtament, to perform or *execute* the contents thereof after the teſtator's deceaſe; and to have the diſpoſing of all the teſtator's ſubſtance according to the tenor of the will: he anſwers to the *hæres deſignatus* or *teſtamentarius* in the *Civil law*, as to debts, goods and chattels of his teſtator. *Terms de Ley.*

The rights powers and duties of EXECUTORS and ADMINISTRATORS, being in many reſpects ſimilar, and the ſeveral determinations in the books, being generally applicable to both, it ſeems moſt methodical and uſeful to conſider them together; for which purpoſe, reference is made from title *Adminiſtrator* to this place. The preſent ſummary is founded on *the Commentaries*; having various points and heads from other ſources interwoven on that excellent ground-work. See 2 *Comm. c.* 32. For particular information at large on theſe ſubjects, ſee alſo *Com. Dig.* titles *Adminiſtration* and *Adminiſtrator*; and alſo *Viner's Abridgment* title *Executor.*

I. 1. *Of the Appointment of Adminiſtrators in Caſes of Inteſtacy.*
2. *How Adminiſtrations may be revoked.*
II. *Of the Appointment of Executors, and particular Adminiſtrators*: and ſee IV.
III. *Of Adminiſtrations to* Next of Kin, *or on Failure of them*: and ſee V. 8.
IV. *Of the Diſtinction in Intereſt between Executors and Adminiſtrators.*
V. *Of the Duty of Executors and Adminiſtrators.*
1. *Of Executor* de ſon tort.
2. *Of burying the deceaſed.*
3. *Proving the Will.*
4. *Making Inventory.*
5. *Collecting the Goods.*
6. *Paying the Debts in due order of Priority.*
7. ——— *Legacies*; and ſee title *Legacy.*
8. *Diſtribution of the Reſidue, to the Executor himſelf or next of kin; and herein,*
9. ——— *Of the Cuſtoms of* London *and* York, *as to Inteſtates.*
VI. 1. *Of Actions by and againſt Adminiſtrators.*
2. ——— *Executors.—And herein* of Devaſtavit.

I. 1. In caſe a perſon makes no diſpoſition of his effects by will, he is ſaid to die *inteſtate*; and in ſuch caſes, it is ſaid, that by the old law, the king was entitled to ſeize upon his goods, as the general truſtee of the kingdom. 9 *Rep.* 38.—This prerogative the king continued to exerciſe for ſome time, by his own miniſters of juſtice; and probably in the county court where matters of all kinds were determined; and it was granted as a franchiſe to many lords of manors and others, who have to this day a preſcriptive right to grant adminiſtration to their inteſtate tenants and ſuitors, in their own Courts-baron, and other courts, or to have their wills there proved, in caſe they make any. 9 *Rep.* 37. Afterwards the crown, in favour of the church, inveſted the prelates with this branch of the prerogative; and then the Ordinary might ſeize the goods and keep them without waſting; and alſo might give, alien or ſell them at his will, and diſpoſe of the money *in pios uſus*; being thus, probably, merely the king's almoner in his dioceſe. *Finch Law* 173, 4: *Plowd.* 277.

As the Ordinary had thus the diſpoſition of inteſtates' effects, the probate of wills of courſe followed; for it was thought juſt and natural, that the will of the deceaſed ſhould be proved to the ſatisfaction of the prelate, whoſe right of diſtributing his goods was ſuperſeded thereby.

By degrees, through an abuſe of this power of the Ordinary, often complained of before it was redreſſed, the Popiſh clergy ſecured the inteſtate's eſtate to themſelves, without paying even his lawful debts; for which reaſon it was enacted by *Stat. Weſtm.* 2. (13 *E.* 1. A.D. 1285.) *c.* 19, that the Ordinary ſhall be bound to pay the debts of the inteſtate, ſo far as his goods will extend, in the ſame manner as executors were bound in caſe of a will.—But ſtill the reſidue remained in the hands of the Ordinary, and the continued abuſe of this power at length produced the *Stat.* 31 *E.* 4. *c.* 11; (A.D. 1357;) which provides, that in caſe of inteſtacy, the Ordinary ſhall depute the *neareſt* and moſt lawful friends of the deceaſed to adminiſter his goods, which *adminiſtrators* are put upon the ſame footing, with regard to ſuits, and to accounting, as executors.—The next and moſt lawful friend is interpreted to be the *next of blood*, who is under no legal diſabilities. 9 *Rep.* 39.—The *Stat.* 21 *H.* 8. *c.* 5, enlarges the power of the eccleſiaſtical judge a little more; permitting him to grant adminiſtration *either* to the widow *or* the next of kin, or to *both* of them, at his diſcretion; and where two or more perſons are in the ſame degree of kindred, gives the Ordinary his election to accept which he pleaſes. 1 *Sid.* 179: *Raym.* 93: 1 *Show.* 351: 1 *Salk.* 36.

On this footing now ſtands the general law relative to the appointment of adminiſtrators—Who are the *next of blood*, or as it is uſually called *next of kin*, is ſtated *poſt.* III. & V. 8.

2. The Ordinary ought not to repeal letters of *adminiſtration* which he hath duly granted; but if they are granted to ſuch perſons who ought not by law to have them, he may revoke them. 1 *Lill.* 38. For juſt cauſe they may be revoked, as where a perſon is a lunatick, *&c.* And if granted where not grantable, they may be repealed by the delegates. 1 *Lev.* 157, 186. If *adminiſtration* is granted, and afterwards a will is produced and proved, the *adminiſtration* ſhall be revoked; and all acts done by the *adminiſtrator* are void. 2 *Rol. Abr.* 907. If a citation is granted againſt a ſtranger *adminiſtrator*, and his *adminiſtration* is revoked by ſentence, yet all acts done by him *bonâ fide* as *adminiſtrator* are good till the revocation; the *adminiſtration* being only voidable. 6 *Rep.* 18: 8 *Rep.* 135. But if there is any fraud, a creditor may have relief upon the *Stat.* 13 *Eliz. cap.* 5. And when the firſt *adminiſtration* is merely void, as granted by a wrong perſon, *&c.* it is otherwiſe: ſo when there is an appeal from the grant of the *adminiſtration*, to ſuſpend the former decree. 5 *Rep.* 30. *Adminiſtration* was granted to *J. S.* and he releaſed all actions, and afterwards the *adminiſtration* was revoked, and declared void; this releaſe was held good. 1 *Brownl.* 51. *Qu.* If it had been without conſideration? If an *adminiſtrator* gives goods away, and then *adminiſtration* is revoked or repealed, 'tis ſaid the gift is good; except it be by *covin*, when it ſhall be void only againſt a creditor by ſtatute: and where the adminiſtrator after many goods adminiſtered, had his adminiſtration revoked, and it was committed

committed to *B.* who ſued the firſt adminiſtrator for goods unduly adminiſtered, it was held that there was no remedy but in Chancery. 6 *Rep.* 19: *Clayt.* 44: 4 *Shep. Ab.* 89: See *Hob.* 266.—But in ſuch a caſe as this it ſeems that the ſecond adminiſtrator might maintain an action at law againſt the firſt, for money had and received, &c. or trover for any goods remaining in his poſſeſſion, or by him converted and not duly adminiſtered.

In 2 *Leon* 155, it is ſaid, where the firſt adminiſtration is *void*, the adminiſtrator who under that adminiſtration takes the goods is a treſpaſſer. Letters of adminiſtration obtained by fraud are void. 3 *Rep.* 78: 6 *Rep.* 18, 19: 8 *Rep.* 143.

See the ſeveral caſes on this part of the ſubject collected in 1 *Com. Dig.* title *Adminiſtrator* (B. 8,); the reſult of which (as given in 4 *Burn's Eccleſiaſtical Law* 236,) is, that an adminiſtration may be repealed, although not arbitrarily, yet where there ſhall be a juſt cauſe for ſo doing; of which the temporal courts are to judge.

II. All perſons are capable of being Executors, that are capable of making wills, and many others beſides; as feme-coverts and infants: nay even infants unborn, or *in ventre ſes meres* may be made Executors. *Weſt. Symb.* *p.* 1. § 635.

A popiſh recuſant convict cannot be an executor. 9 *Rep.* 37. A mayor and commonalty may be executors. 1 *Rol. Abr.* 915. And if the King is made executor, he appoints others to take the execution of the will upon them, and to take account. 5 *Rep.* 29.

It ſeems agreed, that by our law, an alien, or one born out of the allegiance of our King, may be an executor or adminiſtrator; alſo it hath been adjudged, that ſuch a one ſhall have adminiſtration of leaſes as well as perſonal things, becauſe he hath them *in auter droit*, and not to his own uſe. *Off. of Ex.* 17.

But it has been long doubted, whether an alien enemy ſhould maintain an action as executor; for on the one hand it is ſaid, that by the policy of the law, alien enemies ſhall not be admitted to actions to recover effects, which may be carried out of the kingdom to weaken ourſelves and enrich the enemy, therefore public utility muſt be preferred to private convenience; but on the other hand it is ſaid, that thoſe effects of the teſtator are not forfeited to the King by way of reprifal, becauſe they are not the alien enemy's, for he is to recover them for others; and if he allows ſuch alien enemies to poſſeſs the effects as well as an alien friend, he muſt allow them power to recover, ſince in that there is no difference, and by conſequence he muſt not be diſabled to ſue for them; if it were otherwiſe, it would be a prejudice to the King's ſubjects, who could not recover their debts from the alien executor, by his not being able to get in the aſſets of the teſtator. *Cro. Eliz.* 683: *Moor* 431: *Carter* 49, 191: *Skin.* 370.

But an excommunicated perſon cannot be an executor or adminiſtrator, for by the excommunication he is excluded from the body of the church, and is incapable to lay out the goods of the deceaſed to pious uſes. *Co. Lit.* 134: *Swinb.* 349: *Godolph.* 85.

No infant can act as Executor till the age of 17 years; till which time adminiſtration muſt be granted to ſome other *durante minore ætate*. *Went. Off. of Ex. c.* 18: 6 *Rep.* 67: 4 *Inſt.* 335.

And if the right of adminiſtration devolves on an infant, adminiſtration *durante minore ætate* is to be granted till he arrives at 21. *Godolph.* 102: 5 *Co.* 29: *Hob.* 250: *Yelv.* 128.

And as ſuch an adminiſtrator is but in nature of a curator for the infant, and has no intereſt or benefit in the teſtator or inteſtate's eſtate, but in right of the infant, it has been always held diſcretionary in the Ordinary to whom to grant it, and therefore it hath been frequently adjudged, that he is not obliged within the *Stat.* 21 *H.* 8. *c.* 5, to grant it to the next of kin either of the deceaſed, or the infant. *Hob.* 250: 1 *Vent.* 219: 1 *Keb.* 549: 3 *Mod.* 24: 1 *New. Abr.* 381.

If an infant, and one of full age, are made executors, he who is of full age may take out adminiſtration *durante minori ætate* of the infant, and may declare as executor or adminiſtrator *durante minori ætate*; and there is no abſurdity in this caſe, that there ſhould be an executor and adminiſtrator to the ſame party. 1 *New. Abr.* 381.

In like manner as it may be granted *durante abſentiâ* or *pendente lite*; when the executor is out of the realm; 1 *Lutw.* 342; or when a ſuit is commenced in the Eccleſiaſtical court, touching the validity of the will. 2 *P. Wms.* 589. 590.

The appointment of an executor is eſſential to the making of a will; (*Went. c.* 1: *Plowd.* 281;) and it may be performed either by expreſs words, or ſuch as ſtrongly imply the ſame: but if the teſtator makes an incomplete will without naming any executors, or if he names incapable perſons, or if the executors named refuſe to act (See 9 *Rep.* 37: *Went. Off. Ex.* 38,) in any of theſe caſes adminiſtration muſt be granted *cum teſtamento annexo* to ſome other perſons; (1 *Rol. Ab.* 907: *Comb.* 20;) and then the duty of the adminiſtrator, as alſo when he is conſtituted only *durante minore ætate*, &c. is very little different from that of an Executor, See *Glanvil, l.* 7. *c.* 6.

A man may appoint two or more perſons to be *joint Executors*, and they are accounted in law but as one perſon. See poſt. V. 3, 5.—Such joint executors ſhall not be charged by the acts of their companions, any further than for effects *actually* come to their hands. *Moor* 620: *Cro. Eliz.* 318: 2 *Leon.* 209.—But if two or more executors *join in a receipt* [in writing] and one of them only actually receives the money, each is liable for the whole, *as to creditors at law*; but not as to legatees, or next of kin. 1 *Salk.* 318.—If joint executors by agreement among themſelves, agree that each ſhall intermeddle with a certain part of the teſtator's eſtate, yet each ſhall be chargeable for the whole (to creditors) by agreeing to the others' receipts. *Hard.* 314.

III. If the deceaſed died wholly inteſtate, without making either will or executors, then general letters of adminiſtration muſt be granted to ſuch adminiſtrator as the *Stats.* 31 *E.* 3. *c.* 11, and 29 *H.* 8. *c.* 4, (See ante 1,) direct; in conſequence of which it is to be obſerved; 1ſt. That the Ordinary is compellable to grant adminiſtration of the goods of the wife to the *huſband*, or his repreſentatives; (*Cro. Car.* 106; *Stat.* 20 *Car.* 2. *c.* 3: 1 *P. Wms.* 381;) and of the huſband's effects to the widow, or next of kin. *Salk.* 36: *Stra.* 532.—2dly. That among the kindred, thoſe are to be preferred that are the neareſt in degree to the inteſtate.—3dly. That this nearneſs of degree ſhall be reckoned according to the computation of the civilians; (*Pre. Ch.* 593;) and not of the

canoniſts, which the law of *England* adopts in the deſcent of real eſtates; (See title *Deſcent*)—And therefore in the firſt place the *children*, or on failure of children, the *parents* of the deceaſed are entitled to adminiſtration; both which are indeed in the firſt degree, but the children are allowed the preference. *Godolph. p. 2. c. 34. § 1*: 2 *Vern.* 125.—Then follow *brothers*; *grandfathers*; (*Pre. Ch.* 527: 1 *P. Wms.* 41;) *uncles*, or *nephews*; (*Atk.* 455;) and the females of each claſs reſpectively; and Laſtly, *Couſins*.—4th. The half blood is admitted to the adminiſtration as well as the whole; for they are of the kindred of the inteſtate, and only excluded from inheritances of land, upon feodal reaſons. Therefore the brother of the half blood ſhall exclude the uncle of the whole blood; (1 *Vent.* 425;) And the Ordinary may grant adminiſtration to the ſiſter of the half, or the brother of the whole blood, at his own diſcretion. *Aleyn*, 36: *Sty.* 74. See poſt. V. 8.—5. If none of the kindred will take out adminiſtration, a *creditor* may by cuſtom do it. *Salk.* 38.—6thly. If the Executor refuſes, or dies inteſtate, the adminiſtration may be granted to the *reſiduary legatee*, in excluſion of the next of kin. 1 *Sid.* 281: 1 *Vent.* 219. And laſtly the Ordinary may, in defect of all theſe, commit adminiſtration, (as he might have done before the *Stat.* 31 *E.* 3. *c.* 11: *Plowd.* 278;) to ſuch diſcrete perſon as he approves of: or (in theſe caſes as well as in that of an Executor's refuſal, *Cro. El.* 92,) may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor adminiſtrator; his only buſineſs being to keep the goods in his ſafe cuſtody; (*Went. ch.* 14;) and to do other acts for the benefit of ſuch as are entitled to the property of the deceaſed. 2 *Inſt.* 398. If a baſtard who has no kindred, being *nullius filius*, or any one elſe that has no kindred, dies inteſtate, and without wife or child, it hath formerly been held, (*Salk.* 37,) that the Ordinary might ſeize his goods, and diſpoſe of them *in pios uſus*. But the uſual courſe now is, for ſome one to procure letters patent, or other authority from the King; and then the Ordinary of courſe grants adminiſtration to ſuch appointee of the crown. 3 *P. Wms.* 33.

IV. The intereſt, veſted in the executor by the will of the deceaſed, may be continued and kept alive by the will of the ſame executor; ſo that the executor of *A.*'s executor, is to all intents and purpoſes the executor and repreſentative of *A.* himſelf; See 25 *Ed.* 3. *ſt.* 5. *c.* 5: 1 *Leon.* 275; but the executor of *A.*'s adminiſtrator, or the adminiſtrator of *A.*'s executor, is not the repreſentative of *A. Bro. Abr.* title *Adminiſtrator* 7. For the power of an executor is founded upon the ſpecial confidence and actual appointment of the deceaſed; and ſuch executor is therefore allowed to tranſmit that power to another, in whom, he hath equal confidence: but the adminiſtrator of *A.* is merely the officer of the Ordinary, preſcribed to him by act of parliament, in whom the deceaſed has repoſed no truſt at all; and therefore, on the death of that officer, it reſults back to the Ordinary to appoint another. And, with regard to the adminiſtrator of *A.*'s executor, he has clearly no privity or relation to *A.* being only commiſſioned to adminiſter the effects of the inteſtate executor, and not of the original teſtator. Wherefore in both theſe caſes, and whenever the courſe of repreſentation from executor to executor is interrupted by any one adminiſtration, it is neceſſary for the Ordinary to commit adminiſtration afreſh, *of the goods* of the deceaſed *not* adminiſtered by the former executor or adminiſtrator. And this adminiſtrator, *de bonis non*, is the only legal repreſentative of the deceaſed in matters of perſonal property. *Sty.* 225. But he may, as well as an original adminiſtrator, have only a *limited* or *ſpecial* adminiſtration committed to his care, *viz.* of certain ſpecific effects, ſuch as a term of years and the like; the reſt being committed to others. 1 *Roll. Abr.* 908: *Godolph. p. 2. c.* 30: *Salk.* 36: 1 *New Abr.* 385. See alſo the *Stats.* 43 *Eliz. c.* 8: 30 *Car.* 2. *c.* 7.

If an executor dies *before probate*, ſuch an executor's executor cannot prove the will, becauſe he is not named therein, and no one can prove a will but he who is named executor in it; but if the firſt executor had proved the will, then his executor might have been executor to the firſt teſtator, there requiring no new probate. 1 *Salk*, 299.

Though an executor of an executor may thus be executor to the firſt teſtator; yet he may take upon him the executorſhip of his own teſtator, and refuſe to intermeddle with the eſtate of the other: and if the firſt executor refuſes, (as if he dies before probate,) his executor ſhall not adminiſter to the firſt teſtator. *Dyer* 372.

V. 1. The duty and office of Executors and Adminiſtrators in general are very much the ſame; excepting, firſt, that the executor is bound to perform a will, which an adminiſtrator is not, unleſs where a teſtament is annexed to his adminiſtration, and then he differs ſtill leſs from an executor: and, ſecondly, that an executor may do many acts before he proves the will; *Wentw. ch.* 3; but an adminiſtrator may do nothing till letters of adminiſtration are iſſued; for the former derives his power from the will and not from the probate; the latter owes his entirely to the appointment of the Ordinary. *Com.* 51.

If a ſtranger takes upon him to act as executor, without any juſt authority; (as by intermeddling with the goods of the deceaſed, 5 *Rep.* 33, 34; and many other tranſactions, *Wentw. ch.* 14: *Stat.* 43 *Eliz. c.* 8; he is called in law an *Executor of his own wrong*, [*de ſon tort*,] and is liable to all the trouble of an executorſhip, without any of the profits or advantages: but merely doing acts of neceſſity or humanity, as locking up the goods, or burying the corps of the deceaſed, will not amount to ſuch an intermeddling, as will charge a man as executor of his own wrong. *Dyer* 166. Such a one cannot bring any action himſelf in right of the deceaſed, (*Bro. Abr.* title *Adminiſtrator* 8,) but actions may be brought againſt him. And, in all actions by creditors againſt ſuch an officious intruder, he ſhall be named an executor, generally; (5 *Rep.* 31;) for the moſt obvious concluſion, which ſtrangers can form, from his conduct is that he hath a will of the deceaſed, wherein he is named executor, but hath not yet taken probate thereof, 12 *Mod.* 471. He is chargeable with the debts of the deceaſed, ſo far as *aſſets* comes to his hands. *Dyer* 166. And as againſt creditors in general, ſhall be allowed all payments made to any other creditor in the ſame or ſuperior degree. 1 *Chan. Caſ.* 33. himſelf only excepted; in which he differs from a rightful executor. 5 *Rep.* 30: *Moor* 527. And though, as againſt the rightful executor or adminiſtrator, he

he cannot plead ſuch payment, yet it ſhall be allowed him in mitigation of damages; (12 *Mod.* 441. 471;) unleſs perhaps upon a deficiency of aſſets, whereby the rightful executor may be prevented from ſatisfying his own debt. *Wentw. ch.* 14.

When there is a rightful executor, and a ſtranger poſſeſſes himſelf of the teſtator's goods, without doing any further act as executor, he is not an executor *de ſon tort*, but a treſpaſſer; *Dyer* 105: *Rol. Abr.* 918. See 5 *Rep.* 82. An executor of his own wrong may be ſued as executor; and he ſhall be ſued for legacies, as well as a rightful executor. *Noy* 13. Though an executor *de ſon tort* cannot maintain any ſuit or action, becauſe he cannot produce any will to juſtify it, yet he will be ſeverely puniſhed for a falſe plea; for in ſuch caſe the execution ſhall be awarded for the whole debt, though he meddled with a thing of very ſmall value. *Noy* 69.

Debt was brought againſt an executor of his own wrong, who pleaded that he *never was executor*, nor adminiſtred as ſuch; it was held, not to be material whether he had aſſets or no, but to prove that *he had adminiſtered any thing* was enough; for this would make him chargeable with the debt: but if he had not pleaded falſely, he would have been liable for no more than the value of the goods of the deceaſed. *Style* 120.

If an executor of his own wrong poſſeſſes himſelf of goods, and afterwards adminiſtration is granted him, he may by virtue thereof retain goods for his own debt. 5 *Rep.* 30. And where a man took poſſeſſion of an inteſtate's goods wrongfully, and ſold them to another, and then took out adminiſtration, it was adjudged that the ſale was good by relation. *Moor* 126. An executor *de ſon tort* ſhall be allowed in equity, all ſuch payments which a rightful executor ought to have paid. 2 *Chanc. Rep.* 33. See further *poſt.* VI. 2, and this Dict. title *Devaſtavit.*

2. The executor or adminiſtrator muſt *bury* the deceaſed in a manner ſuitable to the eſtate which he leaves behind him. Neceſſary funeral expences are allowed, previous to all other debts and charges; but if the executor, or adminiſtrator be extravagant, it is a ſpecies of *devaſtation* or waſte of the ſubſtance of the deceaſed; and ſhall only be prejudicial to himſelf, and not to the creditors or legatees of the deceaſed. *Salk.* 196: *Godolph. p.* 2. *c.* 26. § 2. See *poſt.* VI. 2, and this Dict. title *Devaſtavit.*

3. The executor or adminiſtrator *durante minore ætate*, or *durante abſentiâ*, or *cum teſtamento annexo*, muſt prove *the will* of the deceaſed: which is done either in common form, which is only upon his own oath before the Ordinary, or his ſurrogate; or *per teſtes*, in more ſolemn form of law, in caſe the validity of the will be diſputed. *Godolph. p.* 1. *c.* 20. § 4. When the will is ſo proved, the original muſt be depoſited in the regiſtry of the Ordinary; and a copy thereof in parchment is made out under the ſeal of the Ordinary; and delivered to the executor or adminiſtrator, together with a certificate of its having been proved before him: all which together is uſually ſtiled the probate.

If there are many executors of a will, and one of them only proves the will, and takes upon him the executorſhip, it is ſufficient for all of them; but the reſt after may join with him, and intermeddle with the teſtator's eſtate: but if they all of them *refuſe* the executorſhip, none of them will ever afterwards be admitted to prove the will; the Ordinary in this caſe grants adminiſtration with the will annexed. 9 *Rep.* 37: 1 *Rep.* 113: *Perk.* 485.

As the teſtator has thought the executor appointed a proper perſon to be intruſted with his affairs, the Ordinary cannot adjudge him diſabled or *incapax*; but a *mandamus* ſhall iſſue from *B. R.* for the Ordinary to grant probate of the will, and admit the executor, if he refuſe him: neither can the Ordinary inſiſt upon ſecurity from the executor, as the teſtator hath thought him able and qualified. 1 *Salk.* 299.

And although an executor becomes bankrupt, yet it is ſaid the Ordinary cannot grant adminiſtration to another: but if an executor become *non compos*, the Spiritual Court may commit adminiſtration for this natural diſability. 1 *Salk.* 307. If an executor takes goods of the teſtator's, and convert them to his own uſe; or if he either receive or pay debts of the teſtator, or give bond for payment; make acquittances for them, or demand the teſtator's debts as executor; or give away the goods of the teſtator, *&c.* theſe are an adminiſtration, ſo that he cannot afterwards refuſe the executorſhip: and it has been held, that if the wife of the teſtator take more apparel than is neceſſary, it is an adminiſtration. *Offic. Exec.* 39.

It is uſual when there is a conteſt about a will, or when the right of adminiſtration comes in queſtion, to enter a caveat in the Spiritual Court, which by their law is ſaid to ſtand in force for three months. *Godolph.* 258: *Goldſb.* 119: 2 *Rol. Rep.* 6: *Cro. Jac.* 463, 4.

But it is ſaid, that our law takes no notice of a caveat, and that it is but a mere cautionary act done by a ſtranger, to prevent the Ordinary from doing wrong; and that thefore, if adminiſtration be granted pending a caveat, this is valid in our law, though by the law in the Spiritual Court, it may be ſuch an irregularity as will be ſufficient to repeal it. 1 *Rol. Rep.* 191: *Cro. Jac.* 463: 2 *Rol. Rep.* 6.

In defect of any will, the perſon entitled to be adminiſtrator, muſt alſo at this period take out letters of adminiſtration under the ſeal of the Ordinary; whereby an executorial power to collect and adminiſter, that is, diſpoſe of the goods of the deceaſed, is veſted in him: and he muſt by *Stat.* 22 & 23 *Car.* 2. *c.* 10, enter into a bond with ſureties, faithfully to execute his truſt. If all the goods of the deceaſed lie within the ſame juriſdiction, a probate before the Ordinary, or an adminiſtration granted by him, are the only proper ones: but if the deceaſed had *bona notabilia*, or chattels to the value of a *hundred ſhillings*, in two diſtinct dioceſes or juriſdictions, then the will muſt be proved, or adminiſtration taken out, before the metropolitan of the province, by way of ſpecial prerogative: 4 *Inſt.* 335; Hence the courts, where the validity of ſuch wills is tried, and the offices where they are regiſtered, are called the prerogative courts, and the prerogative offices, of the provinces of *Canterbury* and *York*. *Lynedewode*, who flouriſhed in the beginning of the 15th century, and was official to archbiſhop *Chicheley*, interprets theſe hundred ſhillings to ſignify *ſolidos legales*; of which he tells us ſeventy-two amounted to a pound of gold, which in his time was valued at fifty nobles or 16*l.* 13*s.* 4*d.* He therefore computes (*Provinc. l.* 3. *t.* 13,) that the hundred ſhillings, which conſtituted *bona notabilia*, were then equal in current money to 23*l.* 3*s.* $0\frac{1}{4}$. This will account for what is ſaid in our antient books, that *bona notabilia* in the dioceſe of *London* (4 *Inſt.* 335, *Godolph. p.* 2. *c.* 22,) and indeed every where elſe (*Plowd.* 281,)

231,) were of the value of ten pounds *by compoſition*: for, if we purſue the calculations of *Lynedewode* to their full extent, and conſider that a pound of gold is now almoſt equal to an hundred and fifty nobles, we ſhall extend the preſent amount of *bona notabilia*, to nearly 70*l.* But the makers of the canons of 1603, underſtood this antient rule to be meant of the ſhillings current in the reign of *James* I. and have therefore directed (*Can.* 92,) that five pounds ſhall for the future be the ſtandard of *bona notabilia*; ſo as to make the probate fall within the archiepiſcopal prerogative. Which prerogative (properly underſtood) is grounded upon this reaſonable foundation: that as the biſhops themſelves were originally the adminiſtrators to all inteſtates in their own dioceſe, and as the preſent adminiſtrators are in effect no other than their officers or ſubſtitutes, it was impoſſible for the biſhops, or thoſe who acted under them, to collect any goods of the deceaſed, other than ſuch as lay within their own dioceſes, beyond which their epiſcopal authority extends not. But it would be extremely troubleſome, if as many adminiſtrations were to be granted, as there are dioceſes within which the deceaſed had *bona notabilia*; beſides the uncertainty which creditors and legatees would be at, in caſe different adminiſtrators were appointed, to aſcertain the fund out of which their demands were to be paid. A prerogative is therefore very prudently veſted in the metropolitan of each province, to make in ſuch caſes one adminiſtration ſerve for all.

4. The executor or adminiſtrator is to make an *inventory* of all the goods and chattels, whether in poſſeſſion or action of the deceaſed; which he is to deliver in to the Ordinary upon oath, if thereunto lawfully required. *Stat.* 21 *H.* 8. *c.* 5: By *Stat.* 1 *Jac.* 2. *c.* 17. § 6, No adminiſtrator ſhall be cited into court to render *an account* of the perſonal eſtate of his inteſtate, otherwiſe than by an inventory thereof, unleſs at the inſtance of ſome perſon in behalf of a minor, or having a demand out of ſuch eſtate as a creditor, or next of kin; nor ſhall be compellable to account before any Ordinary or judge empowered by the act of 22 & 23 *Car.* 2. *cap.* 10, otherwiſe than as aforeſaid. See 9 *Rep.* 39: 2 *Inſt.* 600: *Raym.* 407.

5. He is to *collect* all the goods and chattels ſo inventoried; and to that end he has very large powers and intereſts conferred on him by law; being the repreſentative of the deceaſed; *Co. Litt.* 209; and having the ſame property in his goods as the principal had when living, and the ſame remedies to recover them. And if there be two or more executors, a ſale or releaſe by one of them ſhall be good againſt all the reſt. *Dyer*, 23: *Cro. Eliz.* 347: *Sid.* 33: *Brownl.* 183; unleſs ſuch releaſe be obtained by fraud. *Moor.* 620: *Cro. Eliz.* 318: 2 *Leon.* 209: but in caſe of adminiſtrators it is otherwiſe. 1 *Atk.* 460. Whatever is ſo recovered, that is of a ſaleable nature and may be converted into ready money, is called *aſſets* in the hands of the executor or adminiſtrator, that is, *ſufficient* or enough (from the French *aſſez*) to make him chargeable to a creditor or legatee, ſo far as ſuch goods and chattels extend. Whatever *aſſets* ſo come to his hands, he may convert into ready money, to anſwer the demands that may be made upon him: See 6 *Rep.* 47: *Co. Lit.* 374. In actions againſt executors, the jury muſt find aſſets to what value, for the plaintiff ſhall recover only according to the value of aſſets found. 1 *Ro. Rep.* 58. As to *real aſſets by deſcent*, ſee this Dict. title *Aſſets*.

The chattels real and perſonal of the teſtator coming to the executor, are leaſes for years, rent due, corn growing and cut, graſs cut and ſevered, &c. cattle, money, plate, houſhold goods, &c. *Co. Lit.* 118: *Dyer* 130, 537. An executor having a leaſe for years of land in right of the deceaſed, if he purchaſe the fee, whereby the leaſe is extinct, yet this leaſe ſhall continue to be aſſets, as to the creditors and legatees. 1 *Rep.* 87: *Bro. Leaſe* 63. Though a plantation be an eſtate of inheritance, yet being in a foreign country, it is a chattel in the hands of executors to pay debts. 1 *Vent.* 358. The executor is not only intitled to all perſonal goods and chattels of the teſtator, of what nature ſoever they are; but they are alſo accounted to be in his poſſeſſion, though they are not actually ſo; for he may maintain an action againſt any one who detains them from him: he is likewiſe intitled to *things in action*; as right of execution on a judgment, bond, ſtatute, &c. Alſo to money awarded on arbitration, where the party dies before the day, &c. *Co. Lit.* 209: 2 *Vent.* 249: 1 *Danv. Abr.* 549.

If goods of the teſtator are kept from the executor, he may ſue for them in the Spiritual Court, or at common law; and if one ſeiſed of a meſſuage in fee, &c. hath goods in the houſe, and makes a will and executors, and dies, the executors may enter into the houſe, and carry away the goods. *Lit.* 60. An executor may, in convenient time after the teſtator's death, enter into a houſe deſcended to the heir, for removing and carrying away the goods; ſo as the door be open, or the key be in the door. *Offic. Exec.* 8. He may take the goods and chattels to himſelf, or give power to another to ſeize them for him. 9 *Rep.* 38. If an executor with his own goods redeem the goods of the teſtator; or pays the teſtator's debts, &c. the goods of the teſtator ſhall, for ſo much, be changed into the proper goods of the executor. *Jenk. Cent.* 188.

Where a man by will deviſes that his lands ſhall be ſold for payment of *debts*, his executors ſhall ſell the land, to whom it belongs to pay the debts. 2 *Leon. c.* 276. And if lands are deviſed to executors to be ſold for payment of the teſtator's debts, thoſe executors that act in the executorſhip, or that will ſell, may do it without the others. *Co. Lit.* 113. By *Stat.* 21 *H.* 8. *c.* 4; Bargains and ſales of lands, &c. deviſed to be ſold by executors, ſhall be as good, if made by ſuch of the executors only as take upon them the execution of the will, as if all the executors had joined in the ſale. If lands are thus deviſed to pay debts, a ſurviving executor may ſell them; but if the deviſe be, *that the executor ſhall ſell* the land, and not *of the land to them* to be ſold, here being only an *authority*, not an *intereſt*; if one dies the other cannot ſell. 1 *Lev.* 203.

6. The Executor or Adminiſtrator muſt pay the *debts* of the deceaſed. In payment of debts he muſt obſerve the rules of priority; otherwiſe, on deficiency of aſſets, if he pay thoſe of a lower degree firſt, he muſt anſwer thoſe of a higher out of his own eſtate. And firſt he may pay all funeral charges, and the expences of proving the will, and the like. Secondly, debts due to the King on record or ſpecialty. 1 *And.* 129. Thirdly, ſuch debts as are by particular ſtatutes to be preferred to all others;

others; as the forfeitures for not burying in woollen; (*Stat.* 30 *Car.* 2. *c.* 3;) money due upon poor rates (*Stat.* 17 *Geo.* 2. *c.* 38;) for letters to the poſt-office (*Stat.* 9 *Ann. c.* 10;) and ſome others. Fourthly, debts of record; as judgments (docquetted according to the *Stat.* 4 & 5 *W. & M. c.* 20.) ſtatutes and recognizances. (4 *Rep.* 60: *Cro. Car.* 363.) Fifthly, debts due on ſpecial contracts; as for rent; (for which the leſſor has often a better remedy in his own hands, by diſtraining;) or upon bonds, covenants, and the like under ſeal. (*Wentw. ch.* 12.)

Laſtly, debts on ſimple contracts, *viz.* upon notes unſealed and verbal promiſes. Among theſe ſimple contracts, ſervants' wages are by ſome (1 *Rol. Abr.* 927.) with reaſon preferred to any other: and ſo ſtood the antient law, according to *Bracton.* (*lib.* 2. *c.* 26.) and *Fleta,* (*b.* 2. *c.* 56. § 10.) Among debts of equal degree, the executor or adminiſtrator is allowed to pay himſelf firſt; by retaining in his hands ſo much as his debt amounts to. 10 *Mod.* 496. If a creditor conſtitutes his debtor his executor, this is a releaſe or diſcharge of the debt whether the executor acts or not. (*Plowd.* 184: *Salk.* 299.) provided there be aſſets ſufficient to pay the teſtator's debts: for, though this diſcharge of the debt ſhall take place of all legacies, yet it were unfair to defraud the teſtator's creditors of their juſt debts by a releaſe which is abſolutely voluntary. *Salk.* 303: 1 *Rol. Abr.* 921: 5 *Rep.* 30: 8 *Rep.* 136. But if a perſon dies inteſtate, and the Ordinary commits adminiſtration to a debtor, the debt is not thereby extinguiſhed, for he comes in only by the act of law, not by the act of the party. 5 *Rep.* 136: 1 *Salk.* 306.—See alſo 1 *Cha. Rep.* 292: *Moor* 855: *Hutt.* 128.

If no ſuit is commenced againſt him, the executor may pay any one creditor *in equal degree* his whole debt; though he has nothing left for the reſt, for, without a ſuit commenced, the executor has no legal notice of the debt. *Dyer* 32: 2 *Leon.* 60.

Pending a bill in equity againſt an executor, he may pay any other debt of a higher nature, or of as high a nature, where he has legal aſſets: but where there is a final decree againſt an executor, if he pays a bond, it is a miſ-payment; for a decree is in nature of a judgment. 2 *Salk.* 507.

If there be ſeveral debts due on ſeveral bonds from the teſtator, his executor may pay which bond debt he pleaſes, except an action of debt is actually commenced againſt him upon one of thoſe bonds; and in ſuch caſe, if, pending an action, another bond creditor brings another action againſt him, before judgment obtained by either of them, he may prefer which he will by *confeſſing a judgment* to one and paying him, which judgment he may plead in bar to the other action. *Vaugh.* 89. See *Sid.* 21. But this judgment confeſſed muſt be before plea. The uſual way is, if there is time, and an executor or adminiſtrator is deſirous of preferring another creditor of equal degree with him who ſues, is, inſtantly, before plea to confeſs a judgment, and then plead it, with a *plene adminiſtravit ultra.*

If judgment for 100*l.* is ſuffered, and the plaintiff compounds for 60*l.* the judgment for the whole ſum ſhall not be allowed to keep off other creditors. 8 *Rep.* 133. Judgments are not to be kept on foot by fraud. *Sid.* 230: 1 *Vent.* 76.

On a *Sci. Fac.* againſt an executor, he cannot plead fully adminiſtred, but muſt plead ſpecially that no goods of the teſtator came to his hands, whereby he might diſcharge the debt; for he may have fully adminiſtred, and yet be liable to the debt, where goods of the teſtator's afterwards come to his hands. 1 *Lill.* 568: *Cro. Eliz.* 575. In *Scire Facias* againſt executors, upon a judgment againſt their teſtator, they pleaded *Plene Adminiſtravit,* by paying debts upon bonds *ante notitiam*: It was adjudged no plea, for at their peril they ought to take notice of debts upon record, and firſt pay them; and though the recovery be in another county than that where the teſtator lived: but where an action is brought againſt executors in another county than where they live, and they not knowing thereof, pay debts upon ſpecialty, it is good. *Cro. Eliz.* 793.

Where day of payment is paſt, the penalty of a bond is the ſum due at law, but where the day of payment is not come, the ſum in the condition is the debt, and the executor cannot cover the aſſets any further. The *Bank* of *England* v. *Morrice, Widow. Annaly* 224.

A bill may be exhibited in the Chancery againſt an executor, to diſcover the teſtator's perſonal eſtate; and thereupon he ſhall be decreed to pay debts and legacies, *Abr. Ca. Eq.* 238. If a perſon being executor, and his teſtator greatly indebted, be deſirous to pay the aſſets as far as they will go, and that his payments may not be afterwards queſtioned, he may bring a bill in equity againſt all the teſtator's creditors, in order that they may, if they will, conteſt each other's debts, and diſpute who ought to be preferred in payment. 2 *Vern.* 37.

Where there are only *equitable aſſets,* they muſt be equally paid amongſt all the creditors; for a debt by judgment, and ſimple contract is in conſcience equal. 2 *Peere Williams* 416. As to what are legal, and what equitable aſſets, ſee *Vin. Abr.* title *Payment.* And it is held, that bonds, and other debts, ſhall be paid equally, by executors, where a perſon has deviſed lands to them, to be ſold for the payment of his debts. 1 *P. Wms.* 430.

A debt deviſed by the teſtator, is not to be paid by the debtor to the legatee but to the executor who can give a ſufficient diſcharge for it, and is anſwerable to the legatee if there be ſufficient aſſets. If an executor pays out the aſſets in legacies, and afterwards, debts appear, of which he had no notice, which he is obliged to pay; the executor by bill in Chancery may force the legatees to refund. *Chan. Rep.* 136, 149. One legatee paid ſhall refund againſt another, and againſt a creditor of the teſtator, that can charge the executor only in equity: but if an executor pays a debt upon ſimple contract, there ſhall be no refunding to a creditor of a higher nature. 2 *Vent.* 360.

The following extracts from Mr. *Cox*'s admirable notes to his edition of *Peer Williams*'s Reports; (1 *P. Wms.* 294, 679;) will ſerve as a general ſummary or abridgment of the determinations, relative to the application of the different funds of a teſtator's eſtate, in payment of his different debts.

The perſonal eſtate of a teſtator ſhall in all caſes be primarily applied in diſcharge of his *perſonal debt* (or general legacy) unleſs he by expreſs words, or *manifeſt* intention exempt it. 2 *Atk.* 625: 3 *Atk.* 202: *Haſſewood* v. *Pope,* 3 *P. Wms.* 324: *French* v. *Chichester,* 1 *Bro. P. C.* 193:

C. 192: *Fereyes* v. *Robertſon*, *Bunb.* 302: *Walker* v. *Jackſon*, 2 *Atk.* 624: *Bridgeman* v. *Dove*, 3 *Atk.* 202: *Inchiquin* (E) v. *French*, *Amb.* 33: 1 *Wilſ.* 82. *S. C.*: *Samuel* v. *Wake*, 1 *Bro. C. R.* 144: *Ancaſter* (D) v. *Mayor*, *Bro. C. R.* 454.—Yet it may be ſo exempted; as in *Bampfield* v. *Wyndham*, *Pre. Ch.* 101: *Wainewright* v. *Bendlowes*, 2 *Vern.* 718: *Amb.* 581: *Stapleton* v. *Colville*, *Talb.* 202: *Walker* v. *Jackſon*, 2 *Atk.* 624: *Anderton* v. *Cooke*, 1 *Bro. C. R.* 456, 7. and the caſe of *Kynaſton* & *Kynaſton* cited there.—*Holiday* v. *Bowman*, cited 1 *Bro. C. R.* 145: *Webb.* v. *Jones*, 2 *Bro. B. R.* 60.

Every loan creates a debt from the *borrower* whether there be a bond or covenant for payment or not. *Cope* v. *Cope*, 2 *Salk.* 449: *Howel* v. *Price*, 1 *P. Wms.* 291: *Balſh* v. *Hyam*, 2 *P. Wms.* 455: *King* v. *King*, 3 *P. Wms.* 458.

So the perſonal eſtate ſhall be liable although ſuch *perſonal* debt be alſo ſecured by mortgage. *Howell* v. *Price*, 1 *P. Wms.* 291. *Cope* v. *Cope*, 3 *Salk.* 449: *Pockley* v. *Pockley*, 1 *Vern* 36: *King* v. *King*, 3 *P. Wms.* 360: *Galton* v. *Hancock*, 2 *Atk.* 436: *Robinſon* v. *Gee*, 1 *Ves.* 251: *Belvedere* (E) v. *Rochfort*, 6 *Bro. P. C.* 520.—*Philips* v. *Philips*, 2 *Bro. C. R.* 272.

So lands ſubject to or deviſed for payment of debts, ſhall be liable to diſcharge ſuch mortgaged lands either deſcended or deviſed. *Bartholomew* v. *May*, 1 *Atk.* 487: *Tweedale* (MSS.) v. *Coventry*, (E) 1 *Bro. C. R.* 240. Even though the mortgaged lands be deviſed expreſsly *ſubject to the incumbrance*, 2 *P. Wms.* 366: *Serle* v. *St. Eloy*.—So lands *deſcended* ſhall exonerate mortgaged lands deviſed. *Galton* v. *Hancock*, 2 *Atk.* 424.—So *unincumbered* lands and *mortgaged* lands both being ſpecifically deviſed (but expreſsly "after payment *of all* debts") ſhall contribute in diſcharge of ſuch mortgage. *Carter* v. *Barnardiſton*, 1 *P. Wms.* 505: 2 *Bro. P. C.* 1.

But in all theſe caſes the debt being conſidered as the *perſonal* debt of the *teſtator himſelf*, the charge on the real eſtate is merely collateral. The rule therefore is otherwiſe where the charge is on the *real* eſtate *principally*, although there be a collateral perſonal ſecurity. *Coventry* (Counteſs) v. *Coventry* (E), 2 *P. Wms.* 222: *Freeman* v. *Edwards*, 2 *P. Wms.* 437: *Wilſon* (E) v. *Darlington*, 2 *P. Wms.* 664, *in n*: *Ward* v. *Ld. Dudley*, 2 *Bro. C. R.* 316.—Or where the debt, although perſonal in its creation, was contracted originally by another. *Cope* v. *Cope*, 2 *Salk.* 449: *Bagot* v. *Oughton*, 1 *P. Wms.* 347: *Leman* v. *Newnham*, 1 *Ves.* 51: *Robinſon* v. *Gee*, 1 *Ves.* 251: *Parſons* v. *Freeman*, *Amb.* 115; *Lacam* v. *Mertins*, 1 *Ves.* 312: *Lawſon* v. *Hudſon*, 1 *Bro. C. R.* 58: *Perkyns* v. *Baynton*, 2 *P. Wms.* 664. *in n*: *Shafto* v. *Shafto*, *ib*: *Baſſet* v. *Percival*, *ib*: *Tankerville* v. *Fawcet*, 2 *Bro. C. R.* 57: *Tweddell* v. *Tweddell*, 2 *Bro. C. R.* 101, 152: *Billinghurſt* v. *Walker*, 2 *Bro. C. R.* 604.

With reſpect to the priority of application of *real* aſſets, when the perſonal eſtate is either exempt or exhauſted; it ſeems that, Firſt, the real eſtate expreſsly deviſed for payment of debts ſhall be applied: Secondly, to the extent of ſpecialty debts, the real eſtate deſcended: Thirdly the real eſtate ſpecifically deviſed ſubject to a general charge of debts. *Galton* v. *Hancock*, 2 *Atk.* 424: *Powis* v. *Corbet*, 3 *Atk.* 566: *Wride* v. *Clarke*, 2 *Bro. C. R.* 261 *n*: *Davies* v. *Topp*, *Id.* 259 *n*: *Donne* v. *Lewis*. *Id.* 257.

It being the object of a Court of equity that *every* claimant upon the aſſets of a deceaſed perſon ſhall be ſatisfied, as far as ſuch aſſets *can*, by any arrangement conſiſtent with the nature of the reſpective claims, be applied in ſatisfaction thereof; it has been long ſettled that where one claimant has more than one fund to reſort to, and another claimant only one, the firſt claimant ſhall reſort to that fund on which the ſecond has no lien *Lanoy* v. *Athol* (D), 2 *Atk.* 446: *Lacam* v. *Mertins*, 1 *Ves.* 312: *Mogg* v. *Hodges*, 2 *Ves.* 53.

If therefore a ſpecialty creditor, whoſe debt is a lien on the real aſſets receive ſatisfaction out of the perſonal aſſets, a ſimple contract creditor ſhall ſtand in the place of the ſpecialty creditor againſt the real aſſets, *ſo far* as the latter ſhall have exhauſted the perſonal aſſets in payment of his debt. 2 *C. C.* 4: *Sagitary* v. *Hyde*, 1 *Vern.* 455: *Neave* v. *Alderton*, 1 *Eq. Ab.* 144: *Wiſon* v. *Fielding*, 2 *Vern.* 763: *Galton* v. *Hancock*, 2 *Atk.* 436.—And legatees ſhall have the ſame equity as againſt aſſets deſcended. *Culpepper* v. *Aſton*, 2 *C. C.* 117: *Bowman* v. *Reeve*, *Pre. Ch.* 578: *Tipping* v. *Tipping*, 1 *P. Wms.* 730: *Lucy* v. *Gardner*, *Bunb.* 137: *Lutkins* v. *Leigh*, *Talb.* 54.—So where lands are ſubjected to payment of *all* debts, a legatee ſhall ſtand in the place of a ſimple contract creditor, who has been, ſatisfied out of perſonal aſſets. *Haſlewood* v. *Pope*, 3 *P. Wms.* 323. So where legacies by will are charged on the real eſtate, but not the legacies by codicil, the former ſhall reſort to the real aſſets upon a deficiency of the perſonal aſſets to pay the whole. *Maſters* v. *Maſters*, 1 *P. Wms.* 422: *Bligh* v. *Darnley* (E), 2 *P. Wms.* 620: *Hyde* v. *Hyde*, 3 *C. R.* 83.

But from the principles of theſe rules, it is clear that they cannot be applied in aid of one claimant, ſo as to defeat the claim of another and therefore a pecuniary legatee ſhall not ſtand in the place of a *ſpecialty creditor* as againſt land *deviſed*; though he ſhall as againſt land deſcended. *Scott* v. *Scott*, *Amb.* 383: *Clifton* v. *Burt*, 1 *P. Wms.* 678: and *Haſlewood* v. *Pope*, 3 *P. Wms.* 324: But ſuch legatee *ſhall* ſtand in the place of a mortgagee who has exhauſted the perſonal aſſets to be ſatisfied out of the mortgaged premiſes though ſpecifically deviſed. *Lutkins* v. *Leigh*, *Talb.* 53: *Forreſter* v. *Ld. Leigh*, *Amb.* 171. for the application of the perſonal aſſets in caſe of the real eſtate mortgaged, does not take place to the defeating of every legacy. *Oneal* v. *Mead*, 1 *P. Wms.* 693: *Tipping* v. *Tipping*, *Id.* 730: *Davies* v. *Gardner*, 2 *P. Wms.* 190: *Ryder* v. *Wager*, *Id.* 335.

It is now ſettled that the Court of Chancery will not marſhall aſſets in favour of a charitable bequeſt ſo as to give it effect out of the perſonal chattels, it being void ſo far as it touches any intereſt in land. *Mogg* v. *Hodges*, 2 *Ves* 52: *Attorney General* v. *Tyndal*, *Amb.* 614: *Foſter* v. *Blagden*, *Amb.* 704: *Hillyard* v. *Taylor*, *Id.* 713. II. and it is to be obſerved that none of the rules abovementioned *ſubject* any fund to a claim to which it was not before ſubject; but only take care that the *election* of one claimant ſhall not prejudice the claims of the others. 2 *Atk.* 438: 1 *Ves.* 312.

7. When the debts are all diſcharged, the *legacies* claim the next regard; which are to be paid by the executor ſo far as his aſſets will extend: but he may not give himſelf the preference herein, as in the caſe of debts. 2 *Vern.* 434: 2 *P. Wms.* 25. See title *Legacy*.—The aſſent of an executor to legacies is held neceſſary to entitle the legatee; but as this aſſent may be compelled, ſee *March* 97, it does not ſeem neceſſary to ſtate the effect of a diſſent where there are aſſets ſufficient to anſwer

anſwer both debts and legacies. Where there are not aſſets the aſſent of the executor to a legacy would ſubject him to a devaſtavit.—See *Co. Litt.* 111: *Keilw.* 128: *Perk.* 570: *Plowd.* 525, 543: 4 *Rep.* 28: *Cro. Eliz.* 719. and this Dict. title *Legacy*.

8. When all the debts and particular legacies are diſcharged, the ſurplus or reſiduum muſt be paid to the Reſiduary Legatee, if any be appointed by the will; and if there be none, it was long a ſettled notion that it devolved to the executor's own uſe, by virtue of his executorſhip. *Perkins* 525.—But whatever ground there might have been formerly for it, this opinion ſeems now to be underſtood, with the following reſtriction; that although where the executor has no legacy at all, the *reſiduum* ſhall in general be his own, yet wherever there is ſufficient on the face of a will, (by means of a competent legacy or otherwiſe) to imply that the teſtator intended his executor ſhould not have the reſidue, the undeviſed ſurplus of the eſtate ſhall go to the next of kin, the executor then ſtanding upon exactly the ſame footing as an adminiſtrator. *Prec. Chan.* 323: 1 *P. Wms.* 7, 544: 2 *P. Wms.* 338: 3 *P. Wms.* 43, 194: *Stra.* 559: *Lawſon* v. *Lawſon*, *Dom. Proc.* 28 *April* 1777.

The reſult of the many caſes on this ſubject, (as ingeniouſly ſtated in a note of Mr. *Cox*'s to his edition of *P. Wms. vol.* 1. *p.* 550,) appears to be this.

By law the appointment of an Executor veſts in him beneficially, all the perſonal eſtate of the teſtator not otherwiſe diſpoſed of; but wherever courts of Equity have ſeen, *on the face of the will*, ſufficient to convince them that the teſtator did not intend the executor to take the ſurplus, they have turned the executors into truſtees for thoſe on whom the law would caſt the ſurplus, in caſe of a complete inteſtacy, *i. e.* the next of kin; as where the executors are expreſsly called executors *in truſt*, or where any other expreſſions occur, ſhewing the office only to be intended them, and not the beneficial intereſt. *Pring* v. *Pring*, 2 *Vern.* 99: *Rachfield* v. *Careleſs*, 2 *P. Wms.* 158: *Graydon* v. *Hicks*, 2 *Atk.* 18: *Dean* v. *Dalton*, 2 *Bro. C. R.* 634: *Bennet* v. *Bachelor*, 3 *Bro. C. R.* 28. So where there there is a reſiduary clauſe, but the name of the reſiduary legatee is not inſerted. *Wheeler* v. *Sheers*, *Moſel.* 288: *Cloyne* (Biſhop) v. *Young*, 2 *Vez.* 91: *North* (Lord) v. *Purdon*, 2 *Vez.* 495. Or where the reſiduary legatee dies in the life-time of the teſtator, *Nicholls* v. *Criſp. Amb.* 769: *Bennett* v. *Bachelor*, 3 *Bro. C. R.* 28.

So a *pecuniary* legacy to a ſole executor affords a ſufficient argument to exclude him from the reſidue; as it is abſurd to ſuppoſe a teſtator to give expreſsly *a part* of the fund to the perſon he intended to take the whole. *Cook* v. *Walker*, cited 2 *Vern.* 676: *Joſlin* v. *Brewett*, *Bunb.* 112: *Davers* v. *Dewes*, 3 *P. Wms.* 40. And it is ſettled (notwithſtanding the caſe of *Ball* v. *Smith*, 2 *Vern.* 675,) that the wife being the executrix ſhall make no difference, as appears as well by the caſes mentioned in *Farrington* v. *Knightley*, (1 *P. Wms.* 544. and *ſeq.*) as by 2 *Eq. Ab.* 444. *p.* 58: *Martin* v. *Rebow*, 1 *Bro. C. R.* 154. So *equal pecuniary* legacies to two or more executors ſhall exclude them from the ſurplus. *Petit* v. *Smith*, 1 *P. Wms.* 7; and the ſeveral caſes there mentioned, and 3 *Bro. C. R.* 110. Neither will legacies to the next of kin vary the rule. *Andrew* v. *Clark*, 2 *Vez.* 162.

But wherever the legacy is *conſiſtent* with the intent that the executor ſhould take the whole, a court of equity will not diſturb his legal right: and therefore where the gift to the executor is only an *exception* out of another legacy, it ſhall not exclude him from the reſidue, becauſe it is neceſſary to make ſuch exception expreſsly. *Griffith* v. *Rogers*, *Pre. Ch.* 231: *Hoſkins* v. *Hoſkins*, *Pre. Ch.* 263: *Granville* (Ld.) v. *Beaufort*, (Dſs.) 1 *P. Wms.* 114: *Jones* v. *Weſtcombe*, *Pre. Ch.* 316: *Newſtead* v. *Johnſton*, 2 *Atk.* 45: 2 *Eq. Ab.* 444. p. 58. So the ſame principle ſeems to have prevailed in *Lawſon* v. *Lawſon*, 7 *Bro. P. C.* 511. So a legacy to one only of two or more executors ſhall exclude neither from the ſurplus; becauſe the teſtator might intend to ſuch a one, a preference *pro tanto*, *Coleſworth* v. *Branguin*, *Pre. Ch.* 323: *Maſon* v. *Hawkins*, 4 *Bro. P. C.* 1: *Johnſton* v. *Twiſt*, cited 2 *Vez.* 167: *Cloyne* (Bp.) v. *Young*, 2 *Vez.* 91: *Wilſon* v. *Iwatt*, 2 *Vez.* 166. The ſame rule and reaſon hold, where ſeveral executors have *unequal* pecuniary legacies. *Braſbridge* v. *Woodroffe*, 2 *Atk.* 69: *Bowker* v. *Hunter*, 1 *Bro. C. R.* 328: although in the laſt caſe the following were objected as authorities againſt the determination, viz. 2 *Vern.* 677: *Pre. Ch.* 92: 2 *Vern.* 361: and *Vachel* v. *Jefferies*, *Pre. Ch.* 169: and 1 *Bro. P. C.* 167.

Then as to *ſpecific* legacies, it is determined that a ſpecific legacy will exclude a ſole executor, *Randal* v. *Bookey*, 2 *Vern.* 425: *Southat* v. *Watſon*, 3 *Atk.* 226: *Martin* v. *Rebow*, 1 *Bro. C. R.* 154. and alſo that diſtinct ſpecific legacies of *unequal* value to ſeveral executors, ſhall not exclude them. *Blinkhorne* v. *Feaſt*, 2 *Vez.* 27: and the language of Lord *Hardwicke* in *Southat* v. *Watſon*, treats ſpecific and pecuniary legacies as ſtanding preciſely upon the ſame ground in queſtions of this nature. See title *Legacy*.

However no caſe occurs in the books in which *diſtinct ſpecific* legacies of equal value to ſeveral executors have excluded them from the ſurplus. And the argument which ſupports this rule as to *pecuniary*, certainly does not apply with equal force to *ſpecific* legatees; ſince it is very probable that a teſtator may wiſh to diſtribute ſpecific quantities of ſtock, or particular debts, *&c. &c.* amongſt his executors in ſome particular manner; although equally in point of value and conſiſtently with an intention that they ſhould take the ſurplus. The caſe of *Shrimpton* v. *Stanhope*, cited 3 *Atk.* 230, is not a caſe of *diſtinct ſpecifick* legacies; for it appears from *Reg. Lib. B.* 1736. *fo.* 104, that the teſtator there gave ſome ſpecific legacies to a man and his wife jointly, whom he alſo made his executors. And ſo in *Willis* v. *Brady*, *Barn.* 64, and theſe caſes therefore ſeem like legacies to a ſole executor.

With regard to the admiſſion of parol evidence, in caſes of this kind, ſee *Rachfield* v. *Careleſs*, 2 *P. Wms.* 158; and *Rutland* (D.) v. *Rutland* (Dſs.) 2 *P. Wms.* 210: and Mr. *Cox's* notes on the former of thoſe caſes.

Concerning the *Adminiſtrator* indeed there was formerly much debate, whether or no he could be compelled to make any diſtribution of the inteſtate's eſtate. *Godol. p.* 2. *c.* 32. For though (after the adminiſtration was taken in effect from the Ordinary, and transferred to the relations of the deceaſed) the ſpiritual court endeavoured to compel a diſtribution, and took bonds of the adminiſtrator for that purpoſe, they were prohibited by the temporal Courts, and the bonds declared void at law. 1 *Lev.* 233: *Cart.* 125: 2 *P. Wms.* 447. And the right of the huſband not only to adminiſter, but alſo to enjoy exclu-

ſively, the effects of his deceaſed wife, depends ſtill on this doctrine of the common law: the ſtatute of frauds declaring only, that the ſtatute of diſtribution does not extend to this caſe. But now theſe controverſies are quite at an end; for by the ſtatute commonly called the Statute of Diſtribution, 22 & 23 *Car.* 2. *c.* 10. (explained by 29 *Car.* 2. *c.* 30.) it is enacted, that the ſurpluſage of inteſtates' eſtates, (except of *femes coverts*, which are left as at common law. *Stat.* 29 *Car.* 2. *c.* 3. § 25.) ſhall, after the expiration of one full year from the death of the inteſtate, be diſtributed in the following manner. *One third* ſhall go to the widow of the inteſtate, and the reſidue in equal proportions, to his children, or if dead, to their repreſentatives, that is, their *lineal* deſcendants: if there are no children or legal repreſentatives, ſubſiſting, then a moiety ſhall go to the widow, and a moiety to the next of kindred in equal degree and their repreſentatives, if no widow, the whole ſhall go to the children; if neither widow nor children, the whole ſhall be diſtributed among the next of kin in equal degree and their repreſentatives: but no repreſentatives are admitted, among collaterals, farther than the children of the inteſtate's brothers and ſiſters. *Raym.* 496: *Lord Raym.* 571.

The next of kindred, here referred to, are to be inveſtigated by the rules of conſanguinity, as thoſe who are entitled to letters of adminiſtration, of whom ſufficient has already been ſaid, (*ante.* III.) And therefore by this ſtatute, the mother, as well as the father, ſucceeded to all the perſonal effects of their children, who died inteſtate, and without wife or iſſue; in excluſion of the ſons and daughters, the brothers and ſiſters of the deceaſed. And ſo the law ſtill remains with reſpect to the father; (See 1 *P. Wms.* 48.) And the father need not adminiſter. (*Pr. Ch.* 260.) But by *Stat.* 1 *Jac.* 2. *c.* 17, if the father be dead, and any of the children die inteſtate, without wife or iſſue, in the life-time of the mother, ſhe and each of the remaining children, or their repreſentatives, ſhall divide his effects in equal portions.—And in caſe a man die leaving a wife and a mother and brothers and ſiſters, the wife ſhall have only a *moiety*, the remainder going to his mother, brothers and ſiſters equally. 2 *P. Wms.* 344.

This ſtatute of diſtribution bears in its principle a near reſemblance to our ancient *Engliſh* law, previous to the ſtatute of wills, by which, (See *Glanvil, l.* 2. *c.* 5: *Bracton, l.* 2. *c.* 26: *Fletal*, 2. *c.* 57;) a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal deſcendants, another to his wife, and the third was at his own diſpoſal; or if he died without a wife, he might then diſpoſe of one moiety, and the other went to his children. And ſo if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or iſſue, the whole was at his own diſpoſal. The ſhares of the wife and children were called their *reaſonable* parts; and the writ *de rationabili parte bonorum* was given to recover them. *F. N. B.* 122.

By the ſame *Statute* of diſtributions it is directed that no child of the inteſtate (except his heir at law,) on whom he ſettled in his life-time any eſtate in lands, or pecuniary portion, equal to the diſtributive ſhares of the other children, ſhall have any part of the ſurpluſage with their brothers and ſiſters; but if the eſtates ſo given them, by way of advancement, are not quite equivalent to the other ſhares, the children ſo advanced ſhall have ſo much only as will make them equal. And this with reſpect to goods and chattels is part of the ancient cuſtom of *London*, of the Province of *York*, and of *Scotland*: and with regard to lands deſcending in coparcenary, that it hath always been, and ſtill is, the common law of *England*, under the name of *botchpot*.

It may be obſerved that the doctrines and limits of repreſentation, laid down in the ſtatute of Diſtribution, ſeem to have been in ſome meaſure alſo borrowed from the civil law: whereby it will ſometimes happen, that perſonal eſtates are divided *per capita*, and ſometimes *per ſtirpes*; whereas the Common-law, knows no other rule of ſucceſſion but that *per ſtirpes* only. They are divided *per capita*, to every man an equal ſhare, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure repræſentationis*, in the right of another perſon. As if the next of kin be the inteſtate's three brothers, *A. B.* and *C*; here his effects are divided into three equal portions, and diſtributed *per capita*, one to each: but if one of theſe brothers, *A.* had been dead leaving three children, and another, *B.* leaving two; then the diſtribution muſt have been *per ſtirpes*; *viz.* one third to *A*'s, three children, another third to *B*'s two children; and a remaining to *C.* the ſurviving brother: Yet if *C.* had alſo been dead, without iſſue, then *A*'s, and *B*'s, five children, being all in equal degree to the inteſtate, would take in their own rights *per capita*; *viz.* each of them one fifth part. *Prec. Chanc.* 54.

A queſtion hath been made, if a father die inteſtate, leaving only one ſon, which ſon alſo dies inteſtate, whether adminiſtration ſhould be granted, to the next of kin, of the *father* or of the ſon? The latter determination hath been, that, by this ſtatute of diſtribution of inteſtate's eſtates, a right is veſted in one child, where there is one and no more (*viz.*) a right to ſue for the eſtate; and by conſequence, if he die, before the eſtate is recovered and actually in his poſſeſſion, it muſt go to his adminiſtrator, and not to the adminiſtrator of the father. *Palmer* v. *Allcock*, 3 *Mod.* 58: Vide *Shower* 26. and 2 *Vern.* 274.

So where a perſon died inteſtate, leaving two, who were next a-kin, in equal degree to him; one of them died inteſtate within the year, and before diſtribution; adjudged, that *an intereſt was veſted in him*, and his next of kin ſhall have the adminiſtration, like the caſe of a *reſiduary legatee* dying before probate of the will, (*viz.*) his next of kin ſhall have the adminiſtration, and the next of the teſtator. *Show.* 25.

9. The Statute of Diſtributions expreſsly excepts and reſerves the cuſtoms of the city of *London*, of the province of *York*, and of all other places having peculiar cuſtoms of diſtributing inteſtates' effects. So that, though in thoſe places, the reſtraint of deviſing is removed, their antient cuſtoms remain in full force, with reſpect to the eſtates of inteſtates.

In the city of *London*, (*Ld. Raym.* 1329,) and province of *York*, (2 *Burn. Eccl. Law* 746.) as well as in the kingdom of *Scotland*, (*Ibid.* 782.) and probably alſo in *Wales*, (concerning which there is little to be gathered, but from the *Stat.* 7 & 8 *W.* III. *c.* 38.) the effects of the inteſtate, after payment of his debts are in general divided according to the antient univerſal doctrine of the *pars rationabilis*. If the deceaſed leaves a widow and children,

children, his ſubſtance (deducting for the widow's her apparel and the furniture of her bed-chamber, (which in *London* is called the *widow's chamber*) is divided into three parts, one of which belongs to the widow, another to the children, and the third to the adminiſtrator; if only a widow, or only children they ſhall reſpectively, in either caſe, take one moiety, and the adminiſtrator the other, 1 *P. Wms.* 341: *Salk.* 246.—If neither widow nor child, the adminiſtrator ſhall have the whole. 2 *Show.* 175.—And this portion or *dead man's* part, the adminiſtrator was wont to apply to his own uſe. (2 *Freem.* 85: 1 *Vern.* 133.) till the *Stat.* 1 *Jac.* 2. *c.* 17. declared that the ſame ſhould be ſubject to the ſtatute of Diſtribution. So that if a man dies worth 1800 *l.* perſonal eſtate, leaving a widow and two children, this eſtate ſhall be divided into eighteen parts; whereof the widow ſhall have eight, ſix by the cuſtom, and two by the ſtatute; and each of the children five, three by the cuſtom, and two by the ſtatute; if he leaves a widow and one child, ſhe ſhall have ſtill eight parts, as before; and the child ſhall have ten, ſix by the cuſtom and four by the ſtatute, if he leaves a widow and no child, the widow ſhall have three fourths of the whole, two by the cuſtom and one by the ſtatute; and the remaining fourth ſhall go by the ſtatute to the next of kin. It is alſo to be obſerved, that if the wife be provided for by a jointure before marriage in bar of her cuſtomary part, it puts her in a ſtate of non-entity, with regard to the cuſtom only; (2 *Vern.* 665: 3 *P. Wms.* 16.) but ſhe ſhall be entitled to her ſhare of the dead-man's part under the ſtatute of Diſtribution, unleſs barred by ſpecial agreement. 1 *Vern.* 15: 2 *Chan. Rep.* 252. and if any of the children are advanced by the father in his life-time with any ſum of money, (not amounting to their full proportionable part) they ſhall bring that portion into hotchpot with the reſt of the brothers and ſiſters, but not with the widow, before they are entitled to any benefit under the cuſtom; (2 *Freem.* 279: 1 *Equ. Caſ. Abr.* 155: 2 *P. Wms.* 526;) but if they are fully advanced, the cuſtom entitles them to no farther dividend. 2 *P. Wms.* 527.

Thus far in the main the cuſtoms of *London* and of *York* agree: but beſides certain other leſs material variations there are two principal points in which they conſiderably differ. One is, that in *London* the ſhare of the children (or orphanage part) is not fully veſted in them till the age of twenty-one, before which they cannot diſpoſe of it by teſtament (2 *Vern.* 558.) and, if they die under that age, whether ſole or married, their ſhare ſhall ſurvive to the other children; but after the age of twenty-one, it is free from any orphanage cuſtom, and in caſe of inteſtacy, ſhall fall under the ſtatute of Diſtributions, *Prec. Chanc.* 537. The other, that in the province of *York*, the heir at Common-law, who inherits any land either in fee or in tail, is excluded from any filial portion or reaſonable part. 2 *Burn.* 754.

VI. 1. Againſt an *adminiſtrator* and for him, action will lie, as for and againſt an executor, and he ſhall be charged to the value of the goods, and no further; unleſs it be by his own falſe plea, or by waſting the goods of the inteſtate. An executor or *adminiſtrator* ſhall never be charged *de bonis propriis*, but where he doth ſome wrong; as by ſelling the teſtator's goods, and converting the money to his own uſe, concealing or waſting them, or by pleading what is falſe. *Dyer* 210: 2 *Roll. Rep.* 295. But this plea muſt be of a fact, within his own knowledge. If an *adminiſtrator* plead *plene adminiſtravit*, and 'tis found againſt him, the judgment ſhall be *de bonis propriis*, becauſe 'tis a falſe plea, and that upon his own knowledge. 2 *Cro.* 191: *Contrà* where he pleads ſuch a plea, and that he hath no more than to ſatisfy ſuch a judgment, &c. the recovery ſhall be *de bonis teſtatoris*, &c. 2 *Rol. Rep.* 400. This muſt mean, where ſuch plea is true in fact. Upon *plenè adminiſtravit* pleaded by an *adminiſtrator*, the plaintiff muſt prove his debt, or he ſhall recover but a penny damages, though there be aſſets; becauſe the plea only admits the debt, but not the *quantum*. 1 *Salk.* 296.

Special bail is not required of *adminiſtrators* or executors in any action brought againſt them for the debt of the inteſtate; except where they have waſted the goods of the deceaſed: nor ſhall coſts be had againſt them. Vide tit. *Coſts*. See *Cro. Eliz.* 503: *Yelv.* 168: *Hut.* 69: 2 *Rol. Rep.* 87: 1 *Salk.* 207: 3 *Salk.* 106. Not even on a writ of error where judgment is affirmed. Where an *adminiſtrator* is plaintiff, he muſt ſhew by whom *adminiſtration* was granted; for that only intitles him to the action: but if an *adminiſtrator* is defendant, the plaintiff need not ſet forth by whom *adminiſtration* was granted, for it may not be within his knowledge. *Sid.* 228: 1 *Lutw.* 301. Generally an *adminiſtrator* ſhall be charged by others, for any debt or duty due from the deceaſed, as he himſelf might have been charged in his life-time; ſo far as he hath any of the inteſtate's eſtate, to diſcharge the ſame. *Co. Lit.* 219: *Dyer* 14.

If a man have judgment for land in a real or mixed action, and for damages, and then dies; his executor or *adminiſtrator*, not the heir, ſhall have execution for the damages; but not for the land. *Fitz. Admin.* 53: *March* 9.

2. For the goods of the teſtator, taken from them, or for treſpaſs upon the land, &c, *Executors* may, *before the will proved*, bring action of treſpaſs, detinue, &c. And if they ſell cattle, or other goods of the teſtator, before the will is proved, they may have actions for the money payable, before the ſame is proved. *Offic. Exec.* 35. It has been ruled, that an executor may commence an action before probate; but he cannot declare upon it, without producing in court the letters teſtamentary: he is not like an adminiſtrator, who hath no right till adminiſtration committed; for his right is the ſame before, as after probate of the will, and the not proving it, is only an impediment to the action. 1 *Salk.* 303.

[Probate obtained before trial of the action ſeems ſufficient, unleſs oyer of the *letters teſtamentary* is demanded; for it is of the will, not the probate, profert is made, and on the trial, for any matters relative to the *perſonal* eſtate, with which the executors have to do, the probate is the proper proof of the will. J. M.]

Executors may maintain action of trover for goods converted in the life of the teſtator. *Cro. Eliz.* 377. And by the *Stat. Weſtm.* 2. (13 *E.*) *c.* 23, executors ſhall have a writ of account, and the like action and proceſs, as the teſtator might have had,—By *Stat.* 4 *E.* 3. *c.* 7, the executors may bring actions for treſpaſs done to their teſtator, as for goods and chattels carried away in his life, and ſhall recover their damages in the ſame manner as he ſhould have done.—By *Stat.* 25 *E.* 3. *ſt.* 5. *c.* 5, *executors of executors* ſhall have actions of debt, account, and of goods

goods taken away of the *firſt teſtator's*; and have execution of ſtatutes, &c. and ſhall anſwer to others, ſo far as they recover goods of the *firſt teſtator*, as the *firſt executor's*—As to proceſs againſt Executors, See *Stat.* 9 *E.* 3. *c.* 3.

Formerly, if an executor waſted goods and left an executor, and died leaving aſſets, his executor ſhould not be chargeable, becauſe it was a perſonal tort. 2 *Lev.* 120; but now it is otherwiſe by the *Stat.* 4 & 5 *W.* & *M.* *c.* 24.

The law ſubjects the executors to every perſon's claim and action, which he had againſt the teſtator, except as to a treſpaſs *vi et armis*, &c. committed by the teſtator; for which reaſon the executor is ſaid to be the teſtator's aſſignee, and to repreſent the perſon of the teſtator: but for perſonal wrongs done by the teſtator to the perſon, or goods, &c. of another, the *executor* doth not repreſent him: becauſe perſonal actions die with the perſon. *Co. Lit.* 209: 9 *Rep.* 89. See title *Action*.

Nothing can be debt in the *executor*, which was not debt in the teſtator. *Cro. Eliz.* 232. A promiſe to pay to an *executor*, when the teſtator is not named, is not good. *Cro. Jac.* 570. But a teſtator may bind his *executors* as to his goods, though he himſelf is not bound. *Ibid.* And an *executor* may recover a duty due to the teſtator, though he be not named. *Dyer* 14. Action lies againſt an *executor* upon a collateral promiſe made and broken by the teſtator. *Cro. Jac.* 663. The teſtator's *aſſumpſit* to do any collateral thing, as to build an houſe, &c. which is not a debt, binds *executors*. *Jenk. Cent.* 290, 336. *Aſſumpſit* lies upon a contract of the teſtator; and the reaſon is the ſame upon a promiſe, where the teſtator had a valuable conſideration. *Palm.* 329. Though a debt upon a ſimple contract of the teſtator, cannot be recovered of the *executor* by action of debt; yet it may by *aſſumpſit*. 1 *Lev.* 200: 9 *Rep.* 87.

If two perſons are *jointly bound*, and one of them dies, the ſurvivor only ſhall be charged, and not the other's *executor*. *Paſch.* 16 *Car.* 2. When there are two *executors*, if one of them dies, action is to be brought againſt the ſurviving *executor*, and not the *executor* of the deceaſed: but in equity the teſtator's goods are liable in whoſeſoever's hands they are. 1 *Leon.* 304: *Chan. Rep.* 57.

If there be no aſſets, the obligee *executor* may ſue the heir of the obligor teſtator in action of debt upon his bond. 1 *Salk.* 304: 1 *Lil. Abr.* 575.

If an executor releaſes all actions, ſuits and demands, it extends only to demands in his own right, not ſuch as he hath as executor. *Show.* 153. An executor ſhall be charged with rent in the *detinet*, if he hath aſſets; and if he continues the poſſeſſion, he ſhall be charged in the *debet* and *detinet*, in reſpect of the perception of the profits, whether he hath aſſets or not. 1 *Lev.* 127. But an executor is not ſuable in the *debet* and *detinet* for part, and in the *detinet* for the other part; becauſe they require ſeveral judgments, *viz.* *De bonis propriis* for the *debet* and *detinet* and *de bonis teſtatoris* for the *detinet*. 3 *Lev.* 74. See title *Debet* and *Detinet*.

If an executor has a term, and the rent reſerved is *more* than the value of the premiſes, in action brought againſt him for it, in the *debet* and *detinet*, he may plead the ſpecial matter, *viz.* That *he hath no aſſets*, and that *the land is of leſs value than the rent*, and demand judgment if he ought not to be charged in the *detinet tantum*: and he cannot waive the leaſe; without renouncing the whole executorſhip. 1 *Salk.* 297.

One executor cannot regularly ſue another at law; but he may have relief in equity: In the eye of the law all are but as one executor; and moſt acts done by, or to any of them, are eſteemed acts done by, or to all of them. 1 *Rol. Abr.* 918. If where one executor is ſued, he plead that there is another executor, *he ought to ſhew that he hath adminiſtered*. 1 *Lev.* 161. And *he only that adminiſters is to be* ſued *in actions againſt executors*; but actions *brought by executors are to be in the name of all of them*, though ſome do not take upon them the executorſhip. 1 *Rol.* 924: *Jenk. Cent.* 106, 107. If any executor refuſes to join in an action, with his co-executors, he muſt be *ſummoned and ſevered*.

An executor is not diſabled by outlawry to ſue for the debts of the teſtator.

By the *Stat. of Frauds* 29 *Car.* 2. *c.* 3, No action ſhall charge an executor to anſwer damages out of his own eſtate, upon any promiſe to another, unleſs there be be *ſome writing* thereof *ſigned by the party* to be charged therewith. See *Rann* v. *Hughes*, 4 *Bro. P. C.*

By *Stat.* 17 *Car.* 2. *c.* 8. § 1, On any judgment after verdict, had by or in the name of an executor, or adminiſtrator; an adminiſtrator *de bonis non* may ſue forth a *ſcire facias*, and take execution upon ſuch judgment. If an executor makes himſelf a ſtranger to the will of the teſtator, or pleads *Ne unques* executor or any *falſe plea*, and it is found againſt him, judgment ſhall be *de bonis propriis*; in other caſes *de bonis teſtatoris*. *Cro. Jac.* 447.

If on a *ſcire facias* againſt an executor, the ſheriff return a *devaſtavit*; the plaintiff ſhall have judgment and execution *de bonis propriis* of the defendant: and if *nulla bona* be returned, he may have a *capias ad ſatisfaciend.* or an *elegit*. 2 *Nelſ.* 791: *Dyer* 185. But one executor ſhall not be charged with a *devaſtavit* made by his companion; for the act of one ſhall charge the other no further than the goods of the teſtator in his hands amount to. *Cro. Eliz.* 318.

If an executor does any waſte, or miſ-employs the eſtate of the deceaſed, or doth any thing by negligence or fraud, &c. it is a *devaſtavit* and he ſhall be charged for ſo much out of his own goods. 8 *Rep.* 133. And a *new* executor may have an action againſt a former executor, who waſted the goods of the deceaſed; or the old one may remain chargeable to creditors, &c. *Hob.* 266.

If an executor takes an obligation in his own name, for a debt due by ſimple contract to the teſtator, this ſhall charge him as much as if he had received the money; for the new ſecurity hath extinguiſhed the old right, and is *quaſi* a payment to him. *Off. of Ex.* 158: *Yelv.* 10: 1 *Lev.* 189.

So if the executor ſues a perſon in trover and converſion, in which he has a right to recover; and afterwards he and the defendant come to an agreement, that he ſhall pay the executor ſuch a ſum at a future day, and the party fails, this is a *devaſtavit*; and he ſhall anſwer *ad valorem*. 2 *Lev.* 189: 2 *Jon.* 83 *S. C.*: 1 *Vern* 474. *S. C.*

It is a *devaſtavit* to permit intereſt to run in arrear, and then ſuffer judgment for it; and want of aſſets to pay before the incurring of it by the adminiſtrator ſhall not be intended unleſs it be expreſsly pleaded. 2 *Lev.* 40: *Hil.* 23 & 24 *Car.* 2. *B. R. Seaman* v. *Dee.*

An executor in caſe of a *devaſtavit* is in nature of a truſtee of an eſtate. *Chan. Caſes* 304.

EXECUTORY DEVISE.

EXECUTORY ESTATE, Is where an eſtate in fee created by deed or fine is *to be afterwards executed* by *entry*, *livery*, writ, &c. Leaſes for years, rents, annuities, conditions, &c. are called inheritances *executory*. *Wood's Inſt.* 293. *Eſtates executed* are when they paſs preſently to the perſon to whom conveyed, without any after-act. 2 *Inſt.* 513. See title *Eſtate*.

EXECUTORY DEVISE, The Deviſe of a *future intereſt*. A Deviſe that *veſts not at the death of the teſtator*, but depends on ſome *contingency* which muſt happen before it can veſt. 1 *Eq. Caſ. Abr.* 186.

An executory deviſe differs from a remainder in three very material points. 1. That it needs not any particular eſtate to ſupport it. 2. That by it a fee-ſimple or other leſs eſtate, may be limited after a fee-ſimple. 3. That by this means a remainder may be limited of a chattel intereſt, after a particular eſtate for life created in the ſame. See title *Remainder* and 2 *Comm.* 172—5.

1. The firſt caſe happens when a man deviſes a future eſtate to ariſe upon a contingency: and, until that contingency happens, does not diſpoſe of the fee-ſimple, but leaves it to deſcend to his heir at law. As if one deviſes land to a feme-ſole and her heirs, upon her day of marriage: here is in effect a contingent remainder without any particular eſtate to ſupport it; a freehold commencing *in futuro*. This limitation though it would be void in a deed, yet is good in a will, by way of executory deviſe. 1 *Sid.* 153. For, ſince by a deviſe a freehold may paſs without corporal tradition or livery of ſeiſin, (as it muſt do if it paſſes at all) therefore it may commence *in futuro*; becauſe the principal reaſon why it cannot commence *in futuro* in other caſes, is the neceſſity of actual ſeiſin, which always operates *in præſenti*. And, ſince it may thus commence *in futuro*, there is no need of a particular eſtate to ſupport it, the only uſe of which is to make the remainder, by its unity with the particular eſtate, a preſent intereſt. And hence alſo it follows, that ſuch any executory deviſe not being a preſent intereſt, cannot be barred by a recovery, ſuffered before it commences. *Cro. Jac.* 593. See this Dict. title *Fine and Recovery*.

2. By executory deviſe a fee, or other leſs eſtate, may be limited after a fee. And this happens where a deviſor deviſes his whole eſtate in fee, but limits a remainder thereon to commence on a future contingency. As if a man deviſes land to *A.* and his heirs; but, if he dies before the age of twenty-one, then to *B.* and his heirs: this remainder alſo, though void in a deed, is good by way of executory deviſe. 2 *Mod.* 289.

In both theſe ſpecies of executory deviſes, the contingencies ought to be ſuch as may happen within a reaſonable time, as within one or more life or lives in being, or within a moderate term of years; for Courts of Juſtice will not indulge even wills ſo as to create a perpetuity; which the law abhors. 12 *Mod.* 287: 1 *Vern.* 164: 1 *Salk.* 229. The utmoſt length that has been hitherto allowed for the contingency of an executory deviſe of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are deviſed to ſuch unborn ſon of a feme-covert as ſhall firſt attain the age of twenty one, and his heirs; the utmoſt length of time that can happen before the eſtate can veſt, is the life of the mother and the ſubſequent infancy of her ſon, and this hath been decreed to be a good executory deviſe. *Forr.* 232. This limit was taken from the time in which an eſtate may be rendred unalienable by a ſtrict ſettlement. An executory deviſe to an unborn ſon, of a *man*, may be ſuſpended a few months beyond the life of the father and twenty-one years afterwards; by a poſthumous birth.

3. By executory deviſe a term of years may be given to one man for his life, and afterwards limited over in remainder to another which could not be done by deed: for by law the firſt grant of it, to a man for life, was a total diſpoſition of the whole term; a life eſtate being eſteemed of a higher and larger nature than any term for years. 8 *Rep.* 95.

And, at firſt, the courts were tender, even in the caſe of a will of reſtraining the deviſee for life from aliening the term, but only held, that in caſe he died without exerting that act of ownerſhip, the remainder over ſhould then take place; for the reſtraint of the power of alienation, eſpecially in very long terms was introducing a ſpecies of perpetuity. *Bro.* tit. *Chattels* 23: *Dyer* 74. But, ſoon afterwards it was held, that the deviſee for life hath no power of aliening the term ſo as to bar the remainderman. *Dyer* 358: 8 *Rep.* 96; yet, in order to prevent the danger of perpetuities, it was ſettled, that though ſuch remainders may be limited to as many perſons ſucceſſively as the deviſor thinks proper, yet they muſt all be *in eſſe* during the life of the firſt deviſee; for then, as it is expreſſed, all the candles are lighted and are conſuming together, and the ultimate remainder is in reality only to that remainder-man who happens to ſurvive the reſt. It was alſo ſettled that ſuch remainder may not be limited to take effect, unleſs upon ſuch contingency as muſt happen (if at all) during the life of the firſt deviſee. 1 *Sid.* 451: *Skinn.* 341: 3 *P. Wms.* 358.

Having ſaid thus much on Executory Deviſes in general, ſubſequent information may be thus divided.

I. *Of Executory Deviſes of Lands of Inheritance.*
II. *Of Executory Deviſes of Terms for Years.*

I. If a *particular eſtate* is limited, and the *inheritance paſſes out of the donor*, this is a *contingent remainder*; but where the *fee* by a *deviſe* is *veſted in any perſon*, and *to be veſted in another upon contingency*, this is an *executory deviſe*: and in all caſes of *executory deviſes*, the eſtates deſcend until the contingencies happen. *Raym.* 28: 1 *Lutw.* 798. Where a *contingent eſtate* limited, *depends upon a freehold*, which is capable of ſupporting a remainder, it *ſhall never be conſtrued an executory deviſe, but a remainder*. And ſo it is, if the eſtate be limited by words *in præſenti*, as when a perſon deviſes his lands to the heirs of *A. B.* who is living, &c. Though if the ſame were to the heir of *A.* after his death, it would be as good as an executory deviſe. 2 *Saund.* 380: 4 *Mod.* 255.

One by will deviſes land to his mother for life, and after her death, to his brother in fee; provided, that if his wife, being then *enſeint*, be delivered of a ſon, then the land to remain to him in fee, and dies, and the ſon is born; in this caſe it was held, that the fee of the brother ſhall ceaſe, and veſt in the ſon, by way of *executory deviſe*, on the happening of the *contingency*; and here ſuch fee eſtate enures as a new original deviſe to take effect when the firſt fails. *Dyer* 33, 127: *Cro. Jac.* 592. A *remainder of a fee* may not be limited by the rules

rules of law *after a fee simple*; for when a man hath parted with his *whole* estate, there cannot remain any thing for him to dispose of: but of late times a distinction hath been made between an *absolute fee-simple*, and a *fee-simple* which *depends upon a contingency*, or is *conditionally limited*; especially where such a contingency may happen in the course of a *few years*, or of *one or two lives*; and where such a *remainder* is *limited by will*, it is called an *executory devise*. 2 *Nelf. Abr.* 797.

An estate devised to a son and his heirs, upon condition that if he did not pay the legacies given by the will within such a time, that then the land should remain to the legatees, &c. and their heirs: this limitation of *a fee in remainder*, after a *fee limited to the son*, being upon the *contingency*, of the son's failing in payment of the legacies, was adjudged good by way of *executory devise*. *Cro. Eliz.* 833. And where the father devised his lands to his youngest son and his heirs, and if he die without issue, the eldest son being alive, then to him and his heirs; this was held a good remainder in fee to the eldest brother, after the conditional contingent estate in fee to the youngest, as depending upon the possibility that he might be alive when his youngest brother died without issue; and his dying without issue, was a collateral determination of his estate, whilst the other was living. *Godb.* 282: 2 *Nelf. Abr.* 798.

There can be no *executory devise* after an *estate-tail generally limited*, because that would tend to *a perpetuity*; and a contingency is too remote where a man must expect a fee upon another's dying *without issue, generally*: But *dying without issue, living another*, may happen in a little time, because it depends upon *one life*; and therefore a devise of a fee-simple to one, but to remain to another upon such a contingency, is now held good by *executory devise*. *Cro. Jac.* 695.

If a devise be "to *A.* for ever, that is, if he shall have a son or sons who shall attain 21, but if *A.* shall die without son or sons to inherit, that the son of *B.* shall inherit:" this is a fee in *A.* with an executory devise to the son of *B.* who shall take if *A.* die without issue, or if the issue die before 21. 1 *Bro. C. R.* 147.

If a devise be to the second son, then unborn, of *A. B.* and after his decease, or accession to his paternal estate, then to *his* second son and his heirs-male, with remainders over: such second son of *A. B.* when born, will take an estate in tail-male by way of executory devise, determinable on the accession of the family estate, and in the mean time the lands descend to the heir of the testator. 2 *Blac. Rep.* 1159.

II. It has now been long fully settled, that a term for years, or any chattel interest, may be given by an executory devise to an unborn child of a person in existence, when it attains the age of 21; and that the limits of executory devises of real and personal property are precisely the same. *Fearne.*

It is very common to bequeath chattel-interests to *A.* and his issue, and if he dies without issue to *B.* It seems now to be determined, that where the words are such as would have given *A.* an estate tail in real property; in cases of personal property the subsequent limitations are void, and *A.* has the absolute interest: But if it appear from any clause or circumstance in the will, that the testator intended to give it over, only in case *A.* had no issue living at the time of his death, upon that event the subsequent limitation will be good as an executory devise. See *Fearne* and the cases referred to in *Cox's P. W.* iii. 262.

Formerly where a term of years, (which is but a chattel) was devised to one; and that if he died, living another person, it should remain to the other person, during the residue of the term, such a remainder was adjudged void: For a devise of a chattel to one for an hour, was a a devise of it for ever. *Dyer* 74. But it was afterwards held, that *a remainder of a term to one, after it was limited to another for life*, was good: In a case where a testator having a term, devised that his wife should have the lands for so many years of the term as she should live; and that after her death the residue thereof should go to his son and his assigns; and this was the first case wherein an executory remainder of a term for years was adjudged good. *Dyer* 253, 358.

A person possessed of a term, devised it to his wife for eighteen years, and after to his eldest son for life, after to the son's eldest issue male during life; though he have no such issue, at the time of the devise, and death of the devisor, if he has before his own death, he shall have it as an *executory devise*. 1 *Rol.* 612. But if one devise a term to his wife for life; the remainder to his first son for life, and if he dies without issue, to his second son, &c. the remainder to the second son is void, and no executory devise; yet where the dying without issue living at a person's death, may be confined to one life, it hinders not a remainder over. 1 *Eq. Abr.* 194.

Executory devises, as to *terms for years*, are not extended beyond *a life or lives*; they ought to arise within the compass of *one life*. 1 *Salk.* 229. Where there is an *executory devise*, there needs not any *particular estate* to support it; and because the person who is to take upon contingency, hath not a *present* but *future interest*, his estate *cannot be barred by a common recovery*. 2 *Nelf. Abr.* 797, 798. It is held *executory devises*, and *limitations* of the *trust of a term*, are governed alike. 1 *Vern.* 234.

Lessee for years devised *all his term* to his son, and his will was, that his wife should have the *occupation and profits of the lands*, during the minority of his son, &c. and he made her sole executrix, and died; she afterwards proved the will, then she sold the term, and died; adjudged that this sale was void against her son, because it shall be intended that the devise to the wife, shall *precede* the devise to the son, though it followed in words, and then she will not have the whole term, but only so much thereof for so long time as she should live, before her son came of age; and that the remainder was to vest in him, upon the contingency of his living till he came of full age. *Plow. Com.* 53. 519.

The husband being possessed of a term for years, devised *the lease itself* to his wife for *her life*, and after her death to *her children unpreferred*; it was insisted for the wife, that she had the whole term, the devise being of *the lease itself*, and the lands are not mentioned throughout the will; but adjudged that the wife had only *an estate for so many years of the lease as she should live*, and that so much as remained unexpired at her death, was to vest in the children upon the contingency of their living at that time. 1 *And.* 61; 2 *Leon.* 92: 3 *Leon.* 89; *Gald.* 26.

EXEMPLIFICATION,

EXEMPLIFICATION or LETTERS PATENT &c. See title *Evidence.*

EXEMPLIFICATIONE, A writ granted for the exemplification of an original record. *Reg. Orig.* 290.

EXEMPTION, *Exemptio*] A privilege to be free from ſervice or appearance; as knights, clergymen, &c. are exempted from appearing at the county-court by ſtatute, and Peers from being put upon inqueſts. 6 *Rep.* 23. Perſons ſeventy years of age, apothecaries, &c. are alſo exempted by law from ſerving on juries: and juſtices of peace, attorneys, &c. from pariſh offices: 2 *Inſt.* 247. There is an exemption from tolls, &c. by the King's *Letters Patent*: And a writ of exemption, or of eaſe, to be quit of ſerving on juries, and all public ſervice. *Shep. Epitom.* 1049. See further the proper titles in this Dict.

EXENNIUM or EXHENIUM, A gift or preſent; and more properly a new year's gift.

EXERCITUALE, A heriot; paid only in arms, horſes, or military accoutrements. *Leg. Edw. Conf.* 1.

EXETER. By letters patent under the Great Seal, the ſcite of the caſtle of *Exon* (part of the dutchy of *Cornwall*) to be granted to ſome perſons appointed by the juſtices in quarter-ſeſſions for the county of *Devon*, for the term of 99 years, to the uſe of the ſaid county and for other public uſes; under the ancient yearly rent of 10*l. per annum*, payable to the crown. *Stat.* 9 *Ann. c.* 19.

EXFREDIARE, From *ex* and the Sax. *Frede, Frith, Peace.*] To break the peace, or commit open violence. *Leg. H.* 1. *c.* 13.

EX GRAVI QUERELA, A writ that lies for him to whom any lands or tenements in fee are deviſed by will, (within any city, town or borough, wherein lands are deviſeable by cuſtom,) and the heir of the deviſor enters, and detains them from him. *Reg. Orig.* 244: *Old Nat. Br.* 87. And if a man deviſes ſuch lands or tenements unto another in tail, with remainder over in fee, if the tenant in tail enter, and is ſeiſed by force of the intail, and afterwards dieth without iſſue; he in remainder ſhall have the writ *ex gravi querela* to execute that deviſe. *New Nat. Br.* 441. Alſo where tenant in tail dies without iſſue of his body, the heir of the donor, or he who hath the reverſion of the land, ſhall have this writ in the nature of a *formedon in the reverter. Ibid.* If a deviſor's heir be ouſted by the deviſee, by entry on the lands; he may not after have this writ, but is to have his remedy by the ordinary courſe of the common law. *Co. Lit.* 111.—If the claimant's title accrues within twenty years, the moſt eligible method of proceeding, is now by Ejectment.

EXHIBIT, *Exhibitum.*] Where a deed, or other writing is in a ſuit in Chancery exhibited to be proved by witneſſes, and the examiner or commiſſioners appointed certify on the back of it, that the deed or writing was ſhewed to the witneſs, to prove it at the time of his examination, and by him ſworn to; this is then called an *exhibit* in law proceedings. The ſame under a commiſſion of bankrupt.

EXHIBITIO. An allowance for meat and drink, ſuch as was cuſtomary among the religious appropriators of churches, who uſually made it to the depending vicar: the benefaction ſettled for the maintaining of ſcholars in the Univerſities, not depending on the foundation, are called *exhibitions. Paroch. Antiq.* 304.

EXIGENDARIES. See *Exigenter.*

EXIGENT, or *Exigi facias.*] A writ that lies where the defendant in an action perſonal cannot be found, nor any thing of his within the county, whereby to be attached or diſtrained; and is directed to the ſheriff, to proclaim and call him *five county-court days*, one after another, charging him to appear upon pain of outlawry: It is called *exigent*, becauſe it *exacteth* the party, *i. e.* requires his appearance or forth-coming to anſwer the law; and if he come not at the laſt day's proclamation, he is ſaid to be *quinquies exactus* (*five times exacted,*) and is outlawed. *Cromp. Juriſ.* 188.

The ſtatutes requiring proclamations on exigents awarded in civil actions, are 6 *Hen.* 8. *c.* 4: 31 *Eliz. cap.* 3. Exigents are to be awarded againſt receivers of the King's money, who detain the ſame; and againſt conſpirators, rioters, &c. *Stat.* 18 *Ed.* 3. *c.* 1. And a writ of proclamation ſhall be iſſued to the ſheriff to make three proclamations in the county where the defendant dwells, for him to yield himſelf, &c. *Stat.* 31 *Eliz. c.* 3.

The writ of exigent alſo lies in an indictment of felony, where the party indicted cannot be found: And upon ſuing out an exigent for a criminal matter before conviction, there ſhall be a writ of proclamation, &c. 3 *Inſt.* 31. 4 & 5 *W. & M. c.* 22. If a perſon indicted of felony abſent himſelf ſo long that the writ of exigent is awarded, his withdrawing will be deemed a *flight in law* whereby he will be liable to forfeit his goods; and though he renders himſelf upon the exigent, after ſuch withdrawing, and is found Not guilty, it is ſaid the forfeiture ſhall ſtand. 5 *Rep.* 110: 3 *Inſt.* 232. After a *capias* directed to the ſheriff to take and impriſon a perſon, &c. if he cannot be taken, an exigent is awarded: And after a judgment in a civil action, the exigent is to go forth after the firſt *capias*; but before judgment there muſt be a *capias, alias* and *pluries.* 4 *Inſt.* 177. If the defendant be in priſon, or beyond ſea, &c. he or his executors may reverſe the award of the exigent. See further this Dict. title *Outlawry.*

EXIGENTER, *Exigendarius.*] An officer of the court of Common Pleas; of which officers there are four in number: They make all exigents and proclamations, in actions where proceſs of outlawry doth lie; and alſo writs of *ſuperſedeas*, as well as the *prothonotaries*, upon ſuch exigents made out in their offices. But the iſſuing writs of *ſuperſedeas* is taken from them by an officer in the ſame court, conſtituted by letters patent by King *James* the Firſt.

EXIGI FACIAS, See *Exigent.*

EXILE. A baniſhment, or driving one away from his country. And this exile is either by reſtraint, when the government forbids a man, and makes it penal to return; or it is voluntary, where he leaves his country upon diſguſt, but may come back at pleaſure. 2 *Leo.* 191.

One natural and regular conſequence of perſonal liberty, under the laws of *England* is that every *Engliſhman* may claim a right to abide in his own country ſo long as he pleaſes, and not to be driven from it unleſs by ſentence of the law. Exile and Tranſportation are both puniſhments unknown to the common law; and wherever the latter is inflicted, it is either by the choice of the criminal himſelf to eſcape a capital puniſhment, or by the expreſs direction of ſome ſtatute. See *Magna Charta, c.* 29; which expreſsly declares that no freeman ſhall be baniſhed unleſs by the

judgment of his peers, or by the laws of the land. And for the provisions of the *Habeas Corpus Act*, *ſt.* 31 *Car.* 2. *c.* 2, (termed by *Blackſtone* a ſecond *Magna Charta* and ſtable bulwark of our liberties,) with reſpect to ſending Engliſhmen priſoners to *Scotland*, *Ireland*, or beyond the ſeas; ſee titles *Falſe Impriſonment*; *Habeas Corpus*.

Soldiers and ſailors form neceſſary exceptions to theſe rules; but it is ſaid the King cannot even conſtitute a man Deputy, or Lord Lieutenant of *Ireland*, nor make one a foreign Ambaſſador, againſt his will: ſince theſe in reality might be no more than honourable exiles. 2 *Inſt.* 46.

See further on this ſubject, this Dict. titles *Abjuration*, *Clergy*, *Felony*, *Tranſportation*.

EXILIUM, Signifies in law conſtruction, a ſpoiling: And by the ſtatute of *Marlbridge* it ſeems to extend to the injury done to tenants, by altering their tenure, ejecting them, *&c.* and this is the ſenſe that *Fleta* determines, who diſtinguiſhes between *vaſtum*, *deſtructio* and *exilium*; for he tells us that *vaſtum* and *deſtructio* are almoſt the ſame, and are properly applied to houſes, gardens or woods; but *exilium* is when ſervants are infranchiſed, and wards unlawfully turned out of their tenements. *Fleta*, *lib.* 1. *cap.* 11. See *Stat. Marlb. c.* 25.

EXITUS, Iſſue or off-ſpring: and applied to the iſſues or yearly rents and profits of lands. *Stat. Weſt.* 2. *c.* 45. See title *Iſſues*.

EXLEGALITUS, He who is proſecuted as an outlaw. *Leg. Edw. Confeſ. c.* 38.

EX MERO MOTU, Words uſed in the King's charters and letters patent, to ſignify that he grants them of *his own will and mere motion*, without petition or ſuggeſtion of any other: And the intent and effect of theſe words, is to bar all exceptions that might be taken to the charters or letters patent, by alledging that the King in granting them was abuſed by falſe ſuggeſtions. *Kitch.* 352. When the words *ex mero motu* are made uſe of in any charter, they ſhall be taken moſt ſtrongly againſt the King. 1 *Co Rep.* 451.

EX OFFICIO. The power a perſon has *by virtue of an office*, to do certain acts, without being applied to: as a juſtice of peace may not only grant ſurety of the peace, at the complaint or requeſt of any perſon, but he may demand and take it *ex officio*, at diſcretion, *&c. Dalt.* 270.

Ex Officio Informations. Informations at the ſuit of the King, filed by the Attorney-General, as by *virtue of his office*; without applying to the court wherein filed, for leave, or giving the defendant any opportunity of ſhewing cauſe why it ſhould not be filed. See title *Information*.

EXONERATIONE SECTÆ, A writ that lay for the King's ward, to be free from all ſuit to the county-court, hundred court, leet, *&c.* during wardſhip. *F. N. B.* 158.

Exoneratione Sectæ ad Curiam Baron'. A writ of the ſame nature, ſued by the guardian of the King's ward, and directed to the ſheriff or ſtewards of the court, that they do not diſtrain him, *&c.* for not doing ſuit of court. *New Nat. Br.* 352. And if the ſheriff diſtrain tenants in ancient demeſne to come to the ſheriff's torn or leet, they may have a writ commanding the ſheriff to ſurceaſe, *&c. Ibid.* 359. Likewiſe if a man have lands in divers places in the county, and he is conſtrained to come to the leet where he is not dwelling, when he reſides within the precinct of any other leet, *&c.* then he ſhall have this writ to the ſheriff to diſcharge him from coming to any other court-leet than in the hundred where he dwelleth. *Ibid.* 357.

By the common law, parſons ſhall not be diſtrained to come to court leets, for the lands belonging to their churches; and if they be, they may have the writ *exoneratione ſectæ*, *&c.* F. N. B. 394. So ſhall a woman holding land in dower, if ſhe is diſtrained to do ſuit of court for ſuch land; when the heir has lands ſufficient in the ſame county. *Ibid.*

EX PARTE, Of the one part; as a commiſſion in Chancery *ex parte*, is that which is taken out and executed by one ſide or party only, on the other party's neglecting or refuſing to join: When both plaintiff and defendant proceed, it is a joint commiſſion.

Ex parte talis, Is a writ that lies for a *bailiff* or *receiver*, who having auditors aſſigned to take his account, cannot obtain of them reaſonable allowance, but is caſt into priſon. And the courſe in this caſe is to ſue this writ out of the Chancery, directed to the ſheriff to take four mainpernors to bring his body before the barons of the *Exchequer* at a certain day, and to warn the lord to appear at the ſame time. *F. N. B.* 129.

EXPECTANT, Having relation to or depending upon; and this word is uſed in the law with *fee*, as *fee-expectant*.

Expectancy, *Eſtates in*; are of two ſorts; one created by act of the *parties*, called a *remainder*; the other by act of *law*, called a *reverſion*. See titles, *Eſtate*; *Remainder*; *Reverſion*; *Executory Deviſe*.

EXPEDITATE, *Expeditare.*] In the laws of the *foreſt*, ſignifies to cut out the ball of the dog's fore-feet, for the preſervation of the King's game: But the ball of the foot of a maſtiff is not to be taken out, but the three claws of the fore-foot on the right ſide are to be cut off by the ſkin. *Cromp. Juriſd.* 152: *Manwood*, *cap.* 16. This relates to every man's dog who lives near the foreſt; and was formerly done once in every three years: and if any perſon keeps a great dog not expeditated, he forfeits to the King 3*s.* 4*d.* 4 *Inſt.* 308. See title *Foreſt*.

EXPEDITATÆ ARBORES, Trees rooted up or cut down to the roots.—*Fleta*, *lib.* 2. *c.* 41.

EXPENDITORS, Perſons appointed by commiſſioners of *ſewers* to pay, diſburſe, or expend the money collected by the tax for the repairs of ſewers, *&c.* when paid into their hands by the collectors, on the reparations, amendments and reformations ordered by the commiſſioners, for which they are to render accounts when thereunto required. *Laws of Sewers* 87, 88. See title *Sewers*. The ſteward who ſuperviſes the repair of the banks and water-courſes in *Romney Marſh*, is called the *Expenditor*.

EXPENSÆ LITIS, Coſts of ſuit, allowed a plaintiff or defendant, recovering in his action. See title *Coſts*.

EXPENSIS MILITUM NON LEVANDIS, &c. An ancient writ to prohibit the ſheriff from levying any allowance for knights of the ſhire, upon thoſe that hold lands in ancient demeſne. *Reg. Orig.* 261. For there was alſo a writ *de expenſis militum levandis*, for levying expences for knights of the parliament, *&c. Reg. Orig.* 191. See title *Parliament*.

EXPLEES, The rents or profits of an eſtate, *&c.* See *Eſplees*.

EXPLORATOR, A ſcout; alſo a huntſman, or chaſer.

EXPORTATION,

EXPORTATION, The ſhipping or carrying out the native commodities of *England* for other countries; mentioned in the ſtatutes relating to the *Cuſtoms*. See this Dict. title *Navigation Acts*.

EXPOSITION OF DEEDS, ſhall be favourable, according to the apparent intent: and be reaſonable and equal, &c. *Co. Lit.* 313. See title *Deed*.

EX POST FACTO, Is a term uſed in the law, ſignifying ſomething done after another thing that was committed before. And an act done, or eſtate granted, may be made good by matter *ex poſt facto*, that was not ſo at firſt, by election, &c. As ſometimes a thing well done at firſt, may afterwards become ill. 5 *Rep.* 22: 8 *Rep.* 146. See title *Statute*.

To EXTEND, *Extendere.*] To value the lands or tenements of one bound by a ſtatute, who hath forfeited his bond, at ſuch an indifferent rate, as by the yearly rent the creditor may in time be paid his debt. *F. N. B.* See the next article.

EXTENDI FACIAS, or EXTENT, *Extenta.*] A writ of execution, or commiſſion to the ſheriff for the valuing of lands or tenements; and ſometimes the act of the ſheriff or other commiſſioner upon this writ. *Bro.* 313. See this Dict. title *Execution*. This term is alſo uſed for the eſtimate or valuation of lands, which when made to the utmoſt value, is ſaid to be the full extent; whence come our extended rents, or rack rents.

If one bound to the King by ſpecialty, or to others by ſtatute, recognizance, &c. hath forfeited it; ſo that by the yearly rent of the debtor's lands, the creditor is to be paid his debt; upon this the creditor may ſue a writ to the ſheriff out of the Chancery to deliver him the lands and goods to the value of the debt, which is termed a *liberate*. F. N. B. 131. This is after the extent directed to the ſheriff to ſeize and value the lands, &c. of the debtor, to the utmoſt extent. 4 *Rep.* 67.

Lands and goods are to be appraiſed and extended by the inqueſt of twelve men, and then delivered to the creditor, in order to the ſatisfaction of his debt: every extent ought to be by inquiſition and verdict, by the *Stat. Weſtm.* 2. And the ſheriff cannot execute the writ without an inquiſition. *Cro. Jac.* 569.

The body of the cogniſor, and all lands and tenements that were his at the time of the ſtatute, &c. entered into, or afterwards, into whoſe hands ſoever they come, are liable to the extent. 2 *Inſt.* 396. But *copyhold* lands are chargeable only during the life of the cogniſor; and may not be extended by *elegit*, ſo as to admit a ſtranger to have intereſt in the lands held by copy, without the admittance of the lord. Lands in ancient demeſne, annuities, rents, &c. are extendible. 1 *Rol. Abr.* 88. Two parts of an entire rent may be delivered upon an extent by the ſheriff. *Cro. Eliz.* 742. But if the cogniſor of a ſtatute have a rent-charge, and before the extent he purchaſe parcel of the land; the rent is gone, and ſhall not be in execution: 'Tis otherwiſe if he purchaſes after extent of the rent. *Dyer* 206. A reverſion of lands, &c. may not be extended; but a plaintiff had judgment for his debt and damages *de reverſione cum acciderit*, and a ſpecial *elegit* to extend the moiety, &c. 2 *Sid.* 86: *Dyer* 373.

An advowſon in groſs is not extendible on elegit, &c. *Stat. Weſtm.* 2. *cap.* 18. An office of truſt cannot be extended, becauſe 'tis not aſſignable; and nothing ſhall be extended, but what may be aſſigned over. *Dyer* 7. Though an office is extendible in equity. *Chanc. Rep.* 39. Goods and chattels, as leaſes for years, cattle, &c. in the cogniſor's own hands, and not ſold for valuable conſideration, are ſubject to the extent. As the lands are to be delivered to the party at a reaſonable yearly value, ſo the goods ſhall be delivered in extent at a price that is reaſonable: And on a *ſcire facias ad computand'* the cogniſee is to account according to the *extended* value; not the *real* value of the land. *Hardr.* 136. If the extenders appraiſe and value the lands too high, the cogniſee at the return of the writ may pray that they may take and retain the lands at the rate appraiſed; and then 'tis ſaid he may have execution againſt their lands for the debt; but this may not be on *elegit*. *Cro. Jac.* 12. It has been adjudged, that at the return of the writ the cogniſee may refuſe the lands, &c. extended, if over valued. *Cro. Car.* 148.

Where lands are extended at under-value, and delivered in execution, the cogniſee hath an intereſt in the land, which cannot be diveſted by finding of ſurpluſage. *Cro. Eliz.* 266: *Cro. Jac.* 85. The cogniſor cannot enter upon the cogniſee, when ſatisfaction is received for the debt, but is put to his *ſcire facias* on an *extent*: Though on an *elegit*, the defendant may enter becauſe the land is only awarded, till the debt, which is certain, is ſatisfied; whereas on extent, the land is to be held until the debt, damages and coſts, &c. are ſatisfied: And the cogniſee being in by matter of record, ſhall not be put out but by matter of record, *viz.* a *ſcire facias* brought againſt him. 4 *Rep.* 67: *March's Rep.* 207, 208. *Sed qu.* Where is the difference? Is not the tenant by *elegit* in by matter of record?

After an extent returned, a *liberate* ſhall go to the ſheriff, reciting the *extendi facias* and return, and commanding that he deliver the goods and lands to the conuſee (under a ſtatute-ſtaple, &c.) *ſi per extentum et pretium illa habere voluit*. F. N. B. 131: *Lutw.* 432.

The cogniſee hath no abſolute property in lands by the extent, till the delivery upon the *liberate*; but notwithſtanding, by the very extent they are *in cuſtodiâ legis* for his benefit. *Cro. Car.* 106, 148. No actual ſeiſin can be on an extent, and a cogniſee of a ſtatute ſtaple, &c. cannot bring ejectment before the *liberate*; nor can the ſheriff upon the *liberate* turn the tertenant out of poſſeſſion, as he may upon a *hab. fac. poſſeſſionem*. 1 *Vent.* 41. Where there is an extent upon a ſtatute, and a *liberate* thereupon, but not returned, yet it is good; though regularly, when inquiſitions are taken, the writ ought to be returned. 4 *Rep.* 67: 1 *Lill. Abr.* 592. The ſheriff may be charged to make a return of his writ, if he put the cogniſee in poſſeſſion of part only; and ſo the cogniſee may have poſſeſſion of the whole. 2 *Nelſ. Abr.* 774. But it is ſaid if a perſon ſuing out an extent, die before the return of a writ, the ſheriff may not proceed in his inquiſition, &c. afterwards; for there muſt be a proſecution *de novo*.

After a full and perfect execution had by extent, returned, and of record, there ſhall never be any re-extent upon an eviction: But by *Stat.* 32 *Hen.* 8. *cap.* 5, if lands delivered in execution on a judgment, ſtatute or recognizance ſhall be evicted, without fraud, or default of the tenant, who holds them in execution, before the debt and damages are wholly levied, the recoveror or

conuſee may have a *ſcire facias* againſt the perſon on whom the execution was firſt ſued, his heirs, executors or aſſigns, of lands then liable, returnable in the ſame Court, 40 days after the teſte; and if the defendant makes default, or ſhews not cauſe, the Chancellor or Juſtices of the court where the *ſcire facias* is returned ſhall make a new writ of the like nature of the former execution for levying the reſidue of the debt. *Co. Lit.* 290.

If lands be extended upon a miſtake, *&c.* a re-extent may be had; ſee *Dyer* 299. If part of the lands is evicted, the cogniſee is to hold over the reſidue of the land till the debt is ſatisfied. 4 *Rep.* 66. When lands are delivered in extent, it is as if the cogniſee had taken a leaſe thereof for years, until the debt is ſatisfied; and he ſhall never afterwards take out a new execution: the cogniſee having accepted the land upon the *liberate*, the law preſumes the debt to be ſatisfied. 1 *Lutw.* 429. An extent was filed, and though it was diſcovered that lands were omitted, the court would not grant a re-extent. *Sid.* 356. By *Stat.* 16 & 17 *C.* 2. *c.* 5, (made perpetual by *Stat.* 22 & 23 *C.* 2. *c.* 2;) when any judgment, ſtatute or recognizance ſhall be extended (within twenty years after ſuch judgment, *&c.* had,) the ſame ſhall not be avoided or delayed by occaſion that any part of the lands extendible are omitted out of ſuch extent: ſaving to the parties whoſe lands ſhall be extended, their remedy for contribution againſt thoſe whoſe lands are omitted; except heirs within age.

Where a *feri facias* iſſues, and is delivered to the ſheriff to be executed, the property of the goods is veſted by the *delivery*, and an extent afterwards for the King comes too late. *Comb.* 123: See alſo 2 *Black. Rep.* 1294: *Doug.* 415, 599. See title this Dict. *Execution.*

EXTINGUISHMENT; from *Lat. Extinguo.*] The Extinction or annihilation of a right, eſtate, *&c.*; by means of its being merged in, or conſolidated with, another, generally a greater or more extenſive, right or eſtate. Wherever a right, title, or intereſt is deſtroyed, or taken away by the act of God, operation of law, or act of the party, this in many books is called an Extinguiſhment. *Co. Lit.* 147, *b*: 1 *Ro. Ab.* 933.

This Extinguiſhment is of various natures, as applied to various rights; *viz. Eſtates, Commons, Copyholds, Debts, Liberties, Services*, and *Ways*: See more at large under thoſe titles; what follows will give ſome general information on the ſubject.

EXTINGUISHMENT OF ESTATES. If a man hath a yearly rent out of lands, and afterwards purchaſes the lands whereout it ariſeth, ſo that he hath as good an eſtate in the land as in the rent; now both the property and rent are conſolidated or united in one poſſeſſor; and therefore the rent is ſaid to be extinguiſhed. Alſo where a perſon has a leaſe for years, and afterwards buys the property; this is a conſolidation of the property and fruits, and is an extinguiſhment of the leaſe: But if a man have an eſtate in land but for life or years, and hath a higher eſtate, as a fee ſimple, in the rent; the rent is not extinguiſhed, but in ſuſpence for a time; for after the term, the rent ſhall revive. *Terms de Ley.*

Extinguiſhment of a rent is a deſtroying of the rent by purchaſe of the land; for no one can have a rent going out of his own land; though a perſon muſt have *as high an eſtate in the land, as in the rent, or the rent will not be extinct. Co. Litt.* 147. If a perſon hath a rent-charge to him and his heirs iſſuing out of lands, and he purchaſeth any part of the land to him and his heirs; as the rent is intire and iſſuing out of every part of the land, the whole rent-charge is extinguiſhed: though it is not ſo where one hath a *rent-ſervice*, and purchaſeth part of the land out of which it iſſues; *rent ſervice* being *apportionable* according to the value of the land, ſo that it ſhall only extinguiſh the rent for the land purchaſed. *Lit.* 222: *Co. Lit.* 148. And if the grantee of a rent-charge purchaſes parcel of the lands, and the grantor by his deed granteth that he may diſtrain for the rent in the reſidue of the land, this amounts to a new grant. *Co. Lit.* 147. See titles *Grant*; *Eſtate.*

If a man be ſeiſed of a rent-charge in fee, and grants it to another and his heirs, and the tenant attorns; the grantor is without remedy for the rent in arrear before his grant; and ſuch arrears become as it were extinct. *Vaugh.* 40: 1 *Lill. Abr.* 594. *A. B.* made a leaſe for years of lands to another, and afterwards granted a rent-charge to *C. D.* who deviſed the ſaid rent to the ſaid *A. B.* till 100 *l.* ſhould be levied; then to *B. G.* and died: Adjudged that by the deviſe to *A. B.* the rent was ſuſpended, and that a perſonal thing once ſuſpended by the act of the party is extinguiſhed for ever. *Dyer* 140.

If tenant for life, makes a leaſe for years, rendring rent, and afterwards the reverſion deſcends to the tenant for life; this is not an extinguiſhment of the term; but it is otherwiſe if he have the reverſion by purchaſe. 1 *Co. Rep.* 96. A jointenant for life purchaſes the land in reverſion, it will extinguiſh the eſtate for life for a moiety, and ſever the joint-tenure. 2 *Rep.* 60. Lands are given to two men, and the heirs of their bodies; though they have an eſtate for life jointly, and ſeveral inheritances, yet the eſtate for life is not extinct: *Contrà*, if it be by *ſeveral conveyances*; as where a leaſe is made to two for their lives, and after the leſſor grants the reverſion to them and their heirs, *&c.* here the life eſtate will be extinguiſhed. *Co. Lit.* 182.

If one after his title begun to be tenant by the curteſy, make a feoffment in fee upon condition, and enter for the condition broken; the eſtate is extinct, ſo that if his wife die, he ſhall not be tenant by the curteſy. 1 *Rep.* 18. Where a man hath an eſtate for his own life, and for another's life at once; the eſtate *pour auter vie* will be extinguiſhed in the eſtate for his own life, which is greater in law than the other. 11 *Rep.* 87: *Dyer* 11. See *Bro.* 409: *Moor* 94: 2 *Nelſ. Abr.* 821.

When the freehold cometh to the term, the eſtate for years is extinct. 2 *Nelſ. Ab.* 820. Where the remainder of a term is granted over to another, if the party in poſſeſſion purchaſe the fee-ſimple, though by this means his intereſt is extinguiſhed; yet that ſhall not defeat the reverſionary intereſt. 10 *Rep.* 52: 2 *Nelſ.* 820.

A fine, *&c.* of lands, will extinguiſh a term: and by purchaſe of an eſtate in fee-ſimple, an eſtate-tail in land is extinct. 9 *Rep.* 139. But if a fee-ſimple and fee-tail meet together by *deſcent*, the eſtate-tail will not be extinguiſhed. 3 *Rep.* 61. Deſcent of lands to the ſame perſon who has a term, will extinguiſh the term. *Moor* 286.

When a leſſor enters tortiouſly upon the leſſee againſt his conſent, the rent is extinguiſhed 2 *Lev.* 143. But it has been adjudged, that rent is not extinct by the entry of the leſſor, but only ſuſpended; and revives by the leſſee's re-entry. *Dyer* 361. An infant has a rent, and

purchaſes

purchaſes the land out of which it is iſſuing; by this the rent will be ſuſpended, but not extinct. *Bro. Extinguiſh.* A man leſſee for years takes a wife, or woman leſſee a huſband, that hath the reverſion after the leaſe; here the term is *not* extinguiſhed. 12 *Rep.* 81. See title *Baron and Feme.*

EXTINGUISHMENT OF COMMON. By purchaſing lands wherein a perſon hath common appendant, the common is extinguiſhed. *Cro. Eliz.* 594. A commoner releaſes his common in one acre, it is an extinguiſhment of the whole common. *Show. Rep.* 350. And where a perſon hath common of *vicinage*, if he incloſes any part of the land, all the common is extinct. 1 *Brownl.* 174.

But if one hath common appendant in a great waſte, belonging to his tenant, and the lord improve part of the waſte leaving ſufficient; if he after make a feoffment to the commoner of the land improved, this will be no extinguiſhment. *Dyer* 339: *Hob.* 172. A commoner aliens part of his land, to which the common doth belong; the common is not extinct, but ſhall be divided. 2 *Shep. Abr.* 152. See title *Common.*

EXTINGUISHMENT OF COPYHOLD. It is laid down as a general rule, that any act of the copyholder's, which denotes his intention to hold no longer of his lord, and amounts to a determination of his will, is an extinguiſhment of his copyhold. *Hutt.* 81: *Cro. Eliz.* 21: 1 *Jon.* 41.

As if a copyholder in fee accepts a leaſe for years of the ſame land from the lord, this determines his copyhold eſtate; or if the lord leaſes the copyhold to another, and the copyholder accepts an aſſignment from the leſſee, his copyhold is extinct. *Moor* 184: 2 *Co.* 16 *b*: *Godb.* 11, 101.

So if a copyholder bargains and ſells his copyhold to the leſſee for years of the manor, his copyhold is thereby extinguiſhed; or if he joins with his lord in a feoffment of the manor, his copyhold is thereby extinct, for theſe are acts which denote his intention to hold no longer by copy. *Hutt.* 65: 1 *Jon.* 41. *S. C*: *Godb.* 11.

So if a copyholder accepts to hold of his lord, by bill under the lord's hand, this determines his copyhold; ſo if he accepts an eſtate for life by parol, if with livery, this is an extinguiſhment; otherwiſe not; for without livery nothing but an eſtate at will paſſes, which cannot merge or extinguiſh an eſtate at will. 1 *And.* 199: *Latch.* 213.

If one ſeiſed of a *manor* in right of his wife lets lands by indenture for years, this doth not deſtroy the cuſtom as to the wife; for after the death of her huſband ſhe may demiſe it again by copy. *Cro. Eliz.* 459.

So if a copyhold is in the hands of a ſubject, who after becomes King, the copyhold is extinct, for it is below the Majeſty of a King to perform ſuch ſervile ſervices; yet after his deceaſe the next that hath right ſhall be admitted, and the tenure revived. 2 *Sid.* 82: 4 *Co.* 24: *Cro. Eliz.* 252. See 2 *Leon.* 208: 4 *Co.* 26 *b*: *Cro. Eliz.* 103. And a copyhold eſtate is extinct whenever it becomes not demiſeable by copy. *Coke's Copyholder.* 62. See further title *Copyhold.*

EXTINGUISHMENT OF DEBT. If feme ſole debtee take the debtor to huſband; or there be two *joint* obligors in a bond, and the obligee marries one of them; or in caſe a perſon is bound to a feme ſole and another, and ſhe takes the obligor to huſband; in theſe caſes, the debt will be extinguiſhed. 8 *Rep.* 136. And if a debtor makes the debtee his executor, or him and another executor, and they take the executorſhip upon them; or if the debtee makes his debtor executor, &c. it is an extinguiſhment of the debt, and it ſhall never revive. *Plowd.* 184. 1 *Salk.* 304. But where a debtee or debtor executor legally refuſeth; or he and others being made executors they all refuſe, then the debt is revived again. *Plowd.* 185. See titles *Baron and Feme*: *Executor.*

It is agreed as a general rule, that a creditor's accepting a higher ſecurity than he had before, is an extinguiſhment of the firſt debt; as if a creditor by ſimple contract accepts an obligation, this extinguiſhes the ſimple contract debt. 1 *Rol. Abr.* 470, 471, 604: 6 *Co.* 44.

So if a man accepts a bond for a legacy, he cannot ſue for his legacy in the ſpiritual court; for by the deed the legacy is extinct, and it is become a mere debt at Common-law. *Yelv.* 38.

So if a bond-creditor obtains judgment on the bond, or has judgment acknowledged to him, he cannot afterwards bring an action on the bond; for the debt is drowned in the judgment, which is a ſecurity of a higher nature than the bond. 6 *Co.* 44 *b.*

But theſe caſes muſt be underſtood where the debtor himſelf enters into theſe ſecurities; and therefore if a ſtranger give bond for a ſimple-contract due by another, this does not extinguiſh the ſimple contract debt; but if *upon making the contract*, a ſtranger gives bond for it, or, being preſent, promiſes to give bond for it, and after does ſo, the debt by ſimple contract is extinguiſhed, the obligation being made *upon*, or *purſuant to the contract.* 2 *Leon.* 110.

But the accepting a ſecurity of an inferior nature is by no means an extinguiſhment of the firſt debt; as if a bond be given in ſatisfaction of a judgment. *Cro. Jac.* 579: 2 *Brownl.* 29: *Cro. Jac.* 649, 650.

Alſo the accepting a ſecurity of equal degree is no extinguiſhment of the firſt debt; as where an obligee has a ſecond bond given to him; for one deed cannot determine the duty upon another. *Cro. Eliz* 304, 716, 727: 1 *Brownl.* 74: *Lit. Rep.* 58: *Cro. Car.* 86.

Though a bond is taken for a ſimple contract debt, yet *if it is after an act of bankruptcy*, the ſimple contract is *not* extinguiſhed. *Stran.* 1042.

By a releaſe of part of a debt due on bond, the whole is gone, and the obligation *extinguiſhed. Bro. Contract.* 80: 1 *And.* 235.—See further titles *Acceptance*: *Bond.*

EXTINGUISHMENT OF LIBERTIES. Liberties and franchiſes granted by the King, may ſometimes be extinguiſhed, and ſometimes not. *Moor* 474. When the King grants any privileges, liberties or franchiſes, which were in his own hands, as parcel of the flowers of the crown, ſuch as *bona felonum, fugitivorum & utlagatorum*, waifs, ſtrays, deodand, wreck on the ſea, &c. if they come to the crown again, they are drowned and extinct in the crown, and the King is ſeiſed of them *jure coronæ*: but if liberties of fairs, markets or other franchiſes, and juriſdictions, be erected and created by the King, they will not be extinguiſhed, nor their appendances ſevered from the poſſeſſions. 9 *Rep.* 25. A man has liberties by preſcription, if he takes letters patent of them, the preſcription will be gone and extinct; for things of a higher determine thoſe of a lower nature. 2 *H.* 7. 5. See title *King.*

EXTINGUISHMENT

EXTINGUISHMENT OF SERVICES. The lord purchaſes or accepts parcel of the tenancy, out of which an intire ſervice is to be paid or done; by this the whole ſervice will be extinct: but if the ſervice be *pro bono publico*, then no part of it ſhall be extinguiſhed; and homage and fealty are not ſubject to extinguiſhment, by the lord's purchaſing part of the land. 6 *Rep.* 1, 105: *Co. Lit.* 149. If the lord and another perſon do purchaſe the lands, whereout he is to have ſervices, they are extinct: alſo by ſeverance of the ſervices, a manor may be extinguiſhed. *Co. Lit.* 147: 1 *And.* 257. See title *Tenure*.

EXTINGUISHMENT OF WAYS. If a man hath a highway as appendant, and after purchaſes the land wherein this way is, the way is extinct. *Terms de Ley*. Though a way of neceſſity to market, or church, or to arable land, *&c.* is not extinguiſhed by purchaſe of ground, or unity of poſſeſſion. 11 *H.* 7. 25: *Co. Litt.* 155. See title *Way*.

EXTIRPATIONE. A judicial writ, either before or after judgment, that lies againſt a perſon who when a verdict is found againſt him for land, *&c.* doth maliciouſly overthrow any houſe, or extirpate any trees upon it. *Reg. Jud* 13, 56.

EXTOCARE. To grub up lands, and reduce them to arable or meadow. *Mon. Ang. tom.* 2. *p.* 71.

EXTORTION, *extorſio*, from *extorqueo*, to wreſt away.] In a large ſenſe, any oppreſſion under colour of right; it is uſually applied to that abuſe of publick juſtice which conſiſts in the unlawful taking by an officer, *&c. by colour of his office*, of any money, or valuable thing, from a perſon where none at all is due, or not ſo much is due, or before it is due. *Co. Lit.* 368: 10 *Rep.* 102. See title *Bribery*; *Fees*.

The diſtinction between *bribery* and *extortion* ſeems to be this. The former offence conſiſts in the *offering* a preſent or receiving one if offered; the latter, in *demanding* a fee or preſent, by colour of office.

At the Common law, which was affirmed by the ſtatute of *Weſtm.* 1. *c.* 26, it was extortion for any miniſter of the King, whoſe office did any way concern the adminiſtration and execution of juſtice, or the common good of the ſubject, to take any reward for doing his office, except what he received from the King: though reaſonable fees for the labour and attendance of officers of the courts of juſtice are not reſtrained by ſtatute, which are ſtated and ſettled by the reſpective courts; and it has been thought expedient to allow theſe officers to take certain immediate fees in many caſes. 2 *Inſt.* 209: 3 *Inſt.* 149: 1 *Hawk. P. C. c.* 68.

The taking of money by *virtue* of an office, implies the act to be lawful; but to take any money by *colour* of an office, implies an ill action: and the taking being for expedition of buſineſs, is judged by colour of the office, and unlawful. 2 *Inſt.* 206: *Co. Lit.* 368.

Yet according to ſome it ſeems that an officer, who takes a reward which is voluntarily given to him, and which has been uſual in certain caſes, for the more diligent or expeditious performance of his duty, cannot be ſaid to be guilty of extortion; for without ſuch a *premium* it would be impoſſible in many caſes to have the laws executed with vigour and ſucceſs. 2 *Inſt.* 210: 3 *Inſt.* 149: *Co. Lit.* 368.

But it has been always held, that a promiſe to pay an officer money for the doing of a thing, which the law will not ſuffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made. 1 *Rol. Abr.* 16: 1 *Rol. Rep.* 313: *Noy* 76: 1 *Jon.* 65: *Cro. Eliz.* 654: *Moor* 468: *Cro. Jac.* 103.

It is extortion to oblige an executor to prove a will in the biſhop's court, and to take fees thereon, knowing the ſame to have been proved in the Prerogative Court. *Str.* 73.—Or in a ſheriff's officer to admit a priſoner to bail, upon an agreement to receive a certain ſum when the priſoner ſhould pay to a third perſon another ſum of money. 2 *Burr.* 924.—To arreſt a man in order to obtain a releaſe from him, 8 *Mod.* 189.—In a gaoler to obtain money from his priſoner by any colourable means. 8 *Mod.* 226: *Stra.* 575.—Or in a church-warden *colore officii*. 1 *Sid.* 307.—In a miller, if he takes more toll than is due by cuſtom. *Ld. Raym.* 159. Or a commiſſary for abſolution. 3 *Leon.* 268.—Or a ferry-man more for his ferry. 4 *Mod.* 101.—Or to ſeize upon the place where a fair is held, and by building ſtalls to force an exorbitant price for them. *Ld. Raym.* 150.—Or in an under-ſheriff to refuſe to execute proceſs till his fees are paid. *Salk.* 330.—Or to take a bond for his fee before execution is ſued out. *Hut.* 53. Or for a coroner to refuſe his view until his fees be paid. 3 *Inſt.* 149.

Extortion, by the Common-law is ſeverely puniſhed, on indictment, by fine and impriſonment, and removal of officers from the offices wherein committed. 1 *Hawk. P. C. c.* 68. By the *Stat.* 3 *Ed.* 1, Inferior officers of juſtice, *&c.* guilty of extortion, are to render, by *c.* 26, double, and by *c.* 30, treble value; and there are divers other ſtatutes for puniſhing extortions of ſheriffs, bailiffs, gaolers, clerks of the aſſiſe, and of the peace, attornies and ſolicitors, *&c.* See *Stats.* 23 *H.* 6. *cc.* 7; 9. See title *Sheriff*. 33 *Hen.* 8. *c.* 24: 29 *Eliz. c.* 4: 1 *Jac.* 1. *c.* 10: 9 & 10 *W.* 3. *c.* 41: 10 & 11 *W.* 3. *c.* 23: 3 *Geo.* 1. *c.* 15: 17 *Geo.* 3. *c.* 26. § 6. As to the extortion of officers of the cuſtoms, diſtraining merchants for undue charges, *&c.* See *Stat.* 28 *H.* 6. *c.* 5; and this Dict. title *Cuſtoms*.

In caſes of extortion, there muſt be a poſitive charge and that the perſon charged with it took ſo much *extorſivè* or *colore officii*; which words are as eſſential as *proditorie* or *felonice* for treaſon or felony. 2 *Salk.* 680.

Officers may be jointly indicted of extortion as they may be jointly guilty of the offence. 1 *Salk.* 382.

The place, where the extortion was committed, ſhould be ſet down in the declaration. See *Pl. C. c.* 200. The ſum certain extorted muſt be particularly ſet forth, and he cannot ſay, that the defendant did extort divers ſums from divers men generally. *Godb.* 438. *pl.* 583. *Mich.* 4 *Car.*

The indictment, (which may be brought at the Seſſions *Str.* 73,) or information, muſt ſtate the fact particularly. 3 *Leon.* 268: 25 *E.* 3. *ſt.* 3. *c.* 9: 11 *Mod.* 80. It muſt alſo ſpecify the time when the offence was committed. 4 *Mod.* 101, 3. But although it be omitted to be ſtated for what the thing extorted was taken, it is good after verdict. *Sid.* 91. And in general the Court of K. B. will oblige the party to demur to a defective indictment for extortion. 5 *Mod.* 13. And whatever may be the ſum, if there is proof only of a ſhilling taken, the defendant is guilty: for the taking is the offence and not the contract. *Ld. Raym.* 149. And he alſo who aſſiſts is equally guilty, for there are no acceſſaries in extortion. *Str.* 73.

Againſt

Againſt attornies for extortion, action may be brought, and the party grieved ſhall have treble damages and coſts; but information will not lie on the *Stat.* 3 *Jac.* 1 *cap.* 7. *Sid.* 434: 2 *Nelſ.* 822.

If an officer by terrifying another in his office, take more than his ordinary fees or duties he is guilty of extortion which may be compared to unlawful uſury, *&c.* And *Crompton* ſays, that wrong done by any man is a treſpaſs; but exceſſive wrong is properly extortion. *Cromp. Juſt.* 8. And extortion has been deemed more odious than robbery, becauſe it carries an appearance of truth; and is often accompanied with perjury in officers, *&c.* by breaking their oaths of office.

EXTRACTA CURIÆ. The iſſues or profits of holding a court ariſing from the cuſtomary fees, *&c. Paroch. Antiq.* 572.

EXTRACTS of writings or records, being notes thereof. See title *Eſtreats*.

EXTRAJUDICIAL. Is when judgment is had in a cauſe, not depending in that court where given; or wherein the judge has not juriſdiction.

EXTRAPAROCHIAL. Out of any pariſh; any thing privileged and exempt from the duties of a pariſh.—See this Dict. title *Poor*.

EXTRAVAGANTS. Certain conſtitutions of the Popes, ſo called, becauſe *extra corpus canonicum Gratiani, five* extra *decretorum libros* vagantur. *Du Cange.*

EXTUMÆ. Reliques in churches and tombs.—*Cartular. Abbat. Glaſton. MS.*

EXUPERARE. To overcome; ſometimes it ſignifies to apprehend or take, as, *exuperare vivum vel mortuum Leg. Edm. c.* 2.

EY, *Inſula*, an iſland.] where the names of places end in *ey*, it denotes them an iſland. As *Ramſey*, is the iſland of *Rams*; *Sheppy*, the iſland of *Sheep*; *Herſey*, the iſland of *Harts*, &c.

EYERY of hawks. See title *Aerie*.

EYRE. Vide *Eire*, and *Juſtices in Eyre*.

F.

F Is a letter wherewith *felons, &c.* are branded and marked with an hot iron, on their being admitted to the benefit of clergy. See this Dict. title *Clergy*.

FABRICK LANDS, Are lands given towards the re-building or repairing of cathedral and other churches; for in ancient times, almoſt every perſon gave by his will more or leſs, to the *fabrick* of the cathedral or pariſh church where he lived; and lands thus given were called *fabrick lands*, being *ad* fabricam *reparandum*: theſe lands are mentioned in the *Stat.* 12 *Car.* 2. *c.* 8.

FACTA ARMORUM, Feats of arms, juſts, tournaments, *&c. Hiſ. Joh. Brompton*, in *R.* 1. *p.* 1261.

FACTO, In fact; as where any thing is actually done, *&c.* See *De facto*.

FACTOR, The agent of a merchant abroad, reſiding in this country; or *è contra*.—A Factor is authoriſed by a letter of Attorney, with a ſalary or allowance for his care. He muſt purſue his commiſſion ſtrictly; and the ſame perſon may be factor for many different merchants. *Mal.* 81.

If the principal give the *factor* a general commiſſion to act for the beſt, he may do for him as he thinks fit; but otherwiſe he may not. Though in commiſſions at this time, it is common to give the *factor* power in expreſs words, to diſpoſe of the merchandize, and deal therein as if it were his own; by which the *factor's* actions will be excuſed, though they occaſion loſs to his principal. *Lex Mercat*: *Mal.* 81: *Str.* 1178.

Goods remitted to a *factor* ought to be carefully preſerved; and he is accountable for all lawful goods which ſhall come to his hands; yet if the factor buy goods for his principal, and they receive damage after in his poſſeſſion, through no negligence of his, the principal ſhall bear the loſs; and if a *factor* be robbed, he ſhall be diſcharged in account brought againſt him by his principal. 4 *Rep.* 83. See title *Bailment*.

If the *factor* has orders from his principal not to ſell any goods but in ſuch a manner, and breaks thoſe orders, he is liable to the loſs or damage that ſhall be received thereby: and where any goods are brought or exchanged without orders, it is at the merchant's curteſy whether he will accept of them, or turn them on his *factor's* hands. When a *factor* has bought, or ſold goods purſuant to orders, he is immediately to give advice of it to his principal; leſt the former orders ſhould be contradicted before the time of his giving notice, whereby his reputation might poſſibly ſuffer: and where a factor has made a conſiderable profit for his principal, he muſt take due care in the diſpoſition of the ſame; for without commiſſion or particular orders, he is anſwerable. A factor ſhall ſuffer for not obſerving orders; and no factor acting for another man's account in merchandize, can juſtify receiving from the orders of his principal, though there may be a probability of advantage by it: if he make any compoſition with creditors without orders, he ſhall anſwer it to his principal. *Lex Mercatoria*.

Factors ought to obſerve the contents of all letters from their principals, or written to them by their order. A merchant is anſwerable in action upon the caſe for the deceits of his factor, in ſelling goods abroad: and as ſomebody muſt be a loſer by ſuch deceit, it is more reaſonable that he who employs, and puts confidence in the deceiver, ſhould loſe, than a ſtranger. 1 *Salk.* 289.

Factors are liable to the ſtatutes concerning bankrupts. *Stat.* 5 *Geo.* 2. *c.* 30, § 39. See title *Bankrupt*. Factor not to buy cattle on his own account. *Stat.* 31 *Geo.* 2. *c.* 40. § 11. See title *Cattle*.

A bare commiſſion to a *factor* to ſell and diſpoſe of merchandize, is not ſufficient power for the factor to entruſt any perſon, or to give a further day of payment than the day of the ſale of the goods; for in this caſe, on the delivery of the one he ought to receive the other: and by the general power of doing as if it were his own, he may not truſt an unreaſonable time, *viz.* beyond one or three months, *&c.* the uſual time allowed for the commodities diſpoſed of; if he doth, he ſhall be anſwerable to his principal out of his own eſtate. 1 *Bulſt.* 102: But in 2 *C. C.* 57, it is ſaid that by his general commiſſion a factor has authority to ſell upon credit.

If a *Factor* buys goods on account of his principal, where he is uſed ſo to do, the contract of the *factor* ſhall oblige the principal to a performance of the bargain; and the principal is the proper perſon to be proſecuted, on non-performance: but if the *factor* enters into a charter-party of affreightment with a maſter of a ſhip, the contract obliges him only; unleſs he lades aboard generally his principal's goods, then both the principal and lading become liable for the freight and not the *factor*. *Goldſb.* 137.

It is a general rule that where a factor, who is authoriſed to ſell goods in his own name, makes the buyer debtor to himſelf, though he is not anſwerable to his principal for the *debt*, if the money be not paid; yet he has a right to receive it, if it be paid, and his receipt is a diſcharge to the buyer. The factor may compel ſuch payment by action, and the buyer cannot defend himſelf by ſaying that the principal was indebted to him more than the amount. *Comp.* 255, 6. Where goods are ſold by a factor at his own riſk, for which he has an additional allowance, the vendee is not anſwerable to the owner. *Stra.* 1182. See *Del credere*.

Though a factor has power to ſell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a ſecurity for his own debt, though there is the formality of a bill of parcels and a receipt. *Stran.* 1178.

If a

If a factor sells goods as his own, by indorsement of the bill of lading, though no delivery is made, the goods being at sea, the vendee shall keep possession unless fraud appears between him and the factor. 4 *Burr.* 2046: 1 *Blac. Rep.* 629. See *post*, the last paragraph of this article.

It hath been held in Equity, that if one employs a factor, and entrusts him with the disposal of merchandize, and the factor receives the money, and dies indebted in debts of a higher nature, and it appears by evidence, that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of superior creditors, *&c.* for as money has no ear mark, Equity cannot follow that in behalf of him who employed the factor. 1 *Salk.* 160.

If a person doth employ a factor to sell goods, who sells them on credit, and before the money is paid dies indebted, more than his assets will pay; this money shall be paid to the principal merchant, and not to the factor's administrator, but thereout must be deducted what was due for commission: for a factor is in nature only of a trustee for his principal. 2 *Vern.* 638.

Bills remitted to a factor or banker, while unpaid, are in the nature of goods unsold, and if the factor become bankrupt, must be returned to the principal, subject to such lien as the factor may have thereon. 2 *Blac. Rep.* 1154.

A factor has a *Lien* on goods consigned to him, not only for incident charges, but as an *item* of mutual account, for the general balance due to him, so long as he retains the possession; if he parts with the possession, he parts with his *lien*. See 1 *Burr.* 489: 1 *Blac. Rep.* 104. If he be surety in a bond for his principal, he has a lien on the price of the goods sold by him for his principal to the amount of the sum he is bound for. *Coup.* 251. A dyer, merely as a manufacturer has not a general lien; but a packer being in the nature of a factor has. 4 *Burr.* 2214.

A factor has no lien on goods for a *general* balance, unless they come into his *actual* possession: and if in consideration of goods being consigned to him he accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the bills are due, and before the goods get into his actual possession; the consignor may stop them *in transitu*. 1 *Term Rep.* 119. If a factor accept bills drawn by his principal upon the faith of consignments agreed to be made by the principal to the factor, and both of them become bankrupts before a cargo consigned come into possession of the factor; the factor's assignees have no property in such cargo, and cannot recover the produce of it, against the assignees of the principal, if the latter have sold it, and received the purchase money. 1 *Term Rep.* 783. See 4 *Bro. P. C.* (8vo. *ed.*) 47.

The consignor may stop goods *in transitu* before they get into the hands of the consignee, in case of the insolvency of the consignee; but if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is divested. There is no distinction between a bill of lading indorsed in blank, and an indorsement to a particular person. 4 *Bro. P. C.* (8vo. *ed.*) 57. See 2 *Term Rep.* 63: 1 *H. Blac. Rep.* 357: And further as to stopping goods *in transitu* 2 *Term Rep.* 674: 3 *Term Rep.* 465.—See further this Dict. title *Merchant*.

FACTORAGE, Is the wages or allowance paid and made to a factor by the merchant. The gain of factorage is certain, however the success proves to the merchant; but the commissions and allowances vary according to the customs and distance of the country. in the several places where factors are resident: *Lex Mercat.* See title *Factor*.

FACTUM, a man's own act and deed; fact or feat; particularly used in the civil law, for any thing stated and made certain. See *Fait*.

FACULTY, *facultas.*] As restrained from the original and active sense, to a particular understanding in law, is used for a privilege granted to a man by favour and indulgence, to do that which by law he ought not to do. And for the granting of these, there is an especial court under the *Archbishop of Canterbury*, called the *Court of the Faculties*; and the chief officer thereof the *Master of the Faculties*; who has power by the *Stat.* 25 *H.* 8. *cap.* 21, to grant dispensations; as to marry persons without the banns first asked, (and every diocesan may make the like grants) to ordain a deacon under age, for a son to succeed the father in his benefice, one to have two, or more benefices incompatible, *&c.* And in this court are registered the certificates of bishops and noblemen granted to their chaplains, to qualify them for pluralities and non-residence. 4 *Inst.* 337. See title *Chaplain*.

FASTING MEN, In *Mon. Angl. tom.* 1. *pag.* 100, are rendered to signify vassals: but *Cowel* thinks they rather mean pledges or bondsmen; which, by the custom of the *Saxons*, were *fast* bound to answer for one another's peaceable behaviour. See *Festing-men*.

FAG, A knot or excrescency in cloth; and in this sense it is used in the statute 4 *Ed.* 4. *cap.* 1. The *fag-end*, signifies that end of a piece of cloth or linen, where the weaver ends his piece, and works up the worst part of his materials.

FAGGOT, A badge wore in the times of *popery*, by persons who had recanted and abjured what was then adjudged to be heresy: those were condemned not only to the penance of carrying a *faggot*, as an emblem of what they had merited, to such an appointed place of solemnity; but, for a more durable mark of infamy, they were to have the sign of a *faggot* embroidered on the sleeve of their upper garment: and if this badge or *faggot* was at any time left off, it was often alledged as the sign of *apostacy*.

FAIDA, Malice or deadly feud. *Leg. H.* 1. *c.* 88.

FAILURE OF RECORD, Is when an action is brought against a man, who alledges in his plea matter of record in bar of the action, and avers to prove it by the record; but the plaintiff saith, *Nul tiel record*, *viz.* denies there is any such record: upon which, the defendant hath day given him by the court to bring it in; and if he fails to do it, then he is said to *fail of his record*, and the plaintiff shall have judgment to recover. *Terms de Ley.* In debt upon an escape, the plaintiff declared, that he had obtained a judgment in an inferior court, upon which the defendant was taken, and the sheriff suffered him to escape; the defendant pleaded *Nul tiel record*, and being at issue, the record was certified at the day; by which it appeared that there were several variances in the continuances and process; but because the plaint, count, and judgment certified, agreed with the plaintiff's declaration, it was held that those variances made no failure of record. *Hob.* 179.

In *Formedon* for the manor of *Isfield*, the defendant pleaded in bar a common recovery of the ſaid manor againſt the donee in tail, who replied *Nul tiel record*, and the defendant having brought in the record, it appeared that the recovery was of the manor of *Iffield*; and adjudged, that this being in a common recovery, ſhall be no failure of record for this ſmall variance, but ſhall be amended, being the miſpriſion of the clerk. 5 *Rep.* 46. And where a fine with proclamations was levied, and upon an iſſue of *Nul tiel record*, on which it was brought in at the day, tho' the year of the King was left out in the proclamations made in one term, as it was expreſſed in the proclamations of the other two terms, they were held to be right, and the omiſſion no failure of record. *Dyer* 234. If a judgment, &c. be reverſed for error, *Nul tiel record* may be pleaded. 8 *Rep.* 142. And where the tenor only of a record, &c. is brought in, it is a failure of record. *Dyer* 187.

FAINT-ACTION. Fr. *feinte.*] A *feigned* action; ſuch that although the words of the writ are true, yet for certain cauſes the plaintiff hath no title to recover thereby; but a *falſe action* is properly where the words of the writ are *falſe*. *Co. Litt.* 361.

FAINT-PLEADER. A fraudulent, falſe or colluſory manner of pleading to the deceit of a third perſon; againſt which, among other things, was made the *Stat.* 3 *Ed.* 1. *cap.* 19.

FAIR-PLEADER. See title *Beau-pleader.*

FAIR. Fr. *foire*, Lat. *feriæ*, *nundinæ*.] A ſolemn or greater ſort of market, granted to any town by privilege, for the more ſpeedy and commodious providing of ſuch things as the ſubject needeth; and the utterance of what commodities we abound in above our own uſes and occaſions: and both our *Engliſh* and the *French* word ſeems to come from *feriæ* [feſtivals]; becauſe it is incident to a *fair* that perſons ſhall be privileged from being moleſted or arreſted in it, for any other debt, or contract than what was contracted in the ſame, or at leaſt was promiſed to be paid there. See *Stat.* 17 *Ed.* 4. *c.* 2, made perpetual by 1 *R.* 3. *c.* 6: and this Dict. title *Courts of Pie-powders.* See alſo *Stats.* 2 *E.* 3. *c.* 15: 5 *E.* 3. *c.* 5: 27 *H.* 6. *c.* 5: 1 & 2 *P.* & *M.* *c.* 7: 18 *Eliz.* *c.* 21.

I. *The Right to a Fair, and the Manner of holding it.*
II. *The Duty, Power, and Intereſt of the Owners of Fairs.—How far a Sale in a Fair changes the Property of a Thing therein ſold,* See this Dict. title *Market.*

I. The firſt inſtitution of fairs and markets ſeems plainly to have been for the better regulation of trade and commerce, and that merchants and traders might be furniſhed with ſuch commodities as they wanted, at a particular mart, without that trouble and loſs of time, which muſt neceſſarily attend travelling about from place to place; and therefore as this is a matter of univerſal concern to the commonwealth: ſo it hath always been held, that no perſon can claim a fair or market, unleſs it be by grant from the King, or by preſcription, which ſuppoſes ſuch a grant. 2 *Inſt.* 220: 3 *Mod.* 123.

And therefore, if any perſon ſets up any ſuch fair or market, without the King's authority, a *quo warranto* lies againſt him; and the perſons who frequent ſuch fair, &c. may be puniſhed by fine to the King. 3 *Mod.* 127.

Alſo it ſeems, that if the King grants a patent for holding a fair or market, without a writ of *ad quod damnum* executed and returned, that the ſame may be repealed by *ſcire facias*; for though ſuch fairs and markets are a benefit to the commonwealth; yet too great a number of them may become nuſances to the public, as well as a detriment to thoſe who have more ancient grants. 3 *Lev.* 222.

Fairs are generally kept once or twice in the year; and it has been obſerved, that *fairs* were firſt occaſioned by the reſort of people to the feaſt of Dedication, and therefore in moſt places the *fairs*, by old cuſtom, are on the ſame day with the wake or feſtival of that Saint to whom the church was dedicated; and for the ſame reaſon they were kept in the church-yard, till reſtrained by *Stat.* 13 *E.* 1. *ſt.* 2. *c.* 6: 2 *Inſt.* 221. *Blount.* The *Court of Pie-powder* is incident to every *fair*, &c. By *Stat.* 2 *Ed.* 3. *c.* 15, *fairs* are not to be kept longer than they ought by the lords thereof, on pain of their being ſeized into the King's hands, until ſuch lords have paid a fine for the offence; and proclamation is to be made how long *fairs* are to continue.—By *Stat.* 5 *E.* 3. *c.* 5, no merchant ſhall ſell any goods or merchandiſe at a *fair* after the time of the *fair* is ended, under the penalty of forfeiting double the value of the goods ſold, one fourth part thereof to the proſecutor, and the reſt to the King. Any citizen of *London* may carry his goods or merchandiſe to any *fair* or market in *England* at his pleaſure. See *Stat.* 3 *Hen.* 7. *c.* 9; and this Dict. title *London.*

It ſeems clearly agreed, that if a perſon hath a right to a fair or market, and another erects a fair or market ſo near his, that it becomes a nuſance to his fair, &c. that for this detriment and injury done to him, an action on the caſe lies; for it is implied in the King's grant, that it ſhould be no prejudice to another. 2 *Rol. Abr.* 140.

Alſo, although the new market be held on a different day, yet an action on the caſe lies; for this, by foreſtalling the ancient market, may be a greater injury to the owner, than if held on the ſame day with his. 2 *Saund.* 172: 1 *Mod.* 69. See title *Market.*

If a man hath a fair or market, and a ſtranger diſturbs thoſe who are coming to buy or ſell there, by which he loſes his toll, or receives ſome prejudice in the profits ariſing from his fair, &c. an action on the caſe lies. 1 *Rol. Abr.* 106: 2 *Vent.* 26, 28. So if upon a ſale in a fair a ſtranger diſturbs the lord in taking the toll, an action upon the caſe lies for this. 1 *Rol. Abr.* 106.

The King is the ſole judge where fairs and markets ought to be kept; and therefore it is ſaid, that if he grants a market to be kept in ſuch a place, which happens not to be convenient for the country, yet the ſubjects can go to no other; and if they do, the owner of the ſoil where they meet is liable to an action at the ſuit of the grantee of the market, 3 *Mod.* 123. But if no place be limited for keeping a fair by the King's grant, the grantees may keep it where they pleaſe, or rather where they can moſt conveniently; and if it be ſo limited, they may keep it in what part of ſuch place they will. 3 *Mod.* 108.

At what time *fairs* are to be held, ſee *Stat.* 27 *H.* 6. *c.* 5. & 1 *Car.* 1. *c.* 1: 29 *Car.* 2. *c.* 7: and this Dict. title *Holidays.*

II. Owners

II. Owners and governors of fairs are to take care that every thing be ſold according to juſt weight and meaſure; for that and other purpoſes they may appoint a clerk of the *fair* or market, who is to mark and allow all ſuch weights, and for his duty herein can only take his reaſonable and juſt fees. See 4 *Inſt.* 274: *Moor* 523: 1 *Salk.* 327.

Fairs and markets are ſuch franchiſes as may be forfeited; as if the owners of them hold them contrary to their charter, as by continuing them a longer time than the charter admits, by diſuſer, and by extorting fees and duties where none are due, or more than are juſtly due. 2 *Inſt.* 220: *Finch* 164: 3 *Mod.* 108.

As to their *intereſt*, it ariſes chiefly from tolls. *Toll* payable at a fair or market is a reaſonable ſum of money due to the owner of the fair or market, upon ſale of things tollable within the fair or market, or for ſtallage, pickage, or the like. 2 *Inſt.* 222: 2 *Jon.* 207.

But this is not incident to a *fair* or market without ſpecial grant; for where it is not granted, ſuch a fair or market is accounted a *free fair* or market. 2 *Inſt.* 220: *Cro. Eliz.* 559.

Toll is a matter of private benefit to the owner of the *fair* or market, and not incident to them; therefore if the King grants a *fair* or market, and grants no toll, the patentee can have none, and ſuch *fair* or market is counted free. *Cro. Eliz.* 558: 2 *Inſt.* 220. *S. P.*: 2 *Lutw.* 1336. *S. P.* reſolved.

Alſo if the King, at the time he grants a *fair* or market, grants a toll, and the ſame is outrageous and exceſſive, the grant of the toll is void, and the ſame becomes free. 2 *Inſt.* 220: 2 *Lutw.* 1336. But the King, after he grants a *fair* or market, may grant that the patentee may have a reaſonable toll; but this muſt be in conſideration of ſome benefit accruing from it to thoſe who trade and merchandiſe in ſuch fair or market. 2 *Inſt.* 221.

No toll ſhall be paid for any thing brought to the fair or market, before the ſame is ſold, unleſs it be by cuſtom time out of mind, and upon ſuch ſale the toll is to be paid by the buyer; and therefore my Lord *Coke* ſays, that a *fair* or market by preſcription is better than one by grant. 2 *Inſt.* 221.

And by *ſtat. Weſtm.* 1. *cap.* 31. "Touching them that take outrageous toll, contrary to the common cuſtom of the realm in market towns, it is provided, that if any do ſo in the King's town, which is let in fee-farm, the King ſhall ſeize into his own hand the franchiſe of the market; and if it be another's town, and the ſame be done by the lord of the town, the King ſhall do in like manner; and if it be done by a bailiff, or any mean officer, without the commandment of his lord, he ſhall reſtore to the plaintiff as much more, for the outrageous taking, as he had of him, if he carried away his toll, and ſhall have forty days' impriſonment."

But where by cuſtom a toll is due upon the ſale of any goods in a fair or market, and he who ought to pay it refuſes, an action on the caſe lies againſt him. 1 *Rol. Abr.* 103, 104, 106.

Some perſons however are *exempt* from payment of toll, and if the King or any of his progenitors have granted to any to be diſcharged of toll, either generally, or ſpecially; this grant is good to diſcharge him of all tolls to the King's own *fairs* or markets, and of the tolls, which, together with any *fair* or market have been granted after ſuch grant of diſcharge; but cannot diſcharge tolls formerly due to ſubjects either by grant or preſcription. 2 *Inſt.* 221.

Alſo the King himſelf ſhall not pay toll for any of his goods; and if any be taken, it is puniſhable within the ſtatute *Weſtm.* 1. *cap.* 31: 2 *Inſt.* 221. So tenants in ancient demeſne are free and quit from all manner of tolls in fairs and markets, whether ſuch tenants hold in fee, or for life, years, or at will. 2 *Inſt.* 221: 4 *Inſt.* 269: 1 *Rol. Abr.* 321.

But this privilege does not extend to him who is a merchant, and gets his living by buying and ſelling, but is annexed to the perſon in reſpect of the land, and to thoſe things which grow and are the produce of the land. *F. N. B.* 228: 2 *Leon.* 191: *Cro. Eliz.* 227: 2 *Inſt.* 221: 1 *Rol. Abr.* 321, 2.

Owners of *fairs* and markets are to appoint toll-takers or book-keepers, on pain of 40 *s.* and they ſhall enter and give account of horſes ſold, *&c. Stat.* 1 *&* 2 *P. & M. c.* 7: 31 *Eliz. c.* 12. See further titles *Toll*: *Horſes*: *Market.*

FAIT, *factum.*] A deed or writing, lawfully executed to bind the parties thereto. See title *Deed.*

FAIT ENROLLE, *Fr.*] A deed of bargain and ſale, *&c.* and forging the inrollment of it is a great miſdemeanor, but not forgery within the *Stat.* 5 *Eliz*: 1 *Keb.* 568.

FAITOURS, *Fr.*] In the ſtatute 7 *R.* 2. *cap.* 5, is uſed for evil doers; and may be interpreted idle livers, from *faitardiſe*, which ſignifies a kind of ſleepy diſeaſe, proceeding from too much ſluggiſhneſs: and in the ſame ſtatute it ſeems to be ſynonimous with vagabonds. *Terms de Ley.* See titles *Poor*; *Vagrants.*

FALANG, A jacket or cloſe coat, *Blount.*

FALCATURA, One day's mowing of graſs; a cuſtomary ſervice to the lord by his inferior tenants: *falcata* was the graſs freſh mowed, and laid in *ſwathes*; and *falcator* the ſervile tenant performing the labour. *Kennet's Gloſſ.*

FALCO, A faulcon. *Falconarius*, a falconer; *falco gentilis*, a jer-falcon; *Falco Spuarius*, a Sparrow-Hawk.—*Cowel.*

FALDA, A ſheepfold.—*Rot. Chart.* 6 *Hen.* 3.

FALDAGE, *faldagium.*] A privilege which ſeveral lords antiently reſerved to themſelves, of ſetting up *folds* for ſheep in any fields within their manors, for the better manurance of the ſame; and this was uſually done not only with their own but their tenants' ſheep, which they call *fecta faldæ.* This *faldage* is termed in ſome places a *fold courſe*; and in old charters *faldſoca*, i. e. *libertas* faldæ, *or* faldagii.

FALDÆ CURSUS, A ſheep walk or feed for ſheep. 2 *Vent.* 139.

FALDFEY, FALD-FEE, A fee or rent paid by ſome cuſtomary tenants for liberty to fold their ſheep upon their own land.

FALDISTOR, *Sax.*] The higheſt ſeat of a biſhop, incloſed round with a lettice. *Cowel.*

FALDWORTH, A perſon of age, that he may be reckoned of ſome decennary. *Du Freſne.*

FALERÆ, Lat. *phaleræ.*] The tackle and furniture of a cart or wain. *Mon. Angl. tom.* 2. 256.

FALESIA, A great rock, bank or hill by the ſea ſide. *Domeſd.*

FALK-LAND, or FOLK-LAND. See title *Copy-hold.*

FALLOW-LAND. See *Warrectum & Terra Warrecta.*

FALLUM, An unexplained term for ſome particular ſort of land.—*De duobus acris & viginti* fallis *in, &c. Mon. tom.* 2. 425.

FALMOTUM, or *falkmote*; The ſame with *folkemote*, See title *Parliament.*

FALSE ACTION. If brought againſt one, whereby he is caſt into priſon, and dies pending the ſuit, the law giveth no remedy in this caſe, becauſe the truth or *falſhood* of the matter cannot appear before it is tried: and if the plaintiff be barred or nonſuited, at Common-law, regularly all the puniſhment is amercement. *Jenk. Cent.* 161. See *Faint Action.* But if one commence a bailable action againſt another and hold him to bail thereon, either without a reaſonable cauſe, or for ſomething conſiderable, more than what is *bonâ fide* due, an *action upon the caſe* will lie for the vexation and injury. See title *Action.* II.

FALSE CLAIM. By the foreſt laws, is where a man *claims* more than is his due, and is amerced and puniſhed for the ſame. A perſon had a grant, by charter, of the tenth of all the veniſon in the foreſt of *Lancaſter*, viz. *In carne tantum ſed non in corio*; and becauſe he made a *falſe claim*, by alledging that he ought to have the tenth of all veniſon within the foreſt, as well in *carne*, as in *corio*, therefore he was *in miſericordia de decima venationis ſuæ in corio non percipiendo. Manwood, c.* 25.

FALSE FORM. In proceedings at law, is aided by a verdict; though not where there is want of certainty, *&c.* 1 *Keb.* 734. 876. See titles *Amendment*: *Error.*

FALSE IMPRISONMENT.

FALSUM IMPRISONAMENTUM.] A treſpaſs committed againſt a perſon, by arreſting and impriſoning him without juſt cauſe, contrary to law; or where a man is unlawfully detained without legal proceſs; it is alſo uſed for a writ which is brought for this treſpaſs.

To conſtitute the injury of falſe impriſonment two points are neceſſary: the detention of the perſon and the unlawfulneſs of ſuch detention. Every confinement of the perſon is an impriſonment whether it be in a common priſon, or in a private houſe, or in the ſtocks, or even by forcibly detaining one in the public ſtreets. 2 *Inſt.* 589. Unlawful or falſe impriſonment conſiſts in ſuch confinement or detention without ſufficient authority: which authority may ariſe either from ſome proceſs from the courts of juſtice, or from ſome warrant from a legal officer having power to commit, under his hand and ſeal, and expreſſing the cauſe of ſuch commitment. 2 *Inſt.* 46. See this Dict. titles *Arreſt*; *Commitment*: *Conſtable.*—Such authority may alſo ariſe from ſome other ſpecial cauſe; warranted, for the neceſſity of the thing, either by Common or Statute law: as the arreſting of a felon by a private perſon without warrant; the impreſſing of mariners for the public ſervice; or the apprehending waggoners (under *Stat.* 13 *Geo.* 3. *c.* 78,) for miſbehaviour in the publick highways. Falſe impriſonment may alſo ariſe by executing a lawful warrant or proceſs at an unlawful time, as on a *Sunday*. See titles *Arreſt*; *Sunday.*

The means of removing the actual injury of falſe impriſonment are four fold; by writs of *mainprize*; *odio et atia*; *homine replegiando*; and *habeas corpus.* See this Dict. under thoſe titles. The remedy for a ſatisfaction for the injury is by action of treſpaſs *vi et armis* uſually called an action of falſe impriſonment; which is generally accompanied with a charge of aſſault and battery alſo: and therein the party ſhall recover damages for the injury he has received.

The moſt atrocious degree of this offence, that of ſending any ſubject of this realm a priſoner into parts beyond the ſeas, whereby he is deprived of the friendly aſſiſtance of the laws to redeem him from ſuch his captivity, is criminally puniſhed with the pains of *præmunire*, and incapacity to hold any office, without a poſſibility of pardon. *Stat.* 31 *C.* 2. *c.* 2. See this Dict. titles *Exile*; *Habeas corpus.*—And by the *Stat.* 43 *Eliz. c.* 13, to carry any one by force out of the four Northern counties, or impriſon him within the ſame, in order to ranſom him, or make ſpoil of his perſon or goods, is felony without benefit of clergy in the principals and all acceſſaries before the fact. Inferior degrees of this offence of falſe impriſonment are alſo puniſhable by indictment, and the delinquent may be fined and impriſoned. 4 *Comm.* 218.

By the ſtatute of Limitations, 21 *Jac.* 1. *c.* 16, this action muſt be brought within four years; which has been conſtrued to be from the end of any continued impriſonment. *Salk.* 420.—By *Stat.* 24 *Geo.* 2. *c.* 44, actions againſt juſtices of peace, or conſtables acting under their warrants, muſt be brought within ſix months; and one month's notice of bringing the action muſt be given them; and by *Stat.* 21 *Jac.* 1. *c.* 12, thoſe officers may plead the general iſſue, and give the ſpecial matter in evidence. See this Dict. titles *Juſtice*: *Conſtable*: *Action.*

No action of falſe impriſonment lies againſt a judge of a *court of record* for any act done by him in the execution of his office, nor for any miſtake of judgment. *Salk.* 396. See 1 *Term Rep.*

The King cannot give any power to impriſon, where impriſonment may not be awarded by the Common-law. 2 *Brownl.* 18: And if a perſon is impriſoned on any by-law of a corporation, *&c.* it is *falſe impriſonment*; becauſe a by-law to impriſon is againſt *Magna Charta, quod nullus liber homo impriſonetur, &c.* 5 *Rep.* 64. It is the ſame of a cuſtom to impriſon perſons; but it is incident to a court of record to impriſon. 2 *Nelſ. Abr.* 827.

If a juſtice of peace, *&c.* commits a perſon without juſt cauſe, it is *falſe impriſonment*; and a conſtable cannot impriſon a man at his pleaſure, to compel him to do any thing required by law: but is to carry him before a juſtice. 1 *Leon.* 327.

In *falſe impriſonment* brought againſt an officer of an inferior court, if he juſtify an arreſt by virtue of their warrant, he muſt intitle the court to juriſdiction, or the action lies againſt him. *March. pl.* 195. If erroneous proceſs iſſues out of a court that hath juriſdiction of the matter, and the bailiff or officer executes it, whereby the party is impriſoned, the officer ſhall be excuſed in action of *falſe impriſonment*: but if the court out of which the proceſs iſſues hath no cognizance of the cauſe, it is otherwiſe; for in ſuch caſe the whole proceedings are *coram non judice*, and the officer will not be excuſed. 10 *Rep.* 75. See titles *Arreſt*: *Conſtable.*

An officer hath a warrant upon a *capias ad ſatisfaciend'* againſt an earl, or counteſs, *&c.* who are privileged in their perſons, and he arreſts them: it is ſaid action of

falſe

falſe impriſonment will not lie againſt the officer, becauſe he is not to examine the judicial act of the court, but to obey. 6 *Rep.* 56: 10 *Rep.* 75.

If an arreſt is made by one who is no legal officer, it is *falſe impriſonment*, for which action lies. *Co. Lit.* 69. An action of *falſe impriſonment* lies againſt a bailiff for arreſting a perſon without warrant, though he afterwards receives a warrant: and ſo it is if he arreſt one after the return of the writ is paſt; for it is then without writ. 2 *Inſt.* 53. If a ſheriff, or any of his bailiffs, arreſts a man out of his county, &c. or after the ſheriff is diſcharged of his office; or a perſon arreſts one on a juſtice's warrant after his commiſſion is determined, &c. it will be *falſe impriſonment*. *Dyer* 41. And if the ſheriff, after he hath arreſted a man lawfully, when a legal diſcharge comes to him, as a *ſuperſedeas*, or the like, do not then diſcharge the party, he may be ſued in this action. 2 *R.* 1. 12: *Fitzh.* 253.

In caſe the plaintiff in a ſuit brings an unlawful warrant to a ſheriff, and ſhews him the defendant, requiring him to make the arreſt; or if he bring a good warrant and direct the ſheriff to a wrong man, &c. for this the action of *falſe impriſonment* will lie againſt both. *Bro. Treſp.* 59, 307: *Faux. Impr.* 19: 1 *Brownl.* 211. If a warrant be granted to arreſt, or apprehend a perſon, where there are ſeveral of the name, and the bailiff or other officer arreſts a wrong perſon, he is liable to action of *falſe impriſonment*; and he is to take notice of the right party at his peril. *Dyer* 244: *Moor* 457.

A man arreſted on a *Sunday* may bring his action of *falſe impriſonment*; but one has been refuſed to be releaſed in ſuch a caſe. 5 *Mod.* 95. See titles *Arreſt*: *Sunday*. If a bailiff demand more than his juſt fees, when offered him, and keep a perſon in cuſtody thereupon, it is *falſe impriſonment* and puniſhable: and if a ſheriff, or gaoler keeps a priſoner in gaol, after his acquittal, for any thing except for fees, it is unlawful impriſonment. 2 *Inſt.* 482: *Wood.* 16. If a man falſely impriſons *A. B.* and the gaoler detains him till he pays ſo much money, he ſhall have action of *falſe impriſonment*, and taking ſo much money from him againſt ſuch perſon. *Mod. Caſ.* 179.

Unlawful or *falſe impriſonment* is ſometimes called *dureſs of impriſonment*, where one is wrongfully impriſoned 'till he ſeals a bond, &c. 2 *Inſt.* 482. See title *Dureſs*.

An impriſonment will be unlawful, and give this action, although the cauſe be good, when he that makes it doth the ſame without any colour of authority; or if he has a colour, yet if he hath no good authority, from the court, &c. or where a court or officer hath power, but do not well make it out; or when the authority is well made forth, and not rightly purſued and executed. 4 *Rep.* 64: 8 *Rep.* 67: *Dyer* 242. And all perſons male or female, that have a hand in a wrong impriſonment, ſhall be ſued in action of *falſe impriſonment*; and the party grieved may ſue any one of them for it. *Co. Lit.* 57: *Bro. Treſp.* 113, 256.

A man under arreſt, or in the ſtocks, &c. is ſaid to be in priſon: And in a common arreſt, where lawful, the officer may make any place his priſon, becauſe the writ commands that *Habeas Corpus ejus coram, &c. apud Weſtm.* which is a general authority. 1 *Salk.* 401.

It is not in every caſe where a man is wrongfully impriſoned, that an action *vi et armis*, for falſe impriſonment will lie, but in ſome caſes, it muſt be an *action on the caſe*, as where a warrant iſſues againſt a man, without legal cauſe, and he is, under colour of that authority, wrongfully impriſoned, as there was colour of authority, the action muſt be *caſe*, and not treſpaſs *vi et armis*, and ſo in ſimilar caſes. *J. M.*—See title *Action*.

In criminal caſes, where a man is falſely impriſoned, he may bring a *Habeas Corpus*, and upon return of the writ, ſetting forth the cauſe of the commitment, if it appears to be againſt law, he ſhall be diſcharged; or he may be bailed, if it be doubtful, &c. 4 *Inſt.* 182. See titles *Habeas Corpus*: *Impriſonment*.

FALSE JUDGMENT, *Falſum Judicium.*] A writ that lieth where *falſe judgment* is given in the county-court, court baron, or other courts *not of record*. *F. N. B.* 17, 18. See title *Error*.

A judgment may be falſified, reverſed or avoided without a writ of error for matters foreign to, or *debors*, the record; that is, not apparent upon the face of it, ſo that they cannot be aſſigned for error in the ſuperior court, which can only judge from what appears in the record itſelf; and therefore if the whole record be not certified, or not timely certified by the inferior court, the party injured thereby, in both civil and criminal caſes, may allege a *Diminution* of the record, and cauſe it to be rectified. See this Dict. title *Diminution*. Thus if any judgment whatever be given by perſons who had no good commiſſion to proceed againſt the perſon condemned, it is void; and may be falſified by ſhewing the ſpecial matter without writ of error. As where a commiſſion iſſues to *A.* and *B.* and twelve others or any two of them, of which *A.* or *B.* ſhall be one, to take and try indictments, and any of the other twelve proceed without the interpoſition or preſence of either *A.* or *B.* in this caſe all proceedings, trials, convictions and judgments are void for want of a proper authority in the commiſſioners, and may be falſified upon bare inſpection without the trouble of a writ of error. 2 *Hawk. P. C. c.* 50. § 2. It being a high miſdemeanor in the judges ſo proceeding, and little, if any thing, ſhort of murder in them all, in caſe the perſon *ſo attainted* be executed and ſuffer death. 4 *Comm.* 390.

So likewiſe if a man purchaſes land of another, and afterwards the vendor is, either by outlawry or his own confeſſion, convicted and attainted of treaſon or felony previous to the ſale or alienation; whereby ſuch land becomes liable to forfeiture or eſcheat: now upon any trial the purchaſor is at liberty, without bringing any writ of error, to falſify, not only the time of the felony or treaſon ſuppoſed, but the very point of the treaſon or felony itſelf; and is not concluded by the confeſſion or outlawry of the vendor: though the vendor himſelf is concluded, and not ſuffered then to deny the fact which he had by confeſſion or ſlight acknowledged. But if ſuch attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falſify or contradict the *fact* of the crime committed; though he is at liberty to prove a miſtake in *time*: or that the offence was committed after the alienation and not before. 3 *Inſt.* 231: 1 *Hal. P. C.* 361.

This writ may be brought on a judgment in a plea, real or perſonal: and for errors in the proceedings of inferior courts, or where they proceed without having juriſdiction, writ of *falſe judgment* lieth: though the plaintiff aſſign errors in a writ of *falſe judgment*, he ſhall not ſay,

In

In hoc erratum eſt, &c. but *unde queritur diverſimodo ſibi* falſum judicium *factum fuiſſe judicium in hoc*, &c. *Moor* 73: 2 *Nelſ. Abr.* 829. If a writ of *falſe judgment* abate for any fault in the writ, the plaintiff ſhall not have *Scire facias ad audiend' errores*, upon the record certified, becauſe it comes without an original: but if the plaintiff dies, and *falſe judgment* is given in the inferior court, his heir ſhall have a *Sci. fac. ad audiend' error.* againſt him who recovered upon that record which is removed into *C. B*; and where the plaintiff in a writ of *falſe judgment* is nonſuit, it was formerly a queſtion, whether the other party ſhall ſue execution upon this record ſo removed againſt the plaintiff, without ſuing out a *Scire facias*; but it has been adjudged, that he *may* do it, *Hil.* 23 *Hen.* 6: *New Nat. Br.* 39.

When a record is removed into *C. P.* by writ of *falſe judgment*, if the party alledges variance between the record removed, and that on which judgment was given, the trial ſhall be by thoſe who were preſent in court when the record was made up. 2 *Lutw.* 957: *Stat.* 1 *Ed.* 3. *c.* 4. A man ſhall not have a writ of *falſe judgment* but in a court where there are ſuitors; for if there be no ſuitors, there the record cannot be certified by them. *New Nat. Br.* 40. Where *falſe judgment* is given on a writ of *juſticies*, directed to the ſheriff, the party grieved ſhall have a writ of falſe judgment; although the judgment be for debt, or treſpaſs above the ſum of 40 *s. Ibid.*

Where a record of a judgment in the county-court was vicious, and the judgment reverſed in *C. B.* the ſuitors were ordered to be amerced a mark, and the county clerk fined 5 *l.* And if a plaintiff in an inferior court declare for more than 40 *s.* Judgment ſhall be reverſed by writ of *falſe judgment*: but where damages are laid under that ſum, coſts may make it amount to more. 1 *Mod.* 249: 2 *Mod.* 102, 206.

Upon *falſe judgment* before bailiffs, or others who hold plea by preſcription, in every ſum in debt by bill before them a party ſhall not have a writ of *falſe judgment*; but a writ of error thereupon. *M.* 4 *E.* 4. For defaults of tenants for life, in writs of right, &c. writ of falſe judgment lies by him in reverſion: and this writ may be brought againſt a ſtranger to the judgment, if he be tenant of the land. A judgment ſhall be intended good till reverſed by writ of *falſe judgment*, &c. See titles *Accedas ad Curiam*; *Attaint*.

FALSE LATIN. Before the ſtatute directing law proceedings to be in *Engliſh*, if a *Latin* word was ſignificant though not good *Latin*, yet an indictment, declaration, or fine, ſhould not be made void by it: but if the word was not *Latin*, nor allowed by the law, and it were in a material point, it made the whole vicious. 5 *Rep.* 121: 2 *Nelſ.* 830.

FALSE NEWS. Spreading falſe news, to make diſcord between the King and nobility, or concerning any great man of the realm, is puniſhed by Common-law, with fine and impriſonment, which is confirmed by ſtatutes *Weſtm.* 1, 3 *Ed.* 1. *c.* 34: 2 *Rich.* 2. *ſtat.* 1. *c.* 5: 12 *Ric.* 2. *c.* 11. See 2 *Inſt.* 226: 3 *Inſt.* 198.

FALSE OATH, See title *Perjury*.

FALSE PLEA. *In præcipe quod reddat* againſt two, if the one comes and takes the intire tenancy upon him, upon which they are at iſſue, and it is found againſt the tenant, by this he ſhall loſe his moiety; for it is found againſt the tenant for his part, becauſe it is tried *per pais* upon iſſue; *contra*, of plea to the writ by demurrer. Note the difference. *Br. Peremptory, pl.* 73. cites 8 *Ed.* 3. 17.

Plaintiff in a ſuit in Chancery againſt an executor, ſhall have the ſame advantage thereof, as if the ſame plea were found falſe by verdict at law; and ſhall have all the ſame conſequences here, as follow on a falſe plea at law to all intents. 2 *Cha. Caſ.* 201.—See titles *Plea*, and *Pleading*.

FALSE PROPHECY. See title *Prophecy*.

FALSE RETURN. On a falſe return by a mayor, &c. to a *mandamus*, or by a ſheriff, &c. to a writ, a ſpecial action on the caſe will lie. See title *Action*.

FALSE TOKENS. Where perſons get money or goods into their hands, by forged letters, or other counterfeit means, they are puniſhable by impriſonment, &c. See title *Cheats*.

FALSE VERDICT. A writ of *attaint* lieth, to inquire whether a jury of twelve men have given a falſe verdict; that ſo the judgment following thereupon may be reverſed. It is allowed in almoſt every action except in a writ of right. See titles *Attaint*: *Jury*: *Trial*.

TO FALSIFY. To prove a thing to be *falſe*. *Perk.* 383.

FALSIFYING A RECORD. A perſon that purchaſes land of another, who is afterwards outlawed of felony, &c. may *falſify the record*, not only as to the time wherein the felony is ſuppoſed to have been committed, but alſo as to the point of the offence: but where a man is found guilty by verdict, a purchaſor cannot *falſify* as to the offence; though he may for the time, where the party is found guilty generally in the indictment, &c. becauſe the time is not material upon evidence. And any *judgment* given by perſons who had no good commiſſion to proceed againſt the perſon condemned, may be *falſified* by ſhewing the ſpecial matter, without writ of error. Alſo where a man is *attainted* of treaſon or felony, if he be afterwards pardoned by parliament, the attainder may be *falſified* by him or his heir, without plea. 2 *Hawk. P. C.*

FALSIFYING A RECOVERY. Iſſue in tail may *falſify a recovery* ſuffered by tenants for life, &c. And it has been held, that a perſon may *falſify a recovery* had by the iſſue in tail, where an eſtate-tail is before bound by a fine. 2 *Nelſ. Abr.* 831. But where there is tenant for life, remainder in tail, and reverſion in fee, tenant for life ſuffers a common recovery, in which he in remainder is vouched, and the uſes declared to him, who had the remainder in tail; adjudged, that by the recovery all remainders and reverſions are barred, and that they could not *falſify* this *recovery*. 10 *Rep.* 43.

He in reverſion ſuffered a common recovery, and declared the uſes; his heir ſhall not *falſify* it by pleading that his father had nothing at the time of the *recovery*, becauſe he is eſtopped to ſay he is not tenant to the *præcipe*. *Godb.* 189. An infant brought an aſſiſe in *B. R. pending* which action the tenant brought an aſſiſe againſt the infant in *C. B.* for the ſame land, and had judgment by default, which he pleaded in bar to the aſſiſe brought by the infant; who ſet forth all this matter in his replication, and that the demandant, at the time of the ſecond writ brought, was tenant of the land, and prayed that he might *falſify* this *recovery*; and it was held that he might becauſe he could not have writ of error, or attaint. *Godb.* 271: *Cro. Eliz.* 284. It has been determined, that a *recovery*

covery is not ſo firm, but it may be *falſified* in point of *recovery* of the thing itſelf, between the ſame parties. *Ibid.*—See titles *Fine* and *Recovery*.

FALSIFYING A VERDICT. Where in any real action, there is a verdict againſt tenant in tail, the iſſue can never *falſify* ſuch verdict in the point directly tried; but only in a ſpecial manner, as by ſaying that ſome evidence was omitted, *&c.* 2 *Ld. Raym.* 1050. See titles *Trial*: *New Trial*: *Jury*: *Verdict*.

FALSONARIUS. A forger.—*Hoveden* 424.

FALSO RETURNO BREVIUM. A writ that lieth againſt the ſheriff who hath execution of proceſs, for *falſe returning* of writs. *Reg. Jud.* 43.

FAMILIA. Signifies all the ſervants belonging to a particular maſter; but in another ſenſe it is taken for a portion of land, ſufficient to maintain one *family*: It is ſometimes mentioned by our writers to be a *Hide* of land, which is alſo called a *Manſe*; and ſometimes *Carucata* or a plough-land. *Blount*.

FANATICKS. Perſons ſuppoſing themſelves inſpired. A general name for *Quakers*, *Anabaptiſts*, and other ſectaries and diſſenters from the church of *England*. See *Stat.* 13 *Car.* 2. *c.* 6.

FANATIO, *Menſis Fanationis.*] The *fawning* ſeaſon or *fence-months* in *foreſts*. *Kennet's Gloſſ.* See title *Fence-Month*.

FARANDMAN. *Sax.*] A traveller or merchant ſtranger, to whom by the laws of *Scotland* juſtice ought to be done with all expedition, that his buſineſs or journey be not hindered. *Skene c.* 104.

FARDEL OF LAND. *Fardella Terræ.*] Is generally accounted the fourth part of a *Yard Land*; but according to *Noy*, (in his *Compleat Lawyer*, *p.* 57,) It is an eighth part only, for there he ſays that two *fardels* of land make a *nook*, and four *nooks* a *yard land*.

FARDING DEAL. *Quadrantata terræ.*] is the fourth part of an acre: and beſides *quadrantata terræ*, we read of *obolata*, *denariata*, *ſolidata*, and *librata terræ*, which probably ariſe in proportion of quantity from the *farding-deal*, as an half-penny, penny, ſhilling or pound in money, riſe in value; and then muſt *obolata* be half an acre, *denariata* an acre, *ſolidata* twelve acres, and *librata terræ* twelve ſcore acres of land: but ſome hold *obolata* to be but half a perch, and *denariata* a perch; and there is mentioned *viginti libratas terræ vel redditus*, in *Reg. Orig.* 94, 248, whereby it ſeems that *librata terræ* is ſo much as yields 20 *s. per annum*. *F. N. B.* 87. *Spelm. Gloſſ.*

FARE. *Sax.*] A voyage or paſſage by water; but more commonly the money paid for ſuch paſſage, in which ſenſe it is now uſed. See *Stat.* 3 *P. & M. cap.* 16. So for what we pay an hackney or ſtage coachman for our carriage.

FARINAGIUM. Toll of meal or flour.—*Ordin. Inſul. de Jerſey* 17 *Edw.* 2.

FARLEU. Is money paid by tenants in the Weſt of *England* in *lieu* of a *heriot*: and in ſome manors in *Devonſhire*, *farleu* is diſtinguiſhed to be the beſt goods; as *heriot* is the beſt beaſt, payable at the death of a tenant. *Cowel*.

FARLINGARII. Whoremongers and adulterers. *Sax.*

FARM, OR FERM. Lat. *firma*, from the Sax. *feorme*, i. e. Food; and *feorman* to feed or yield victuals.] A large meſſuage and land, taken by leaſe under a certain yearly rent, payable by the tenant; and in former days, about the time of *William* the Firſt, called the Conqueror, theſe rents were reſerved to the lords in victuals and other neceſſaries ariſing from the land; but afterwards in the reign of King *Hen.* 1. were altered and converted into money. *Terms de Ley*. A *farm* is moſt properly the chief meſſuage in a village; and it is a collective word, conſiſting of divers things gathered in one, as a meſſuage, land, meadow, paſture, wood, common, *&c.* *Locare ad firmam* is to let or ſet to *farm*; and the reaſon of it may be in reſpect of the firm or ſure hold the tenants thereof have above tenants at will. A *farm* in *Lancaſhire* is called *Ferm holt*; in the North a *Tack*; and in *Eſſex* a *Wike*: And *ferm* is taken in various ways. *Plowd.* 195.

FARMER. He that holds a *farm*, or is tenant or leſſee thereof. *Terms de Ley*. And it is ſaid generally every leſſee for life or years, although it be but of a ſmall houſe and land, is called *Farmer*, as he is that occupieth the *farm*: as this word implies no myſtery, except it be that of huſbandry, huſbandman is the proper addition of a *farmer*. 2 *Hawk. P. C. c.* 23. § 115. By ſtatute, no parſon or ſpiritual perſon may take *farms* or leaſes of land, on pain of forfeiting 10 *l. per* month, *&c.* See title *Clergyman*.—No perſon whatſoever ſhall take above two *farms* together, and they to be in the ſame pariſh, under the penalty of 3 *s.* 4 *d.* a week. *Stats.* 25 *H.* 8. *c.* 13: 32 *H.* 8. *c.* 28. *ſ.* 4.

FARTHING. Was the fourth part of a *Saxon* penny, as it is now of the *Engliſh* penny.

FARTHING OF GOLD. *quaſi* fourth thing.] A coin uſed in ancient times, containing in value the *fourth* part of a *Noble*. It is mentioned in the ſtat. 9 *H.* 5. *cap.* 7, where it is ordained, that there ſhall be good and juſt weight of the *noble*, *half noble*, and *farthing of gold*, *&c.*

FARTHING OF LAND. Seems to differ from *Farthing-deal*; for it is a large quantity of land: in a ſurvey book of the manor of *Weſt Slapton* in Com. *Devon* is entered thus: *A. B.* holds ſix *farthings* of land at 12 *l. per annum*.

FARUNDEL of land. See title *Farding-deal*.

FASIUS. Fr. *Faiſſeau.*] A faggot of wood. *Mon. Angl. tom.* 2. *p.* 238.

FAST-DAYS, Are *days* of *faſting* and humiliation, appointed to be obſerved by publick authority. There are fixed *days* of *faſting* injoined by our Church, at certain times in the year, mentioned in ancient ſtatutes, particularly the 2 & 3 *Ed.* 6. *c.* 19. and 5 *El. c.* 5. And by *Stat.* 12 *Car.* 2. *c.* 14, the 30th of *January* is ordained to be a *day* of *faſting* and repentance, for the murder of King *Charles* I. Other days of *faſting* which are not fixed, are occaſionally appointed by the *King's Proclamation*. Though abſtinence from eating of fiſh is required on thoſe days, by our laws; it is made penal to affirm that any forbearing of fleſh, or eating of fiſh is neceſſary to ſalvation. 1 *Hawk. P. C.* See *Embring Days*.

FASTERMANS, among the *Saxons* were pledges. *Leg. Ed. Confeſſ. cap.* 38. Vide *Fæſtingmen*.

FAT, VAT, OR WATE, Is a large wooden veſſel uſed by maltſters and brewers, for meaſuring of malt with expedition, containing eight buſhels or a quarter. *Stats.* 1 *H.* 5. *c.* 10: 11 *H.* 6. *c.* 8. It is alſo a veſſel made uſe of by brewers to run their wort into, and by others for the making of ſalt at *Droitwich* in the county of *Worceſter*.

FATUA MULIER, A whore. *Du Freſne*.

FAUSETUM, A faucet, muſical pipe or flute.

FAUTORS,

FAUTORS, Favourers or ſupporters of others; abettors of crimes, &c.

FEAL. The tenants by knight ſervice did ſwear to their lords to be *feal* and *leal*, i. e to be *faithful* and *loyal*. *Spelm. de Parliament*, 59. See *Fealty*.

FEALTY, *Fidelitas*, Fr. *Faulté*, i. e. *Fidei, fidei, obſequii et ſervitii ligamen, quo particulariter vaſſalus domino aſtringitur*. Spelm.] The oath taken at the admittance of every tenant, to be true to the lord of whom he holds his land: and he that holds lands by the oath of *fealty*, has it in the freeſt manner; becauſe all perſons that have *fee*, hold *per filem et fiduciam*, that is, by *fealty* at leaſt. *Smith de Repub. Ang. lib.* 3. *c.* 8. And fealty is incident to all manner of tenures except *frankalmoigne* and tenancy at will. See title *Tenures*; I. 6, *et paſſim*. This *fealty*, which is uſed in other nations, as well as *England*, at the firſt creation of it bound the tenant to *fidelity*; the breach whereof was the loſs of his fee.

It is uſually mentioned with *homage*, but differs from it; being an obligation permanent, which binds for ever: and theſe differ in the manner of the ſolemnity, for the oath of *homage* is taken by the tenant kneeling; but that of *fealty* is taken ſtanding, and includes the ſix following things, *viz.*

1. *Incolume*, that he do no bodily injury to the lord. 2. *Tutum*, that he do no ſecret damage to him in his houſe, or any thing which is for his defence. 3. *Honeſtum*, that he do him no injury in his reputation. 4. *Utile*, that he do no damage to him in his poſſeſſions. 5. *Facile*, and 6. *Poſſibile*, that he render it eaſy for the lord to do any good, and not make that impoſſible to be done, which was before in his power to do: all which is compriſed in *Leg. Hen.* 1. *c.* 5.

Fealty has likewiſe been divided into *general* and *ſpecial*; *general*, to be performed by every ſubject to his prince; and *ſpecial*, required only of ſuch as in reſpect of their fee, are tied by oaths to their lords. *Grand Cuſtum. Normand.*

By *ſtat.* 17 *Ed.* 2. *ſt.* 2, the form of this oath is appointed, and as now obſerved, it runs as follows, *viz.* *I* A. B. *will be to you my lord* C. *true and faithful, and bear to you* fealty *and* faith *for the lands and tenements which I hold of you: and I will truly do and perform the cuſtoms and ſervices that I ought to do to you. So help me God.* The oath is adminiſtered by the lord or his ſteward; the tenant holding his right hand upon the book, and repeating after the lord, &c. the words of the oath; and then kiſſing the book. *Terms de Ley.*

The law with reſpect to *fealty* continues the ſame as when Lord *Coke* wrote; (See 1 *Inſt.* 686. *in note*:) for it does not appear to be varied by *Stat.* 12 *C.* 2. *c.* 24, or any other ſtatute made ſince: but it is no longer the practice to exact the performance of fealty. In the caſe of copyholders it is become a thing of courſe on admitting them to enter a reſpite of fealty; but with reſpect to ſuch as hold by other tenures it is never thought of. In *Wood's Inſt.* 183, it is ſaid that leſſees for life or years ought to do fealty to their lords for the lands they hold.—However it may not be amiſs to remember that the title to fealty ſtill remains; that it is due from *all* tenants except tenants in *frankalmoigne*, and ſuch as hold at will or by ſufferance, and if required muſt be iterated at every change of the lord; it differing in this reſpect from homage, which except in ſpecial caſes is only due *once*; that the receiving of it is at leaſt attended with the advantage of preſerving the memory of tenures; which though perhaps ſufficiently done in the caſe of copyholds by the admittances and by the payment of fines and quit-rents and continual render of other ſervices, may be very neceſſary in caſes where fealty is the only ſervice due; and laſtly, that the law for compelling the performance of fealty has provided the remedy by diſtreſs, which is an inſeparable incident to all ſervices due by tenure, and, in the caſe of fealty cannot as it is ſaid, be exceſſive. See 1 *Inſt.* 68 *a*: 103 *b*: 104 *a b*: 152 *b*: 2 *Inſt.* 107: 4 *Co.* 8, *b*.

FEASTS, Anniverſary times of *feaſting* and thankſgiving, as *Chriſtmas*, *Eaſter*, *Whitſuntide*, &c. The *four feaſts* which our laws eſpecially take notice of, are the *feaſts* of the *annunciation of the bleſſed Virgin Mary*, of the *nativity of St. John the Baptiſt*, of *St. Michael the Archangel*, and of *St. Thomas the Apoſtle*; (or in lieu of the laſt, *the birth of our Lord Chriſt*,) on which quarterly days, rent on leaſes is uſually reſerved to be paid. See *Stats.* 5 & 6 *Ed.* 6. *c.* 3: 12 *Car.* 2. *c.* 30.

FEE; and FEE-SIMPLE.—*Tenant in fee-ſimple*, is he which has lands or tenements to hold to him and his heirs for ever. *Litt. c.* 1. § 1.

The word *fee* is ſometimes uſed for the compaſs or circuit of a lordſhip or manor, as we ſay the *lord of the fee*, &c. as well as the particular eſtate of the tenant: and alſo for a perpetual *right incorporeal*; as to have the keeping of priſons, &c. in *fee*. *Bract. Lib.* 2. *c.* 5: *Old Nat. Br.* 41. And when a rent or annuity is granted to one and his heirs, it is a *fee perſonal*. *Co. Lit.* 1, 2.

As to the general nature and origin of eſtates in fee-ſimple, and the other eſtates ariſing therefrom, See this Dict. titles *Eſtate*; *Tenure*, III. 5. It is therefore in this place ſufficient to inquire,

I. *In what Things one may have a Fee-ſimple.*
II. *By what Means ſuch an Eſtate may be acquired.*
III. *By what Words it may be created.*

I. A man may have an eſtate, in fee-ſimple of all lands or tenements or other things real. *Co. Lit.* 1 *b*. Of lordſhips, advowſons, commons, eſtovers, and all hereditaments. *Co. Lit.* 4 *a*. So he may have a fee-ſimple in things mixed; as in franchiſes, liberties, &c. *Co. L.* 2 *a*.

So if a man grants to another and his heirs all woods, underwoods, timber-trees or others in ſuch a part of a foreſt, ſaving the ſoil; the grantee has a fee to take *in alieno ſolo*. *R.* 8 *Co.* 137 *b*.

So, in things perſonal; as in annuity. *Co. Lit.* 2 *a*. In a dignity granted to him and his heirs. *Co. Lit.* 2. *a*. In a ſwan-mark. 7 *Co.* 17. In a part or ſhare of the *New River* water. *Ca. Parl.* 207.

So, in the patronage of an hoſpital, or other thing created *de novo*, in which there was not a precedent eſtate, a man may have a fee to him and his heirs, qualified in a particular manner: as if a Queen conſort inſtitutes an hoſpital, and reſerves the patronage *ſibi & reginis Angliæ ſuccedentibus*. *Ca. Ch.* 214.

But in eſtates in *eſſe* before ſuch deſultory inheritance it cannot be: as the dutchy of *Cornwall* limited to the prince *& filiis regis Angliæ primogenitis*, ſhall not be good, except when limited by act of parliament. 8 *Co.* 16.

II. A

II. A man may take a fee by deſcent or by purchaſe.

In what manner a man may take by deſcent, ſee under title *Deſcent*.

With reſpect to *purchaſers*, it is to be noted, that ſome are incapable of purchaſing.

An alien cannot purchaſe any lands in *England*. *Vaugh.* 227, 291: 7 *Co.* 16; 17, 18: *Dyer*, 2. *pl.* 8. See *Alien*.

All perſons attainted of treaſon or felony are incapable of purchaſing. 2 *New Abridg.* 249: *Co. Lit.* 8. *a.* See *Dig. Feud. lib.* 2. *tit.* 23, 24: *Vigellius* 242, 350: *Spel. Gloſſ.* 214, 215.

If a man be *attainted of felony*, and after purchaſe land, and dies, the King ſhall have it by his prerogative, and not the lord of the fee; becauſe his perſon being forfeited to the King, he cannot purchaſe but for the King. *Co. Lit.* 2 *b.*

A monſter not having human ſhape cannot purchaſe or inherit, but an hermaphrodite ſhall inherit or purchaſe *ſecundum prævalentiam ſexûs incaleſcentis*; one born deaf and dumb may *inherit*; ſo may one born deaf, dumb and blind, becauſe it is for their advantage; but they cannot *contract*, becauſe they cannot underſtand the ſigns of contracting; an infant, an ideot, and a perſon of *non-ſane memory* may inherit, becauſe the law, in compaſſion to their natural infirmities, preſumes them capable of property; ſo alſo an infant or a perſon of *non-ſane memory* may purchaſe, becauſe it is intended for his benefit, and the freehold is in him till he diſagree thereto, becauſe an agreement is preſumed, it being for their benefit, and becauſe the freehold cannot be in the grantor, contrary to his own act, nor can be in abeyance, for then a ſtranger would not know againſt whom to demand his right; if at full age, or after recovery of his memory they agree thereto, they cannot avoid it; but if they die during minority or lunacy, the heirs may avoid it; for they ſhall not be ſubject to the contracts of perſons who wanted capacity to contract; ſo, if after his memory recovered, the lunatick or perſon *non compos* die without agreement to the purchaſe, their heirs may avoid it. *Co. Lit.* 2. 8: 2 *Vent.* 303. See title *Eſtate*.

A feme covert is capable of purchaſing; for ſuch an act does not make the property of the huſband liable to any diſadvantage, nor does it ſuppoſe a ſeparate will or power of contracting in the wife; but here the will of the wife is ſuppoſed the mind of the huſband, (he not objecting,) ſince no man is ſuppoſed not to aſſent to that which is for his benefit; but in this caſe the huſband may diſagree, and it ſhall avoid the purchaſe. *Co. Lit.* 3 *a.* See title *Baron* and *Feme*.

By the *ſtat.* 11 & 12 *W.* 3. *c.* 4, *Papiſts* are diſabled from purchaſing lands, &c. See title *Papiſt*.

Perſons capable of purchaſing may gain a fee-ſimple by *feoffment*; or by fine, or *common recovery*; which are of the nature of a feoffment upon record; or by *grant*, or by *exchange*, *releaſe*, or *confirmation*, which are in the nature of grant; or by *bargain* and *ſale*; or by *covenant* to ſtand ſeiſed; or by *deviſe*. See title *Eſtate*.

So a man may gain a fee by wrong; as by *diſſeiſin*, *abatement*, or *intruſion*. See thoſe titles.

III. It is the word *heirs* makes the inheritance; and a man cannot have a greater eſtate. *Lit.* 1. To have *fee-ſimple* implies, that it is without limitation to what heirs, but to heirs generally: though it may be limited by act of parliament. 4 *Inſt.* 206. If one give or grant land to *J. S.* and his heirs; and if he die without heirs, that *J. D.* ſhall have it to him and his heirs: by this *J. S.* hath a *fee ſimple*, and *J. D.* will have no eſtate. *Dyer* 4, 33. This means by parol, with livery and ſeiſin, or by deed, &c. but not by will.

Where land is given or granted by fine, deed or will, in poſſeſſion, reverſion, or remainder, to another and his heirs; it will be a *fee ſimple*. *Plowd.* 134. And if land be granted to a man and his heirs, *habendum* to him for life only, and livery of ſeiſin is made; it is a *fee-ſimple* eſtate, becauſe a fee is expreſſed in the *grant*. 2 *Rep.* 23.

A leaſe is granted to one for a term of years, and after that the leſſee ſhall have the land to him and his heirs by the rent of 10 *l.* a year; if the grantor make *livery* upon it, 'tis a *fee-ſimple*: otherwiſe but for years. *Co. Lit.* 217. Where lands are granted to *A.* for life, remainder to *B.* for life, the remainder to the right heirs of *A.* here *A.* hath a *fee ſimple*. 20 *Hen* 6. 35: *Bro. Eſt.* 34, 35. A gift or grant to a man's wife during life, after to him in tail, and after to his right heirs; he will have a *fee-ſimple* eſtate. 2 *Rep.* 91.

If lands are granted to a man and his ſucceſſors, this creates no *fee-ſimple*: but if ſuch a grant be made to a corporation, it is a *fee-ſimple*; and in caſe of a ſole corporation, as a biſhop, parſon, &c. a *fee-ſimple* is to them and their ſucceſſors. *Co. Lit.* 8. *b*: *Wood* 119. An eſtate *granted* to a perſon, to hold to *him* for ever, or to *him* and *his aſſigns* for ever, is only an eſtate for life; the word *heirs* being wanted to make it *fee-ſimple*: but in *wills*, which are more favoured than grants, the *fee ſimple* and inheritance may paſs without the word *heirs*. *Co. Lit.* 19, 9.

And by deed of feoffment a *fee-ſimple* may be created, which would be an eſtate-tail by will; as where lands are given to another, and his heirs male, &c. without the word *body*. *Hob* 32. A gift to a man and his children, and their heirs, is a *fee-ſimple* to all that are living. *Co. Lit.* 8: *Lit. Rep.* 6.

A feoffment to *B.* & *heredibus*, without ſaying *ſuis*, gives him a fee-ſimple. *Co. Lit.* 8 *b.* So to a ſon *and the heirs of his father*. Semb. *Co. Lit.* 220. *b.* So to *B.* & *liberis ſuis* and their heirs; if he has iſſue, it gives them a joint eſtate in fee. *Co. Lit.* 9 *a.* So to *B. heredibus* & *ſucceſſoribus ſuis*, gives a fee. *Co. Lit.* 9 *a.*

So a grant to the King *in perpetuum* gives him a fee, without the words, *his heirs or ſucceſſors*, for he never dies. *Co. Lit* 9 *b.* So a feoffment to a corporation aggregate *in perpetuum* gives a fee; for it never dies. *Co. Lit.* 9 *b*: 1 *Rol.* 832. *l.* 55.

Or, to a corporation ſole, to be held in *frankalmoigne*. *Co. Lit.* 9 *b*: 1 *Roll.* 833. *l* 5. So if *A.* re-enfeoffs *B. adeo plené* as *B.* enfeoffed him, he has a fee without the word, *heirs*. *Co. Lit.* 9 *b.*—This muſt mean where *A.* had an eſtate in fee of the feoffment of *B* 1 *Rol.* 833. *l.* 12. So a grant to the church of *B.* gives a fee, without the word, *heirs or ſucceſſors*. 1 *Rol.* 833. *l.* 3.

And a limitation to *the right heirs* of *B.* gives a fee, without the words, *and their heirs*. 1 *Rol.* 133 *l.* 16. So a fee may be given without the words, *his heirs*, by fine *ſur conuzance de droit come ceo*, &c. *Co. Lit.* 9 *b.* or by a *common recovery*. *Co. Lit.* 9 *b.*

So a fee paſſes without the words, *his heirs*, where a man gives land with his daughter, &c. in *frankmarriage*.

Co. Lit. 9 *b.* If a parcener, or joint-tenant releaſes to his companion. *Co. Lit.* 9 *b.* If the lord, *&c.* releaſes to the tertenant; which enures by way of extinguiſhment. *Co. Lit.* 9 *b.* If a man releaſes a mere right; as where a diſſeiſſee releaſes to the diſſeiſſor all his right. *Co. Lit.* 9 *b.*

So, if a rent be granted upon partition, for owelty (or equality) of partition. *Co. Lit.* 9, 10. So if a peer be ſummoned to parliament by writ, he has a fee in his dignity, without the word *heirs*. *Co. Lit.* 9 *b.* So, by the foreſt law, if the King at a juſtice ſeat, grants to another an *aſſart* in *perpetuum*, without more, he has a fee. *Co. Lit.* 10 *a.* So, by cuſtom, a grant of a copyhold, *ſibi & ſuis*, or *ſibi & aſſignatis*, may give the inheritance. 4 *Co.* 29 *b.*

A *fee ſimple* determinable upon a contingency, is a *fee* to all intents; though not ſo durable as abſolute *fee*. *Vaugh.* 273. But ſee title *Executory Deviſe*.

In pleading eſtates in fee-ſimple, they may be alledged generally; but the commencement of eſtates-tail, and other particular eſtates, muſt regularly be ſhewn. *Co. Lit.* 303. The fee-ſimple eſtate, being the chief and moſt excellent; he who hath it in lands or tenements may give, grant, or charge the ſame by deed or will at his pleaſure; or he may make waſte or ſpoil upon it: And if he bind himſelf and his heirs to warranty, or for money by obligation, or otherwiſe, and leave ſuch land to the heir, it ſhall be charged with warranty and debts: Alſo the wife of a man that is ſeiſed of ſuch an eſtate, ſhall be endowed; and the huſband of a woman having this eſtate, ſhall be tenant by the curteſy. *Co. Lit.* 273: *Dyer* 330. *Perk.* § 236.

Though fee-ſimple is the moſt ample eſtate of inheritance, it is ſubject to many incumbrances; as judgments, ſtatutes, mortgages, fines, jointures, dower, *&c.* And there is a fee-ſimple *conditional*, where the eſtate is defeaſible by not performing the condition; and a *qualified* fee-ſimple, which may be defeated by a limitation, *&c.* This is called a *baſe fee*, upon which no reverſion or remainder can be expectant. *Co. Lit.* 18: 10 *Rep.* 97.

See further on this ſubject titles *Deſcent*; *Eſtate*; *Executory Deviſe*; *Tenure*; *Wills*, *&c.*

FEE EXPECTANT. [*Feudum Expectativum*] See *Expectant*.

FEE-TAIL. See title *Tail*.

FEE FARM, *Feodi Firma.*] Or *fee-farm rent*; is when the lord, upon creation of the tenancy, reſerves to himſelf and his heirs, either the rent for which it was before let to farm, or was reaſonably worth, or at leaſt a fourth part of the value; *without homage, fealty, or other ſervices*, beyond what are eſpecially compriſed in the feoffment. 2 *Inſt.* 44. By *Fitzherbert*, a third part of the yearly value of the land may be appointed for the rent, where lands are granted in *fee-farm*, *&c. F. N. B.* 110. And Lord *Coke* ſays, *fee-farm* rents may be one half, a third, or fourth part of the value. *Co. Lit.* 143. See 2 *Comm.* 43: *Dyer* 627, *in note*, and the notes to 1 *Inſt.* 143.

Theſe *fee farm* rents ſeem to be more or leſs, according to the conditions or conſideration of the purchaſe of the lands out of which they are iſſuing. It is the nature of *fee farm*, that if the rent be behind and unpaid for the ſpace of two years, then the feoffor or his heirs may bring an action to recover the lands, *&c. Brit. c.* 66. *num.* 4. See title *Ceſſavit*.

Feodi firma appellatur, cum quis, ex dono vel conceſſione alterius, prædia tenuerit ſibi et hæredibus ſuis, reddendo vel dimidiam, vel tertiam, vel ad minus quartam partem veri valoris. Tenens hujuſmodi ad nulla ſervitia obligatur, niſi quæ in ipſâ Chartâ continentur: exceptâ *fidelitate*, quæ omnibus tenuris incumbit. *Spelm. Gloſs.* 221.

FEE-FARM RENTS OF THE CROWN. The *fee farm* rents remaining to the Kings of *England* from their *ancient demeſnes*, were many of them alienated from the crown in the reign of King *Charles* II. By *Stats.* 22 *Car.* 2. *c.* 6: 22 & 23 *C.* 2. *c.* 24, (explained by *Stat.* 10 *An. c.* 18,) the King was enabled by letters-patent to grant *fee-farm* rents due in right of his crown, or in right of his dutchies of *Lancaſter* and *Cornwall*, except quit-rents, *&c.* to truſtees to make ſale thereof, and the truſtees were to convey the ſame by bargain and ſale to purchaſers, *&c.* who may recover the ſame as the King might. But it has been obſerved, that men were ſo very doubtful of the title to alienations of this nature, that while theſe rents were expoſed to ſale for ready money, ſcarce any would deal for them, and they remained unſold: but what made men earneſt to buy them, was the hope upon ſome of his Majeſty's other payments, which occaſioned perſons to reſort to this as the moſt eligible in the preſent juncture: No tenant in tail of any of the ſaid rents is enabled to bar the remainder. See further title *Crown*: *Palatine*.

FEES, Certain perquiſites allowed to officers in the adminiſtration of juſtice, as a recompence for their labour and trouble; aſcertained either by acts of parliament, or by ancient uſage, which gives them an equal ſanction with an act of parliament. 2 *New Abr.* 463.

I. *In what Caſes Fees are due.*
II. *At what Time they may be demanded.*

I. At common law no officer, whoſe office related to the *adminiſtration of juſtice*, could take any reward for doing his duty, but what he was to receive from the King. *Co. Lit.* 368: 2 *Inſt.* 176, 208, 9.

And this fundamental maxim of the common law is confirmed by *Weſtm.* 1. *cap.* 26. which enacts, "That no ſheriff, or other King's officer, ſhall take any reward to do his office, but ſhall be paid of that which they take of the King; and that he who ſo doth ſhall yield twice as much, and ſhall be puniſhed at the King's pleaſure."

This ſtatute comprehends eſcheators, coroners, bailiffs, gaolers, the King's clerk of the market, aulnager, and other inferior miniſters and officers of the King, whoſe offices do any way concern the *adminiſtration* or *execution, of juſtice*. 2 *Inſt.* 209.

And ſo much hath this law been thought to conduce to the honour of the King and welfare of the ſubject, that *all preſcriptions* whatſoever, which have been *contrary to it*, have been holden *void*; as where by preſcription the clerk of the market claimed certain fees for the view and examination of all weights and meaſures, and it was held merely void. 4 *Inſt.* 274: *Moor* 523: 2 *Inſt.* 209: 2 *Rol. Abr.* 226.

But it hath been holden, that the fee of 20*d.* commonly called the bar fee, which hath been taken time out of mind, by the ſheriff, of every priſoner who is acquitted; and alſo the fee of one penny, which was claimed by the coroner of every *viſne*, when he came before the juſtices

in.

in *eyre*, are not within the meaning of the ſtatute, becauſe they are not demanded by the ſheriff or coroner for doing any thing relating to their offices, but claimed as perquiſites of right belonging to any of them. 2 *Inſt.* 210: *Staun. P. C.* 49.

Alſo it is holden by Lord *Coke*, that within the words of the ſtatute 34 *Ed.* 1. which are, "No tallage or aid ſhall be taken or levied by us or our heirs in our realm, *without the good will and aſſent of* archbiſhops, biſhops, earls, barons, knights, burgeſſes, and other freemen of the land;" no new offices can be erected with new fees, or old offices with new fees; for that is a tallage upon the ſubject, which cannot be done without common aſſent by act of parliament. 2 *Inſt.* 533.

Yet it is holden, that an office erected for the public good, though no fee is annexed to it, is a good office; and that the party, for the labour and pains which he takes in executing it, may maintain a *quantum meruit*, if not as a fee, yet as a *competent recompence* for his trouble. *Moor* 808.

All fees allowed *by acts of parliament* become eſtabliſhed fees; and the ſeveral officers intitled to them may maintain *action of debt* for them. 2 *Inſt.* 210. All ſuch fees as have been allowed by the courts of juſtice to their officers, as a recompence for their labour and attendance, are eſtabliſhed fees: and the parties cannot be deprived of them without an act of parliament. *Co. Lit.* 368: *Prec. Chan.* 551.

Where a fee is due by cuſtom, ſuch cuſtom, like all others, muſt be reaſonable; and therefore where a perſon libelled in the ſpiritual court for a burying fee due to him for every one who died in his pariſh, though buried in another; the court held this unreaſonable, and a prohibition was granted. *Hob.* 175: 1 *Rol. Abr.* 557, 559. *S. C.* adjudged.

The plaintiff brought an action on the caſe for fees due to him as Uſher of the Black Rod, and obtained a verdict. *Stran.* 747. No fee ſhall be taken for a report upon a reference from any court. *St.* 1 *Jac.* 1. *c.* 10.—Certain fees of ſheriffs ſettled. *St.* 3 *Geo.* 1. *c.* 15. See title *Sheriff*.—Fees on *niſi prius* records out of the Exchequer to be the ſame as on other records. *St.* 23 *Geo.* 2. *c.* 26. § 10.—Fees of juſtices' clerks to be regulated. *St.* 26 *Geo.* 2. *c.* 14: 27 *Geo.* 2. *c.* 16. Debt lies for the ſheriff's fees for executing an *elegit*. *Lord Raym.* 1212.

As to the *quantum* of the fees due, it muſt be obſerved in general, that it is extortion for any officer to take more for executing his office, than is allowed by act of parliament, or is the known and ſettled fee in ſuch caſe. 10 *Co.* 102 *a*: *Co. Lit.* 368.

As to the fees of ſheriffs for executions, by *St.* 29 *Eliz. cap.* 4. it is enacted, "That it ſhall not be lawful for any ſheriff, &c. nor for any of their officers, &c. by colour of their office, to take of any perſon, directly or indirectly, for the ſerving and executing of any extent or execution upon the body, lands, goods or chattels of any perſon, more recompence than in this preſent act appointed, *i. e.* twelve-pence of and for every twenty ſhillings where it exceedeth not one hundred pounds; and ſix-pence of and for every twenty ſhillings, over and above the ſaid ſum of 100*l.* that he or they ſhall ſo levy or extend, and deliver in execution, or take the body in execution for; upon pain, that the perſon offending, ſhall forfeit, to the party grieved, his treble damages; and ſhall forfeit the ſum of 40*l.* for every time that he, they, or any of them ſhall do the contrary."

II. It is extortion for any officer to take his fee before it is due; and therefore where an under-ſheriff refuſed to execute a *capias ad ſatisfaciendum* till he had his fees, the court held, that the plaintiff might bring an action againſt him for not doing his duty, or might pay him his fees, and then indict him for extortion. *Co. Lit.* 368: 10 *Co.* 102 *a*: 1 *Salk.* 330.

Officer muſt obey a writ, though fees unpaid. *Stran.* 814. Proceſs muſt be obeyed though fees are not tendered. *Stran.* 1262. If an *habeas corpus ad ſubjiciendum* be directed to a gaoler, he muſt bring up the priſoner although his fees were not paid him; and he cannot excuſe himſelf of the contempt to the court, by alledging that the priſoner did not tender him his fees. 1 *Keb.* 272. *pl.* 57. So as to an *habeas corpus ad faciendum & recipiendum*. *March* 89: 2 *Keb.* 280: 2 *Inſt.* 178: 1 *Keb.* 566. *cont.*

But if the gaoler brings up the priſoner by virtue of ſuch *habeas corpus*, the court will not turn him over till the gaoler be paid all his fees; nor, according to ſome opinions, till he be paid all that is due to him for the priſoner's diet: for that a gaoler is compellable to find his priſoner ſuſtenance. See 1 *Rol. Rep.* 338: *Co. Lit.* 295: 9 *Co.* 87: *Plowd.* 68 *a*: 2 *Rol. Abr.* 32: 2 *Jon.* 178.

If a perſon pleads his pardon, the judges may inſiſt on the uſual fee of gloves to themſelves and officers, before they allow it. *Fitz. Coron.* 294: *Pulton de Pace* 88: *Keling* 25: 2 *Jon.* 56: 1 *Sid.* 452.

If an erroneous writ be delivered to the ſheriff, and he executes it, he ſhall have his fees, though the writ be erroneous. 1 *Salk.* 332. It ſeems to be laid down in the old books as a diſtinction, that upon an extent of land upon a ſtatute, the ſheriff is to have his fees, ſo much *per* pound according to the ſtatute immediately; but that upon an *elegit* he is not to have them till the *liberate*. *Poph.* 156: *Winch* 51. *S. P.*

Fees of Attornies and Officers, Are conſiderations allowed them as a recompence for their labour: and in reſpect to officers, they are granted over and above their ſalaries, to excite them to diligence in executing their offices. They differ from *wages* which are paid to ſervants for certain work and labour done in a certain ſpace; whereas *fees* are diſburſed to officers, &c. for the tranſacting of buſineſs which occaſionally occurs. If a client, when his buſineſs in court is diſpatched, refuſeth to pay the officer his court fees; the court on motion will grant an attachment againſt him, on which he ſhall be committed until the *fees* are paid. 1 *Lill. Abr.* 598. Eccleſiaſtical courts have not power to eſtabliſh *fees*: But if a perſon bring a *quantum meruit in B. R.* &c. for *fees*, and the jury find for him, then they become eſtabliſhed *fees*. 1 *Salk.* 333.

A ſolicitor in Chancery may exhibit his bill for his fees for buſineſs done in that court; and ſo he may where the buſineſs is done in another court, if it relates to another demand the plaintiff makes in chancery. 1 *Vern.* 203: 2 *Chan. Ca.* 153. But it hath been held, that chancellors, regiſters and proctors who are officers of temporal profit, and whoſe fees do not relate to the juriſdiction of the ſpiritual court, cannot ſue for them in the ſpiritual court. See 3 *Leon.* 208: 2 *Rol. Rep.* 59: 1 *Mod.*

167: 2 *Keb.* 615: 3 *Keb.* 303, 441, 516: 4 *Mod.* 254: 5 *Mod.* 242.

Action on the caſe lies for an attorney for his *fees*, againſt him that retained him in his cauſe: And attornies are not to be diſmiſſed by their clients, till their *fees* are paid. 1 *Lil.* 142. But attornies are not to demand more than their juſt *fees*; nor to be allowed *fees* to counſel without tickets, or the ſignature of counſel, &c. *Stat.* 3 *Jac.* 1. *c.* 7. An attorney may have action of debt for his *fees*, and alſo of counſel, and coſts of ſuit: as a counſellor is not bound to give counſel till he has his *fee*; it is ſaid he can have no action for it: Though it has been held otherwiſe. *F. N. B.* 121: 1 *Brownl.* 75: 31 *H.* 6. *c.* 9.

There were no *fees* due to ſheriffs for executing their offices, till the *Stat.* 29 *Eliz. c.* 4; which allows them *fees* for executing writs of execution, &c. By the *Stat.* of *Weſtm.* 2, 13 *E.* 1. *cc.* 42, 44, the ancient *fees* of officers of courts of juſtice were ordained: And by ſtatutes, the *fees* of ſheriffs, gaolers, bailiffs, &c. are limited.

See further as connected with the ſubject of fees, this Dict. titles *Bribery*; *Extortion*; and alſo titles *Barriſter*; *Sheriff*; *Attorney*; *Coroner*, &c.

FEIGNED ACTION, See title *Faint Action.*

FEIGNED ISSUE, If, in a ſuit in equity, any matter of *fact* is ſtrongly conteſted, the court uſually directs the matter to be tried by a jury; eſpecially ſuch important facts as the validity of a will, or whether *A.* is the heir at law to *B.* or the exiſtence of a *modus decimandi*, or real and immemorial compoſition for tithes. But as a jury cannot be ſummoned to attend a court of equity, the fact is uſually directed to be tried in the court of King's Bench, or at the aſſiſes, upon a *feigned iſſue*. For this purpoſe, a feigned action is brought, wherein the pretended plaintiff declares that he laid a wager of 5 *l.* with the defendant, that *A.* was heir at law to *B*; then he avers that he is ſo; and brings his action for the 5 *l.* the defendant allows the wager, but avers that *A.* is not the heir to *B.* and thereupon that iſſue is joined, which is directed out of Chancery to be tried: and thus the verdict of the jurors at law determines the fact in the court of equity. 3 *Comm.* 452. If it is a matter of great difficulty and conſequence, the direction may be for a trial at bar, with leave of the court. See titles *Chancery*; *Equity.*

FELAGUS, *Quaſi fide cum eo ligatus.*] A companion, but particularly a friend, who was bound in the *decennary* for the good behaviour of another. In the laws of King *Ina*, it is ſaid, if a murderer could not be found, &c. the parents of the perſon ſlain ſhould have ſix marks, and the King forty; if he had no parents, then the lord ſhould have it. *Et ſi dominus non haberet*, felagus *ejus.* LL. *Inæ. cap.* 15.

FELD, Is a *Saxon* word, ſignifying *field*; and in its compound it ſignifies wild, as *feld* honey, is wild honey, &c. *Blount*

FELE HOMAGERS, Were faithful ſubjects; from the Sax. *fai*, i. e. *fides*.

FELO DE SE, One that commits felony by laying violent hands upon himſelf, or commits any unlawful malicious act, the conſequence of which is, his own untimely death. When a perſon with deliberation and direct purpoſe kills himſelf, by hanging, drowning, ſhooting, ſtabbing, &c. he becomes *felo de ſe*; but the perſon that commits this felony, muſt be of the age of diſcretion, and *compos mentis*: And therefore if an infant under fourteen years of age, or a lunatick during his lunacy, or one diſtracted by a diſeaſe, or an ideot, kills himſelf, it is not felony. 3 *Inſt.* 44: *Dalt. ch.* 145. Alſo if a perſon during the time that he is *non compos mentis* giveth himſelf a mortal wound, though he dieth thereof when he recovers his memory, he is not *felo de ſe*; becauſe at the time of the ſtroke he was not *compos mentis*: *Dalt.* 342. 344. And he who deſires and perſuades another man to kill him, is not a *felo de ſe*; his aſſent being void in law, and the perſon killing him a murderer. *Kelw.* 136. It is *felo de ſe* where a man maliciouſly attempts to kill another, and falls upon his ſword, or ſhooting at another the gun burſts, whereby he kills himſelf; but he muſt be the *only* agent. 1 *Hawk. P. C. c.* 27: 1 *Hal. P. C.* 413.

A *felo de ſe* cannot make a will of goods and chattels; [or rather ſuch will, if made, is void;] for they are forfeited by the act and manner of his death: but he may make a deviſe of his lands, for they are not ſubject to forfeiture. *Plowd.* 261.

A *felo de ſe* ſhall forfeit all his goods and chattels real and perſonal; but not until it is lawfully found by the oath of twelve men, before the coroner on view of the body, that he is *felo de ſe*. 3 *Inſt.* 55. By the return of the inquiſition the goods, &c. are veſted in the King: Though it hath been ſaid, that the goods of a *felo de ſe* are forfeited before inquiſition, *viz.* immediately upon committing the fact. 1 *Lev.* 8: but ſee 5 *Rep.* 110, where it is adjudged that they are not forfeited till it is found of record. The lands of inheritance of a *felo de ſe* are not forfeited, by reaſon he was not attainted in his life-time: nor is ſuch a perſon's wife barred of dower, or his blood corrupted. 1 *Hawk. P. C. c.* 27. If a judgment is obtained by a plaintiff in any action, and the plaintiff hangs himſelf, ſo as to become *felo de ſe*, the debt is forfeited to the King. 1 *Saund.* 36: 2 *Nelſ. Abr.* 840. Goods are forfeited to the King by a *felo de ſe*, for the loſs of a ſubject, and breach of the peace. 1 *Plowd.* 261. This forfeiture has relation to the time of the act done, in the felon's life-time which was the cauſe of his death. As if the huſband and wife be poſſeſſed jointly of a term of years, in land, and the huſband drown himſelf, the land ſhall be forfeited to the King; and the wife ſhall not have it by ſurvivorſhip. For by the act of caſting himſelf into the water he forfeits the term; which gives a title to the King, prior to the wife's title by ſurvivorſhip; which could not accrue till the inſtant of her huſband's death. *Finch L.* 216. But theſe forfeitures are, perhaps too often, ſaved, by the coroner's jury finding their verdict lunacy; to which they are inclined on a favourable interpretation, that it is impoſſible for a man in his ſenſes to do a thing ſo contrary to nature; but if this argument be good, ſelf-murder can be no crime, becauſe a madman cannot be guilty of any crime. 1 *Hawk. P. C. c.* 27.

If a perſon *felo de ſe* is ſecretly made away with that the coroner cannot view the body; preſentment is to be made of it by juſtices of peace, &c. to entitle the King to the forfeiture of goods. 5 *Rep.* 110. Where a perſon is found *felo de ſe*, who, on account of lunacy, &c. ought not to be ſo; or where one is returned *non compos* when in truth the party is *felo de ſe*, &c. if there be no fault in the coroner, or incertainty in the inquiſition, a

melius

melius inquirendum will not be granted; but the inquisition is traverſable in *B. R.* 3 *Mod.* 238: 2 *Nelſ. Abr.* 840. A pardon of murder, doth not pardon *felo de ſe*; but a pardon of all felonies and forfeitures doth. By cuſtom and practice, the body of a *felo de ſe* is buried in the highway, with a ſtake driven through the body.

FELONS GOODS. The ſtatute *de prærogativa regis*, 17 *Ed.* 2. *c.* 1, grants to the King, among other things, the goods of felons and fugitives. If the King grant to a man and his heirs *felons' goods*, the grantee cannot deviſe them, &c. on the ſtatute 32 *H.* 8. *c.* 1, becauſe they are not of a yearly value; but where a perſon is ſeiſed of a manor, to which they are appendant, it is otherwiſe, for they will paſs as appurtenant. 3 *Rep.* 32. See titles *Flight*; *Forfeiture*.

FELONY.

FELONIA.] A general term of law including generally, all capital crimes, below treaſon. 4 *Comm.* 98. This word is of feudal original; but as to the derivation of which authors differ. Some deduce it, fancifully enough as it ſeems, from φωλος Gr. an impoſtor; from *fallo Lat.* to deceive; and *Coke* (1 *Inſt.* 391,) ſays it is *crimen* felleo *animo perpetratum*.—All, however, agree that it is ſuch a crime as occaſions a forfeiture of the offender's lands or goods; this therefore gives great probability to *Spelman*'s derivation from the *Teutonick* or *German fee*, a feud or fief, and *lon*, price or value. *Spelm. in verb. Felon.*—Felony according to this derivation, is then the ſame as *pretium feudi*; the conſideration for which a man gives up his fief or eſtate; as in common ſpeech it is ſaid, ſuch an act is as much as one's life or eſtate is worth. In this ſenſe, it will clearly ſignify the feodal forfeiture, or rather the *act* by which an eſtate is forfeited or eſcheats to the lord. See 4 *Comm.* 95.

FELONY, in the general acception of law, compriſes every ſpecies of crime which occaſioned, at Common-law, the forfeiture of lands or goods. This moſt frequently happens in thoſe crimes for which a capital puniſhment, either was or is liable to be inflicted: for thoſe felonies which are called clergyable, or to which the benefit of clergy extends, were antiently puniſhed with death in lay or unlearned offenders, though now by the ſtatute-law that puniſhment is for the firſt offence univerſally remitted. See this Dict. title *Clergy*, *Benefit of*. Treaſon itſelf (ſays *Coke* 3 *Inſt.* 15,) was antiently compriſed under the name of Felony. And not only all offences now capital are in ſome degree or other, felony; but this is likewiſe the caſe with ſome other offences, which are not puniſhed with death; as ſuicide, where the party is already dead; homicide by chance medley, or in ſelf-defence; and petty larceny or pilfering: all which are, ſtrictly ſpeaking Felonies, as they ſubject the committers of them to forfeitures. So that upon the whole the only adequate *definition of Felony* ſeems to be this *viz.* "An offence which occaſions a total forfeiture, of either lands or goods or both, at the Common law; and to which, capital *or other* puniſhment may be ſuperadded, according to the degree of guilt." 4 *Comm.* 94.

As felony may be without inflicting capital puniſhment, ſo it is poſſible that capital puniſhment may be inflicted for an offence which is no felony; as in caſe of *Herely* by the Common-law, which though capital, never worked any forfeiture of lands or goods, an *inſeperable* incident to felony. 3 *Inſt.* 43. Of the ſame nature was the puniſhment of ſtanding mute, which at Common-law was capital, but without any forfeiture, and was therefore no felony. In ſhort the true criterion of Felony is forfeiture, for in all felonies which are puniſhable by death, the offender loſes all his lands in fee-ſimple, and alſo his goods and chattels; in ſuch as are not ſo puniſhable, his goods and chattels only. 1 *Inſt.* 391.

The idea of felony is ſo generally connected with that of capital puniſhment, that it ſeems hard to ſeparate them; and to this uſage the interpretations of law now conform. For if a ſtatute makes any new offence *felony*, the law implies that it ſhall be puniſhed with death (*viz.* by hanging,) as well as by forfeiture, unleſs the offender prays the benefit of clergy. *Hawk. P. C.* i. *c.* 41. § 4; ii. *c.* 48. So where a ſtatute decrees an offence to undergo judgment of life and member, the offence becomes a Felony, though that preciſe word be omitted; but the words of the ſtatute muſt not in ſuch caſe be the leaſt doubtful or ambiguous. 1 *Hawk. P. C. c.* 41. §§ 1, 2.

Under the word *felony* in commiſſions, &c. is included petit treaſon, murder, homicide, burning of houſes, burglary, robbery, rape, &c. chance medley, *ſe defendendo* and petit larceny. All felonies puniſhable according to the courſe of the Common-law, are either by the Common-law, or by ſtatute. Piracy, robbery, and murder *on the ſea* are puniſhable by the civil and ſtatute law. 1 *Inſt.* 391.

Felony, by the *Common-law*, is againſt the life of a man; as murder, manſlaughter, *felo de ſe*, *ſe defendendo*, &c. Againſt a man's goods, ſuch as larceny, and robbery: Againſt his habitation, as burglary, arſon or houſe-burning; and againſt public juſtice, as breach of priſon. 3 *Inſt.* 31.

It is not very eaſy to recapitulate the vaſt variety of offences which are made Felony, by the almoſt innumerable ſtatutes which have been from time to time found neceſſary, to reſtrain mankind within thoſe bounds which the ſecurity of Society requires.—Unfortunately theſe are continually increaſing; as the penalties of death or tranſportation have, after repeated trials, in many inſtances been found by experience, to be the only means of preventing the increaſe of crimes; from the commiſſion of which milder puniſhments were inſufficient to deter offenders.

A general liſt is here ſubjoined of *Felonies by ſtatute*; *within clergy*, and *without*. For the particulars relative to each offence, this *Dictionary* may be conſulted under the proper titles; ſee particularly titles *Larceny*; *Robbery*; *Acceſſary*.

FELONIES WITHIN CLERGY. *Armour*, the King's, embezzling.—*Aſſaults*, with intent to ſpoil perſons' dreſs.—*Bail*, perſonating; before commiſſioners.—*Bridges* deſtroying, ſeveral ſpecified in different ſtatutes.—*Burning* ricks of corn, hay, &c.—*Cattle*, ſheep, &c. killing in the night maliciouſly, or ſlaughtering horſes without notice.—*Cloth*, ſtealing from tenters, 3d. Offence.—*Collieries* deſtroying engines to drain.—*Commons*, deſtroying incloſures of.—*Copper*, removing from a houſe to ſteal it, aſſiſting therein, or buying it when ſtolen.—*Corn*, deſtroying granaries; 2d. off.—*Cuſtoms*; harbouring ſmugglers and aſſiſting to run goods.—*Dikes* cutting in marſh land.—*Fiſhing* in encloſed pond, &c. with intent to ſteal; or buying ſtolen fiſh.—*Foreign State* ſerving.—*Forgery* of bank-bills and ſtamps for marking plate.—*Gaoler*, forcing a priſoner to become

become an approver; (impeacher.)—*Hawk*, ſtealing.—*Hunting*, in the night or in diſguiſe.—*Jewels* and *plate* ſtolen, receiving of.—*Iron bars* fixed to buildings, ſtealing.—*King* or his council, conſpiring to deſtroy.—*Labourers*; confederacy of maſons againſt the ſtatute of Labourers.—*Lead*; Entring black lead mines with intent to ſteal; ſtealing lead affixed to buildings; or buying or receiving it when ſtolen—*Locks*, floodgates, ſluices or banks, deſtroying—*Maiming* another.—*Marriage* clandeſtine, ſolemnizing.—*Money*; exporting ſilver, importing falſe money, blanching copper, putting off counterfeit money, or counterfeiting copper money.—*Mutiny* and deſertion in ſeamen or ſoldiers.—*Palaces* of the King, entring with intent to ſteal.—*Pewter* ſtolen, buying or receiving.—*Plague*, perſons infected with, going out of doors.—*Poligamy*, or bigamy.—*Poſt-Office* frauds in, as to poſtage of letters.—*Proceſs* oppoſing execution of, in pretended privileged places.—*Records* withdrawing or ſecreting.—*Reſcuing priſoners* for treaſon or felony; or offenders againſt ſtatutes concerning ſpirituous liquors. Or offenders condemned to hard labour; or bodies of murderers.—*Robbery*, of furniture from lodgings; aſſaulting with intent to rob.—*Rogues* incorrigible eſcaping from the houſe of correction or offending a ſecond time.—*Servants*, taking their maſter's goods at his death; aſſaulting maſter woolcomber or weaver: imbezzling goods to the value of 40 *s.*—*Sheep* exporting alive; 2d offence.—*Ships* deſtroying; forcibly preventing the lading, ſailing, &c. of ſhips by ſeamen, keelmen and others.—*Stamp duties* certain frauds in.—*Stolen goods* buyers or receivers of, or perſon taking reward to diſcover—*Stores*, government embezzling.—*Trees*, ſhrubs, &c. deſtroying in nurſeries or gardens to the value of 5 *s.*—*Turnpikes*, gates, toll-houſes, &c. deſtroying.—*Warrens* entering in the night and killing conies.—*Watermen*, carrying too many paſſengers, if any drowned.—*Woods*, ſetting fire to.

FELONIES WITHOUT CLERGY.—*Acceſſaries* in certain caſes.—*Bail* perſonating.—*Bank of England*, clerks imbezzling notes; altering dividend warrants, &c. paper makers unauthoriſed uſing moulds for notes; (See poſt *Forgery*).—*Banks* of the ſea, deſtroying.—*Bankrupt*, not ſurrendering; concealing his eſtate, &c.—*Baſtard*, concealing death of.—*Black act*, offenders under.—*Bleaching grounds*, robbery of.—*Bridges* wilfully damaging, thoſe of *London*, *Weſtminſter* and *Fulham*.—*Burglary*—*Burning houſes*; or barns with corn.—*Cattle* ſtealing.—*Challenging jurors* above twenty, in felonies cuſted of clergy.—*Cloth* ſtealing from the tenters.—*Coal mines* ſetting fire to.—*Cottons* ſelling with forged ſtamps.—*Cuſtoms*; ſmugglers ſhooting at or wounding officers of the navy or cuſtom houſe; harbouring tranſported offenders; not ſurrendering on proclamation.—*Deer-ſtealing*, 2d off.—*Deeds* inrolled acknowledging in the name of another.—*Fens*, deſtroying works for draining of.—*Fines* acknowledging in another's name. *Forgeries* of deeds, tranſfers of ſtock, ſtamps, regiſters, &c. &c.—*Hops*, cutting the binds.—*Horſe-ſtealing*.—*Judgments* acknowledging in another's name.—*Letters* threatening, ſending; or reſcuing offenders ſo doing.—*Linen*, ſtealing from bleaching grounds; or cutting or deſtroying.—*Mail*, robbing, or ſtealing letters from poſt-office.—*Maiming*; maliciouſly lying in wait for that purpoſe—*Marſhes*; ſetting fire to engines for draining.—*Mariners* wandering without teſtimonials, and ſee *Stat.* 39 *Eliz. c.* 17. § 4. (poſt *Seamen*).—*Mines* deſtroying.—*Money*, uttering falſe money, 3d off.—*Murder*.—*Mute*, ſtanding on trial for treaſon or felony.—*Northern borders*, thieves and ſpoilers in *Cumberland*, *Northumberland*, *Weſtmorland* and *Durham*.—*Outlawry*, for felonies without clergy.—*Perjury*, convicts for, eſcaping, breaking priſon or returning from tranſportation.—*Pick-pocket* of above 12 *d.* value.—*Piracy*; under which is included, ſailors hindering the captain of a ſhip from fighting, by forcible reſtraint.—*Poiſoning* of malice prepenſed.—*Popiſh recuſants*, prieſts and jeſuits in certain caſes.—*Priſoners* for-ſwearing themſelves under inſolvent acts; refuſing to deliver up or concealing their effects; eſcaping from confinement to hard labour; 2d off.—*Privy Councillors* attempting to kill.—*Quarentine*, neglecting the regulations for performing.—*Rape* of child under 10 years old—*Reſcuing convicts* from tranſportation, or murderers.—*Rebels* returning from tranſportation, their aiders and correſpondents.—*Recognizance* or *recovery*, acknowledging in another's name.—*Riots* and deſtroying buildings.—*Robbery*, of churches, on the highway, in booths in fairs, dwelling-houſes, ſhops, ware-houſes, coach-houſes or ſtables; on board veſſels; in wharfs; in lodgings if above 12 *d.* value; ſtealing exchequer orders, bank notes, navy bills, promiſſory notes, &c.—*Sea*; Treaſons, Robberies, Murders, &c. upon.—*Seamen* perſonating to receive their pay.—*Ships* of war and others, wilfully deſtroying.—*Shooting at* another.—*Silk*; deſtroying any ſilk or velvet in the loom, or the tools for manufacturing thereof.—*Smuggling*, and aſſembling armed for that purpoſe.—*Soldiers*; deſerting, wandering without teſtimonials, inliſting in foreign ſervice or ſeducing others ſo to do.—*South-ſea Company*; ſervants embezzling their effects.—*Stamps* counterfeiting.—*Stolen goods*, helping to a reward in certain caſes. *Stores*, government; imbezzling or burning or deſtroying in dock yards.—*Tranſportation*, returning from, or being at large in the kingdom after ſentence.—*Turnpikes*, gates, weighing engines, locks, ſluices, &c. deſtroying.—*Wool*; deſtroying woollen goods, racks, or tools, or forcibly entering a houſe for that purpoſe.—*Women*, ſtealing, and marrying.—*Wreck* of ſhips, cauſing by ſtealing pumps, &c. ſtealing ſhipwrecked goods, or killing ſhipwrecked perſons.

Before the reign of K. *Hen.* I. *felonies* were puniſhed with pecuniary fines; for he was the firſt who ordered *felons* to be hanged, *about* the year 1108. The judgment againſt a man for *felony* hath been the ſame ſince the reign of that King, *i. e.* That he be hanged by the neck till dead; which is entered *ſuſpendatur per collum*, &c. 4 *Inſt.* 124. *Felony* was anciently every capital crime perpetrated with an evil intention: All capital offences by the Common-law, came generally under the title of *felony*; and could not be expreſſed by any word but *felonicè*; which muſt of neceſſity be laid in an indictment of *felony*. *Co. Lit.* 391. It is always accompanied with an evil intention; and therefore felony cannot be imputed to any other motive. But the bare intention to commit a *felony* is ſo very criminal, that at the Common-law it was puniſhable as *felony*, where it miſſed of its effect through ſome accident; and now the party may be ſeverely fined for ſuch an intention. 1 *Hawk. P. C. c.* 25.

Felony is puniſhed with loſs of life, and of lands *not entailed*, goods and chattels; And *felony* ordinarily works corruption

corruption of blood; unleſs a ſtatute making an offence *felony*, ordains it ſhall be otherwiſe, as ſome ſtatutes do. See title *Attainder*.

The puniſhment of a perſon for *felony*, by our ancient books, is, 1ſt, To loſe his life, 2dly, To loſe his blood, as to his anceſtry, and ſo as to have neither heir nor poſterity. 3dly, To loſe his goods. 4thly, To loſe his lands; and the King ſhall have *annum, diem & vaſtum*, to the intent that his wife and children be caſt out of the houſe, his houſe pulled down, and all that he had for his comfort or delight deſtroyed. 4 *Rep.* 124. A felony by ſtatute incidentally implies, that the offender ſhall be ſubject to the like attainder and forfeiture, *&c.* as is incident to a *felon* at Common-law. 3 *Inſt.* 47, 59, 90.

All *felonies* are ſeveral, and cannot be joint; ſo that a pardon of one felon cannot diſcharge another: but the *felony* of one man may be dependant upon that of another, and the pardon of the one by a neceſſary conſequence enure to the benefit of the other, as in caſes of principal and acceſſary, *&c.* 2 *Hawk. P. C.*

Private perſons may arreſt felons by their own authority, or by warrant from a juſtice of peace: And every private perſon is bound to aſſiſt an officer to take felons, *&c.* 2 *Hawk, P. C.* ſee title *Conſtable*.

But one ought not to be arreſted upon ſuſpicion of *felony*, except there be *probabilis cauſa* ſhewed for the ground of the ſuſpicion. 1 *Lil. Abr.* 603. If a *felony* is not done by a man, but ſome perſon elſe, if another hath probable cauſe to ſuſpect he is the felon, and accordingly doth arreſt him, this is lawful, and may be juſtified: But to make good ſuch juſtification, there muſt be in fact a *felony* committed by ſome perſon, without which there can be no ground of ſuſpicion. 2 *Hale's Hiſt. P. C.* 78. And as to the perſon, there ought to be a *reaſonable* cauſe to ſuſpect him, otherwiſe the arreſt will be illegal. See titles *Arreſt*; *Conſtable*.

A private man arreſting one for *felony*, cannot juſtify breaking doors, to take the party ſuſpected; but he doth it at his peril, *viz.* if in truth he be a felon, it is juſtifiable; but if innocent, then it is not: To prevent a murder or manſlaughter, private perſons may break doors open. 2 *Hale* 82. Officers may break open a houſe to take a felon, or any perſon juſtly ſuſpected of *felony*; and if an officer hath a warrant to take a felon, who is killed in reſiſting, it is not *felony* in the officer; but if the officer is killed, it is otherwiſe. *Dalt.* 289.

Perſons indicted of *felony*, *&c.* where there are ſtrong preſumptions and circumſtances of guilt, are not repleviſable; but for larceny, *&c.* when perſons are committed who are of good reputation, they may be bailed. 2 *Hawk. P. C.* The former part of the poſition muſt be, with an exception to the power of the court of *King's Bench*. See title *Bail*.

If one be committed to priſon for one *felony*, the juſtices of gaol delivery may try him for another *felony*, for which he was not committed, by virtue of their commiſſion, 1 *Lil.* 602.

In the higheſt crime, and in the loweſt ſpecies of felony, *viz.* in petit larceny, and in all miſdemeanors, ſtanding mute hath always been equivalent to conviction. But upon appeals or indictments for other felonies, or petit treaſon, the priſoner was not by the ancient law looked upon as convicted, ſo as to receive judgment for the felony, but ſhould, for his obſtinacy, have received the terrible ſentence of *penance*, or *peine fort & dure*. If a felon ſtands mute by the act of God, the *felony* is to be inquired of by jury, and whether the priſoner be the ſame perſon, and all other matters in the ſame manner as if the criminal had pleaded. And it may be inquired of by inqueſt of office, whether he do ſo of malice or by the act of God. 2 *Hawk. P. C.* See 4 *Comm.* 325. and this Dict. titles *Peine fort & dure*; *Trial*.

Where a married woman commits *felony*, in company with her huſband, it ſhall be preſumed to be done by his command, and ſhe ſhall be excuſed. 3 *Inſt.* 310. See title *Baron and Feme* VII.

If a man's horſe be going into the ground of another, and he takes it *felleo animo*, not as damage-feaſant, it is no finding, but *felony*: But if *A*'s ſheep ſtray into the flock of *B*. and he drives the ſame along with his flock, or by miſtake ſhears them, this is not a *felony*; though if he knew them to be another perſon's, and marks them with his mark, is an evidence of *felony*. 1 *Hale's Hiſt. P. C.* 506.

Where one ſteals another's goods, and a third perſon feloniouſly takes them from him; he is a *felon* as to both the others. And when there is a pretence of title to things unlawfully taken, it may be only a trick to colour *felony*; and the ordinary diſcovery of a felonious intent is, if the party doth it ſecretly, or being charged with the goods denies it. 1 *H. P. C.* 507, 509. If a perſon to whom goods are delivered on a pretended buying them, runs away with them, it is *felony*: and a gueſt ſtealing plate ſet before him at an inn, *&c.* is *felony*; alſo perſons who have the charge of things, as a ſervant of a chamber, *&c.* may be guilty of felony: and the leaſt removing of a thing in attempts of *felony*, is *felony*, though it be not carried off. 3 *Inſt.* 308: *Raym.* 275.

But goods muſt not be of a baſe nature; ſuch as dogs, *&c.* nor *feræ naturæ*, as deer, hares, *&c.* except they be made tame, when it will be *felony* to ſteal them. If any turkeys, geeſe, poultry, fiſh in a trunk, *&c.* are taken away, it is *felony*. 3 *Inſt.* 309, 310. Stealing of tame peacocks, is *felony*; ſo of herons and young hawks in their neſts: it is otherwiſe of pheaſants, partridges, conies, *&c.* although they be ſo kept that they cannot eſcape; if they be not reclaimed, and known. *Jenk. Cent.* 204. As to cats, dogs, monkeys, and the like; though it be not *felony* to take them, treſpaſs lies for them. *Jenk. Ibid.*

FEME COVERT, A married woman; ſaid to be *covert baron*. See title *Baron* and *Feme*.

FEME SOLE, *Fr.*] A woman alone, that is unmarried. *Feme Sole Merchant*; A married woman who by the cuſtom of *London* trades on her own account, independent of her huſband. See titles *Baron and Feme*: *London*.

FENCE, A hedge, ditch, or other incloſure of land for the better manurance and improvement of the ſame. And where a hedge, and ditch join together, in whoſe ground or ſide the hedge is, to the owner of that land belongs the keeping of the ſame hedge or fence, and the ditch adjoining to it on the other ſide, in repair and ſcoured. *Par. Offic.* 188. An action on the caſe or treſpaſs lies, for not repairing of fences, whereby cattle come into the ground of another, and do damage. 1 *Salk.* 335. Alſo it is preſentable in the Court-Baron, *&c.* By *ſtat.* 9 *Geo.* 3. *c.* 29. deſtroying fences ſet up for incloſing commons is made felony, but within benefit of clergy. See this Dict. titles *Common*; *Incloſure*.

FENCE-MONTH, *menſis fanationis, menſis prohibitionis*, or *menſis vetitus.*] Is a month wherein female *deer* in foreſts, *&c.* do *fawn*, and therefore it is unlawful to hunt in *foreſts* during that time; which begins fifteen days before *Midſummer*, and ends fifteen days after it, being in all thirty days. *Manw. part* 2. *cap.* 13: *Stat.* 20 *Car.* 2. *cap.* 3. Some ancient foreſters call this month the *defence-month*, becauſe then the deer are to be defended from being diſturbed, and the interruptions of fear and danger; as there are certain *defence-months* for fiſh, particularly ſalmons, as appears by the *Stat. Weſtm.* 2. *cap.* 47, *&c.* Serjeant *Fleetwood* ſaith, that the *fence-month* hath been always kept with watch and ward, in every bailiwick throughout the whole foreſt, ſince the time of *Canutus*. *Fleetwood's Foreſt Laws, p.* 5.

FENGELD, *Sax.*] A tax or impoſition, exacted for the repelling of enemies. *MS. Antiq.*

FENS, *paludes.*] Low marſhy grounds, or lakes for water; for the draining whereof in this kingdom ſeveral ſtatutes have been enacted, which are chiefly local; and of which the following abridgments are retained as a ſpecimen.

The ſtatutes 4 *Jac.* 1. *cc.* 8, 13, make proviſion for draining and ſecuring from inundation the drowned grounds and marſhes of *Leſneſs* and *Fants* in *Kent*; and the fens and low grounds in the *Iſle of Ely*. The *St.* 15 *Car.* 2. *cap.* 17, appoints *William Earl of Bedford*, and other adventurers, a corporation, for the draining of *Bedford Level* in *Bedfordſhire*, conſiſting of a governor, bailiffs, and conſervators, *&c.* who have power to lay and levy taxes within the great level of the *fens*; and alſo to erect works within the ſame, for carrying the water to the ſea, making ſatisfaction to the owners of lands for injury received; throwing down any of which works, incurs treble damages, *&c.*

By *St.* 16 & 17 *Car.* 2. *c.* 11, *Deeping fens, &c.* in *Lincolnſhire*, are to be drained from water; and *Edward Earl of Manchester*, and ſeveral others are declared undertakers thereof, on certain truſts, with power to erect banks, bridges, drains, locks, ſluices, *&c.* for recovery of the ſaid *fens*; and aſſeſſees of lands held by the adventurers under the truſtees, may hold aſſemblies for making of bye laws, for the management of the works of draining; they may charge the owner of the lands by an acre tax, *&c.* and on default of payment, ſell the defaulter's lands, *&c.*

The *St.* 11 *Geo.* 2. *c.* 34, ordains that commiſſioners ſhall be appointed, for effectually draining and preſerving of the *fens* in the Iſle of *Ely* in *Cambridgeſhire*; who are authoriſed to make drains, dams, *&c.* and proper works thereon: and the ſaid commiſſioners may charge proprietors with a proportionable acre-tax, *viz.* for *Waterden Fen*, at the rate of 5*s.* and *Redmoor, Cawdle Fen*, and the *Holts*, at 2*s.* an acre by the year, for four years; and afterwards at an yearly rate, not exceeding 1*s.* 6*d. per* acre; they may likewiſe borrow money for maintaining and effecting the works, by aſſigning over the duties: perſons obſtructing the draining to forfeit 100*l.* and if any perſon ſhall burn any of the engines erected, he ſhall be impriſoned three years; and being convicted again of the like offence, to be guilty of felony. And for raiſing money, for draining and future preſervation of *Deeping fens*, a rate of 20*s.* an acre is to be paid, by all the taxable land owners, according to agreement of the proprietors; levied by diſtreſs of goods, or ſale of defaulter's lands; which may be alſo mortgaged to raiſe the money *&c.* by 11 *Geo.* 2. *c.* 39.

By the *Stat.* 21 *Geo.* 2. *c.* 18, commiſſioners are appointed for draining and preſerving certain *fen lands* in the ſeveral pariſhes of *Maney, Upwell, Welney, Downham, Witcham*, and in a certain extra-parochial place in *Byal Fen*, within the iſle of *Ely*, and county of *Cambridge*, who may make an aſſeſſment of 1*s.* 6*d. per* acre yearly, on which they may borrow money, with like powers, authorities and directions as in *Stat.* 11 *Geo.* 2. *cap.* 34.

By *Stat.* 27 *Geo.* 2. *c.* 19, Any perſon convicted of maliciouſly cutting or deſtroying any bank, mill, engine, flood-gate or ſluice, for draining the lands in *Bedford level* ſhall be guilty of felony without benefit of clergy. By *Stats.* 11 *Geo.* 2. *c.* 34: 14 *Geo.* 2. *c.* 24: 21 *Geo.* 2. *c.* 18, the ſecond offence in ſetting fire to engines for draining the fens mentioned in thoſe acts is alſo made felony without benefit of clergy.

By *Stat.* 22 *H.* 8. *c.* 11. cutting down and deſtroying the dikes in *Norfolk* and *Ely* is made felony.—And by *Stat.* 10 *Geo.* 2. *c.* 32. removing the materials of ſea walls or banks incurs a forfeiture of 20*l.*

See further titles *Rivers*: *Sea-Banks. Poudike.*

FEOD or FEUD. See title *Tenure*, I. 1.

FEODAL, *feodalis, vel feudalis.*] Of or belonging to the feud or *fee. Stat.* 12 *Car.* 2. *cap.* 24.

FEODALITY, Fealty. See title *Fealty*; *Tenures*, I. 6.

FEODARY, or FEUDARY, *feudatarius.*] An officer of the *court of wards*, appointed by the maſter of that court by virtue of the ſtatute 32 *Hen.* 8. *c.* 26; whoſe buſineſs was to be preſent with the *eſcheator* in every county at the finding of offices of lands, and to give in evidence for the King as well concerning the value as the tenure; and his office was alſo to ſurvey the lands of the ward, after the office found, and to rate it. He did likewiſe aſſign the King's widows their dowers; and receive all the rents of wards, lands within his circuit, which he anſwered to the receiver of the court. This office was wholly taken away by the operation of ſtatute 12 *Car.* 2. *cap.* 24, aboliſhing tenures.

FEODATARY or FEUDATARY, The tenant who held his eſtate by *feodal* ſervice; and grantees, to whom lands in *feud* or *fee* were granted by a ſuperior lord, were ſometimes called *homagers*; and in ſome writings are termed *vaſſals, feuds* and *feodataries*. See title *Tenures*, I.

FEODUM, See FEUD.

FEODUM MILITIS, A knight's *fee*: *feodum laicum*, a lay *fee*, or land held in fee of a lay lord. *Kennet's Gloſſ.* See title *Feuds.*

FEOFFMENT, *Feoffamentum*, from the verb *feoffare*; *donatio feudi.*] A gift or grant of any manors, meſſuages, lands or tenements, to another in fee, to him and his heirs for ever, by the delivery of ſeiſin and poſſeſſion of the thing given or granted.—In every feoffment, the giver or grantor is called the *feoffor*, and he that receives by virtue thereof, is the *feoffee*. *Littleton* ſays, the proper difference between a *feoffor* and a *donor*, is, that the one gives in *fee-ſimple*, the other in *fee-tail. Litt. lib.* 1. *cap.* 6.

Blackſtone, (2 *Comm.* 399,) defines feoffment to be the gift of any corporeal hereditament to another. The deed of feoffment is our moſt antient conveyance of lands; and in records we often find fees given to knights under the phraſes of *de veteri feoffamento*, and *de novo feoffamento*; the firſt whereof were ſuch lands as were given or granted by

by King *Henry* I. And the others, such as were granted after the death of the said King, since the beginning of the reign of *Henry* II. At Common-law the usual conveyance was by feoffment, to which delivery (shortly called livery) and seisin were necessary, the possession being thereby given to the *feoffee*; but if livery and seisin could not be made, by reason there was a tenant in possession, the reversion was granted, and the particular tenant attorned. *Co. Lit.* 9. 49. A feoffment is said, in some respects, to excel the conveyance by fine and recovery; it clearing all disseisins, abatements, intrusions, and other wrongful estates, which no other conveyance doth: and for that it is so solemnly and publicly made, it has been of all other conveyances the most observed. *West. Symb.* 235: *Plowd.* 554. See this Dict. titles *Conveyance*; *Deed*; and 2 *Comm. c.* 20: *Shep. Touchst. c.* 9. and the notes to the 8vo edition 1791.

This conveyance is now but very little used; except where no consideration passes, as in case of trustees of lands for a corporation, *&c.* It is still however a formal, valid, and effectual mode of conveyance: but has been of late years almost entirely superseded by the conveyance by *Lease and Release*. See this Dict. under that title; as also titles *Bargain and Sale*; *Conveyance*; *Deed*.

It will be found useful to consider the learning relating to feoffments according to the following division.

I. *Of what Things a Feoffment may be made.*
II. *Who may make a Feoffment, and how it is to be made.*
III. *Of the different Kinds of Livery; with their Effects and Operations.*

I. A Feoffment may be of a messuage, land, meadow, pasture, or other corporeal hereditament, and of a moiety, third, or fourth part of it; that lies in livery.

So a Feoffment may be made of lands, in which a man has no fixed estate; as, if he has twelve acres to be annually assigned in such a meadow; and livery in any acre, which he has at the time of the feoffment, is sufficient. *Co. Lit.* 4 *a*; 48 *b*: 2 *Rol.* 10. *l.* 40—50.

So, if a feoffment be of fifty acres towards the North in such a moor, which contains 100 acres, livery in any of them is sufficient. 2 *Rol.* 11. *l.* 5: *Dy.* 372 *b*.

So, if two manors be divided *alternis vicibus* between parceners, either may make a feoffment of her manor; and the deed ought to comprehend both; and she shall make livery in one *secundum formam chartæ* this year, and in the other the next year. *Co. L.* 48 *b*.

But a feoffment cannot be made of a thing of which livery cannot be given; as, of *incorporeal* inheritances, *rent, advowson, common, &c.* 2 *Rol.* 1. *l.* 20. Though it be an advowson, *&c.* in gross. *Cont.* 11 *H.* 6. 4: *Acc.* 2 *Rol.* 1. *l.* 21.

So a feoffment of lands, which are uncertain till a future act, is void; for livery does not operate *in futuro*: as, if *A.* agrees by indenture to convey 20 *l. per annum* in land to such an use, and 20 *s. per annum* to such an use, and makes a feoffment of all his lands to the uses in the indenture; it will be void for all but that where livery was made, it not being ascertained which shall be to one use, and which to the other. *R.* 1 *Rol.* 187.

In a deed of feoffment, there must be a good feoffor, that is, one able to grant the thing conveyed by the deed; a feoffee capable to take it; and a thing grantable, and granted in the manner the law requireth. *Co. Lit.* 42, 49, 190.

See further of what things a feoffment may be made *Com. Dig.* Feoffment (A. 2.) *Vin. Ab.* Feoffment (C.)

II. If a person *non compos* makes a feoffment, and gives livery himself, this is allowed on all hands to be good to bind himself, so that he can by no process or plea avoid the feoffment, and restore himself to the possession; the same law of an ideot; and the reason is, because the investiture being made before the *pares curiæ*, their solemn attestation could not be defeated by the person himself, because it is presumed they are competent judges of the ability of the feoffor to make such feoffment. 2 *Rol. Abr.* 2: *Co. Lit.* 247: 4 *Co.* 125 *a*: *Show. Parl. Cases* 153. and see title *Ideots and Lunaticks*; and *post.* II.

But if an infant makes a feoffment, and makes livery himself, this shall not bind him, but he himself may avoid it by writ of *dum fuit infra ætatem*; yet the feoffment of the infant is not void in itself, as well because he is allowed to contract for his benefit, as that there ought to be some act of notoriety to restore the possession to him equal to that which transferred it from him. 4 *Co.* 125: 2 *Rol. Abr.* 2: 8 *Co.* 42, 43: *Whittingham*'s case.

Yet if an infant makes a feoffment, and a letter of attorney to make livery, that is void; so if a person *non compos* makes a surrender or release, this is void in law; so if he makes a letter of attorney to give livery; but the heir at law after the death of the person of *non-sane* memory, or ideot, may avoid his feoffment; and so may the King upon an office found of his lunacy during his life. 8 *Co.* 45: *Co. Litt.* 247 *a*: 4 *Co.* 125 *a*: 2 *Rol. Abr.* 2: *Show. Par. Cases.* 153.

There must be livery of seisin in all feoffments, and gifts, *&c.* where a corporeal inheritance or freehold doth pass; and without livery, the deed is no feoffment, gift or demise. *Lit.* 59: 8 *Rep.* 82. But a freehold may pass without livery, by the statute 27 *H.* 8. *c.* 10. By force of which statute, a feoffment to the use of the feoffor, feoffee, *&c.* supplies the place of livery and seisin. *Wood's Inst.* 239.

But a feoffment may not be of such things whereof livery and seisin may not be made; for no deed of feoffment is good to pass an estate without livery of seisin; and if either of the parties die before livery, the feoffment is void. *Plowd.* 214, 219. Though where a feme feoffor made a feoffment of lands with livery in view, and then married the feoffee before the livery was executed by actual entry; it was adjudged the livery might be executed after marriage, the feoffee having not only an authority to enter, but an interest passed by the livery in view, and the woman did all on her part to be done, 1 *Vent.* 186.

A man may either give or receive *livery in deed* by letter of attorney; for since a contract is no more than the consent of a man's mind to a thing, where that consent or concurrence appears, it were unreasonable to oblige each person to be present at the execution of the contract, since it may as well be performed by any other person delegated for that purpose by the parties to the contract. *Co. Lit.* 52: 2 *Rol. Abr.* 8.

But such delegation, or authority to give or receive livery, must be by deed, that it may appear to the court, that the attorney had a commission, to represent the parties

ties that are to give or take the livery, and whether the authority was purſued. *Co. Lit.* 48 *b*: 52 *a*.

If a man be diſſeiſed, and makes a deed of feoffment, and a letter of attorney to enter and take poſſeſſion of the land, and afterwards to make livery, according to the form of the charter, it will be a good feoffment, though he was out of poſſeſſion at the time of the deed made: for the feoffment takes effect by the livery, and not by the deed. *Co. Lit.* 48, 52.

A feoffment being a Common-law conveyance, and executed by livery, makes a tranſmutation of eſtate; but a conveyance on the ſtatute of uſes, as a covenant to ſtand ſeiſed, *&c.* makes only a tranſmutation of poſſeſſion, and not of eſtate. 2 *Lev.* 77: 1 *Vent.* 378. A feoffment to the uſe of *A.* for life, the remainder to *B.* If *A.* refuſes to take the eſtate, *B.* ſhall take preſently, becauſe the whole eſtate is out of the feoffor by livery; but if it had been by covenant to ſtand ſeiſed, he ſhould not have taken till after the death of *A.* but it would reſt in the covenantor, who ſhall have the uſe in the mean time. 2 *Lev.* 77: 1 *Leon. Ca* 279. Before the *Stat. Weſtm.* 1, if a man had made feoffment in fee, without declaring any uſe, it ſhould have been to the uſe of the feoffee; though now by that ſtatute, where no conſideration or declaration of uſe is expreſſed, it ſhall go to the feoffor himſelf. 2 *Leon.* 15, 16. If I convey lands by feoffment, which I have on the part of the mother, to *J. S.* and his heirs, without conſideration; the uſe will be void, and the land ſhall return again to me and my heirs on the part of the mother; yet if I declare the uſe to me and my heirs, or upon ſuch feoffment reſerve a rent in like manner, it ſhall go to my heirs at the Common-law, it being a new thing divided from the land. *Hob.* 31: *Co. Lit.* 13, 231: 1 *Rep.* 100: *Dyer* 134. Where a man makes a feoffment, without any conſideration; by that the eſtate and poſſeſſion paſſes, but not the uſe, which ſhall deſcend to his heir. 1 *Leon.* 182.

A feoffment in fee is made to the uſe of ſuch perſons, and for ſuch eſtates, as the feoffor ſhall appoint by his will, or to the uſe of his laſt will; by operation of law the uſe veſts in the feoffor, and he is ſeiſed of a qualified fee, *viz.* until he makes his will, and declares the uſes; and after the will is made, it is only directory, for nothing paſſes by it but all by the feoffment. 6 *Rep.* 18: *Aloor* 567. A feoffment in fee, upon condition, *&c.* was inrolled, but no livery made; and it was adjudged no good feoffment, but the inrollment ſhall conclude the perſon to ſay that it was not his deed. *Poph.* 6: 2 *Nelſ. Abr.* 844. If a bargain and ſale of lands be not inrolled, and the bargainor deliver livery and ſeiſin of the lands *ſecundum formam chartæ*, *&c.* it has been held a good feoffment. 2 *And.* 68.

A feoffment in fee made upon condition not to alien, the condition is void; becauſe it is repugnant to the eſtate; but if livery is had, the feoffment will be good againſt the feoffor: and a bond with condition that the feoffee ſhall not alien, is ſaid to be good. *Co. Lit.* 206: *Cro. Jac.* 596. If a man makes a feoffment of lands on condition that the feoffee ſhall give the lands to the feoffor, and his wife in ſpecial tail, remainder to the heirs of the feoffor; and he dies before ſuch gift is made, the feoffee ought to make it as near the intent of the condition as may be, *viz.* to the wife without impeachment of waſte, remainder to the heirs of the body of her huſband, on her body begotten, and remainder to the huſband's right heirs. In caſe the feoffor, and his wife both die, the feoffee then ſhould make the eſtate to the iſſue, and heirs of the body of his father and mother begotten, remainder to the right heirs of the huſband or father. *Co. Lit.* 219, 220.

Tenant in tail makes a feoffment in fee; the inheritance of the tail is not given to the feoffee by the feoffment, nor is he thereby tenant in tail; for none ſhall be tenant in tail but he only who is comprehended in the gift made by the donor. But it gives away all the immediate eſtate the feoffor had. *Plowd.* 562: *Hob.* 335. If leſſee for life, and the reverſioner in fee, make a feoffment in fee by deed, each gives his eſtate; the leſſee his by livery, and the fee from him in remainder. 6 *Rep.* 15: *Lil. Abr.* 609. A feoffment was made *habendum* to the feoffee and his heirs, after the death of the feoffor, and livery was made: yet it was held to be a void feoffment, for an eſtate of freehold in lands cannot begin at a day to come: but where a leſſor made a leaſe for lives, and granted the reverſion to another for life, whoſe eſtate for life was to begin after the death of the ſurvivor of the other leſſees for life, this was adjudged a good eſtate in reverſion for life. *Hob.* 171: 1 *Nelſ. Abr.* 846.

If the huſband alone make a feoffment of his wife's land, or of both their lands, his wife being on the land and diſagreeing to it; this will be good againſt all perſons but the wife: alſo ſo it is, if one jointenant make a deed of feoffment of the whole land his companion being then upon it; or if a man diſſeiſe me of my lands, and then enfeoff another thereof, whilſt I am upon the land, *&c. Perk.* § 219, 220.

Every gift or feoffment of lands made by fraud or maintenance, ſhall be void; and the diſſeiſee, notwithſtanding ſuch alienation, ſhall recover againſt the firſt diſſeiſor his land and double damages; provided he commence his ſuit in a year after the diſſeiſin, and that the feoffor be pernor of the profits. *Stat.* 1 *R.* 2. *c.* 9. See *ſtat.* 11 *H.* 6. *c.* 3.

See more fully who may make a feoffment and to whom, 4 *Co.* 125: 8 *Co.* 42 *b*: *Bac. Abr. Feoffment*, (D): *Vin. Abr. Feoffment* (E).

III. Livery may be by *deed*; or in *law*; which latter is alſo called *livery within view*.

The livery in *deed*, is the *actual tradition* of the land, and is made either by the delivery of a branch of a tree or a turf of the land, or ſome other thing, in the name of all the lands and tenements contained in the deed; and it may be made by words only without the delivery of any thing; as if the feoffor being upon the land, or at the door of the houſe, ſays to the feoffee, *I am content that you ſhould enjoy this land according to the deed*; or *enter into this houſe* or *land, and enjoy it according to the deed*; this is a good livery to paſs the freehold, becauſe in all theſe caſes, the charter of feoffment makes the limitation of the eſtate, and then the words ſpoken by the feoffor on the land, are a ſufficient *indicium* to the people preſent, to determine in whom the freehold reſides during the extent of the limitation; beſides, the words, being relative to the charter of feoffment, plainly denote an intention to enfeoff. *Co. Lit.* 48 *a*: 9 *Co.* 137 *b. Thorowgood's* caſe. 6 *Co.* 26. *Sharp's* caſe. 2 *Rol. Abr.* 7. And ſee *Cro. Jac.* 80. which ſeems *contrà*.

But if a man without any charter, being in his houſe, ſays, *I here demiſe you this houſe, as long as I live, paying* 20 *l. per annum*, this paſſes no freehold but only an eſtate

eſtate at will; becauſe the word *demiſe* denotes only the extent of the limitation of the eſtate intended to be conveyed; but bare words of limitation, without ſome acts or words to diſcover the intention of the feoffor to deliver over the poſſeſſion, are not ſufficient to convey the freehold; for if a charter of feoffment be made to a man and his heirs, this, without ſome other act, or word to give the poſſeſſion, only paſſes an eſtate at will, becauſe the act of delivery is requiſite to the perfection of the charter; but beſides the charter of feoffment, there muſt be ſome act or words to deliver over the poſſeſſion, before the feoffee can enjoy it purſuant to the charter. 6 *Co.* 26: 2 *Rol. Abr.* 7: *Co. Lit.* 48: *Cro. Eliz.* 482: 9 *Co.* 138: *Moor, pl.* 632.

Livery in deed is thus performed.—The feoffor, leſſor, or his attorney, (for this may be as effectually done by deputy or attorney as by the principals themſelves in perſon,) come to the land, or to the houſe; and there in the preſence of witneſſes declare the contents of the feoffment or leaſe on which livery is to be made: and then the feoffor, if it be of land doth deliver to the feoffee, all other perſons being out of the ground, a clod or turf or a twig or bough there growing with words to this effect, "I deliver theſe to you in the name of ſeiſin of all the lands and tenements contained in this deed." But if it be of a houſe, the feoffor muſt take the ring or latch of the door, the houſe being quite empty, and deliver it to the feoffee in the ſame form; and then the feoffee muſt enter alone and ſhut the door, and then open it, and let in the others. 1 *Inſt.* 48: *Weſt. Symb.* 251.

If the conveyance or feoffment be of divers lands, lying ſcattered in one and the ſame county, then in the feoffor's poſſeſſion, livery of ſeiſin of any parcel, in the name of the reſt ſufficeth for all; but if they be in ſeveral counties there muſt be as many liveries as there are counties, *Lit.* § 414. Alſo if the lands be out on leaſe, though all be in the ſame county, there muſt be as many liveries as there are tenants; becauſe no livery can be made in this caſe but by the conſent of the particular tenant; and the conſent of one will not bind the reſt. *Dy.* 18.

In all theſe caſes it is prudent and uſual to indorſe the livery of ſeiſin on the back of the deed; ſpecifying the manner, place, and time, of making it, together with the names of the witneſſes. *Co. Lit.* 48.

The livery *within view*, or the livery in *law*, is, when the feoffor is not actually on the land, or in the houſe, but being in ſight of it ſays to the feoffee, *I give you yonder houſe*, or *land, go and enter into the ſame, and take poſſeſſion of it accordingly*; this ſort of livery ſeems to have been made at firſt only at the court barons, which were antiently held *ſub dio*, (in the open air) in ſome open part of the manor, from whence a general ſurvey or view might have been taken of the whole manor, and the *pares curiæ* eaſily diſtinguiſhed that part which was then to be transferred. *Pollex.* 47. This livery in law cannot be given or received by attorney, but only by the parties themſelves, 1 *Inſt.* 48.

This latter ſort of livery alſo is not perfect to carry the freehold, till an *actual entry* made by the feoffee, becauſe the poſſeſſion is not actually delivered to him, but only a licence or power given him by the feoffor to take poſſeſſion of it; and therefore, if either the feoffor or feoffee die before livery, and entry made by the feoffee, the livery within the view becomes ineffectual and void; for if the feoffor dies before entry, the feoffee cannot afterwards enter, becauſe then the land immediately deſcends upon his heir, and conſequently no perſon can take poſſeſſion of his land without an authority delegated from him who is the proprietor; nor can the heir of the feoffee enter, becauſe he is not the perſon to whom the feoffor intended to convey his land, nor had he an authority from the feoffor to take poſſeſſion; beſides, if the heir of the feoffee were admitted to take poſſeſſion after his father's death, he would come in as a purchaſer, whereas he was mentioned in the feoffment to take as the repreſentative of his anceſtor, which he cannot do, ſince the eſtate never veſted in his anceſtor. *Co. Lit.* 48 *b*: 2 *Rol. Abr.* 3, 7: 1 *Vent.* 186: *Moor* 85: *Pollex.* 48.

The livery *within view* may be made of lands in another county than where the lands lie, becauſe the tranſlation of the feud was often made at the court-baron, in the preſence of *pares curiæ*; and theſe courts being held *ſub dio*, the *pares* could have a diſtinct view of every part of the manor; and therefore were proper to atteſt this ſort of inveſtiture, though the lands were in a different county, for notwithſtanding that, they might have been part of the ſame manor, for which the court was held. *Co. Lit.* 48 *b*.

This ceremony was firſt inſtituted, that the *pares* of the county might, upon any diſpute relating to the freehold, determine in whom it was lodged; and from thence be the better enabled to determine in whom the right was. Hence therefore it is, that if a man makes a feoffment, or leaſe for life, to commence *in futuro*, and makes livery immediately, the livery is void, and only an eſtate at will paſſes to the feoffee; for the deſign of the inſtitution would fail, if ſuch livery were effectual to paſs the freehold; for it would be no evidence, or notoriety of the change of the freehold, if after the livery made, the freehold ſtill remained in the feoffor; the uſe of the inveſtiture would rather create than prevent the uncertainty of the freehold, and in many caſes would put men to fruitleſs trouble and expence in purſuit of their right; for by that means, after a man had brought his *præcipe* againſt a perſon, whom he ſuppoſed to be tenant to the freehold, and had proceeded in it a conſiderable time, the writ might abate by the freehold's veſting in another, by virtue of a livery made before the purchaſe of the writ. Another reaſon why ſuch future intereſts cannot be allowed to paſs by any act of livery was becauſe no man would be ſafe in his purchaſe, if the operation of livery might create an eſtate, to commence many years after the livery was made; and though they have allowed a future intereſt, to commence by way of leaſe, yet that had no ſuch ill effect in making purchaſes uncertain, becauſe antiently they were under the power of the freeholder, who by recovery might deſtroy them; and now, unleſs ſuch leaſes are made upon good conſiderations, they are fraudulent againſt a purchaſer; and it is not to be preſumed that leaſes at great diſtances ſhould be purchaſed for value. *Cro. Eliz.* 451: 2 *Vent.* 204: *Co. Lit.* 217: 5 *Co.* 94 *b*.

Hence, by the way, we may account why a freehold in reverſion or remainder cannot be granted *in futuro*, though there no livery is neceſſary to paſs it; as where *A.* is tenant for life, remainder to *B.* in fee; *A.* makes a leaſe for years to *C.* and afterwards grants the land to

D. habend' from *Michaelmas* next enſuing, for life; this grant to *D.* was adjudged void, though *C.* attorned to it after *Michaelmas*, becauſe ſuch future grants create an uncertainty of the freehold; and the tenant of the freehold being the perſon who is to anſwer the ſtranger's *præcipe*, and who was anſwerable to the lord for the ſervices, it were unreaſonable to permit him by any act of his own, to prevent or delay the proſecution of their right. *Cro. Eliz.* 451: 2 *Vent.* 204: *Co. Lit.* 217: 5 *Co.* 94 *b*: 2 *Co.* 55, *Buckler's* caſe: 2 *And.* 29: *Moor* 423: *Cro. Eliz.* 450, 585: *Hob.* 170, 171: 5 *Co.* 94: 1 *Rol. Rep.* 261.

In what caſes livery may be made within the view, See *Vin. Abr. Feoffment* (M).—And further as to the different kinds of livery, *Bac. Abr. Feoffment* (A): *Com. Dig. Feoffment* (B): *Vin. Abr. Feoffment* (E. F.): And this Dict. tit. *Livery of Seiſin.*

A deed of feoffment is to made by the words, *Have granted, bargained, enfeoffed, &c.*

FERÆ NATURÆ. Beaſts and birds that are wild, in oppoſition to the tame; ſuch as hares, foxes, wild geeſe, and the like, wherein no man may claim a property. Unleſs under particular circumſtances, as where they are confined, or made tame, *&c.* See titles *Game*; *Property.*

FERDFARE, from the Sax. *fyrd* and *fare* iter.] *Significat quietantiam eundi in exercitum. Fleta, lib.* 1. *c.* 47.

FERDWIT, Sax. *ferd* exercitus, & *wite* pœna.] Was uſed for being quit of manſlaughter, committed in the army. *Fleta, lib.* 1.—It is rather a fine impoſed on perſons for not going forth in a military expedition; to which duty all perſons, who held land, were in neceſſity obliged: and a neglect or omiſſion of this common ſervice to the public, was puniſhed with a pecuniary mulct called the *ferdwite. Cowel.*

FERIAL DAYS, *dies feriales, feriæ.*] According to the *Latin* dictionary are holy days; but in the *Stat.* 27 *H.* 6. *c.* 5, *Ferial* days are taken for working days; all the days of the week, except *Sunday*; the week days as diſtinguiſhed from *Sunday*, the profane from the ſacred, were called *dies feriales*, by a charter dat. 28 *Mart.* 1448.—*Ex Cartular. Eccl. Elyenſis* MS.

FERLINGATA (FERLINGUS AND FERDLINGUS) TERRÆ. A quarter or fourth part of a yard-land.—See titles *Fardel of Land*, and *Furdingdeal.*

FERM, *firma*] A houſe and land let by leaſe, *&c.* See title *Farm.*

FERMARY, from the Sax. *feorme*, victus.] Is an hoſpital; and we read of friers of the *firmary.*

FERMISONA, The winter ſeaſon of killing deer; as *tempus piuguedinis* is the ſummer ſeaſon.

FERNIGO, A piece of waſte ground where *fern* grows. *Cartular. Abbat. Glaſton. MS.*

FERRAMENTUM, *ferramenta.*] The iron tools or inſtruments of a mill.—*Et reparare* ferramenta *ad tres carucas, i. e.* the iron work of three ploughs. *Lib. Nig. Heref.*

FERRANDUS, An iron colour particularly applied to horſes, which we at this time call an *iron grey.*

FERRY, A liberty by preſcription, or the King's grant, to have a boat for paſſage upon a river, for carriage of horſes and men for reaſonable toll: it is uſually to croſs a large river. *Terms de Ley.* A *ferry* is no more than a common highway; and no action will lie for one's being diſturbed in his paſſage, unleſs he alledge ſome particular damage, *&c.* 3 *Mod. Rep.* 294.

A Ferry is in reſpect of the landing-place, and not of the water, the water may be to one, and the ferry to another; as it is of *ferries* on the *Thames*, where the *ferry* in ſome places belongs to the archbiſhop of *Canterbury*, while the mayor of *London* has the intereſt of the water; and in every *ferry*, the land on both ſides of the water ought to belong to the owner of the *ferry*, or otherwiſe he cannot land on the other part. *Savil* 11. And every *ferry* ought to have expert and able ferrymen, and to have preſent paſſage, and reaſonable payment for the paſſage. And it is requiſite to have one, who has property in the ferry, and not to allow every fiſherman to carry, and re-carry at their pleaſure, for divers inconveniences; and eſpecially when a place is between the diviſions of two counties, any felon may be conveyed from one county to another, ſecretly, without any notice. *Sav.* 14.

A ferryman if it be on ſalt water, ought to be privileged from being preſſed as a ſoldier, or otherwiſe. *Savil* 11, 14.

Owner of a ferry cannot ſuppreſs that, and put up a bridge in its place without licence, and writ of *ad quod damnum*; *per Holt* Ch. J. *Show.* 243, 257: *Cart.* 193: 1 *Salk.* 12.

If a ferry be granted at this day, he that accepts ſuch grant is bound to keep a boat for the public good; *per Holt* Ch. J. *Show.* 257.

Cuſtom for the inhabitants to be diſcharged of toll, may have a reaſonable beginning by agreement, as that the inhabitants of the town might be at the charge of procuring the grant, and in conſideration thereof, one man to find the boat, and take toll; and the inhabitants to pay none. *Show.* 257.

A common ferry was for all paſſengers paying toll, but the inhabitants of *A.* were toll-free. An inhabitant of *A.* may bring an action for taking toll, but not for neglecting to keep up the ferry; becauſe the former is a private right, but the latter a public. But he cannot maintain an action for not paſſing; for ſo, any other ſubject might bring an action, which would be endleſs; but the taking toll was a ſpecial damage, and without ſpecial damage he can only indict, or bring information. 1 *Salk.* 12.

The not keeping up a *ferry*, has been held to be indictable. See title *Bridge.*

FERSPEKEN, To ſpeak ſuddenly.—*Leg. H.* 1. *c.* 61.

FESTA IN CAPPIS, Were ſome grand holy-days, on which the whole *choirs* and *cathedrals* wore *caps. Vita Abbat. S. Albani. p.* 80, 83.

FESTINGMEN. The Sax. *Feſtiuman* ſignifies a ſurety or pledge; and to be free of *feſtingmen*, was probably to be free of *frank-pledge*, and not bound for any man's forth-coming, who ſhould tranſgreſs the law. *Mon. Ang. tom.* 1. *p.* 123.

FESTING-PENNY, Earneſt given to ſervants when hired or retained in ſervice, ſo called in ſome *Northern* parts of *England*, from the Sax. *Feſtnian*, to *faſten*, or confirm.

FESTUM, A feaſt. *Feſtum S. Michaelis*, the feaſt of *St. Michael, &c.*

FESTUM STULTORUM, The feaſt of fools. See *Caput anni.*

FEUD, (*Deadly.*) See *Deadly Feud.*

FEUDAL AND FEUDARY, See titles *Feodal* and *Feodary.*

FEUDBOTE,

FEUDBOTE, A recompence for engaging in a *feud*, and the damages conſequent; it having been the cuſtom in antient times, for all the kindred to engage in their kinſman's quarrel. *Sax. Dict.*

FEUDS, See title *Tenures* I.

FIAT, A ſhort order or warrant of ſome Judge for making out and allowing certain proceſſes, *&c.* If a *certiorari* be taken out in vacation, and teſted of the precedent term, the *fiat* for it muſt be ſigned by a judge of the court, ſome time before the eſſoin-day of the ſubſequent term, otherwiſe it will be irregular: but it is ſaid there is no need for a judge to ſign the writ of *certiorari* itſelf; but only where it is required by ſtatute. 1 *Salk.* 150. See title *Certiorari*.

FIAT JUSTITIA. On a petition to the King, for his warrant to bring a writ of *error in parliament*, he writes on the top of the petition *fiat juſtitia*, and then the writ of error is made out, *&c.* And when the King is petitioned to redreſs a wrong, he indorſes upon the petition, "*Let right be done the party.*" *Dyer* 385: *Stamf. Prærog. Reg.* 22.

FICTION OF LAW, *Fictio juris.*] Is allowed of in ſeveral caſes: but it muſt be framed, according to the rules of law; not what is imaginable in the conceptions of man; and there ought to be equity and poſſibility in every legal *fiction*. There are many of theſe *fictions* in the *civil* law; and by ſome civilians, it is ſaid to be an aſſumption of law upon an untruth, for a truth in ſomething poſſible to be done, but not done. *Godolphin & Bartel.* The ſeiſin of the conuſee in a fine is but a *fiction in our law*; it being an invented form of conveyance only. 1 *Lil. Abr.* 610. And a common recovery is *fictio juris*, a formal act or device by conſent, where a man is deſirous to cut off an eſtate-tail, remainders, *&c.* 10 *Rep.* 42.

By *fiction of law*, a bond made beyond ſea, may be pleaded to be made in the place where made, *to wit*, in *Iſlington* in the county of *Middleſex*, *&c.* in order to try the ſame here; without which it cannot be done. *Co. Lit.* 261. And ſo it is in ſome other caſes; but the law ought not to be ſatisfied with *fictions*, where it may be otherwiſe really ſatisfied; and *fictions in law* ſhall not be carried farther than the reaſons which introduce them neceſſarily require. 1 *Lil. Abr.* 610: 2 *Hawk.* 320.

FIDEM MENTIRI, Is when a tenant doth not keep that *fealty* which he hath ſworn to the lord. *Leg. H.* 1. *c.* 53.

FIEF, which we call *fee*, is in other countries the contrary to chattels: in *Germany*, certain diſtricts or territories are called *fiefs*; where there are *fiefs of the empire*. See this Dict. title Fee; *Tenure*.

FIERI FACIAS, A judicial writ of execution, that lies where judgment is had for debt or damages recovered in the King's courts; by which writ the ſheriff is commanded to levy the debt and damages of the goods and chattels of the defendant, *&c.* *Old Nat. Br.* 152. See this Dict. title *Execution*.

This writ, though mentioned in the ſtatute *W.* 2. 13 *E.* 1. *c.* 18, is a writ of execution at Common law, and is called a *fieri facias*, becauſe the words of the writ, directed to the ſheriff, are *quod fieri facias de bonis & catallis*, *&c.* and from theſe words the writ takes its denomination. *Co. Litt.* 290 *b.*

This writ is to be ſued out within a year and a day after judgment; or the judgment muſt be revived by *ſcire facias*: but if a *fieri facias* ſued in time, be not executed, a ſecond *fieri facias*, or *elegit* may be ſued out; and it is ſaid ſome years after, without a *ſcire facias*, provided continuances are entered from the firſt *fi. fa.* which it is alſo held may be entered after the ſecond *fi. fa.* taken out, unleſs a rule is made that proceedings ſhall ſtay, *&c.* *Sid.* 59: 2 *Nelſ. Abr.* 776. If a man recover debt againſt *A. B.* and levy part of it by *fieri facias*, and this writ is returned; yet he may take the body in execution by *capias* for the reſt of the debt. *Rol. Abr.* 904. The ſheriff on a *fieri facias* is to do his beſt endeavours to levy the money upon the goods and chattels of the defendant; and for that purpoſe to inquire after his goods, *&c.* And the plaintiff may inquire and ſearch if he can find any, and give notice thereof to the ſheriff, who *ex officio* is to take and ſell them if he can, or if not, by a writ of *venditioni exponas.* 2 *Shep. Abr.* 111.

There may be a *teſtatum fieri facias* into another county, if the defendant hath not goods enough in the county where the action is laid to ſatisfy the execution; and the *fieri facias* for the ground of the *teſtatum*, may be returned of courſe by the attornies, as originals are. 2 *Salk.* 589. If all the money is not levied on a *fieri facias*, the writ muſt be returned before a ſecond execution can be iſſued; becauſe it is to be grounded on the firſt writ, by reciting that all the money was not levied. 1 *Salk.* 318.

Where the ſheriff ſells goods which he levied by *fieri facias*, and doth not pay the money, action of debt will lie againſt him; for the defendant is diſcharged as to the plaintiff, and the ſheriff is now become his debtor in law; and if the ſheriff die after he hath levied the debt, the like action will lie againſt his executors, as it is a duty when levied. *March. Rep.* 13: *Cro. Car.* 387.

If a ſheriff that hath ſeized goods by *fieri facias* is going out of his office, he muſt deliver them to the new ſheriff, and return his writ executed *pro tanto*; and he ought not to deliver them to the owner, by reaſon the writ of execution is warranted by record, and therefore the diſcharge thereof muſt appear by record. *Yelv.* 44. Upon a *fieri facias* the ſheriff returned, that he had levied goods *ad valentiam* of the debt; the return being filed, a motion was made that he might bring in the money, which not being done, an attachment was granted, and then the ſheriff appeared and prayed to amend the return, for that the goods were damaged by lying, and he could not get buyers; but it was adjudged that the return ſhall not be altered, *for he might have returned this at firſt by way of excuſe*; and having returned that he had levied goods *ad valentiam*, he ſhall pay the money. *Sid.* 407.

The ſheriff cannot deliver the goods by him taken in execution to the plaintiff, in ſatisfaction of his debt; becauſe his authority is *to ſell* the goods. *Lut.* 589: 1 *Lil. Abr.* 611. And if a ſheriff ſells the goods taken by *fieri facias* at under-price, the ſale is good, and the defendant can have no remedy; though where there appears to be covin between the ſheriff and the buyer, the owner ſhall have his action upon the caſe. *Keilw.* 64: 1 *Salk.* 28. On a *fieri facias* the ſheriff has power to take any thing but wearing cloaths; and if the defendant hath two gowns, *&c.* it is ſaid he may ſell one. If the ſheriff executes a writ of *fieri facias*, he may afterwards return *nulla bona*, if there appear a prerogative writ; or, on better information, that the goods taken were not the defendant's. *Comb.* 356, 432.

By

By the ſeizure of the goods, the ſheriff hath a property in them; but goods of a ſtranger, &c. in the poſſeſſion of the defendant ſhall not be ſeized in execution; *for the ſheriff at his peril muſt take notice whoſe goods they are*: though, if the ſheriff inquires by a jury, where the property is lodged, and it is found that they are the defendant's goods, when they are not, this will indemnify the ſheriff. *Dalt. Sher.* 60: *Wood's Inſt.* 608.

The ſheriff cannot break open the door of an houſe to execute a *fieri facias* upon the goods of the owner or occupier; but a man's houſe ſhall be a protection for his own goods only, and *not for the goods of another*. 5 *Rep.* 91: 2 *Nelſ. Abr.* 775. If the defendant is a beneficed clergyman, and the ſheriff returns *quod eſt clericus beneficiatus*, &c. a writ ſhall go to the biſhop of the dioceſe to levy the debt *de bonis eccleſiaſticis*, who thereupon ſends forth a ſequeſtration of the profits of the clerk's benefice, directed to the churchwardens, &c. But this writ of ſequeſtration muſt be renewed every Term. 2 *Inſt.* 4, 472, 627.

By virtue of a *fieri facias* a term for years may be ſold, as well as any other goods, and without an inqueſt or jury: alſo corn growing may be ſold. 8 *Rep.* 96: 1 *Rol. Abr.* 892. And if the ſheriff on a *fieri facias*, &c. ſelleth a term for years, and after that the judgment is reverſed; the *term* ſhall *not* be reſtored, but the *money* for which it is ſold. 4 *Rep.* 141.

But where a term is delivered to the plaintiff upon an *elegit*, and then the *elegit* is reverſed, reſtitution ſhall be of the term. *Cro. Jac.* 246. When upon a *fieri facias* the ſheriff ſells a term; reciting it falſely, as to its commencement and ending, &c. the ſale is void, becauſe there is no ſuch term, yet if he recites it generally, and being of divers years yet to come, ſells all the intereſt which the defendant had in the land, the ſale will be good. 4 *Rep.* 74.

If an execution is ſued on a *fi. fa.* and the defendant dies before it is executed, it may be ſerved on the defendant's goods in the hands of his executor or adminiſtrator. *Cro. Eliz.* 181. Two *fieri facias's* are delivered the ſame day to the ſheriff againſt the ſame perſon; he is bound to execute that firſt, which was firſt delivered; and if he executes the laſt firſt, he muſt anſwer it to the party who brought the firſt, who may bring an action againſt him; but the execution ſhall ſtand good. 1 *Salk.* 330.

A man had a judgment for debt againſt another, and on a *fi. fa.* the ſheriff took his goods in execution, but the plaintiff ſuffered the goods to remain in the hands of the debtor, and would not let the ſheriff proceed any further: *A. B.* having alſo a judgment againſt this debtor, on a *fieri facias*, ſeized upon the ſame goods, and it was held good, for the former was a fraudulent execution. 7 *Mod.* 37, 38.

On a writ of *fieri facias* againſt one partner, the ſheriff may take the goods of both; yet the vendee ſhall have only a moiety thereof in common with the other. *Comb.* 207. By the Common law, goods were bound from the day of the *teſte* of the writ; but by *Stat.* 29 *Car.* 2. *c.* 3. *ſect.* 16, they are bound only from the time of delivery thereof, &c. *Ibid.* See *Godb.* 147. and further this Dict. titles *Sheriff*; *Extent*; *Execution*.

FIFTEENTHS, A tribute or impoſition of money, antiently laid generally upon cities, boroughs, &c. through the whole realm; ſo called, becauſe it amounted to a *fifteenth part* of that which each city or town was valued at, or a *fifteenth* of every man's perſonal eſtate according to a reaſonable valuation. And every town knew what was a *fifteenth part*, which was always the ſame; whereas a ſubſidy raiſed on every particular man's lands or goods, was adjudged uncertain; and in that regard the *fifteenth* ſeems to have been a rate formerly laid upon every town; according to the land, or circuit belonging to it. *Camd. Brit.* 171.

There are certain rates mentioned in *Domeſday*, for levying this tribute yearly; but ſince, though the rate be certain, it is not to be levied but by parliament. By 31 *Ed.* 3. *c.* 13, a *fifteenth* was granted, for pardon, &c. The 7 *Ed.* 6. *c.* 4, granted a ſubſidy and two *fifteenths* by the temporalty, &c. And in the 1, 5, &c. *Eliz.* and 1, 3, and 18 *Jac.* 1, *fifteenths* and tenths were granted for maintaining the wars, &c.—See *Cowell*; 1 *Com.* 309; and this Dict. title *Taxes*.

FIGHTING AND QUARRELLING, Is prohibited by ſtatute, in a church, or church-yard, &c. on pain of excommunication, and other corporal puniſhment. *Stat.* 5 & 6 *Ed.* 6. *c.* 4. See title *Church*.

FIGHTWITE, *Sax.*] A mulct for fighting, or making a quarrel to the diſturbance of the peace.

FIGURES, It was moved to quaſh an indictment, becauſe the year of our Lord in the caption was in figures. But *per Hale*, Ch. J. the year of the King is enough. *Mod.* 78. *pl.* 40: *Mich.* 22 *Car.* 2. *Anon*: *Sid.* 40: *Keb.* 19: *Sti.* 88: 2 *Lev.* 102.

The *Stat.* 6 *Geo.* 2. *c.* 14, Allows the expreſſing numbers *by figures* in all writs, &c. pleadings, rules, orders and indictments, &c. in courts of juſtice, as have been commonly uſed in the ſaid courts, notwithſtanding any thing in the *Stat.* 4 *Geo.* 2. 26. See titles *Pleading*; *Error*; *Amendment*.

FILACER, FILAZER OR FILIZER, *Filizarius*, from Lat. *Filum*.] An officer of the court of *Common Pleas*, ſo called, as he files thoſe writs whereon he makes out proceſs. There are fourteen of theſe *filazers* in their ſeveral diviſions and counties, and they make forth all writs and proceſſes upon original writs, iſſuing out of Chancery, as well real, as perſonal and mixed, returnable in that court: and in actions merely perſonal, where the defendants are returned ſummoned, they make out *pones* or attachments; which being returned and executed, if the defendant appears not, they make forth a *diſtringas*, and ſo *ad infinitum*, or until he doth appear; if he be returned *nihil*, then proceſs of *capias* infinite, &c. They enter all appearances and ſpecial bails, upon any proceſs made by them: and make the firſt *ſcire facias* on ſpecial bails, writs of *habeas corpus*, *diſtringas nuper vicecomitem vel balli-vum*, and all *ſuperſedeas's* upon ſpecial bail: in real actions, writs of view, of grand and petit *cape*, of *withernam*, &c. alſo writs of *adjournment* of a term, in caſe of public diſturbance, &c.

And until an order of court, 14 *Jac.* 1, they entered declarations, imparlances and pleas, and made out writs of execution, and divers other judicial writs, after appearance: but that order limited their proceedings to all matters before appearance, and the *prothonotaries* to all after. The *filazers* of the *Common Pleas* have been officers of that court before the *Stat.* 10 *H.* 6. *c.* 4, wherein they are mentioned: and in the *King's Bench*, of later times, there have been *filazers*, who make out proceſs upon *original*

original writs returnable in that court, on actions in general.

FILE, *Filacium.*] A thread, ſtring or wire, upon which writs, and other exhibits in courts and offices are faſtened or *filed*, for the more ſafe keeping and ready turning to the ſame. A *file* is a record of the court; and the *filing* of proceſs of a court, makes it a record of it. 1 *Lil.* 112. An original writ may be *filed* after judgment given in the cauſe, if ſued forth before; declarations, *&c.* are to be *filed*: and affidavits muſt be *filed*, ſome before read in court; and ſome preſently when read in court. *Ibid.* 113. Before *filing* a record removed by *certiorari*, the juſtices of *B. R.* may refuſe to receive it, if it appears to be for delay, *&c.* and remand it back for the expedition of juſtice: but if the *certiorari* be once *filed*, the proceedings below cannot be revived. An indictment, *&c.* cannot be amended after *filed*. See this Dict. titles *Certiorari*: *Amendment*.

FIELD-ALE OR FILKDALE; A kind of drinking in the *field*, by bailiffs of hundreds; for which they gathered money of the inhabitants of the hundred to which they belonged: but it has been long ſince prohibited. *Bract*: 4 *Inſt.* 307.

FILICETUM, A ferny ground.—*Co. Lit.* 4.

FILIOLUS, Is properly a little ſon; a godſon.—*Dugd. Warwickſh.* 697.

FILUM AQUÆ, The thread or middle of the ſtream where a river parts two lordſhips: *Et habeant iſtas buttas uſque ad* filum aquæ *prædictæ*. *Mon. Angl. tom.* 1. *f.* 390: *File du Mer* the high tide of the ſea. *Rot. Parl.* 11 *H.* 4. It is alſo the middle of any river or ſtream which divides counties, townſhips, pariſhes, manors, liberties, *&c.*

FINDERS, Mentioned in ſeveral ancient ſtatutes, ſeem to be the ſame with thoſe which we now call *Searchers* who are imployed for the diſcovery of goods imported, or exported, without paying cuſtom. See title *Cuſtoms*.

FINE OF LANDS.

THE LAW on this ſubject, of itſelf very extenſive, is alſo cloſely implicated with that of *Recoveries*.—A definition of both terms is therefore here given, with ſome idea of the diſtinct nature of thoſe aſſurances.—It might perhaps have been eligible to have brought together the law on both thoſe ſubjects, but that was, to the preſent editor, more deſirable than practicable. See therefore this Dict. title *Recovery*, for what relates excluſively thereto.

A FINE. *Finis*, or *Finalis Concordia*; from the words with which it begins; and alſo from its effect in putting a *final* end to all ſuits and contentions.] A ſolemn amicable agreement or compoſition of a ſuit, (whether that ſuit be real or fictitious,) made between the demandant and tenant, with the conſent of the judges; and enrolled among the records of the court, where the ſuit was commenced; by which agreement freehold property may be transferred, ſettled and limited. See *Cruiſe* on *Fines*, 1ſt edit. 4, 89, 92.

Shepherd ſays, ſometimes it is taken for "a final agreement or conveyance upon record for the ſettling and ſecuring of lands and tenements;" and ſo it is deſignated by ſome to be, "an acknowledgement, in the king's court, of the land or other things to be his right that doth complain:" and by others "a covenant made between parties and recorded by the juſtices:" and by others "a friendly, real, and final agreement amongſt parties, concerning any land, or rent, or other thing whereof any ſuit or writ is hanging between them in any court:" and by others more fully "an inſtrument of record of an agreement concerning lands, tenements, or hereditaments; duly made by the king's licence, and acknowledged by the parties to the ſame, upon a writ of covenant, writ of right, or ſuch like, before the Juſtices of the Common Pleas or others thereunto authoriſed, and engroſſed of record in the ſame court; to end all controverſies thereof, both between themſelves which be parties and privies to the ſame, and all ſtrangers not ſuing or claiming in due time." *Shep. Touchſt. c.* 3; and the authorities there cited.

The moſt diſtinguiſhable properties of a Fine are, 1, The extinguiſhing dormant titles by *barring ſtrangers*; unleſs they claim within five years. 2. Barring the *iſſue in tail* immediately. [But not barring the remainders or reverſions, which depend on the eſtate-tail barred; except where the tenant in tail has the *immediate reverſion* in fee in himſelf. See *Cruiſe on Fines*, 2d *edit.* 176: 1 *Show.* 370: 1 *Salk.* 338: 4 *Mod.* 1.] 3. Binding *Femes Covert*, ſee *poſt*. IV.—Theſe conſtitute the peculiar qualities on account of which a Fine is moſt uſually, if not always, reſorted to, as one of the moſt valuable of the *Common Aſſurances* of the realm: being now in fact *a fictitious proceeding to transfer or ſecure real property* by a mode more efficacious than ordinary conveyances. 1 *Inſt.* 121 *a. note* 1, 2:—for which ſee, at full length, Mr. *Hargrave's* excellent Abridgement of the Hiſtory of Fines and their purpoſes.

Fines being agreements ſolemnly made in the king's courts were deemed to be of equal notoriety with judgments in writs of right; and therefore the common law allowed them to have the ſame quality of barring all who ſhould not claim within a year and a day. See *Plowd.* 357. Hence we may probably date the origin and frequent uſe of *Fines* as feigned proceedings. But this puiſſance of a Fine was taken away by *Stat.* 34 *E.* 3. *c.* 16: and this ſtatute continued in force till *Stat.* 1 *Ric.* 3. *c.* 7. and 4 *H.* 7. *c.* 24; which revived the ancient law, though with ſome change; proclamations being required to make Fines more notorious, and the time for claiming being enlarged, from a *year and a day* to *five years*. See *poſt.* 1. The force of Fines on the rights of ſtrangers being thus regulated it has ever ſince been a common practice to levy them merely for better guarding a title againſt claims, which, under the common ſtatutes of limitation, might ſubſiſt with a right of *entry* for 20 years; and with a right of *action* for a much longer time. 1 *Inſt.* *ubi ſupra* and ſee *poſt*.

A RECOVERY.—In its moſt extenſive ſenſe is a reſtitution to a former right by the ſolemn judgment of a court of juſtice. In its general acceptation a *Common Recovery* is a judgment in a fictitious ſuit, brought againſt the tenant of the freehold, obtained in conſequence of a default made by the perſon who is laſt vouched to warranty in ſuch fictitious ſuit. *Cruiſe on Recoveries*, 1, 120, 121, 137.

The Common Recovery that is uſed for aſſurance of land is nothing elſe but *fictia juris* or a certain form or courſe ſet down by law to be obſerved for the better aſſuring of lands and tenements to men. And this is ſomewhat after the example of Recovery upon title, which is without conſent and contrary to the will of him againſt whom the

ſame

ſame is had: for there is ſo this a colourable ſuit, wherein there is a demandant who is called the recoveror, and a tenant who is called the recoveree; and one that is called (or vouched) to warrant upon a ſuppoſed warranty, who is called the vouchee. *Shep. Touchſt. c.* 3. and the authorities there cited.

Conſidered as a legal aſſurance or conveyance, it is a *Fiction of law*, adopted for the purpoſe of deſtroying that ſpecies of perpetuity which was created by the ſtatute *de donis*; (13 *E.* 1. *ſt.* 1. *c.* 1;) and whereby all tenants in tail are enabled, by purſuing the proper form, to bar their eſtates-tail. 10 *Rep.* 37. And not only this, but it is alſo a bar to ALL *remainders* and *reverſions depending* on ſuch eſtate-tail ſo barred; and to all *charges* and *incumbrances* created by the perſons in remainder and reverſion. 1 *Rep.* 62. But a common recovery does not bar an executory deviſe unleſs the executory deviſee comes in as a vouchee. *Fearne* 306: *Pigot* 134: *Cro. Jac.* 590: *Palm.* 131—And by *Stat.* 21 *H.* 8. *c.* 15, no eſtate held by ſtatute-merchant, ſtaple, or elegit ſhall be avoided by means of a feigned recovery.—And ſee alſo this *Stat.* and *Stat. of Glouceſter*, 1 *E.* 1. *c.* 11, as to termors for years.

DISTINCTIONS. Though a Recovery, generally ſpeaking, is a more extenſive ſpecies of conveyance than a Fine; to guard an eſtate againſt all claims and incumbrances, yet the operation of each is not ſeldom neceſſary in aid of the other. A Fine is therefore often levied for the purpoſe of creating a good tenant to the præcipe, on which the Recovery is ſuffered: and a Recovery is frequently ſuffered in order to operate as a diſcontinuance of an eſtate-tail, for the purpoſe of barring remainders or reverſions depending on ſuch eſtates-tail; and thus a conveyance by *Fine* and *Recovery*, if *unreverſed*, bars all the world.

A Fine is technically ſaid to be *levied*—A Recovery to be *ſuffered*.—Good writers however have but too frequently confounded the terms.

The Student may now purſue his enquires under the following heads:

I. *Generally, of the Nature, ſeveral Kinds, and Effect, of a Fine.*
II. *Further, of the various Sorts of Fines; and how a Fine operates.*
III. *Of what Things a Fine may be levied.*
IV. *By whom, and to whom it may be levied; and ſee poſt* VI.
V. *Before whom, and in what Manner it may be levied.*
VI. *Who may be barred by a Fine, and who not.*
VII. *How a Fine may be reverſed, for Error or Fraud; and of amending Fines.*

I. Under this head it will be neceſſary to explain, 1, The nature of a Fine. 2, Its ſeveral kinds. 3, Its force and effect.

1. A Fine is ſometimes ſaid to be a feoffment of record; *Co. Lit.* 50: though it might with more accuracy be called an acknowledgement of a feoffment on record. By which is to be underſtood, that it has at leaſt the ſame force and effect with a feoffment, in the conveying and aſſuring of lands: though it is one of thoſe methods of transferring eſtates of freehold by the common law, in which livery of ſeiſin is not neceſſary to be actually given; the ſuppoſition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a Fine may be deſcribed to be an amicable compoſition or agreement of a ſuit, either actual or fictitious, by leave of the king or his juſtices; whereby the lands in queſtion become, or are acknowledged to be, the right of one of the parties. *Co. Litt.* 120. In its original it was founded on an actual ſuit, commenced at law for recovery of poſſeſſion of the land or other hereditaments; and the poſſeſſion thus gained by ſuch compoſition was found to be ſo ſure and effectual, that fictitious actions were, and continue to be, every day commenced, for the ſake of obtaining the ſame ſecurity.

Fines are of equal antiquity with the firſt rudiments of the law itſelf; are ſpoken of by *Glanvil. l.* 8. *c.* 1, and *Bracton. l.* 5, *tr.* 5. *c.* 28, in the reigns of *Henry* II, and *Henry* III; as things then well known and long eſtabliſhed: and inſtances have been produced of them even prior to the *Norman* invaſion. *Plowd.* 369. So that the *Stat.* 18 *E.* 1, called *modus levandi fines*, did not give them original, but only declared and regulated the manner in which they ſhould be levied, and carried on. And that is as follows:

Firſt; The party to whom the land is to be conveyed or aſſured, commences an action or ſuit at law againſt the other, generally an action of covenant, though a Fine may alſo be levied on a writ of *meſne*, of *warrantia chartæ*, or *de conſuetudinibus et ſervitiis*; (*Finch L.* 278;) by ſuing out a writ of *præcipe* called a writ of covenant: the foundation of which is a ſuppoſed agreement or covenant, that the one ſhall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king, by antient prerogative, a *primer fine*, or a noble for every five marks of land ſued for; that is, one-tenth of the annual value. 2 *Inſt.* 511.—The ſuit being thus commenced, then follows:

Secondly; The *licentia concordandi*, or *leave to agree* the ſuit: for, as ſoon as the action is brought, the defendant, knowing himſelf to be in the wrong, is ſuppoſed to make overtures of peace and accommodation to the plaintiff; who accepting them, but having upon ſuing out the writ, given pledges to proſecute his ſuit, which he endangers if he now deſerts it without licence, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is alſo another Fine due to the king by his prerogative, which is an ancient revenue of the crown, and is called the *king's ſilver*, or ſometimes the *poſt fine*, with reſpect to the *primer fine* before-mentioned. And it is as much as the *primer fine*, and half as much more, or ten ſhillings for every five marks of land; that is, three twentieths of the ſuppoſed annual value. 5 *Rep.* 39: 2 *Inſt.* 511: *Stat.* 32 *Geo.* 2. *c.* 14.

Thirdly comes the *concord*, or agreement itſelf, after leave obtained from the court; this is uſually an acknowledgment from the deforciants (or thoſe who keep the other out of poſſeſſion) that the lands in queſtion are the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the Fine is called the *cognizor*, and he to whom it is levied the *cognizee*. This acknowledgement muſt be made either openly in the Court of Common Pleas, or before the Lord Chief Juſtice of that court, or elſe before one of the judges of that court; or two or more commiſſioners in the country, empowered by a ſpecial authority called a writ

writ of *dedimus poteſtatem*; which judges and commiſſioners are bound by *St.* 18 *E.* 1. *ſt.* 4, to take care that the cognizors be of full age, ſound memory, and out of priſon. If there be any feme covert among the cognizors, ſhe is privately examined whether ſhe does it willingly and freely, or by compulſion of her huſband.

The concord being the compleat Fine, it ſhall be adjudged a Fine of that term in which the concord was made, and the writ of covenant returnable. 1 *Salk.* 341. A concord cannot be of any thing but what is contained in the writ of covenant: and the note of the Fine remaining with the *Chirographer*, it hath been held, *eſt principale recordum.* 3 *Leon.* 234.

Though one concord will ſerve for lands that lie in divers counties; yet there muſt be ſeveral writs of covenant. 3 *Inſt.* 21: *Dyer* 227. A concord of a Fine may have an exception of part of the things mentioned therein: and if more acres are named, than a man hath in the place, or are intended to be paſſed; no more ſhall paſs by the Fine than is agreed upon. 1 *Leon.* 81: 3 *Bulſt.* 317, 318.

By theſe acts all the eſſential parts of a Fine are compleated: and if the cognizor dies the next moment after the Fine is acknowledged, provided it be ſubſequent to the day on which the writ is made returnable, ſtill the Fine ſhall be carried on in all its remaining parts. *Comb.* 71. See *poſt.* VII.

Fourthly, comes the *note* of the Fine: which is only an abſtract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement; this muſt be enrolled of record in the proper office, by direction of *St.* 5 *H.* 4. *c.* 14.

The fifth part is the *foot* of the Fine, or concluſion of it: which includes the whole matter, reciting the parties, day, year and place, and before whom it was acknowledged or levied. Of this there are indentures made or engroſſed at the Chirographer's office, and delivered to the cognizor and the cognizee; uſually beginning thus, "*Hæc eſt finalis concordia*; This is the final agreement;" and then reciting the whole proceeding at length. And thus the Fine is completely levied at common law.

By ſeveral ſtatutes, ſtill more ſolemnities are ſuperadded, in order to render the Fine more univerſally public, and leſs liable to be levied by fraud or covin. And firſt, by *St.* 27 *E.* 1. *c.* 1. the note of the Fine ſhall be openly read in the court of Common Pleas, at two ſeveral days in one week, and during ſuch reading all pleas ſhall ceaſe. By *Stat.* 5 *H.* 4. *c.* 14: 23 *Eliz. c.* 3, all the proceedings on Fines, either at the time of acknowledgement, or previous, or ſubſequent thereto, ſhall be enrolled of record in the Court of Common Pleas. By *St.* 1 *Ric.* 3. *c.* 7, confirmed and enforced by *St.* 4 *Hen.* 7. *c.* 24, the Fine, after engroſſment, ſhall be openly read and proclaimed in court (during which all pleas ſhall ceaſe) ſixteen times; viz. four times in the term in which it is made, and four times in each of the three ſucceeding terms; which is reduced to one in each term by *St.* 31 *Eliz. c.* 2; and theſe proclamations are indorſed on the back of the record. It is alſo enacted by *St.* 23 *Eliz. c.* 3, that the Chirographer of Fines ſhall, every term, write out a table of the Fines levied in each county in that term, and ſhall affix them in ſome open part of the Court of Common Pleas all the next term, and ſhall alſo deliver the contents of ſuch table to the ſheriff of every county, who ſhall at the next aſſiſes fix the ſame in ſome open place in the court, for the more public notoriety of the Fine.

2. FINES, thus levied are of four kinds:

Firſt, What, in law French, is called a Fine "*ſur cognizance de droit, come ceo que il ad de ſon done*;" or, a Fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor. This is the beſt and ſureſt kind of Fine, for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in queſtion, and at the ſame time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment or giſt in poſſeſſion, to have been made by him to the plaintiff. This Fine therefore is ſaid to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual livery: ſo that this aſſurance is rather a confeſſion of a former conveyance, than a conveyance now originally made; for the deforciant, or cognizor, acknowledges, *cognoſcit*, the right to be in the plaintiff, or cognizee, as that which he hath, *de ſon done*, of the proper gift of himſelf, the cognizor.

Secondly, a Fine "*ſur cognizance de droit tantum*," or, upon acknowledgment of the right merely; not with the circumſtance of a preceding gift from the cognizor. This is commonly uſed to paſs a *reverſionary* intereſt, which is in the cognizor. For of ſuch reverſions there can be no feoffment, or donation with livery ſuppoſed; as the poſſeſſion during the particular eſtate belongs to a third perſon. *Moor.* 629. It is worded in this manner, "that the cognizor acknowledges the right to be in the cognizee; and grants for himſelf and his heirs that the reverſion, after the particular eſtate determines, ſhall go to the cognizee." *Weſt. Symb. p.* 2. § 95.

Thirdly a Fine "*ſur conceſſit*," is where the cognizor, in order to make an end of diſputes, though he acknowledges no precedent right, yet grants to the cognizee an eſtate *de novo*, uſually for life or years, by way of ſuppoſed compoſition. And this may be done reſerving a rent, or the like; for it operates as a new grant. *Weſt. p.* 2. § 66.

Fourthly, A Fine, "*ſur done, grant, et render*," is a double fine, comprehending the Fine *ſur cognizance de droit come ceo, &c.* and the Fine *ſur conceſſit*: and may be uſed to create particular limitations of eſtate: and this to perſons who are ſtrangers, or not named in the writ of covenant; whereas the Fine *ſur cognizance de droit come ceo, &c.* conveys nothing but an abſolute eſtate, either of inheritance or at leaſt of freehold. *Salk.* 340. In this laſt ſpecies of Fines, the cognizee, after the right is acknowledged to be in him, grants back again or renders to the cognizor, or perhaps to a ſtranger, ſome other eſtate in the premiſes. But, in general, the firſt ſpecies of Fine, *ſur cognizance de droit come ceo, &c.* is the moſt uſed; as it conveys a clear and abſolute freehold, and gives the cognizee a ſeiſin in law, without any actual livery; and is therefore called a Fine executed; whereas the others are but executory. See *poſt.* II.

3. The *force* and *effect* of a Fine, principally depend, at this day, on the common law and the two ſtatutes, 4 *H.* 7. *c.* 24: and 32 *H.* 8. *c.* 36. The antient common-law, with reſpect to this point, is very forcibly declared by the *St.* 18 *E.* 1. *ſt.* 4, in theſe words, "And the reaſon, why ſuch ſolemnity is required in paſſing a Fine, is this, becauſe the Fine is ſo high a bar, and of ſo great force,

and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the Fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas, the day of the Fine levied; unless they put in their claim on the foot of the Fine within a year and a day." But this doctrine of barring the right by *non-claim*, was abolished for a time by 34 *E.* 3. *c.* 16. which admitted persons to claim, and falsify a Fine, at any indefinite distance. *Litt.* § 441; whereby as Sir *Edward Coke* observes, 2 *Inst.* 581, great contention arose, and few men were sure of their possessions, till the parliament held in 4 *H.* 7, reformed that mischief, and excellently moderated between the latitude given by the statute, and the rigour of the common law. For the statute then made (*Stat.* 4 *H.* 7. *c.* 241,) restored the doctrine of non-claim, but extended the time of claim. So that now, by that statute, the right of all strangers whatsoever is barred, unless they make claim, by way of action or lawful entry, not within one year and a day, as by the common law, but within *five* years after proclamations made: except feme-coverts, infants, prisoners, persons beyond the seas, and such as are not of whole mind: who have five years allowed to them and their heirs after the death of their husbands, their attaining full age, recovering their liberty, returning into *England*, or being restored to their right mind.

It seems to have been the intention, to have covertly, by this statute, extended Fines to have been a bar of estates-tail. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar, which they were expressly declared *not* to be by the statute *de donis*; the *St.* 32 *H.* 8. *c.* 36, was thereupon made; which removes all difficulties, by declaring that a Fine levied by any person of full age, to whom, or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail: unless the Fine be levied by a woman after the death of her husband, of lands which were, by the gift of him, or his ancestors, assigned to her in tail for her jointure; or unless it be of lands entailed by Act of Parliament or letters patent, and whereof the reversion belongs to the crown. See *Stat.* 11 *Hen.* 7. *c.* 20.

From this view of the common law, regulated by these statutes, it appears, that a Fine is a solemn conveyance on record from the cognizor to the cognizee; and that the persons bound by a Fine are *Parties*, *Privies*, and *Strangers*.

The *Parties* are either the cognizors, or cognizees; and these are immediately concluded by the Fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almost the only act that a *feme covert*, or married woman, is permitted by law to do, (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband,) it is therefore the usual and almost the only safe method, whereby she can join in the sale, settlement, or incumbrance, of any estate. See *post.* IV.

Though a wife may thus join her husband in either a Fine or Recovery to convey her own estate and inheritance, or an estate settled upon her by her husband as her jointure, or to convey the husband's estates discharged of dower; (See *Cruise*: *Piggot*;) yet if a jointress after her husband's death levies a Fine or suffers a Recovery without the consent of the heir, or the next person entitled to an estate of inheritance, the Fine or Recovery is void, and is also a forfeiture of her estate, by *Stat.* 11 *H.* 7. *c.* 20. See *post* IV.

Privies to a Fine are such as are any way related to the parties who levy the Fine, and claim under them by any right of blood, or other right of representation. Such are the heirs general of the cognizor; the issue in tail since the statute of *H.* 8; the vendee; the devisee; and all others who must make title by the persons who levied the Fine. For the act of the ancestor shall bind the heir, and the act of the principal, his substitute, or such as claim under any conveyance made by him subsequent to the Fine so levied. 3 *Rep.* 87.

Strangers to a Fine are all other persons in the world, except only parties and privies. And these are also bound by a Fine, unless within five years after proclamation made, they interpose their claim; provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea; and persons, who are thus incapacitated to prosecute their rights, have five years allowed them to put in their claims after such impediments are removed. Persons also that have not a present, but a future interest only, as in remainder or reversion, have five years allowed them to claim in, from the time that such right accrues. *Co. Lit.* 372. And if within that time they neglect to claim, or (by the *Stat.* 4 *Ann. c.* 16,) if they do not bring an action to try the right, within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim. See this Dict. title *Claim.*

But, in order to make a Fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers by a mere confederacy, might defraud the owners by levying Fines of their lands; for if the attempt be discovered, they can be *no sufferers*, as to the estate in question, but must only remain in *statu quo*; whereas if a tenant for life levies a Fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner, if claimed in proper time. *Co. Lit.* 251. It is not therefore to be supposed that such tenants will frequently run so great a hazard; but if they do, and the claim is not duly made within five years after their respective terms expire, the estate is for ever barred by it. 2 *Lev.* 52. Yet where a stranger, whose presumption cannot thus be punished, officiously interferes in an estate which in no wise belongs to him, his Fine is of no effect: and may at any time be set aside (unless by such as are parties or privies thereunto) by pleading that "*partes finis nihil habuerunt.*" *Hob.* 334. And even if a tenant for years, who hath only a chattel interest and no freehold in the land, levies a Fine, it operates nothing, but is liable to be defeated by the same plea. 5 *Rep.* 123: *Hard.* 401. See *post.* VII.—Wherefore when a lessee for years is disposed to levy a Fine, it is usual for him to make a feoffment first, to displace the estate of the reversioner, and create a new freehold by disseisin. *Hardr.* 402: 2 *Lev.* 52. See this Dict. title *Recovery.*

In

In order to puniſh criminally ſuch as thus put the eſtate of another to the hazard, as far as in them lies, the *Stat.* 21 *Jac.* 1. *c.* 26, makes it felony without benefit of clergy to acknowledge or procure to be acknowledged, any Fine, Recovery, Judgment, &c. in the name of any perſon not privy or conſenting to the ſame.

II. FINES are generally divided into thoſe with, and without, proclamations; that with proclamations, is termed a Fine according to the ſtatutes 1 *R.* 3. *c.* 7: 4 *H.* 7. *c.* 24. And ſuch a Fine, every Fine that is pleaded is intended [ſuppoſed] to be, if it be not ſhewn what Fine it is. 3 *Rep.* 86.

If tenant in tail levies a Fine, and dies before all the proclamations are made, though the right of the eſtate tail deſcends upon the iſſue, immediately on the death of the anceſtor, yet if proclamations are made afterwards, ſuch right ſhall be barred by the Fine, by the ſtatutes 4 *H.* 7. *c.* 24; 32 *H.* 8. *c.* 36: 3 *Rep.* 84.

The Fine *without proclamations* is called a *Fine at the Common Law*, being levied in ſuch manner as was uſed before the *Stat.* 4 *H.* 7. *c.* 24; and is ſtill of the like force by the *common law*, to diſcontinue the eſtate of the cogniſor, if the Fine be executed. A Fine alſo *with* or *without proclamations* is either *executed* or *executory*: A Fine *executed* is ſuch a Fine as of its own force gives preſent poſſeſſion to the cogniſee, without any writ of ſeiſin to enter on the lands, &c. as a Fine *ſur cogniſance de droit come ceo*; and in ſome reſpects a Fine *ſur Releaſe*, &c, is ſaid to be *executed*. A Fine *executory* doth not execute the poſſeſſion in the cogniſee, without entry or action, but requires a writ of ſeiſin; as the Fine *ſur conuzance de droit tantum*, &c. unleſs the party be in poſſeſſion of the lands; for, if he be in poſſeſſion at the time of levying the Fine, there need not be any ſuch writ, or any execution of the Fine; and *then the Fine will enure by way of extinguiſhment of right*, not altering the eſtate or poſſeſſion of the cogniſee, however it may better it. *Weſt.* § 20.

Since the ſtatute of uſes, 27 *H.* 8, writs of poſſeſſion are never ſued out where Fines are levied to uſes; for the ſtatute executing the poſſeſſion to the uſe, the cogniſee is immediately in poſſeſſion without attornment; and by *Stat.* 4 & 5 *An. c.* 16, attornment after a Fine is become unneceſſary. *Booth*, 250: *Pig.* 49: *Cruiſe* 59.

Fines are likewiſe *ſingle* or *double*; *ſingle*, where an eſtate is granted by the cogniſor to the cogniſee, and nothing is thereby rendered back again from the cogniſee to the cogniſor. The *double* Fine is that which doth contain a grant or render back again from the cogniſee, of the land itſelf; or of ſome rent, common, or other thing out of it, and by which remainders are limited, &c. *Weſt.* §§ 21, 30. A Fine is alſo ſometimes called a *double* Fine, when the lands lie in ſeveral counties.

Lands that are bought of divers perſons may paſs by one Fine, and then the writ of covenant muſt be brought by all the vendees againſt all the vendors, and they muſt every one of them warrant for himſelf and his heirs; and ſuch a Fine is good. *Shep. Touchſt. c.* 2. *p.* 19. And ſuch *joint Fines* ſeem reaſonable, when the ſeveral purchaſes are of ſmall value, though they are *ex gratiâ*. See *Wilſ. on Fines*, 47; where an order of the Chancellor is inſerted, authorizing the curſitor to ſtay the writ when there is more than one demandant and one deforciant, except coparceners, jointenants and tenants in common. It is now the practice to permit two ſeparate purchaſes to be comprized in one Fine on an affidavit that the value of them together does not exceed 200 *l.*

The firſt kind of Fine *ſur cognizance de droit come ceo*, &c. is a ſingle Fine levied with proclamations, according to the *Stat.* 4 *H.* 7. *c.* 24. *It is, as has been already ſaid, the principal and ſureſt kind of Fine*: and this becauſe it is ſaid to be executed, as it gives preſent poſſeſſion (at leaſt in law) to the cogniſee, ſo that he needs no writ of *hab. fac. ſeiſinam*, or other means for execution thereof; for it admits the poſſeſſion of the lands, of which the Fine is levied, to paſs by the Fine, ſo that the cogniſee may enter and the eſtate is thereby in him, to ſuch uſes as are declared in the deed to lead the uſes thereof; but if it be not declared by deed to what uſe the Fine was levied, ſuch Fine ſhall be to the uſe of the cogniſor that levied the ſame. 2 *Inſt.* 513. If the cogniſee of a Fine levied of lands, pay money unto the cogniſor at the time of the Fine levied, and there is no uſe declared of the Fine, the law will conſtrue the Fine to the uſe of the cogniſee: and if there be no money paid by the cogniſee, nor any uſe declared, the Fine ſhall enure to the cogniſor that levied it. *Paſch.* 23 *Car. B. R.* Where a Fine is levied to the uſe of two perſons in tail, &c. in conſideration of marriage, though the deed to lead its uſes doth not mention any marriage had between them, yet it hath been adjudged, *that the eſtate-tail is executed before marriage*; for the Fine doth carry the uſes, and they are perfected by the Fine, notwithſtanding the conſideration is perfected afterwards; but without a Fine, the marriage muſt be had, before any uſe could ariſe. 1 *Leon.* 138.

If a feme covert alone declares the uſes of a Fine intended to be levied by huſband and wife of her land, and the huſband alone declares other uſes; it hath been held that both declarations of uſes are void, and the uſe ſhall follow the ownerſhip of the lands: But in another caſe it was determined that the uſes declared by the wife were void; and the uſes declared by the huſband, good only againſt himſelf, during the coverture. If huſband and wife levy a Fine of the lands of the wife, and he alone declares the uſes, this ſhall bind the wife, if her diſſent doth not appear; becauſe otherwiſe it ſhall be intended that ſhe did conſent. 2 *Rep.* 56, 59. Though there be a variance between a deed declaring uſes, and the Fine levied; yet, if nothing appears to the contrary, ſuch Fine by conſtruction of law ſhall be to the uſes declared in the deed, and which is evidence thereof: and where a Fine varies from a former deſcription, it has been held that a new deed made after, will declare the uſes of the Fine. It is not abſolutely neceſſary, to inſert the word *Uſe*, in the declaration of uſes of Fines; for any words which ſhew the intent of the parties will be ſufficient. 1 *Ld. Raym.* 289, 290.

A Fine *ſur conuzance de droit come ceo*, &c. may not be levied to any perſon but one that is party to the writ of covenant; though a vouchee, after he hath entered into the warranty to the demandant, it is ſaid, may confeſs the action, or levy a Fine to the demandant, for he is then ſuppoſed to be tenant of the land, though he is not a party to the writ; and yet a Fine levied by the vouchee to a ſtranger is void. No ſingle Fine can be with a remainder over to another perſon not contained in it: But if *A.* levy a Fine to *B. ſur conuzance de droit come ceo*, and

B. by the ſame concord grants back the land again to *A.* for life, remainder to *E.* the wife of *A.* for her life, remainder to *A.* and his heirs; this will be a good Fine. *Plowd.* 248, 249.

The ſecond ſort of Fine *ſur conuzance de droit tantum*, is ſaid to be a Fine *executory*, and much of the nature of a Fine *ſur conceſſit*; Though it is moſt commonly made uſe of *to paſs a reverſion*, it is alſo ſometimes uſed by tenant for life, to make a *releaſe* (in nature of a ſurrender) to him in reverſion, but not by the word *ſurrender*; for it is ſaid a particular tenant, as for life, *&c.* cannot *ſurrender* his term to him in reverſion by Fine; but he may *grant* and *releaſe* to him by Fine. *Plowd.* 268: *Dyer* 216. A Fine upon a releaſe, *&c.* ſhall not be intended to be to any other uſe, but *to him* to *whom it is levied.* 3 *Leon.* 61.

The Fine *ſur conceſſit*, uſed to *grant away eſtates for life or years*, is alſo *executory*, ſo that the cogniſees muſt enter, or have a writ of *hab. fac. ſeiſinam* to obtain poſſeſſion; if the parties to whom the eſtate is limited, at the time of levying ſuch Fine, be not in poſſeſſion of the thing granted.

The Fine *ſur done grant & render*, is partly *executed* and partly *executory*; and as to the *firſt* part of it, is altogether of the ſame nature with a Fine *ſur conuzance de droit come ceo*; but as to the *ſecond* part containing a grant and render back, *it is taken in law to be rather a private conveyance or charter between party and party*, and not as a writ of judgment upon record: and this render is ſometimes of the whole eſtate, and ſometimes of a particular eſtate, with remainder or remainders over; or of the reverſion; and ſometimes with reſervations of rent and clauſe of diſtreſs, and grant thereof over by the ſame Fine. 5 *Rep.* 38.

A. B. and *C. D.* levied a Fine of lands, and the cogniſee by the ſame Fine rendered back the land to *A. B.* in tail, reſerving a rent to himſelf, *&c.* the rent and reverſion; ſhall paſs, though in one Fine; and it ſhall enure as ſeveral Fines. *Cro. Eliz.* 727.

It is ſaid, a *grant* and *render* of land, cannot be immediately *in primo gradu* to a perſon who is no party to the writ; but mediately, or *in ſecundo gradu*, it may. 3 *Rep.* 514: *Bro.* 108. The Fine with *grant* and *render*, differs from the Fine *ſur conuzance de droit come ceo, &c.* as that muſt be levied of the land in the original; but the *grant* and *render* may be of another thing than is expreſſed in the original: though to make a good *grant* and *render*, the land rendered muſt paſs to the *cogniſee* by the Fine; for he cannot render what he hath not. 3 *Rep.* 98, 510.

A man may not by this Fine reſerve to himſelf a leſs eſtate by way of remainder than the fee: and the render of a rent (if any be) muſt be to one of the parties to the Fine and not to a ſtranger. *Dyer* 33, 69: 2 *Rep.* 39. To make a leaſe for years, *&c.* by Fine with a render; the leſſee muſt acknowledge the land to be the right of the leſſor that is ſeiſed thereof; and then ſuch leſſor grants and renders the ſame back again to the leſſee, for a certain number of years, reſerving rent, *&c.* and this is a good Fine: but if the leſſor be tenant in tail, then to bind him, he and the leſſee are to acknowledge the tenements the right of *A. B.* who is to render the ſame Fine to *leſſee for years*, the *remainder* to the *leſſor and his heirs*, *&c.* 44 *Ed.* 3. 45: 2 *Leon.* 206.

A *Fine* and *Render* is a *conveyance* at common law, and makes the *cogniſor*, on the render back, a *new purchaſer*; by which, lands ariſing on the part of the mother, may go to the heirs on the part of the father, *&c.* 1 *Salk.* 337.

A Fine and Deed to lead the uſes are to be conſidered as one conveyance; and therefore the Fine operates according to the declaration of uſes. *Doug.* 45: 2 *Wilſ.* 220.

All ſorts of Fines in general *may enure as a confirmation of a former eſtate, which was defeaſible before.* 1 *Sand.* 261. So a Fine may enure by way of *extinguiſhment*; therefore, if *tenant in tail* makes a leaſe, or other eſtate to *A.* and afterwards levies a Fine to *B.* the leaſe, or other eſtate, ſhall be indefeiſible; for his right during ſuch former eſtate was extinct by the Fine. *R. Jon.* 60: *Cro. Jac.* 689. See this Dict. title *Eſtates.*

Where a Fine and Recovery is of ſo many acres in *S.* the party intereſted ſhall have his election where and in what parts of the eſtate the Fine and Recovery ſhould operate. *Blany (Ld.)* v. *Mahon*; *Bro. P. C.*

A Fine does not *aſcertain*, but only *compriſes* the lands whereof it is levied; ſo that it is in all caſes extremely proper to have a declaration of uſes; that the very lands comprehended in the Fine, and intended to paſs by it, may be preciſely aſcertained. 1 *Cruiſe, cap.* 7.

Fine by *E.* to the uſe of himſelf for life, *remainder to his wife that ſhould be at the time of his death, for life*; remainder to the ſon of *E.* in tail. *E.* took to wife *A.* A Fine levied by *E.* and *A.* his wife, who afterwards ſurvived him, and other uſes declared, is no *bar* to her, becauſe it was uncertain who would be the perſon; but had the *perſon been certain*, there perhaps, notwithſtanding it was but a poſſibility, it might have been a bar; *per Walmſley, J. Cro. Eliz.* 826. *pl.* 31.

III. A FINE may be levied of every ſpecies of real property, as of an *houſe*, or *meſſuage, manor, caſtle, office, rent, &c.* and in general it may be laid down as a certain rule, that a Fine may be levied of every thing, whereof a *præcipe quod reddat* lies; *&c.* or of any thing, whereof a *præcipe quod faciat* lies; as cuſtoms, ſervices, *&c*; or whereof a *præcipe quod permittat*, or *præcipe quod teneat* may be brought. 2 *Inſt.* 513.

As Fines may be levied of things in poſſeſſion, ſo they may be levied of a remainder, or reverſion, or of a right *in futuro.* 3 *Rep.* 90.

So now, ſince the *Stat.* 32 *H.* 8. *c.* 7, (ſee title *Tithes*,) it may be levied of rectories, vicarages, tithes, penſions, oblations, and all eccleſiaſtical inheritances made temporal. Of a chantry. So it may be of a ſeignory. Of all ſervices; as homage, fealty, &c. *Weſt.* Of common of paſture. Of a corody. Of an office; as of the cuſtody of a foreſt. Of a boilary. Of two pools and a fiſhery in the water of *D.* Of an annuity. See *Weſt Symb.* 6, 7: *Shep. Touchſt. c.* 2.

A Fine may be, and uſually is, levied of a ſhare in the *New River Water*, by the deſcription of ſo much land covered by water; and when a Fine and Recovery of ſuch ſhare is neceſſary, in regard the New River runs through the ſeveral counties of *Hertford, Middleſex* and *London*, there muſt be three ſeveral Fines and Recoveries. 2 *P. Wms.* 128.

Where money is agreed to be laid out in lands to be ſettled in tail, a Fine cannot be levied of the money, but a decree of a court of Equity can bind it, as much as

a Fine

a Fine alone could have bound the land if it had been bought and ſettled. 1 *P. Wms.* 130: 2 *Atk.* 453: 3 *Atk.* 447: 1 *Vez.* 146: and See 1 *P. Wms.* 471, 485: 1 *Bro. C. R.* 223.

Fines may be levied of all things *in eſſe*, *tempore finis*, which are inheritable; but not of things uncertain; or of lands held in tail by the king's letters patent; of land reſtrained from ſale by act of parliament, or of lands in right of a man's wife, without the wife, *&c.* 5 *Rep.* 225. *Weſt.* § 25. Nor of common without number. *Cruiſe*, 121.

A Fine may be levied of a rent-charge, or of a chief rent; and if a perſon who has a rent-charge, levies a Fine of the land, out of which the rent-charge iſſues, it will bar the rent-charge though the Fine be levied of the land, and not of the rent-charge. *Cruiſe*, *c.* 7; and the authorities there cited.

A Fine may be levied of an undivided moiety, or fourth part of a manor, as well as of the whole. 3 *Rep.* 88. But where a Fine is levied of a manor, nothing but a real manor will paſs, and not a manor by reputation only. *Cruiſe*, *c.* 7.

The word *tenement* is not a ſufficient deſcription of any thing whereof a Fine is to be levied: for a tenement may conſiſt of an advowſon, a houſe or land of any kind: and therefore a Fine levied of a tenement is void, or at leaſt voidable by writ of error; but a Fine of a *meſſuage or tenement* would probably be now held good. *Cruiſe*, *c.* 7. See title *Ejectment*.

And almoſt any kind of contract may be made and expreſſed by a Fine, as by a deed, and therefore it may be ſo made that one of the parties ſhall have the land, and the other a rent out of it; and that one ſhall have it for a time, and another for another time; alſo a leaſe for years, or a jointure for a wife, may be made; and a gift in tail, and a remainder over, may be limited and created thereby. 1 *Rep.* 76.

IV. THE KING, and all perſons who may lawfully grant by deed, may levy a Fine; but not infants, ideots, lunaticks, *&c.* 7 *Rep.* 32. A corporation-ſole may levy a Fine of land which he has in his corporate capacity; but biſhops, deans, and chapters, parſons, *&c.* are reſtrained from levying of Fines to bind their ſucceſſors. But a Fine cannot be levied by a corporation aggregate; for it cannot act but by attorney, and it cannot make conuſance by attorney. All perſons that may be grantees, or that may take by contract, may take by Fine; though in caſes of infants, feme coverts, perſons attainted, aliens, *&c.* who, it it is ſaid, may take by Fine, before the ingroſſing of the Fine, there goes a writ to the juſtices of *C. B. quod permittant finem levari. Lit.* 669. Tenant in fee-ſimple, fee-tail general, or ſpecial, tenant in remainder or reverſion, may levy a Fine of their eſtates; ſo may tenant for life, to hold to the cogniſee for life of tenant for life; but a perſon who is tenant, or hath an intereſt only for years, cannot levy a Fine of his term to another. 3 *Rep.* 77: 5 *Rep.* 124.

It is not neceſſary to be in poſſeſſion of the freehold, in order to levy a Fine; but if any one entitled to the inheritance, or to a remainder in tail, levies a Fine, it will bar his iſſue, and all heirs who derive their title through him. *Hob.* 333.

A Fine by a man *non compos*, though it ought not to be levied, binds for ever when it is levied. So a Fine by a man attainted for treaſon, or felony, binds all but the king, or the lord of the fee. *Weſt. Symb.* 3. *a*: See 2 *Wilſ.* 220. So a Fine by an infant, or feme covert without her huſband, binds till it be avoided. Vide *Com. Dig.* tit. *Baron* and *Feme*, (P. 1.) *Enfant*, (B. 2.):—See 2 *Black. Rep.* 1205, a Fine acknowledged *de bene eſſe* by a *feme covert*, whoſe huſband was abroad, before the Lord Chief Juſtice then in Court.

If commiſſioners take a Fine of an infant, *&c.* the court will grant an attachment againſt them; and upon examination and inſpection, the Fine ſhall be vacated. *R. Skin.* 24.

Lands aſſured for dower, or term of life, or in tail, to any woman by means of her huſband, or his anceſtors, cannot be conveyed away from her by Fine, *&c.* without her act; but if a woman and her huſband levy a Fine of her jointure, ſhe is barred of the ſame; though if the jointure be made after coverture, when the wife hath an election to have her jointure, or dower on the huſband's death, it is ſaid this will be no bar of her dower in the reſidue of the land of the huſband. *Dyer*, 358: *Leon.* 185. See titles *Dower*: *Jointure*.

No Fine of the huſband alone, of the lands of the wife, ſhall hurt her, but that ſhe or her heirs, or ſuch as have right, may avoid it; but if ſhe joins with him, it ſhall bind her and her heirs. Women covert ought to be cautious in levying Fines with their huſbands of their own lands; and if a married woman under age levies a Fine of her lands ſhe cannot reverſe it during her huſband's life, nor after his death, if ſhe be of full age when he dies; but if the huſband dies during her minority, ſhe may. *Dyer* 359: *Wood's Inſt.* 243. A married woman ought not to be admitted alone without her huſband to levy a Fine; and if ſhe be received, the huſband may avoid the Fine by entry; but if he do not, it is good to bar her and her heirs, except ſhe be an infant at the time of the Fine levied; the huſband and wife together may diſpoſe of her land, *&c.* 12 *Rep.* 122. If baron and feme levy a Fine, the feme within age, ſhe may be brought into court by *habeas corpus*, and if it be found by inſpection, that ſhe is under age, it hath been adjudged, where the baron and feme brought a writ of error, that as to both, *quod finis revocetur.* 1 *Leon.* 116, 117: 3 *Salk.* 168.

Huſband and wife, tenants in ſpecial tail, the huſband only levies a Fine, this bars the iſſue in tail; but it remains in right to the wife as to herſelf, and to all the eſtates and remainders depending upon it, and all the conſequences of benefit to herſelf and others, ſo long as ſhe lives, as if the Fine had not been levied. *Hob.* 257, 259. If a huſband make a feoffment of the wife's land, upon condition; which is broken, and the feoffee levies a Fine, and the huſband and wife die having iſſue, and five years paſs; the heir is barred to enter as heir to the father upon the condition, but he ſhall have five years after the death of his father, as heir to his mother. *Plowd.* 367. When the huſband and wife join in a Fine of the wife's lands, all the eſtate paſſeth from her, and he is joined only for conformity; ſo that if the Fine levied by huſband and wife in ſuch a caſe be reverſed, ſhe ſhall have reſtitution. 2 *Rep.* 57, 77. A huſband and his wife covenanted to levy a Fine of the lands of the wife, to the uſe of the heirs of the body of the huſband on the wife, remainder to the huſband in fee; both dying without iſſue, it was held that the heir of the wife had the title, becauſe the

the limitation, to the heirs of the body of the husband, was merely void, there being no precedent estate of freehold for life, &c. to support it as a remainder. 2 *Salk.* 675: 4 *Mod.* 253.

As to *femes covert*, the books which say, that a Fine shall not bind a woman under coverture unless she be examined, must not be understood as if it were in her power to reverse the Fine for want of her examination, but they are to be understood in this sense, that the Judge ought not to receive a Fine from a feme covert without examining her, lest it should not proceed from her own freedom and choice; but if such a Fine be once admitted, and recorded without any examination, though the judge has omitted a very necessary part of his duty, yet the Fine shall stand, and neither the feme nor her heirs shall be admitted to aver that she was not examined; for that were to lessen the credit of the judgment of the courts of justice, which is the highest evidence of the law. 2 *New Abr.* 527: See 1 *Inst.* 121 *a.* in the note already referred to; in which arguments are brought to prove (apparently with great force and justice) that the common notion, of a Fine binding *femes covert* merely by reason of the secret examination of the wife by the judges, is incorrect. If the secret examination by itself was so operative, the law would provide the means of effectually adding that form to ordinary conveyances, and so make them conclusive to *femes covert* equally with a Fine. But it is clearly otherwise; and except in the case of conveyances by custom there must be a *suit depending* for the freehold, and inheritance; or the examination, being extrajudicial, is ineffectual. This mode of binding *femes covert* by the judgment of the court in a real action, appears to have arisen from admitting them and their husbands jointly to defend actions brought against the feme for her estate, the adverse judgment on which was final against the feme.—When the transition was made to the case of friendly suits, the form of secret examination was introduced to avoid any undue influence of the husband. That the examination of a feme in other cases does not bind her to the alienation of her property, See 2 *Inst.* 673: *Keilw.* 4—20.—The just explanation therefore of the subject seems to be, that the pendency of a real action for the freehold of the land, in consequence of previously takingout an original writ, (without which preliminary, even at this day a Fine is a nullity,) should be deemed the *primary* cause of a Fine's binding a feme covert; and that her secret examination on taking the acknowledgement of the Fine, is only a secondary cause of this operation of Fines; See this Dict. title *Baron and Feme* VIII.

If a widow having an estate in dower accept of a Fine, and by the same Fine render back the land for 100 years, *&c. this is a forfeiture of her estate* within the *Stat.* 11 *H.* 7. *c.* 20. See *ante* I. 3.

A. seised in fee levied a Fine to himself for life, remainder to his wife in tail-male for her jointure: had issue male; husband and wife levied a Fine and suffered a recovery.—After the death of the husband and wife issue male entered by force of the *Stat.* 11 *H.* 7. and held lawful. This case is out of the letter, though within the remedy of the statute, for she neither levied the Fine, *&c.* being sole, or with any after-taken husband but by herself with the husband who made the jointure. *Co. Litt.* 365 *b.* See further *Vin. Abr.* Jointress I. K. *Bac Abr.* Discontinuance (D); as to what shall be deemed a forfeiture within the stat. 11 *H.* 7. *c.* 20; and who shall take advantage of it.

If tenant for life grants a greater estate by Fine than for his own life, it is a forfeiture: and if there be *tenant for life*, and *remainder for life*, and the tenant for life levy a Fine to him in remainder and his heirs, both their estates are forfeited; the tenant for life by levying the Fine, and the remainder-man for life by accepting it. 2 *Lev.* 209. Where a Fine is levied by tenant for life, for a greater estate, the Fine may be good; but it is a forfeiture of the estate of tenant for life, whereof he in remainder, *&c.* may take present advantage and enter: and when a person enters for a forfeiture, all estates are avoided. *Dyer* 111. Tho' if such a tenant for life levy a Fine *sur grant et release* to the cognisee for the life of tenant for life; or by a Fine grant a rent out of the land for a longer time, the Fine is good, and there will be no forfeiture of the estate of tenant for life: so likewise if a Fine be levied of lands by tenant for life to a stranger, who thereby acknowledges all his right to be in the tenant for life, and releases to him and his heirs. 27 *Ed.* 1. 1: 44 *Ed.* 3. 36.

If there be tenant in tail upon condition not to alien, or discontinue the lands, *&c.* if he doth, the donor to re-enter; and his issue levy a Fine of the land, this is a forfeiture of the estate. 1 *Leon.* 292. An estate being settled on husband and wife for life, remainder to first and other sons in tail, with remainders over; after the birth of their eldest son, they by release and Fine, mortgaged the lands: on a bill exhibited against the son to redeem, *&c.* he pleaded the marriage settlement of his father and mother, whereby they were but tenants for life, and that his Fine was a forfeiture of their estate; and so it was adjudged. *Preced. Canc.* 591. But it is said where a wife by settlement has only a trust for life, if she joins with her husband in a mortgage in fee and Fine of the lands; this trust is not forfeited, as it would be in case of a legal estate. 1 *P. Wms.* 147.

As to Fines levied by an *infant*, though strictly speaking all contracts made by infants are in their own nature void, *because a contract is an act of the understanding, which during their infancy, they are presumed to want*; yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power to recede from and vacate it when it may prove prejudicial to them; now the method to set aside such a contract must be by matter of equal notoriety with the manner in which it was made; and therefore if an infant levies a Fine, which is no more than his own agreement recorded as the judgment of the court, he must reverse it by writ of error, and this must be brought during his minority, that the court of *B. R.* may by inspection determine the age of the infant; but the judges may in such cases inform themselves by witnesses, church-books, *&c.* 2 *New Abr.* 526: *Co. Litt.* 380 *b*: *Moor* 76: 2 *Rol. Abr.* 15: *Bro.* tit. *Error*: *Bro.* tit. *Fines*, 74, 79: 2 *Inst.* 482: 2 *Bulst.* 320: 12 *Co.* 122. See this Dict. title *Infant* and the stat. 7 *Ann. c.* 19, there cited.

With regard to *idiots* and *lunaticks*, it is necessary to distinguish between their acts done *in pais*, and those solemnly acknowledged on record; though the law is clear, that in neither case are they admitted to disable themselves, for the insecurity that may arise in contracts from counterfeit madness and folly, but their heirs and executors may avoid such acts *in pais* by pleading the disability; because,

becauſe, if they can prove it, it muſt be preſumed real, ſince nobody can be thought to counterfeit it, when he can expect no benefit from it himſelf 4 *Co.* 124: 12 *Co.* 124: *Co. Lit.* 247: *Bro.* tit. *Fait*, 62: *Cro. Eliz.* 398, 622: *F. N. B.* 202.

But neither the lunatick himſelf, nor his heir, can vacate any act of his done in *a court of record*; and therefore if a perſon *non compos* acknowledges a Fine, it ſhall ſtand againſt him and his heirs; for though the judge ought not to admit of a Fine from a man under that diſability, yet when it is once received, it ſhall never be reverſed, becauſe the record and judgment of the court being the higheſt evidence in the law, preſumes the conuſor, at that time, capable of contracting; and therefore the credit of it is not to be conteſted, nor the record avoided by any averment againſt the truth of it. 4 *Co.* 124: 12 *Co.* 124: 2 *Inſt* 483: *Bro.* tit. *Fines*, 75: *Co. Lit.* 247. See this Dict. title *Idiots and Lunaticks.*

By the Common-law if an infant or ideot has by any neglect or contrivance been permitted to levy a Fine, his declaration of the uſes thereof will be good, ſo long as the Fine remains in force; and if the Fine is never reverſed his declaration of the uſes will be binding and concluſive on him and his heirs for ever: becauſe the law will not preſume that a Fine, which is a ſolemn act on record has been levied by a perſon labouring under ſuch diſabilities; and therefore until the Fine which is the principal is annulled, the declaration of the uſes thereof will remain good. Thus ſtands the Common-law on this point; but as the Court of Chancery has, in many inſtances, compelled perſons who had obtained eſtates under a Fine in a fraudulent manner to reconvey them to thoſe who were really entitled thereto; ſo that Court will interpoſe its authority in caſes of this kind, and not ſuffer the declaration of uſes of a Fine levied by an ideot to bar his heirs; as no ſpecies of fraud can be more evident, than that of obtaining a conveyance from a perſon of this diſcription. *Cruiſe c.* 15. and ſee poſt VII.

V. FINES are now levied in the court of *Common Pleas* at *Weſtminſter*, on account of the ſolemnity thereof, ordained by the *Stat.* 18 *Ed.* 1. *ſt.* 4; before which time they were ſometimes levied in the *Exchequer*, in the *County-Courts*, *Courts Baron*, &c. They may be acknowledged before the Lord Chief Juſtice of the *Common Pleas*, as well in, as out of, court; and two of the juſtices of the ſame court, have power to take them in open court: alſo juſtices of aſſiſe may do it by the general words of their patent or commiſſion; but they do not uſually certify them without a ſpecial writ of *dedimus poteſtatem.* 2 *Inſt.* 512: *Dyer* 224. The Chief Juſtice of C. P. may, by the prerogative of his place, take cogniſance of Fines in any place out of the court; and certify the ſame without any writ of *dedimus poteſtatem.* But the Chief Juſtice of *England* cannot, nor any other of the juſtices, except the Chief Juſtice of C. P. who hath this ſpecial authority by cuſtom and not by any ſtatute. 9 *Co. Read.*

The King by patent or commiſſion, with a *non obſtante*, may give power to *A.* and *B.* juſtices of aſſiſe in a circuit, when *A.* is not a judge of either of the benches, only a ſerjeant at law, &c. to take the cogniſance of all Fines jointly and ſeverally; and upon ſuch a commiſſion, the cogniſance of a Fine taken by *A.* will be good, without any *dedimus poteſtatem* ſued out before, or after it. *Jenk. Cent.* 277.

Fines may be, and are levied in the *city* of *Cheſter*, by ſtat. 43 *Eliz. c.* 15.

In the county palatine of *Cheſter*, by *ſtat.* 2 & 3 *E.* 6. *c.* 23.

In the county palatine of *Lancaſter ſtat.* 37 *H.* 8. *c.* 19.

In that of *Durham* by *ſtat.* 5 *Eliz. c.* 27: And in the courts of great ſeſſions in *Wales* by *ſtat.* 34 & 35 *H.* 8. *c.* 26. § 40.

The tenure of *Ancient Demeſne* being a ſpecies of privileged villenage, the tenants thereof could not ſue or be ſued for their lands in the King's courts of Common-law, but had the privilege of having juſtice adminiſtered to them in the court of the manor by *petit writ of droit cloſe* directed to the bailiffs of the King's manors or to the lord of the manor whereof the lands were held. In conſequence of this principle no Fine could be levied by a tenant in ancient demeſne in the court of Common Pleas; but as ſuch tenants were allowed to commence actions in the court of the manor, they were alſo permitted to compound their ſuits; by which means Fines have at all times been levied of lands held in ancient demeſne upon little writs of right cloſe in the court of the manor. Theſe Fines work a diſcontinuance; and the reaſon is becauſe the freehold is recovered in the action; every recoveror being ſuppoſed to recover a fee-ſimple; and the recovery of the fee ſimple muſt work a diſcontinuance. 1 *Cruiſe* 93 *b*: edition 1786.

Fines are alſo taken by commiſſioners in the country, impowered by *dedimus poteſtatem*; the writ of *dedimus* doth ſurmiſe, that the parties who are to acknowledge the Fine are not able to travel to *Weſtminſter* for the doing thereof: theſe commiſſions, general and ſpecial, iſſue out of the Chancery. By the *Common-law* all Fines were levied in court; but the *Stat.* of *Carliſle*, 15 *Ed.* 2, allows the *dedimus poteſtatem* to commiſſioners, who may be puniſhed for abuſes, and the Fines taken before them ſet aſide: and it is ſaid an information may be brought by him in reverſion againſt commiſſioners, who take the caption of a Fine, where a married woman, &c. is an infant. 3 *Lev.* 36.

In the levying of Fines in court, a pleader ſhall ſay *Sir juſtice congé d' accorder*, &c. i. e. he deſires *leave to accord or agree*: and when the ſum for the King's Fine is agreed, after proclamation and crying the peace the pleader ſhall repeat the ſubſtance of the Fine, &c. See *Stat. de Finibus*, 18 *Ed.* 1. *ſt.* 4.

Touching the *form of Fines*, it is to be conſidered upon what writ or action the *concord* is to be made: and there muſt firſt paſs a pair of indentures between the conuſor and conuſee, whereby the conuſor covenants to paſs a Fine to the conuſee of ſuch things, by a time limited; and theſe indentures preceding the Fine, are ſaid to *lead the uſes* of the Fine. But by the *ſtat.* 4 *Ann. c.* 16, the uſes of a Fine, &c. may be declared *after the Fine levied*, and be good in law. Upon this the *writ of covenant* is brought by the conuſee againſt the conuſor, who then yields to paſs the Fine before the judge; and ſo the acknowledgement being recorded, the conuſor and his heirs are preſently concluded, and all perſons (ſtrangers not excepted) after five years paſt; and if the writ, whereon the Fine is grounded, be not a *writ of covenant*, which is uſual, but of *warrantia chartæ*, or a writ of right, or of cuſtoms and ſervices, &c. then the writ is to be ſerved upon the party that is to acknowledge the Fine; and he appearing doth it accordingly. *Weſt.* § 23: *Dyer* 179.

It is the ſtatute *de finibus* 18 *E.* 1. *ſt.* 4, which directs that a *final concord* cannot be levied in the King's court, without original writ. And when a Fine is paſſed, it is to be in the preſence of the parties, who are to be of full age, and good memory; and if a feme covert be one, ſhe is to be privately examined if ſhe conſent freely; for if ſhe doth not, the Fine cannot be levied. By *ſtat.* 1 *R.* 3. *c.* 7, when a Fine is ingroſſed and read and proclaimed in the court of *C. B.* a tranſcript is to be ſent to the juſtices of aſſiſe, and another to the juſtices of the peace of the county where the land lieth, to be openly *proclaimed* at their ſeveral ſeſſions, which being certified, concludes all perſons; but quere whether this is not ſuperſeded by the *Stat.* 4 *H.* 7. *c* 24, which declares that the proclamations in court being made, the Fine ſhall be final? See *ante* I.

The day and year of acknowledging a Fine, and warrant of attorney for the ſuffering a recovery, are to be certified with the concord: and an office is erected for the *inrolment* of writs for Fines, *&c.* the fees whereof are limited and appointed by *ſtat.* 23 *Eliz. c.* 3.

VI. See GENERALLY as to the effect of a Fine *ante* I. 3.—More particularly,

Intereſts in eſtates which may be barred by Fine, are either *intereſts* by *Common-law*, or by *cuſtom*; as copyholds, *&c.* And if I have a fee-ſimple, and am diſſeiſed, and the diſſeiſor levies a Fine with proclamations, and I do not claim within five years after, I and my heirs (allowance being made for impediments) are barred for ever. *Plowd* 353: 3 *Rep.* 79. If a man purchaſe lands of another in fee, and after, finding his title to be bad, and that a ſtranger hath right to the land, levies a Fine thereof with intent to bar him; and he ſuffers five years to paſs without claim, *&c.* he is barred of his right for ever: and in theſe caſes none ſhall be relieved in equity. 3 *Rep.* *Doct. & Stud.* 83. 155.

Femes covert have five years after the death of their huſbands, to avoid the Fine of the huſband of the wife's lands; and alſo to claim their dower; and if they do not make their claim in that time by action or entry, they are barred by ſtatute. *Dyer* 72: 2 *Rep.* 93.

An *infant* ſhall have five years after he comes of age, although he was in his mother's womb at the time of the Fine levied *Plowd.* 359. And an infant is allowed time, during his minority, to reverſe his own fine and prevent the bar; and if not reverſed during that time, their Fines will be good. *Aſſ. pl.* 53.

Strangers out of the realm at the time of the Fine levied, ſhall have five years after their return to prevent the bar; and ſo if they were in *England* when the Fine was levied, and within five years are ſent in the King's ſervice by his commandment *Plowd.* 366. A perſon in *Scotland* or *Ireland* ſhall be ſaid to be *out of* the realm. 4 *H.* 7. *c.* 24.

Lunatics, *&c.* ſhall have five years after the cure of their maladies, though the infirmity happen after the Fine levied, if before the laſt proclamation. *Plowd.* 367: *Dyer* 3.

And they who have *divers defects* have five years after the laſt infirmity removed; but if the impediments are once wholly gone, and afterwards the party relapſes into the like again, the five years ſhall begin immediately after the firſt removal; and if the party dies, his heir ſhall *not* have a new five years. *Plowd.* 375: *Dyer* 233.

If a *feme covert* dies during the coverture, being no party to the Fine, *&c.* or if an *infant* being party to the Fine, and having preſent right, dies in his infancy: if a *perſon beyond ſea* when the Fine was levied, never return *&c.* a *perſon in priſon* dies whilſt therein: or if one *non compos*, *&c.* dies ſuch, in all theſe caſes, their heirs are not limited to any time. 2 *Inſt.* 519, 520. Five years are given after *a remainder* falls; and five years after the *forfeiture* of tenant for life *Plowd.* 374.

A *future intereſt* of another perſon, cannot be barred by Fine and non claim, until five years after it happens; as in caſe of a *remainder* or *reverſion*. 2 *Rep.* 93: *Raym.* 151. And where there is no preſent nor future right in land, *&c.* only *a poſſibility* at the time of levying the Fine, a perſon may enter and claim when he pleaſes. 10 *Rep.* 49. Alſo when there is only *right* to a rent, *&c.* iſſuing out of lands, and not the land in the Fine, the perſons that have it are not barred at all. 5 *Rep.* 124.

No Fine bars any eſtate in *poſſeſſion* or *reverſion*, which is *not devеſted*, or *put to a right*. 9 *Rep.* 106. He that at the time of a Fine levied had not any *title* to enter ſhall not be immediately barred by the Fine: but this is in caſe of *an intereſt* not turned to a *right*, where a man is not bound to claim; and not in the caſe of tenant in tail, barring his iſſue. See *ſtat.* 32 *H.* 8. *c.* 36.

When an eſtate is *put to a right*, and there comes a Fine and non-claim, it is a perpetual bar. *Carter* 82, 162. A Fine, *ſur grant et render* was levied, and a *ſcire facias* brought and judgment given, and alſo writ of ſeiſin awarded, but not executed: and afterwards a ſecond Fine was levied and executed, and five years paſſed; it was the opinion of the court that the ſecond Fine barred the firſt. *March's Rep.* 194: 2 *Nelſ. Abr.* 864.

If a man *attainted of treaſon* or *felony*, levy a *fine* of his land, this, as to the King, and lord of whom the land is held, is *void*, and no bar to their *title of forfeiture*: but as to all others it is a good bar. 2 *Shep. Abr.* 241. One levied a *fine*, and then was *outlawed* for *treaſon* and died; the heir reverſed the outlawry, and it was held the wife ſhould have her dower. if ſhe bring her action within five years. *Moor c.* 876. A Fine is levied by leſſee for life, *&c.* who continues the poſſeſſion, and pays the rent; it ſhall not bind the leſſor, who ſhall have five years claim after the determination of the leſſee's eſtate, *&c.* 3 *Rep.* 77, 78. If one doth levy a Fine of my land, while I am in poſſeſſion, this will not hurt me; nor where a ſtranger levies a Fine of my lands let to a tenant, if the tenant pays me his rent duly: And if there is tenant in tail, or for life, remainder in tail, *&c.* and the firſt tenant in tail or for life, bargains and ſells the land by deed inrolled, and levies a Fine to the bargainee, the remainders are not bound; *for the law adjudges them always in poſſeſſion.* 9 *Rep.* 106.

Leſſees who pretend title to the inheritance of the lands, cannot by Fine bar the inheritance. 3 *Rep.* 77. But if a leaſe is made for years, and the leſſor before entry of the leſſee levies a Fine with proclamations, and the leſſee doth not make his claim within five years, the leſſee is barred, and no relief can be had for him; for though the leſſee for years cannot levy a Fine, yet he ſhall be barred by a Fine levied by the tenant of the land, *&c.* 5 *Rep.* 124. If a perſon hath a remainder depending on an

an eſtate for years, and the termor is diſſeiſed, and a Fine is levied and five years paſs, &c. the termor and reverſioner are barred: becauſe the termor might preſently have entered, and he in remainder had an aſſiſe. *Weſt.* § 183. In caſe a perſon enters upon, and puts out a copyholder, and the diſſeiſor doth levy a Fine of the lands, if the copyholder ſuffer five years to paſs after the diſſeiſin and Fine, without making any claim, the intereſt of the copyholder and his lord are hereby barred for ever: And if a copyholder makes a feoffment in fee upon good conſideration, and the feoffee levies a Fine with proclamations, and five years paſs, the lord is barred; but if a copyholder himſelf levies a Fine, and five years do paſs, the lord is not barred, for the copyholder not having a freehold, the Fine will be be void. *Wood's Inſt.* 247, 248.

A Fine of *ceſtui que truſt* ſhall bar and transfer a truſt, as it would an eſtate at law, if it were on a good conſideration. *Chan. Rep.* 49. And it is ſaid that ſuch a Fine with proclamations and five years non-claim will bar the *remainder* of a *truſt eſtate.* 1 *Vern.* 226. And Fines of *ceſtui que uſe* are as good as if levied of immediate poſſeſſions, &c. 2 *Nelſ. Abr.* 860.

Where the anceſtor is barred by the Fine, there for the moſt part the heir is barred alſo. 9 *Rep.* 105. Although the *iſſue in tail* be within age, out of the realm, &c. when a Fine is had and the proclamations paſſed, the eſtate tail ſhall be barred. 3 *Rep.* 84. The tenant in tail, to him and the heirs male of his body, hath three ſons, the ſecond levies a *Fine* in the life of the father, and the father dies; here the eldeſt is not barred. But if the elder die without iſſue, living the ſecond, it is a bar to the third. *Hob.* 333: *Jenk. Cent.* 96. Tenant in tail diſcontinues: the diſcontinuee levies a Fine with proclamations, and five years paſs without claim in the life of tenant in tail; In this caſe the iſſue may have a *formedon,* and ſhall not be barred; for his father could not claim. It is otherwiſe where he is diſſeiſed, and the diſſeiſor levies ſuch Fine; there the tenant in tail may claim, &c. *Jenk. Cent.* 192.

A tenant for life, and he that is next in remainder in tail join in a Fine; it is a good bar to the iſſue in tail for ever, ſo long as that eſtate-tail ſhall continue. 10 *Rep.* 96.

If one makes his title as heir by another, and not by him that levied the Fine, he is not barred. Alſo *he that is privy in blood only, and not in eſtate, is not within the ſtatutes to be barred* by a Fine: as if lands are given to a man and the heirs female of his body, and he hath a ſon and a daughter, and the ſon levies a Fine, and dies without iſſue, this is no bar to the daughter; for notwithſtanding ſhe be heir to his blood, yet ſhe is not heir to the eſtate, nor need make her conveyance to it by him; but if her father had levied the *Fine,* it would have been otherwiſe. *Trin.* 21 *Jac.* See *Cro. Jac.* 689.

A Fine, &c. cannot deſtroy an *executory* eſtate, which depends upon *contingencies,* as it is uncertain whether there will ever be an eſtate *in being for the Fine to work upon*; but a *Fine and Recovery* will bar an eſtate in *remainder,* as that is an eſtate *veſted.* 1 *Lill. Abr.* 617. See title *Recovery.* Eſtates by ſtatute-merchant, ſtatute-ſtaple, and *elegit,* may be barred, if a Fine is levied, and thoſe that have right ſuffer five years to paſs without claim, &c.

5 *Rep.* 124. If a Fine be levied of lands in ancient demeſne it doth not bar by the ſtatute of non-claim, *Lut.* 781.—See *ante* V.

In the caſe of *Bourne* v. *Hunt,* where tenant in tail of lands in ancient demeſne levied a Fine, in the court of ancient demeſne for three lives with warranty; then levied a ſecond Fine with warranty to the uſe of himſelf and his heirs; and then bargained and ſold to one and his heirs, the following points were determined: 1ſt. That a Fine may be levied in courts of ancient demeſne.—2dly. That ſuch Fines are no bar to the iſſue in tail, but that they work a diſcontinuance: 3dly. That the diſcontinuance determined with the three lives, and that the ſecond Fine made no diſcontinuance. 4thly. That the iſſue in tail have twenty years to make their entry after the expiration of the leaſe for lives.—See 1 *Com. Rep.* 93: (*Roſe's* ed.) *Bro. P. C.*

As *Deans, Biſhops, Parſons,* &c. are prohibited by ſtatute to levy Fines, and may not have a writ of right; they are not barred by five years non-claim, and their non-claim will not prejudice their ſucceſſors. *Plowd.* 238, 375.

By the ancient Common-law, he that had right was to make his claim, &c. *within a year and a day of the Fine levied and the execution thereof,* or he was barred for ever: But this bar is now gone; and if Fine *without proclamations* according to the Common-law be now levied, he that hath right may make his claim or entry, at any time to prevent the bar. *Co. Lit.* 254, 262.

Where a Fine may be a bar as to ſome lands, and not as to other lands, See *F. N. B.* 98. A Fine was levied, and five years paſſed without bringing a writ of error; and it was held a good bar within the *Stat.* 4 *H.* 7. *c.* 14: *Cro. Jac.* 333. But it has been adjudged that where five years paſs, that ſhall not hinder, where the Fine is erroneous. 2 *Nelſ. Abr.* 838.

Although a bill in equity is not ſuch an action as will avoid a Fine, if the ſubject matter of the ſuit be of legal juriſdiction, yet ſtill in ſome inſtances the filing a bill in a Court of equity, will prevent the bar ariſing from a Fine and *non-claim*: and in caſes of this kind the court will direct a trial at law, with an order that the defendant ſhall not ſet up a Fine in bar of the plaintiff's claim: upon the ſame principles that ſuch court ſometimes directs that the defendants in a ſuit at law ſhall not plead the ſtatute of Limitations. 1 *Cruiſe* 329. See *Pincke* v. *Thornycroft,* 1 *Bro. C. R.* 289: *Bro. P. C.*

A. ſeiſed in fee levied a Fine to himſelf for life, remainder to his wife in tail-male for her jointure; had iſſue male; huſband and wife levied a Fine and ſuffered a recovery.—After the death of the huſband and wife iſſue-male entered by force of the *ſtat.* 11 *H.* 7; and held lawful. This caſe is out of the letter, though within the remedy of the ſtatute, for ſhe neither levied the Fine, &c. being ſole, or with any after-taken huſband, but by herſelf with the huſband who made the jointure. *Co. Litt.* 305 *b.*—See further *Vin. Abr. Jointreſs* I. K: *Bac. Abr. Diſcontinuance* (D); as to what ſhall be deemed a forfeiture within the *ſtat.* 11 *H.* 7. *c.* 20; and who ſhall take advantage of it.

VII. FINES MAY BE REVERSED for error, ſo as the writ of error be brought in *twenty years,* &c. and not afterwards

by *Stat.* 10 *and* 11 *W.* 3. *c.* 14. Which 20 years are to be computed from the time of the Fine levied, and not from the time the title accrued. 2 *Stra.* 1257.

No perſon can bring a writ of error to reverſe a Fine, or any judgment, that is *not intitled to the land*, of which the Fine was levied; for the courts of law will not turn out the preſent tenant, unleſs the *demandant* can make out a *clear title, poſſeſſion always carrying with it the preſumption of a good title till the right owner appears*; beſides, where the plaintiff in the writ of error cannot make out a title, he can receive no damage by the Fine, which the writ of error always ſuppoſes to be done, tho' it ſhould be erroneous; and therefore it is no leſs than trifling with the courts of juſtice, to ſeek relief when he cannot make it appear that he has received any injury. 1 *Roll. Abr.* 747: *Dyer* 90: 3 *Lev.* 36.

But if there be ſeveral parties to an erroneous Fine, they ſhall *all join* with the party that is to *enjoy* the land, tho' they themſelves cannot have any thing. 1 *Roll. Abr.* 747: *Dyer* 89.

There muſt be an *actual entry* to avoid a Fine. The delivery of a declaration in ejectment does not amount to an entry ſufficient for this purpoſe; even though the defendant appears to it, and confeſſes leaſe entry and ouſter; for there muſt be an actual entry made *animo clamandi*, whereas in ejectment there is only a fictitious or ſuppoſed entry for the purpoſe of making a demiſe. *Berrington* v. *Parkhurſt*, *Bro. P. C*: 2 *Stra.* 1086. See 1 *Vent.* 42: 3 *Burr.* 1897: *Doug.* 483, 5.—But no entry is neceſſary where the Fine is levied without proclamations; for the *ſtat.* 4 *H.* 7. *c.* 24, does not extend to ſuch a Fine, and it may be avoided at any time within 20 years. 2 *Wilſ.* 45.—The entry, when neceſſary, muſt be made by the perſon who has a right to the lands or by ſome one appointed by him. 1 *Inſt* 258 *a.*

Nothing can be aſſigned for error that contradicts the record; for the records of the courts of juſtice, being things of the greateſt credit, cannot be queſtioned but by matters of equal notoriety with themſelves; wherefore, though the matter aſſigned for error ſhould be proved by witneſſes of the beſt credit, yet the judges would not admit it. 1 *Rol. Abr.* 757.

If there be error in proclamations it ſhall be taken as a good Fine at common law. 3 *Rep.* 86. A Fine may ſtand though the proclamations according to the ſtatute are irregular, for Fines are matters of record and remain in ſubſtance and form as they were before. *Plowd.* 265.

Hence it is, that in a writ of error to reverſe a Fine, the plaintiff cannot aſſign that the conuſor died before the *teſte* of the *dedimus poteſtatem*, becauſe that contradicts the record of the conuzance taken by the commiſſioners, which evidently ſhews, that the conuſor was then alive, becauſe they took his conuſance after they were armed with the commiſſion and the *dedimus* iſſued. *Dyer* 89 *b*: 1 *Rol. Abr.* 757: *Cro. Eliz.* 469.

But the plaintiff in error may ſay, that *after* the *conuſance* taken, and *before* the *certificate* thereof returned, the *conuſor* died; becauſe this is conſiſtent with the record. 1 *Rol. Abr.* 757.

By the chirograph of a Fine the caption appeared to be on the 23d of *December*, whereas in fact the Fine was not acknowledged till the 2d of *March* following, and this was offered to be proved. But the court refuſed to admit the evidence, being of opinion, that no proof of the time of acknowledging a Fine ought to be admitted contrary to, or againſt the chirograph thereof: and that the record which is the chirograph of a Fine, cannot be falſified till it is vacated or reverſed. *Say and Seal Ld.* v. *Lloyd.* 1 *Salk.* 341: 10 *Mod.* 40: *Bro. P. C.*

If there is any difference between the record of the Fine, which remains in the poſſeſſion of the chirographer, deemed the *principale recordum*, and the record which remains with the *cuſtos brevium*, the latter ſhall be amended, and made according to the former. 3 *Leon.* 183.

If a leſſee for years, or a diſſeiſſee, or one that hath right only to a reverſion or remainder, levy a Fine to a ſtranger that hath nothing in the land, this Fine will be void or voidable as to the ſtranger; and he that hath cauſe to except againſt it, may ſhew *that the freehold and ſeiſin was in another at the time of the Fine levied*, and that *partes finis nihil habuerunt tempore levationis finis*, and by this avoid the Fine: and yet a diſſeiſſor, who hath a fee-ſimple by wrong in him, may levy a Fine to a ſtranger that hath nothing in the land, like unto one that is rightfully ſeiſed of land in fee, &c. and it will be a good Fine. *Plowd.* 353: 3 *Rep.* 87. If the *conuſor* of a Fine hath nothing in the land paſſed, at the time of the Fine levied, the Fine may be avoided: But where the *conuſor* or *conuſee* is ſeiſed of an eſtate of freehold, whether by right or by wrong, the Fine will be a good Fine in point of eſtate. 41 *E.* 3. *c.* 14: 22 *H.* 6. *c.* 43.

Fines are not reverſible for raſure, interlineation, miſ-entry, &c. or any want of form; but it is otherwiſe if of ſubſtance. *Stat.* 23 *Eliz. c.* 3. A Fine ſhall not be reverſed for ſmall variance, which will not hurt it; nor is there occaſion for a preciſe form in a render upon a Fine, becauſe it is only an *amicable aſſurance* upon record. 5 *Rep.* 38. If a Fine be levied of lands in a wrong pariſh, though the pariſh in which they lie be not named, it will be a good Fine, and not erroneous, being an amicable aſſurance: and a Fine of a cloſe may be levied by a *lieu conus* in a town, without mentioning the town, vill, &c. *Godb.* 440: *Cro. Jac.* 574: 2 *Mod.* 47. If there be want of an original, or no writs of covenant for lands in every county; or if there is any notorious error, in the ſuing out a Fine, or any fraud or deceit, &c. writ of error may be had to make void the Fine. *Co. Lit.* 9: *Cro. Eliz.* 469. So if either of the parties dies before finiſhed, &c. And if the conuſor of a Fine die before the return of the writ of covenant, (though after the caption of the Fine) it is ſaid it may be reverſed. 3 *Salk.* 168.

If either of the parties conuſors die after the king's ſilver is entered, the Fine ſhall be finiſhed, and be good. *Cro. Eliz.* 469.

If the king's ſilver is not entered before the conuſor's death, the Fine may be reverſed for error. 3 *Mod.* 140. But in 2 *Ld. Raym.* 850, it is ſaid, if a Fine be acknowledged before commiſſioners in the country in the long vacation, and before the next term the conuſor dies; though no writ of covenant was ſued, nor king's ſilver entered; yet the Common Pleas will permit the conuſee to enter the Fine as of Trinity Term preceding. See further *Vin. Abr. Fine. F. b.* 6. In the caſe of *Watts* v. *Birkett*, however, where the conuſor died before the return of the writ of the covenant, the Fine was ſet aſide after it had been completed, becauſe the Poſt Fine or king's ſilver, due at the return of the writ of covenant, *and not before*, became due and was paid after the death of the conuſor. 1 *Wilſ. part.* 1. *p.* 115.

A writ

A writ of error may be brought in *B. R.* to reverſe a Fine levied in *C. B.* and the tranſcript only, not the very record of the Fine, is removed in theſe caſes: But if the court of *B. R.* adjudge it erroneous; then a *certiorari* goes to the chirographer to certify the Fine itſelf, and when it comes up it is cancelled. 1 *Salk.* 341: And where on a writ of error in *B. R.* to reverſe a Fine in *C. B.* the Fine was affirmed; a *writ of error coram vobis reſiden'* hath been allowed to lie. *Ibid.* 357. The court of *B. R.* will not reverſe a Fine without a *ſci. fac.* returned againſt the tertenant, becauſe the cogniſees are but nominal perſons. *Ibid.* 339. Though a Fine may be ſet aſide, by pleading *that neither of the parties had any thing in the eſtate, at the time of levying the Fine*; yet thoſe that are *privy to the perſon* that levied the Fine, are eſtopped to plead this plea. 3 *Rep.* 88. In pleading a Fine or recovery to uſes, the deed need not be ſet forth; but the pleader is to ſay, that the Fine, *&c.* was levied *to ſuch uſes*, and produce the deeds in evidence to prove the uſes. 8 *W.* 3. *B. R.*

Fines may be avoided where they are obtained by fraud, covin, or deceit, though there be no error in the proceſs; and that may be done either by writ of diſceit or averment, ſetting forth the fraud or covin. *Cro. Eliz.* 471.

Thus if a Fine be levied of land in ancient demeſne, the lord ſhall have a writ of diſceit againſt the conuſor and the tenant, and by that avoid the Fine. *F. N. B.* 98 *a. Moor.* 6. See *ante*, V. VI.

If a Fine be levied to ſecret uſes to deceive a purchaſer, and the conuſee pleads the Fine in bar, the purchaſer may aver the fraud in avoidance of the Fine, by 27 *Eliz. cap.* 4; and ſuch averment is not contrary to the record, *becauſe it admits the Fine, but ſets it aſide for the covin and fraud in obtaining it.* 3 *Co.* 8 *a*: *Plowd.* 49 *a.*

So if a Fine be levied upon *an uſurious contract*, it may be avoided by *averment*, becauſe ſuch Fine being levied for ends the law has prohibited, the law will not encourage any evaſion out of the act, nor ſuffer ſuch *uſurious contracts* to be ſupported by the ſolemn acts of the courts of juſtice againſt the intention of the act. 3 *Co.* 80.

A fraudulent obtaining of a Fine, or irregularity therein, cannot be relieved againſt in *Chancery*; but the relief muſt be ſought in the court where the Fine was levied, though the officers may be examined and puniſhed, if they did it *criminaliter*. And where one was perſonated on levying a Fine, it was not ſet aſide in equity, but a reconveyance ordered of the land. *Prec. Ch.* 150, 151. For though the court of Chancery does not ſet aſide a Fine ſo fraudulently obtained, nor ſend the party aggrieved to the court of *C. P.* to get it reverſed, yet it conſiders all thoſe who have taken an eſtate by ſuch a Fine, with notice of the fraud, as truſtees for the perſons who have been defrauded, and decrees a reconveyance of the lands; on the general ground of laying hold of the ill conſcience of the parties to make them do that which is neceſſary for reſtoring matters to their ſituation. 1 *Cruiſe* 314: See *Toth.* 101: 1 *Eq. Ab.* 259: 1 *Vez.* 289: 2 *Vern.* 307.

In ſome caſes the court will vacate a Fine upon motion to prevent the parties the trouble and expence of a writ of error. 3 *Lev.* 36: 2 *Wilſ.* 115. In *Hubert's caſe* (*Cro. Eliz.* 521.) where one levied a Fine in the name of another, not privy nor conſenting thereto, the Fine was declared void by a *vacat* on the roll; and the Lord Keeper in that caſe ſaid he had always noted this difference—If one of my name levy a Fine of my land, I may well confeſs and avoid this Fine by ſhewing the eſpecial matter, for that ſtands well with the Fine. But if a ſtranger who is not of my name levies a Fine of my land in my name, I ſhall not be received to aver, that I did not levy the Fine, but another in my name; for that is merely contrary to the record: and ſo it is of all recognizances and other matters of record; but I conceive when the fraud appears to the court, as here, they may well enter a *vacat* on the roll, and ſo make it no Fine; although the party cannot avoid it by averment during the time that it remains as a record.—The offence of levying a Fine in another's name is puniſhed with death by the *ſtat.* 2 *Jac.* 1. *c.* 26, before mentioned. See *ante* I, 3. *ad fin.* If a Fine be levied by a perſon who got poſſeſſion under a forged deed, equity will decree againſt the Fine. 2 *Atk.* 380.

A record of a Fine may be amended, (if the king's ſilver is paid) for miſpriſion of the clerk. 5 *Rep.* 43.

While the parties are alive, the court will not grant leave for the amendment of a Fine, in the chriſtian name of the plaintiff, for that amounts to making a new Fine. 2 *Blac. Rep.* 816.—Neither while the parties are alive will they permit the Fine to be amended in the term. 2 *Blac. Rep.* 788: 3 *Wilſ.* 249, 250.

Where the deed to lead the uſes is general, and it appears only by affidavit that the intent was to levy the Fine of a greater number of acres than it mentions, the court will not permit an amendment to increaſe the number of acres. 2 *Blac. Rep.* 102-3.

When Fines may be ſet aſide in equity, ſee ante; and 1 *Eq. Ab.* 258: 2 *Eq. Ab.* 474.—When avoided for fraud or aided when defective; *Com. Dig.* Chancery, (3 N): 1 *Veſ.* 289. More fully how Fines may be avoided or reverſed, and by whom; *Com. Dig.* Fine (H); Pleader, (3 B.) 9: *Vin. Abr.* Fine. D. 11: *Bac. Abr.* Fines, 11.

For further matter relative to Fines in general, ſee 3 *Com. Dig.* and *Viner's Abr.* tit. *Fines*: *Sheph. Touchſt. c.* 2: *Cruiſe on Fines*: and this Dict. title *Recovery.*

As to deeds to *lead* or *declare* the uſes of a Fine, *&c.* See this Dict. title *Recovery.*

FINE ADNULLANDO LEVATO DE TENEMENTO QUOD FUIT DE ANTIQUO DOMINICO. A writ directed to the juſtices of *C. B.* for diſannulling a Fine levied of lands in *antient demeſne*, to the prejudice of the lord. *Reg. Orig.* 15. See title *Fine.*

FINES FOR ALIENATIONS; Were Fines paid to the king by his tenant in *chief*, for licence to *alien* their lands according to the *Stat.* 1 *Ed.* 3 *c.* 12; But theſe are taken away by the *Stat.* 12 *Car.* 2. *c.* 24, aboliſhing all tenures but free and common ſocage.

The premiums given on renewal of leaſes, are alſo termed Fines; and there are Fines for alienations of copyholds paid to the Lord. See titles *Leaſe*; *Copyhold.*

FINES, FOR OFFENCES. Fine, in this ſenſe, is amends, pecuniary puniſhment, or recompence for an offence committed againſt the king and his laws, or againſt the lord of a manor: In which caſe a man is ſaid *finem facere de tranſgreſſione cum rege*, &c. *Reg Jud. f.* 25. *a*: *Cowell.*

It ſeems that originally all puniſhments were corporal; but that after the uſe of money, when the profits of the courts aroſe from the money paid out of the civil cauſes, and the Fines and confiſcations in criminal ones, the commutation of puniſhments was allowed of, and the corporal puniſhment which was only in *terrorem*, changed into pecuniary, whereby they found their own advantage.

This begat this diſtinction between the greater and the leſſer offences; for in the *crimina majora* there was at leaſt a Fine to the king, which was levied by a *capiatur*; but upon the leſſer offences there was only an amercement, which was affeered, and for which a *diſtringas*, or action of debt lay. 2 *New Ab.* 502.

The diſcretionary *Fines* (and diſcretionary length of impriſonment) which the courts of juſtice are enabled to impoſe, may ſeem an exception to the general rule, that the puniſhment of every offence is aſcertained by the law. But the *general nature* of the puniſhment, is in theſe, as in other caſes fixed and determinate; though the duration and quantity of each muſt frequently vary, from the aggravations, or otherwiſe, of the offence, the quality and condition of the parties, and from innumerable other circumſtances.

The *quantum* in particular of pecuniary Fines, neither can nor ought to be aſcertained by an invariable law. Our ſtatute law therefore has not often aſcertained the quantity of Fines, nor the common law, ever; it directing certain offences to be puniſhed by Fine in general, without ſpecifying the certain ſum; which is fully ſufficient, when we conſider that however unlimited the power of the Court may ſeem, it is far from being wholly arbitrary; but its diſcretion is regulated by law. For the Bill of Rights *St.* 1 *W. & M. ſt.* 2. *c.* 2, has particularly declared, that exceſſive Fines ought not to be impoſed, nor cruel and unuſual puniſhments inflicted: and the ſame ſtatute further declares, that all grants and promiſes of Fines and forfeitures of particular perſons, before conviction, are illegal and void. Now the bill of Rights was only declaratory of the old conſtitutional law: and accordingly we find it expreſsly holden, long before, that all ſuch previous grants are void; ſince thereby, many times, undue means, and more violent proſecution, would be uſed for private lucre, than the quiet and juſt proceeding of law would permit. 2 *Inſt.* 48.

The reaſonableneſs of Fines in criminal caſes has alſo been uſually regulated by the determination of *Magna Charta c.* 14, concerning amercements for miſbehaviour by the ſuitors in matters of civil right. "*Liber homo non amercietur pro parvo delicto niſi ſecundum modum ipſius delicti, et pro magno delicto, ſecundum magnitudinem delicti; ſalvo contenemento ſuo: et mercator eodem modo, ſalvâ merchandiſâ ſuâ; et villanus eodem modo amercietur, ſalvo wainagio ſuo.*" A rule, that obtained even in *Henry* II's time, (*Glan. l.* 9. *cc.* 8, 11.) and means only, that no man ſhall have a larger amercement impoſed upon him than his circumſtances or perſonal eſtate will bear: ſaving to the landholder his contenement or land; to the trader his merchandize; and to the countryman his wainage or team and inſtruments of huſbandry. In order to aſcertain which, the great charter alſo directs, that the amercement, which is always inflicted in general terms (*ſit in miſericordia*) ſhall be ſet, *ponatur*, or reduced to a certainty by the oath of good and lawful men of the neighbourhood. Which method, of liquidating the amercement to a preciſe ſum, was uſually performed in the ſuperior courts by the aſſeſſment or *affeerment* of the coroner, a ſworn officer choſen by the neighbourhood, under the equity of the *ſtat. Weſt.* 1. *c.* 18, and then the judges eſtreated them into the Exchequer. *F. N. B.* 76. But in the court-leet and court-baron it is ſtill performed by *affeerors* or ſuitors ſworn to *affeere*, that is, tax and moderate the *general* amercement according to the particular circumſtances of the offence and the offender: the affeeror's oath is conceived in the very terms of *Magna Charta. Fitzh. Surv. c* 11. Amercements impoſed by the ſuperior courts on their own officers and miniſters were affeered by the judges themſelves; but when a pecuniary mulct was inflicted by them on a ſtranger (not being party to any ſuit) it was then denominated a Fine. 8 *Rep.* 40. And the antient practice was, when any ſuch Fine was impoſed, to inquire by a jury *quantum inde regi dare valeat per annum, ſalva ſuſtentatione ſua et uxoris, et liberorum ſuorum. Gilb. Exch. c.* 5. And ſince the diſuſe of ſuch inqueſt it is never uſual to aſſeſs a larger Fine than a man is able to pay, without touching the implements of his livelyhood; but to inflict corporal puniſhment, or a limited impriſonment, inſtead of ſuch Fine as might amount to impriſonment for life. And this is the reaſon why Fines in the King's court are frequently denominated Ranſoms, becauſe the penalty muſt otherwiſe fall upon a man's perſon unleſs it be redeemed or ranſomed by a pecuniary Fine. *Mirr. c.* 5. § 3: *Lamb. Eir.* 575.—According to an antient maxim, *qui non habet in crumenâ luat in corpore.* Yet where any ſtatute ſpeaks both of Fine and ranſom, it is holden that the ranſom ſhall be treble to the Fine at leaſt. *Dyer* 232.—See 4 *Comm.* 378—380.

I. *Who may fine and amerce, and for what.*
II. *How Fines, &c. may be mitigated and aggravated; as alſo how they may be recovered, and to whom they are payable.*

I. Where a ſtatue impoſes a Fine at the will and pleaſure of the king, that is intended of his judges, who are to impoſe the Fine. 4 *Inſt.* 71. Courts of record only can *fine* and *impriſon* a perſon, (except as aftermentioned). And ſuch a court may fine for an offence committed in court in their view, or by confeſſion of the party recorded in court. 1 *Lill. Ab.* 621. A man ſhall be fined and impriſoned for all contempts done to any court of record, againſt the commandment of the king's writ, *&c.* 9 *Rep.* 60.

If a perſon is arreſted coming to the courts of juſtice to anſwer a writ, the offender doing it ſhall be fined for the contempt: But there has been a difference made where it is done by the plaintiff in the writ, and a ſtranger, who it is ſaid ſhall not be fined. 9 *H.* 6. *c.* 55: 1 *Danv.* 469.

If an officer of the court neglects his duty, and gives not due attendance; a clerk of the peace doth not draw an indictment well in matter of form, or return thereof, upon a *certiorari* to remove the indictment in *B. R*; if a ſheriff, *&c.* make an inſufficient return of a *habeas corpus* iſſuing out of *B. R. &c.* or if juſtices of the peace proceed on an indictment after a *certiorari* iſſued to remove the indictment; the court may fine them. 1 *Lil.* 620. When a juror at the bar will not be ſworn, he may be fined. 7 *H.* 6. *c.* 12. And if one of the jury depart without giving his verdict; or any of the jury give their verdict to the court before they are all agreed, they may be fined. 8 *Rep.* 38: 40 *Aſſ.* 10.

Alſo the ſheriff in his torn, and the ſteward of a court-leet, have a diſcretionary power, either to award a Fine, or amercement for contempt to the court; as for a ſuitor's refuſing to be ſworn, *&c.* and the ſteward of a court-leet

may

may either amerce or fine an offender, upon a preſentment &c. for an offence not capital, within his juriſdiction. *Keilw.* 66: *Kitchin* 43, 51.

It is ſaid, that ſome courts may impriſon, but not fine, as the conſtables at the petit ſeſſions. 11 *Co.* 44: 1 *Rol. Rep.* 74: 11 *Co.* 43 *b.* Alſo ſome courts cannot fine or impriſon, but amerce, as the county, hundred, &c. 11 *Co.* 43 *b.* But ſome courts can neither fine, impriſon, nor amerce; as eccleſiaſtical courts held before the Ordinary, archdeacon, &c. or their commiſſaries, and ſuch who proceed according to the *Canon*, or *Civil Law.* 11 *Co.* 44 *a.*

Every *court of record* may enjoin the people to keep ſilence under a pain; and impoſe reaſonable Fines, not only on ſuch as ſhall be convicted before them of any crime, on a formal proſecution, but alſo on all ſuch as ſhall be guilty of any contempt in the face of the court; as by giving opprobrious language to the judge, or obſtinately refuſing to do their duty as officers of the court. 11 *H.* 6. 12 *b*: 1 *Rol. Abr.* 219: 8 *Co.* 38: 11 *Co.* 43: *Cro. Eliz.* 581: 1 *Sid.* 145.

If a dead body in priſon, or other place whereon an inqueſt ought to be taken. be interred, or ſuffered to lie ſo long, that it putrify, before the coroner hath viewed it, the gaoler, or townſhip ſhall be amerced. 1 *Keb.* 278: 2 *Hawk P. C* If any homicide be committed, or dangerous wound given, whether with or without malice, or even by miſadventure, or in 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: 4 *Inſt.* 183: *Cro. Car.* 252: 3 *Leon.* 207: 2 *Inſt.* 315: *Dyer* 210.

Beſides Fines impoſed for offences, it ſeems, that regularly there was a Fine or amercement in all actions; for if the plaintiff or demandant did not prevail, it was thought reaſonable that he ſhould be puniſhed for his unjuſt vexation; and therefore there was judgment againſt him, *quod ſit in miſericordia pro falſo clamore.* 8 *Co.* 39: *F. N. B.* 75.

Hence when the plaintiff takes out a writ, the ſheriff, before the return of it, was formerly obliged to take pledges of proſecution, which, when Fines and amercements were conſiderable, were real and reſponſible perſons, and anſwerable for thoſe amercements; but being now ſo very inconſiderable, that they are never levied, they are only formal pledges entered, *viz. John Doe* and *Richard Roe.* 1 *Saund.* 227. See this Dict. tit. *Bail.*

In all actions, where the judgment is againſt the defendant, it was to be entered with a *miſericordia*, or a *capiatur*; and herein the difference is, that if it be an action of debt, or founded on a contract, the entry is *ideo in miſericordia*, without aſſeſſing any ſum in certain, which was afterwards aſſeered by the coroners in the proper county; but if it were in action of treſpaſs, the court ſet the Fine, and levied it by a *capiatur.* 8 *Co.* 60: 1 *Rol. Abr.* 212, 219: *Cro. Eliz.* 844: *Cro. Jac.* 255: Therefore,

In actions *quare vi et armis*, as treſpaſs, and the like; if judgment paſs againſt the defendant in a court of record, he ſhall be fined. 8 *Rep.* 59. But in actions which have not ſomething of force, or fraud, or deceit to the court; if the defendant come the firſt day he is called, and tender the thing demanded to the plaintiff, he is not to be fined. 4 *Rep.* 49: 8 *Rep.* 59, 60, 99: 3 *Aſſ.* 9: 22 *Aſſ.* 82: 1 *Danv. Abr.* 471: 1 *Vent.* 116.

All *capiatur Fines* are taken away by *Stat.* 4 & 5 *W. & M. c.* 12. See title *Capias pro Fine.*

II. A Fine may be mitigated the ſame term it was ſet, being under the power of the court during that time; but not afterwards. *T. Raym.* 376. And Fines aſſeſſed in court by judgment upon an information, cannot be afterwards mitigated. *Cro. Car.* 251. If a Fine certain is impoſed by ſtatute on any conviction, the court cannot mitigate it; but if the party comes in before conviction, and ſubmits to the court, they may aſſeſs a leſs Fine; for he is not convicted, and perhaps never might. The court of *Exchequer* may mitigate a Fine certain, becauſe it is a court of equity, and they have a privy ſeal for it. 3 *Salk.* 33.

If an exceſſive Fine is impoſed at the ſeſſions, it may be mitigated at the King's Bench 1 *Vent.* 336. A defendant being indicted for an aſſault, confeſſed it, and ſubmitted to a ſmall Fine; and it was adjudged that in ſuch a caſe he may produce affidavits to prove on the proſecutor, that it was *ſon aſſault*, and that in mitigation of the Fine; though this cannot be done after he is found Guilty. 1 *Salk.* 55. If a perſon is found Guilty of a miſdemeanor upon indictment, and fined, he cannot move to mitigate the Fine, unleſs he appear in perſon; but one abſent may ſubmit to a Fine, if the clerk in court will undertake to pay it. 1 *Vent.* 209, 207: 1 *Salk.* 55: 2 *Hawk.* 446.

It is a common practice in the court of *B. R.* to give a defendant leave to ſpeak with the proſecutor, *i. e.* to make ſatisfaction for the coſts of the proſecution, and alſo for damages ſuſtained, that there may be an end of ſuits; the court at the ſame time ſhewing, on that account, an inclination to ſet a moderate Fine on behalf of the King. *Wood's Inſt.* 653. And in caſes where coſts are not given by law, after a proſecutor has accepted coſts from the defendant, he cannot aggravate the Fine; becauſe having no right to demand coſts, if he takes them, it ſhall be intended by way of ſatisfaction of the wrong. 2 *H. P. C.* 292. See this Dict. title *Coſts.*

All Fines belong to the King, and the reaſon is, *becauſe the courts of juſtice are ſupported at his charge*; and wherever the law puts the King to any charge for the ſupport and protection of his people, it provides money for that purpoſe. *Bract.* 129. When a perſon is fined to the King, notwithſtanding the body remains in priſon, it is ſaid the King ſhall be ſatisfied the Fine out of the offender's eſtate. 4 *Leon. c.* 393.

By the Common-law, the King, or Lord may, at their election, diſtrain, or bring an action of debt for a Fine or amercement. *Cro. Eliz.* 581: *Savil* 93: *Raſt. Ent.* 151, 553, 606: 2 *H.* 4. 24 *b*: 10 *H* 6. 7: *Raym.* 68. But with reſpect to Fines, ſet in inferior courts, every avowry, or declaration of this kind ought expreſly to ſhew, that the offence was committed within the juriſdiction of the court, for if it were not, all the proceedings were *coram non judice*, and a court ſhall not be preſumed to have juriſdiction where it doth not appear to have one. *Hob.* 129: *Raſt. Ent.* 553: *Co. Ent.* 572. Alſo it is adviſable to allege, that the offence was committed, as well as preſented, and to ſhew the names of the preſentors and the aſſeerors in ſetting forth a preſentment

or

or affeerment, and alſo to ſhew that proper notice was given of holding the court. But for this, See *Hawk. P. C.*

Of common right, a diſtreſs is incident to every Fine and amercement, in a torn or leet, for offences within the juriſdiction thereof; but if the offence were only the neglect of a duty created by cuſtom, and of a private nature, it is clear, that *there muſt be a cuſtom to warrant a diſtreſs*, and perhaps ſuch cuſtom is alſo neceſſary, though the duty be of a public nature. 2 *Hawk. P. C.*

Alſo the Sheriff, or Lord may for ſuch Fines or amercements diſtrain the goods of the offender even in the highway, or in land not holden of the lord, unleſs ſuch land be in the poſſeſſion of the crown. 1 *Rol. Abr.* 670: 2 *Inſt.* 104. But ſuch Fines and amercements being for a perſonal offence, no ſtranger's beaſts can lawfully be diſtrained for them, though they have been levant and couchant upon the lands of the offender. *Owen* 146: *Noy* 20.

A joint award of one Fine againſt divers perſons is erroneous; it ought to be ſeveral againſt each defendant, for otherwiſe one who hath paid his part might be continued in priſon till the others have paid theirs, which would be in effect to puniſh for the offence of another. 2 *Hawk. P. C.* Fines to the King are *eſtreated* into the *Exchequer*.

FINES TO THE KING; *Fines le Roy.*] Under this head are included Fines for *original writs*. On originals on treſpaſs on the caſe, where the damages are laid above 40*l.* a Fine is paid, *viz.* from 40*l.* damages to 100 marks, (66*l.* 13*s.* 4*d.*) 6*s.* 8*d.* From 100 marks to 100*l.* the Fine is 10*s.* From 100*l.* to 200 marks, 13*s.* 4*d.* From 200 to 250 marks, 16*s.* 8*d.* From 250 to 300 marks or 200*l.* it is 1*l.* Fine; and ſo for every 100 marks more, you pay 6*s.* 8*d.* and every 100*l* further 10*s.* Every 100*l.* pays 10*s.* Fine. *R. H.* 6. *W. & M.* Fines are alſo paid for original writs in *debt*; for every writ of 40*l.* debt, 6*s.* 8*d.* and if it be of 100 marks, but 6*s.* 8*d* and for every 100 marks 6*s.* 8*d.* &c. alſo for every writ of *plea of land*, if it be not a writ of right patent, which is for the yearly value of 5 marks, 6*s.* 8*d.* and ſo according to that rate. 19 *H.* 6. 44: 7 *H.* 6. 33: *New Nat. Br.* 212. See title *Fines of Lands*.

FINE NON CAPIENDO PRO PULCHRE PLACITANDO. A writ to inhibit *officers* of courts to take Fines for fair *pleading*. *Reg. Orig.* 179

FINE CAPIENDO PRO TERRIS, &c. A writ lying where a perſon upon conviction of any offence by jury, hath his *lands and goods* taken into the King's hand, and his body is committed to priſon; to be remitted his impriſonment, and have his lands and goods redelivered him, on obtaining favour for a ſum of money, &c. *Reg. Orig. fol.* 142.

FINE PRO REDISEISINA CAPIENDA, A writ that lies for the releaſe of one impriſoned for a *diſſeiſin*, on payment of a reaſonable Fine. *Reg. Orig.* 222.

FINE FORCE, Is where a perſon is *forced* to do that which he can no ways help; ſo that it ſeems to ſignify an abſolute neceſſity or conſtraint not avoidable. *Old Nat. Br.* 68: *Stat.* 35 *H.* 8 *c.* 12.

FINIRE, To fine, or pay a Fine upon compoſition, and making ſatisfaction, &c. The ſame with *fi em facere*, mentioned in *Leg. H.* 1. *c.* 53. And in *Brompton, p.* 1105. and in *Hoveden, p.* 783.

FINITIO, Death, ſo called; becauſe *vita finitur mortu*. *Blount*.

FINORS OF GOLD AND SILVER, Are thoſe perſons who purify and ſeparate gold and ſilver from coarſer metals, by fire and water. They are not to allay it; or ſell the ſame, ſave only to the maſter of the mint, goldſmiths, &c. *ſtat.* 4 *H.* 7. *c.* 2.

FIRDFARE AND FIRDWITE; See *Ferdfare* and *Ferdwit*.

FIRDERINGA, A preparation to go into the army. *Leg. H.* 1.

FIRE and FIRE-COCKS. By *ſtat.* 14 *Geo.* 3. *c.* 78, (the laſt building act,) Churchwardens in *London* and within the bills of mortality, are to fix *fire cocks*, &c. at proper diſtances in ſtreets, and keep a large engine and hand engine for extinguiſhing fire, under the penalty of 10*l.* § 75. And to prevent fires, workmen in the city of *London*, &c. muſt erect party-walls between buildings of brick or ſtone, of a certain thickneſs, &c. under penalties, inflicted by various ſections of the act. On the breaking out of any fire, all the conſtables and beadles ſhall repair to the place with their ſtaves, and be aſſiſting in putting out the ſame, and cauſing people to work, § 85. No action ſhall be had againſt any perſon in whoſe houſe or chamber a fire ſhall accidentally begin. § 86. See this Dict. title *Waſte*, and alſo *ſtat.* 6 *Ann. c.* 31, now ſaid to be made perpetual. 1 *Inſt.* 530. *in n.* 7.

By the ſaid *ſtat.* 14 *Geo.* 3. *c.* 78, Rewards for aſſiſtance are payable to the firſt turncock 10*s.*—To the firſt engine *not exceeding* 30*s.*—The ſecond not exceeding 20*s.*—The third 10*s.*—To be paid by the churchwardens or overſeers, but not without the approbation of an alderman or juſtice of the peace.—The churchwardens, &c. to be repaid by the inhabitant if the fire begins in a chimney. §§ 76, 77, 78—Inſurance offices may lay out the inſurance in rebuilding the premiſes, if the party ſuffering does not give ſecurity to do ſo: or in caſe of diſagreement, not ſettled within 60 days. § 83.

Firemen exempt from being impreſſed § 82.—Penalty on ſervants firing houſes by negligence, 100*l.* or 18 months impriſonment § 84. Reſtrictions on boiling turpentine, 25 *Geo.* 3. *c.* 77. See this Dict. tit. *Arſon*; *Burning*; *Arſon*.

FIREBARE, Sax.] A *beacon* or high tower by the ſea ſide, wherein are continual lights, either to direct ſailors in the night, or to give warning of the approach of an enemy. See title *Beacon*.

FIREBOTE, Fuel for *firing* for neceſſary uſe, allowed by law, to tenants out of the lands, &c. granted them. See *Eſtovers*.

FIRE-ORDEAL, See title *Ordeal*.

FIRE-WORKS. No perſon whatſoever ſhall make, ſell, &c. ſquibbs, rockets, ſerpents, &c. or caſes, moulds, &c. for making ſuch ſquibbs, and every ſuch offence ſhall be adjudged *a common nuſance*, and perſons making or ſelling ſquibbs ſhall forfeit 5*l.*

Perſons throwing or firing ſquibbs, &c. or ſuffering them, &c. to be thrown or fired from their houſes incur a penalty of 20*s.* Likewiſe perſons throwing, caſting or firing, or aiding or aſſiſting in the throwing, caſting or firing of any ſquibbs, rockets, ſerpents, or other fire-works, in or into any public ſtreet, houſe, ſhop, river, highway, road or paſſage, incur the like penalty of 20*s.* and on non-payment may be committed to the houſe of correction. *Stat.* 9 & 10 *W.* 3. *c.* 7.

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This ſtatute does not take from any perſon injured, by throwing of ſquibbs, &c. the remedy at Common-law; for the party may maintain a ſpecial action on the caſe or treſpaſs, &c. for recovery of full damages.

FIRMA, Victuals or proviſions; alſo rent, &c. See title *Farm*.

FIRMA ALBA, Rent of lands let to farm, paid in ſilver, not in proviſion for the lord's houſe. See *Alba Firma*.

FIRMA NOCTIS, A cuſtom or tribute anciently paid towards the entertainment of the King for one night, according to *Domeſday*.—*Comes Meriton* T. R. E. *reddebat* firmam *unius* noctis, &c. i. e. proviſion or entertainment for one night, or the value of it. *Temp. Reg. Edw. Confeſſ.*

FIRMAM REGIS, Anciently *pro* villâ regia, *ſeu* regis manerio. *Spelm.*

FIRMATIO, *Firmationis Tempus*. *Doe* ſeaſon, as oppoſed to *buck* ſeaſon. 31 *H.* 3. *Firmatio* ſignifies alſo a ſupplying with food. *Leg. Inæ, cap.* 34.

FIRMURA, *Free firmage*, *W. de Creſſi* gave to the monks of *Blyth*, a mill, *cum liberâ firmurâ* of the dam of it. *Reg. de Blyth*. This has been interpreted liberty to ſcour and repair the mill dam, and carry away the ſoil, &c. *Blount*.

FIRST-FRUITS, *Primitiæ*.] The profits after avoidance, of every ſpiritual living for the firſt year, according to the valuation thereof in the King's books. Theſe were given in ancient times to the *Pope* throughout all chriſtendom; and were firſt claimed by him in *England* of ſuch foreigners as he beſtowed benefices on here by way of proviſion; afterwards they were demanded of the clerks of all ſpiritual patrons, and at length of all other clerks on their admiſſion to benefices: but upon the throwing off the *Pope*'s ſupremacy in the reign of *Hen.* VIII. they were tranſlated to, and veſted in, the King; as appears by the *Stat.* 26 *H.* 8. *c.* 3; and a new *valor beneficiorum*, was then made by which the clergy are at preſent rated. This *valor beneficiorum* is what is commonly called, The King's books: a tranſcript of which is given in *Ecton's Theſaurus* and *Bacon's Liber Regis*. And for the ordering thereof, there was a court erected, 32 *H.* 8, but diſſolved ſoon after.

Though by *Stat.* 1 *Eliz. c.* 4, theſe profits are reduced again to the crown, yet the court was never reſtored; for all matters formerly handled therein, were transferred to the *Exchequer*, within the ſurvey of which court they now remain.

By *Stat.* 26 *H* 8, the Lord Chancellor, Biſhops, &c. are impowered to examine into the value of every eccleſiaſtical benefice and preferment in their ſeveral dioceſes; and clergymen entered on their livings before the *Firſt fruits* are paid or compounded for, are to forfeit double value. But *Stat.* 1 *Eliz. c.* 4, ordains, that if an incumbent on a benefice do not live half a year, or is ouſted before the year expire, his executors are to pay only a fourth part of the *Firſt fruits*; and if he lives the year, and then dies, or be ouſted in ſix months after, but half the Firſt fruits ſhall be paid; if a year and a half, three quarters of them; and if two years then the whole; not otherwiſe. The archbiſhops and biſhops have four years allowed for the payment, and ſhall pay one quarter every year, if they live ſo long upon the biſhoprick: other Dignitaries in the church pay theirs in the ſame manner as rectors and vicars. By the *Stat.* 27 *H.* 8. *c.* 8, no tenths are to be paid for the firſt year, as then the *Firſt-fruits* are due, and by ſeveral ſtatutes of *Anne*, if a benefice be under 50 *l. per annum* clear yearly value, it ſhall be diſcharged of the payment of *Firſt-fruits* and tenths.

This Queen alſo reſtored to the church what had at firſt been thus indirectly taken from it, not by remitting the tenths and *Firſt-fruits* entirely, but by applying theſe ſuperfluities of the larger benefices to make up the deficiencies of the ſmaller; for this purpoſe ſhe granted a charter, confirmed by *Stat.* 2 *Ann. c.* 11, whereby all the revenue of the *Firſt-fruits* and tenths is veſted in truſtees for ever, to form a perpetual fund for the augmentation of poor livings, under 50 *l.* a year. This is uſually called *Queen Anne's bounty*, which has been ſtill further regulated by ſubſequent ſtatutes; though it is to be lamented that the number of ſuch poor livings is ſo great, that this bounty, extenſive as it is, will be ſlow, and almoſt imperceptible in its operation; the number of livings under 50 *l.* certified by the biſhops at the commencement of the undertaking being 5597; the revenues of which, on a general average, did not exceed 23 *l. per ann.* See 1 *Comm.* 285, 6. *cum notis ib.*

FISH, FISHERIES AND FISHING.

MANY acts of parliament have been made to regulate domeſtic and foreign fiſheries, and the ſale of fiſh.—The following is a very general abridgment of them.

By *Stat.* 1 *Eliz. c.* 17, (made perpetual by *St.* 3 *Car.* 1. *c.* 4,) No fiſherman ſhall uſe any net or engine, to deſtroy the fry of fiſh: and perſons uſing nets for that purpoſe, or taking ſalmon or trout out of ſeaſon, or any fiſh under certain lengths, are liable to forfeit 20*s.* and juſtices of peace, and the lords of leets have power to put the acts in force. By *Stat.* 2 *H.* 6. *c.* 15, No perſon may faſten nets, &c. acroſs rivers to deſtroy fiſh, and diſturb paſſage of veſſels, on pain of 5 *l.*—By *Stat.* 31 *H.* 8. *c.* 2, None ſhall fiſh in any pond or mote, &c. without the owner's licence, on pain of three months impriſonment. Under *Stats.* 22 & 23 *Car.* II. *c.* 25, and 4 *W.* & *M. c.* 23, No perſon ſhall take any fiſh in any river, without the conſent of the owner, under the penalty of 10*s.* for the uſe of the poor, and treble damage to the party grieved, leviable by diſtreſs of goods; and for want of diſtreſs, the offender is to be committed to the houſe of correction for a month: alſo nets, angles, &c. of poachers may be ſeized, by the owners of rivers, or by any perſons by warrant from a juſtice of peace, &c. See tit. *Game*; and *poſt*, *Fiſhing*, *right of*.

By *St.* 5 *Geo.* 3. *c.* 14, Perſons ſtealing or deſtroying fiſh in fiſh-ponds, or receiving ſtolen fiſh, are to be *tranſported* for *ſeven years*. See tit. *Black Act*.—And a forfeiture of 5 *l.* to the owner of the fiſhery, is made payable by perſons taking or deſtroying (or *attempting* ſo to do) any fiſh in any river or other water within any incloſed ground being private property.

The *Stat.* 4 & 5 *Ann. c.* 21, was made for the increaſe and preſervation of ſalmon in rivers in the counties of *Southampton* and *Wilts*; requiring that no ſalmon be taken between the 1ſt of *Auguſt* and 12th of *November*, or under ſize, &c. And by *Stat.* 1 *Geo* 1. *c.* 18, altered as to the river *Ribble*, by *Stat.* 23 *Geo.* 2. *c.* 26, Salmon taken in the rivers *Severn*, *Dee*, *Wye*, *Ware*, *Ouſe*, &c. are to be 18 inches long at leaſt: or the perſons catching them ſhall forfeit 5 *l.*; and ſea fiſh long muſt be of the length

length following, *viz.* Bret and turbot 16 inches, brill and pearl 14, codlin, baſs and mallet 12, ſole and place 8, flounders 7, whiting 6 inches long, &c. on pain of forfeiting 20*s.* to the poor, and the fiſh. By *Stat.* 9 *Geo.* 2. *c.* 33, Perſons that import any fiſh, contrary to the 1 *Geo.* 1. *c.* 18, for better preventing *freſh* fiſh taken by *foreigners* being imported into this kingdom, &c. ſhall forfeit 100*l.* to be recovered in the courts at *Weſtminſter*, one moiety to informers, and the other to the poor; and maſters of ſmacks, hoys, boats, &c. in which the fiſh ſhall be imported, or brought on ſhore, forfeit 50*l.*

Beſides the above, thus particularized, the following ſtatutes relate to the ſame ſubject.—*Weſtm.* 2. (13 *E.* 1.) *c.* 47, and 13 *R.* 2. *c.* 19, as to *Salmon* and their fence months.—31 *E.* 3. *ſt.* 2. *c.* 1. and 35 *E.* 3. (*Ordin. of Herrings*) as to foreſtalling *Herrings*.—31 *E.* 3. *ſt.* 2. *c.* 2, ſelling of herrings at *Yarmouth*.—*Id. c.* 3. as to *Stock fiſh* and *Salmon*.—17 *R.* 2. *c.* 9, appoints juſtices to be conſervators of rivers.—14 *H.* 6. *c.* 6, as to foreigners ſelling fiſh. —22 *E.* 4 *c.* 2: 11 *H.* 7. *c.* 23, as to *pickled* ſalmon and herrings.—2 & 3 *E.* 6. *c.* 6, forbids the granting licences to fiſh in foreign parts.—5 *Eliz. c.* 5, as to toll of fiſh.—39 *Eliz. c.* 10, (continued by 3 *Car.* 1. *c.* 4, and 16 *Car.* 1. *c.* 4, though repealed by 43 *Eliz. c.* 9,) as to aliens fiſhing. —1 *Jac.* 1. *c.* 23, as to treſpaſs by herring fiſhers.—3 *Jac. c.* 12, wears—13 & 14 *Car.* 2. *c.* 28, as to *pilchard* fiſhery. —15 *Car.* 2. *c.* 16,—Packing herrings.—*Newfoundland* fiſhery.—30 *Car.* 2. *c.* 9, *Severn* fiſhery.—4 *Ann. c.* 15, *Stower* fiſhery.—2 *Geo.* 2. *c.* 19, *Oyſter* fiſhery in *Medway* (and ſee tit. *Oyſters.*)—9 *Geo.* 2. *c.* 33, *Lobſter* fiſhery on the coaſt of *Scotland*.—11 *Geo.* 3. *c.* 27: 15 *Geo.* 3. *c.* 43, *Salmon* fiſhery in the *Tweed*.—16 *Geo.* 3. *c.* 36, *Cornwall* pilchard fiſhery, and ſee alſo *Stat.* 31 *Geo.* 3. *c.* 45.

Various ſtatutes have been made as to the particular ſupply and ſale of fiſh in *London* and *Weſtminſter*, *viz.*

Stat. 17 *R.* 2. *c.* 9, Appoints the Mayor of *London* conſervator of the *Thames*—*Stats.* 10 & 11 *W.* 3. *c.* 4: 9 *An. c.* 26: 3 *Geo.* 2. *c.* 27, and 2 *Geo.* 3. *c.* 15; for regulating *Billingſgate* market; The Water bailiff's duty; and the Fiſhmongers' Company.—A long and particular *Stat.* 22 *Geo.* 2. *c.* 49, to eſtabliſh an open fiſh-market in *Weſtminſter* has not, it is believed, been ever put in force.—*Stat.* 30 *Geo.* 2. *c.* 21, regulates the fiſhery in the *Thames* and *Medway*, and *Stat.* 24 *Geo.* 2. *c.* 44, was paſſed to protect officers in their duty, under the ſeveral ſtatutes againſt foreſtallers of fiſh, &c.—Finally the *Stats.* 29 *Geo.* 2. *c.* 39, and 33 *Geo.* 2. *c.* 27, were made to regulate the ſale of fiſh at the firſt hand in the fiſh-markets in *London* and *Weſtminſter*; and to prevent ſaleſmen of fiſh buying fiſh to ſell again on their own account; and to allow bret and turbot, brill, and pearl, although under the reſpective dimenſions mentioned in 1 *Geo.* 1. *c.* 18, to be imported and ſold: and to puniſh perſons who ſhall take or ſell any ſpawn, brood, or fry of fiſh, unſizable fiſh, or fiſh out of ſeaſon, or ſmelts under the ſize of five inches.

By this latter act every maſter of a veſſel is to give a true account of the ſeveral ſorts of fiſh brought alive to the *Nore* in his veſſel, and if after ſuch arrival, he ſhall wilfully deſtroy or throw away any of the ſaid fiſh, not being unwholeſome or unmarketable, &c. he is liable to be committed to the houſe of correction, and kept to hard labour for any time not exceeding two months nor leſs than one. And ſee farther *Stat.* 2 *Geo.* 3. *c.* 15. for the better ſupplying the cities of *London* and *Weſtminſter* with fiſh, by means of fiſh machines, and to reduce the exorbitant price thereof; and to protect and encourage Fiſhermen.

For ſo much concerning the ſeveral national fiſheries as relate to the commerce and navigation of the country, See title *Navigation-Acts* V.

The *Newfoundland* Fiſheries are at preſent regulated under *Stats.* 10 & 11 *W.* 3. *c.* 24, 25: 15 *Geo.* 3. *c.* 31: 26 *Geo.* 3. *c.* 26: 28 *Geo.* 3. *c.* 35: 29 *Geo.* 3. *c.* 53.

Greenland Fiſhery. 4 & 5 *W.* & *M. c.* 17; 1 *An. ſt.* 1. *c.* 16: 26 *Geo.* 3. *c.* 41: 29 *Geo* 3. *c.* 53.—the two latter continued by 31 *Geo.* 3. *c.* 43. and 32 *Geo.* 3. *c.* 22.

Southern Whale Fiſhery. 20 *Geo.* 3. *c.* 50: 28 *Geo.* 3. *c.* 20; 29 *Geo.* 3. *c.* 53.

Britiſh Herring Fiſhery. 26 *Geo.* 3. *c.* 81: 27 *Geo.* 3. *c.* 10.

Scotch Fiſheries. 13 *Geo.* 1. *c.* 30: 29 *Geo.* 2. *c.* 23: 26 *Geo.* 3. *c.* 106.

FISHING, RIGHT OF, AND PROPERTY OF FISH. It has been held, that where the lord of the manor hath the ſoil on both ſides the river, it is a good evidence that he hath the *right* of fiſhing, and it puts the proof upon him who claims a free fiſhery; but where a river ebbs and flows, and is an arm of the ſea, there it is *common to all*, and he who claims a privilege to himſelf muſt prove it; for if treſpaſs is brought for fiſhing there, the defendant may juſtify that the place where, is an arm of the ſea, in which every Subject of our lord the king hath and ought to have free fiſhery.

In the *Severn*, the ſoil belongs to the owners of the land on each ſide; and the ſoil of the river *Thames*, is in the king, &c. but the fiſhing is common to all. 1 *Mod.* 105. He who is owner of the ſoil of a private river, hath a ſeparate or ſeveral fiſhery; and he that hath *free-fiſhery* hath a property in the fiſh, and may bring a poſſeſſory action for them; but *communis piſcaria* is like the caſe of all other commons. 2 *Salk.* 637.

There are three ſorts of Fiſheries or *Piſcaries*. Free Fiſhery; Several (or ſeparate) Fiſhery; and Common of Piſcary.

Common of Piſcary is a liberty of fiſhing in another man's water. 2 *Comm.* 34. See tit. *Common*. A *Free Fiſhery*, or excluſive right of fiſhing in a public river, is a royal franchiſe: this differs from a *Several Fiſhery*; becauſe he that has a *ſeveral fiſhery* muſt alſo be (or at leaſt derive his right from) the owner of the ſoil. It differs alſo from a *common of piſcary*, in that the free fiſhery is an excluſive right, the common of piſcary is not ſo; and therefore in a *free fiſhery* a man has property in the fiſh before they are caught: in a *common of piſcary*, not till afterwards. 2 *Comm.* 39, 40; which ſee. As to a *free fiſhery* no new franchiſe can at preſent be granted of it, by the expreſs proviſion of *Magna Charta*, *c.* 16; and the franchiſe muſt be at leaſt as old as the reign of *Hen.* II. 2 *Comm.* 417. One that has a cloſe pond in which there are fiſh, may call them *piſces ſuos* in an indictment, &c. But he cannot call them as *bona & catalla*, if they be not in trunks. There needs no privilege to make a fiſh pond; as there doth in caſe of a warren. *Mod. Ca* 183 See further this Dict. title *Game*.

FISHERMEN. By *Stat.* 9 *Ann. c.* 26, There ſhall be a maſter, wardens and aſſiſtants of the *Fiſhmongers' Company* in *London*, choſen yearly at the next court of the Lord Mayor and Aldermen after the tenth of *June*, who are

are conſtituted a court of aſſiſtants: and they ſhall meet once a month at their common hall, to regulate abuſes in fiſhery, regiſter the names of fiſhermen, and mark their boats, &c.

FISHGARTH, A dam or wear in a river, made for the taking of fiſh; eſpecially in the rivers of *Ouſe* and *Humber*.

FISH ROYAL, *Whale* and *Sturgeon* which the King is intitled to when either thrown on ſhore or caught near the coaſts. *Plowd.* 315. See tit. *King*.

FLACO, A place covered with ſtanding water. *Mon. Angl. tom.* 1. *p.* 209.

FLAX, See *Hemp*.

FLECTA, A feathered or fledged arrow; a *fleet arrow*.

FLEDWITE OR FLIGHTWITE, from Sax. *Flyth, Fuga, et* Wite, *Mulcta*.] In our ancient law ſignified a diſcharge from amerciaments, where a perſon having been a *fugitive* came to the peace of our Lord the King of his own accord, or with licence. *Raſtal*.

FLEET, Sax. *Fleot*, i. e. *Flota*, a place of running-water, where the tide or *float* comes up.] A *priſon* in *London*, ſo called from a river or ditch that was formerly there, on the ſide whereof it ſtood. To this priſon men are uſually committed for contempt to the King and his laws, particularly againſt the courts of juſtice; or for debt, when perſons are unable or unwilling to ſatisfy their creditors: there are large rules, and a *Warden* or *Keeper* belonging to the *Fleet Priſon*, &c. By *Stat.* 1 *Geo.* 2. *c.* 32, the then Warden of the *Fleet* was diſabled to hold any office, for his notorious oppreſſions of the priſoners; and the King was impowered to grant the ſaid office to ſuch perſon as he ſhould think fit, &c. See titles *Gaol*: *Gaoler*: *Priſoner*.

FLEET-DITCH. The Corporation of *London* were enabled by *Stat.* 6 *Geo.* 2. *c.* 22, to fill up *Fleet Ditch*, and make the ſoil level with the ſtreets: and the fee is veſted in the Mayor and Commonalty. And at the time of building *Blackfriars Bridge* the ditch was arched over, and ſo filled up to the foot of the bridge, that the ground became level with *Fleet-ſtreet*.

FLEET OF SHIPS, See title *Navy*.

FLEM, *Flema*, from Sax. *Flean*, to kill or ſlay.] An outlaw; and by virtue of the word *Flemaſtare* were claimed *bona felonum*; as may be collected from a *quo warranto*, *Temp. Ed.* 3.

FLEMENEFRIT, FLEMENESFRINTHE, FLYMENAFRYNTHE.] The receiving or relieving of a fugitive or outlaw. *Leg. Inæ*, *c.* 29, 47: *LL. H.* 1. *c.* 10, 12.

FLEMESWITE, Sax.] *Fleta*, interprets it *habere catalla fugitivorum*. *Lib.* 1. *c.* 47.

FLETA. The title of an ancient law-book, ſuppoſed to have been written by a Judge who was confined in the *Fleet* priſon. *temp.* E. 1. *Nicolſon's Hiſtorical Engliſh Library* 225.

FLIGHERS, Maſts for ſhips, *Mon. Angl. tom.* 1. *p.* 799.

FLIGHT, For crimes committed, See *Fugam fecit*.

FLOOD-MARK: The mark which the ſea makes on the ſhore, at flowing water and the higheſt tide: it is alſo called *High-water Mark*.

FLORENCE, An ancient piece of *Engliſh* gold coin: every pound weight of old ſtandard gold was to be coined into fifty *Florences*, to be current at ſix ſhillings each; all which made in tale fifteen pounds, or into a proportionate number of *half Florences* or *quarter* pieces; by indenture of the *Mint*, 18 *Ed.* 3.

FLORIN, A foreign coin; in *Spain*, 4 *s.* 4 *d. Germany*, 3 *s.* 4 *d.* and *Holland*, 2 *s.*

FLOTA NAVIUM, A fleet of ſhips.—*Rot. Francia*, 6 *R.* 2. *m.* 21.

FLOTAGES, Such things as by accident ſwim on the top of great rivers; the word is ſometimes uſed in the commiſſions of *Water Bailiffs*.

FLOTSAM, Is where a ſhip is ſunk or caſt away, and the goods are *floating* upon the ſea. 5 *Rep.* 106: *Flotſam*, *Jetſam* and *Lagan* are mentioned together; *Jetſam* being where any thing is caſt out of the ſhip when in danger, and the ſhip notwithſtanding periſheth; and *Lagan* is when heavy goods are thrown over board before the wreck of the ſhip, which ſink to the bottom of the ſea, but are tied to a cork or buoy in order to be found again. 5 *Rep.* 106. The King ſhall have *Flotſam*, *Jetſam* and *Lagan*, when the ſhip is loſt, and the owners of the goods are not known; but not otherwiſe. *F. N. B.* 122. Where the proprietors of the goods may be known, they have a year and a day to claim *Flotſam*. 1 *Keb.* 657. *Flotſam*, *Jetſam*, &c. any perſon may have by the King's grant, as well as the Lord Admiral, &c. See 1 *Comm.* 292. and this Dict. title *Wreck*.

FOCAGE, *Focagium*.] *Houſe-bote* or *Fire-bote*.

FOCAL, A right of taking wood for firing: *Mon. Angl. Tom.* 1. *p.* 779.

FODDER, Sax. *Foda*, i. e. *Alimentum*.] Any kind of meat for horſes, or other cattle: among the *Feudiſts* it was uſed for a prerogative of the Prince, to be provided with corn and other meat for his horſes, by his ſubjects, in his wars or other expeditions. *Hotom de verb. Feudal*.

FODERTORIUM, Proviſion or fodder, to be paid by cuſtom to the King's purveyor. *Cartular.* MS.

FŒNUS NAUTICUM, *Bottomry*; See that title; and title *Inſurance*.

FŒSA, Fr. *Foiſſon*.] Graſs, herbage. *Mon. Angl. Tom.* 2. *p.* 506.

FOGAGE, *Fogagium*.] Fog or rank after-graſs, not eaten in ſummer. *LL. Foreſtar. Scot. c.* 16.

FOITERERS, Vagabonds. *Blount*. See *Faitours*.

FOLC-LANDS, Sax.] Copyhold lands; ſo called in the time of the *Saxons*, as charter lands were called *Boc-lands*, *Kitch.* 174. *Folkland* was *terra vulgi* or *popularis*, the land of the vulgar people, who had no certain eſtate therein, but held the ſame under the rents and ſervices accuſtomed or agreed, at the will only of their Lord the *Thane*; and it was therefore not put in writing, but accounted *prædium ruſticum & ignobile*. *Spelm. of Feuds*, *cap.* 5. See this Dict. titles *Copyhold*; *Tenure*.

FOLC-MOTE, OR FOLK-MOTE, Sax.] *Folgemot*, *Conventus populi*.] Is compounded of *Folk*, *populus*, and *mote* or *gemote*, *convenire*; and ſignified originally, as *Somner* in his *Saxon Dictionary* ſays, a general aſſembly of the people to conſider of, and order matters of the commonwealth: See *Leg. Edw. Confeſſ. cap.* 35. *Spelman* ſays the *folcmote* was a ſort of annual parliament, or convention of the Biſhops, Thanes, Aldermen and Freemen, upon every *May-day* yearly; where the laymen were ſworn to defend one another, and the King, and to preſerve the laws of the kingdom, and then conſulted of the common ſafety. But Dr. *Brady* infers from the laws of our *Saxon* Kings that it was an inferior court, held before the *King's Reeve* or ſteward, every month to do *Folk* right, or compoſe

poſe ſmaller differences, from whence there lay appeal to the ſuperior courts. *Brady's Gloſſ. p.* 48. *Squire* ſeems to think the *Folcmote*, not diſtinct from the *ſhiremote*, or common general meeting of the county. *Angl. Sax. Gov.* 155 *n.*

Manwood mentions *folkmote* as a court holden in *London*, wherein all the *folk* and people of the city did complain of the Mayor and Aldermen, for miſgovernment within the ſaid city: and this word in *Stowe*'s time continued in uſe among the *Londoners*; and denoted *Celebrem ex tota civitate conventum. Stowe's Survey.*

According to *Kennet*, the *folkmote* was a common council of all the inhabitants of a city, town or borough, convened often by ſound of bell to the *Mote Hall* or *Houſe*; or it was applied to a larger congreſs of all the freemen within a county, called the *Shire-mote*, where formerly all knights and military tenants did fealty to the King, and elected the annual ſheriff on the firſt of *October*; till this popular election, to avoid tumults and riots, devolved to the King's nomination. After which the *City Folkmote* was ſwallowed up in a ſelect committee or *Common Council*, and the *County Folk-mote*, in the *Sheriff's Tourn* and *Aſſiſes*. The word *Folkmote* was alſo uſed for any kind of popular or public meeting; as of all the tenants at the *Court-Leet* or *Court Baron*, in which ſignification it was of a leſs extent. *Paroch. Antiq.* 120.—See further this Dict. title *Parliament.*

FOLDAGE AND FOLD-COURSE, A liberty to fold ſheep, &c. See *Faldage*; *Faldfee.*

FOLGARII, Menial ſervants; *Bract. lib.* 3. *tract.* 2. *c.* 10. Houſe-keepers by the *Saxons* were called *Husfaſtene*, and their ſervants or followers, *Folgheres* or *Folgeres*. *LL. Hen.* 1. *c.* 9.

FOOL, A Natural; one ſo from the time of his birth. See title *Idiots and Lunatics.*

FOOT OF A FINE. See title *Fine.*

FOOT-GELD. From *Sax.* Fot, *Pes*; and Geldan, *ſolvere. Pedis redemptio.*] An amercement for not cutting out and *expeditating* the balls of great dogs' feet in the *foreſt*: to be quit of *foot-geld* is a privilege to keep dogs within the foreſt unlawed, without puniſhment. *Manwood, par.* 1. *p.* 86. See title *Foreſt.*

FORAGE, Fr. *Fourage.*] Hay and ſtraw for horſes, particularly for the uſe of horſe in an army.

FORAGIUM, Straw when the corn is thraſhed out. *Cowel.*

FORBALK, *Forbalka.*] Lying forward or next the highway. *Petr. Bleſenſis Contin. Hiſt. Croyland, p.* 116.

FORBARRE, To bar or deprive one of a thing for ever. See *ſtats.* 9 *R.* 2. *c.* 2: 6 *H.* 6. *c.* 4.

FORBATUDUS, The aggreſſor ſlain in combat.

FORBISHER OF ARMOUR, Forbator.] *Si quis forbator arma alicujus ſuſceperit, ad purgandum, &c. LL. Aluredi*, MS. *c.* 22.

FORCE, *Vis.*] Is moſt commonly applied *in pejorem partem*, the evil part, and ſignifies any unlawful violence. It is defined by *Weſt* to be an offence, by which violence is uſed to things or perſons; and he divides it into *ſimple* and *compound*; *ſimple force*, is that which is ſo committed that it hath no other crime accompanying it; as if one by *force* do only enter into another man's poſſeſſion, without doing any other unlawful act: mixed or *compound force*, is when ſome other violence is committed with ſuch a fact, which of itſelf alone is criminal; as where any one by *force* enters into another man's houſe, and kills a man, or raviſhes a woman, &c. And he makes ſeveral other diviſions of this head. *Weſt. Symbol. pa.* 2. *ſect.* 65. Lord *Coke* ſays, there is alſo a *force implied* in law; as every treſpaſs, reſcous, or diſſeiſin, implieth it; and an *actual force*, with weapons, number of perſons, &c. where threatning is uſed to the terror of another. *Co. Lit.* 257. By law any perſon may enter a tavern; and a landlord may enter his tenant's houſe to view repairs, &c. But if he that enters a tavern, commits any *force* or violence: or he that enters to view repairs, breaketh the houſe, &c. it ſhall be intended that they entered for that purpoſe. 8 *Rep.* 146. All *force* is againſt the law; and it is lawful to repel *force* by *force*: there is a maxim in our law, *quod alias bonum et juſtum eſt, ſi per vim vel fraudem petatur, malum et injuſtum eſt.* 3 *Rep.* 78. 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 title *Murder.*

FORCIBLE ENTRY AND DETAINER.

An Offence againſt the public peace which is committed by violently *taking* or *keeping* poſſeſſion of lands and tenements, with menaces, arms and force, and without the authority of the law; whereby he who hath right of entry is barred or hindred. See 4 *Comm.* 148. At Common-law, any one who had a right of entry into lands, &c. might regain poſſeſſion thereof by force; but this liberty being much abuſed, to the breach of the public peace, it was found neceſſary that it ſhould be reſtrained. By *Stat.* 5 *R.* 2. *ſt.* 1. *c.* 8, all forcible entries are puniſhed with impriſonment and ranſom at the King's will. And by *Stats.* 15 *R.* 2. *c.* 2: 8 *H.* 6. *c.* 9: 31 *Eliz. c.* 11: 21 *Jac.* 1. *c.* 15, upon any forcible entry or forcible detainer after peaceable entry, into any lands (or benefices of the church) one or more Juſtices of the peace, taking ſufficient power of the county, may go to the place, and there record the force upon his own view, as in caſe of riots; and upon ſuch conviction may commit the offender to gaol till he makes fine and ranſom to the King. And moreover the juſtice or juſtices have power to ſummon a jury to try the forcibly entry or detainer complained of: and if the ſame be found by that jury, then beſides the fine on the offender, the juſtices ſhall make reſtitution, by the ſheriff, of the poſſeſſion, without inquiring into the merits of the title; for the *force* is the only thing to be tried, puniſhed and remedied by them; and the ſame may be done by indictment at the general Seſſions. But this proviſion does not extend to ſuch as endeavour to *maintain* poſſeſſion by force, where they themſelves or their anceſtors have been in peaceable enjoyment of the lands, &c. for three years immediately preceding. 4 *Comm.* 148. And this may be alledged in ſtay of reſtitution, and reſtitution is to be ſtayed till that be tried, if the other will traverſe the ſame, &c. *Dalt.* 312. See *T. Raym.* 85: 1 *Sid.* 149: *Salk.* 260.

Indictment for *forcible entry* muſt be laid of *liberum tenementum*, &c. to have reſtitution by *ſtats.* 15 *R.* 2. *c.* 2: 8 *H.* 6. *c.* 9, &c. But by *Stat.* 21 *Jac.* 1. *c.* 15, Juſtices of peace may give like reſtitution of poſſeſſion to tenants for years, tenant by *elegit*, ſtatute ſtaple, &c. and copyholders, as to freeholders, ſince which ſtatute the eſtate of the perſon ouſted muſt be ſtated, for perhaps he is only tenant at will. *Semb.* 1 *Salk.* 260: *R.* 1 *Sid.* 102. See

farther as to what ſhall be a good indictment, *Com. Dig.* title *Forcible Entry* (D. 4.)

Having ſaid thus much generally, we may proceed more particularly to enquire,

I. *What ſhall be deemed a Forcible Entry and Detainer under the foregoing Statutes.*

II. *What Remedy is provided in ſuch Caſes.*

I. By ſtat. 5 *R.* 2. *ſt.* 1. *c.* 8, "None ſhall make any entry, into any lands or tenements, (or benefice of holy church *ſtat.* 15 *R.* 2. *c.* 2; or other poſſeſſions, *ſtat.* 8 *H.* 6. *c.* 9. § 2,) but where entry is given by the law; and in ſuch caſe not with ſtrong hand or with multitude of people, but only in peaceable and eaſy manner; on pain of impriſonment and ranſom at the King's will.

When one or more perſons armed with unuſual weapons violently enter into the houſe or land of another; or where they do not enter violently, if they forcibly put another out of his poſſeſſion; or if one enters another's houſe, without his conſent, although the door be open, &c. theſe are all forcible entries puniſhable by law. *Co. Lit.* 257. So when a tenant keeps poſſeſſion of the land at the end of his term againſt the landlord, it is a forcible detainer. And if a leſſee takes a new leaſe of another perſon, whom he conceives to have better title, and at the end of the term keeps poſſeſſion againſt his own landlord, this is a forcible detainer. *Cro. Jac.* 199. Alſo perſons continuing in poſſeſſion of a defeaſible eſtate after the title is defeated, are puniſhable for forcible entry; *for continuing in poſſeſſion afterwards, amounts in law to a new entry. Co. Lit.* 256, 257. And an infant or feme-covert may be guilty of forcible entry within the ſtatutes in reſpect of violence committed by them in perſon; but not for what is done by others at their command, their commands being void. *Co. Lit.* 257, 357.

If a man have two houſes next adjoining, the one by a defeaſible title, and the other by a good title; and he uſes force in that he hath by the good title to keep perſons out of the other houſe, this is a forcible detainer. 2 *Shep. Abr.* 203. A man enters into the houſe of another by the windows, and then threatneth the party, and he for fear doth leave the houſe, it is a forcible entry: ſo if one enter a houſe when no perſon is therein, with armed men, &c. *Moor Caſ.* 185. If a perſon after peaceable entry, ſhall make uſe of arms to defend his poſſeſſion, &c. it will be forcible detainer: a man puts another out of his houſe by force, if he then puts in one of his ſervants in a peaceable manner, who keeps out the party, &c. it will be a forcible entry, but not a detainer; but if himſelf remaineth there with force, this makes a *forcible detainer*. If I hear that perſons will come to my houſe to beat me, &c. and I take in force to defend myſelf, it is no *forcible detainer*; though where they are coming to take lawful poſſeſſion only, it is otherwiſe. 2 *Shep.* 203.

This offence may be committed of a rent, as well as of a houſe or land: as where one comes to diſtrain, and the tenant threatens to kill him, or *forcibly* makes reſiſtance, &c. 2 *Shep.* 201. But forcibly entry cannot be of a *way* or other eaſement; or of a common or office. 1 *Hawk. P. C.* So no man can be guilty of *forcible entry*, for entring with violence into lands or houſes in his own ſole poſſeſſion at the time of entry; as by breaking open doors &c. of his houſe detained from him by one who has the bare cuſtody of it; but jointenants, or tenants in common, may be guilty of *forcible entry*, and holding out their companions. A perſon is not guilty of a *forcible* detainer, by barely refuſing to go out of a houſe, and continuing therein in deſpight of another. And no words alone can make a *forcible entry*, although violent and threatning, without force uſed by the party. 1 *Lill. Abr.* 514.

A forcible entry may be committed by a ſingle perſon as well as by 20, and all who accompany a man when he makes a forcible entry ſhall be adjudged to enter with him, whether they actually come upon the lands or not. 1 *Hawk. P. C. c.* 64.

The ſame circumſtances of violence or terror which will make an entry forcible will make a detainer forcible alſo. And a detainer may be forcible whether the entry were forcible or not. 1 *Hawk. P. C. c.* 64.

If a Juſtice of peace come to view a force in a houſe, and they refuſe to let him in; this of itſelf will make a *forcible detainer* in all caſes; but it muſt be upon complaint made. *Dalt.* 312.

II. The Remedy may be, by action; or by Juſtices of peace upon view; or by indictment or inquiſition.

By *Stat.* 8 *H.* 6. *c.* 9. § 6, "If any perſon be put out or diſſeiſed of any lands or tenements in forcible manner, or put out forcibly and after holden out with ſtrong hand, the party grieved ſhall have aſſize of novel diſſeiſin, or writ of treſpaſs againſt the diſſeiſor; and if he recover, (or if any alienation be made to defraud the poſſeſſor of his right, which is alſo declared by the ſtatute to be void,) he ſhall have treble damages, and the defendant ſhall alſo make fine and ranſom to the King."

But in an action on this ſtatute if the defendant make title which is found for him, he ſhall be diſmiſſed without any enquiry concerning the force; however puniſhable he may be for that at the King's ſuit. 1 *Hawk. P. C*: *Dalt. c.* 129.

If in treſpaſs or aſſiſe upon this ſtatute the defendant is condemned by *non ſum informatus*; he ſhall pay treble damages and treble coſts: adjudged, and affirmed in error. For the words of the ſtatute give them where the recovery is by verdict, or otherwiſe in due manner. *Jenk. Cent.* 197.

The party grieved if he will loſe the benefit of his treble damages and coſts may be aided and have the aſſiſtance of the Juſtices at the general Seſſions by way of indictment on this ſame ſtatute. Which being found there, he ſhall be reſtored to his poſſeſſion by a writ of reſtitution granted out of the ſame court to the ſheriff. *Dalt. c.* 129.

Indictment of *forcible entry* lies not only for lands, but for tithes; alſo for rents: but not againſt a lord entering a common with force, for which the commoner may not indict him, becauſe it is his own land. *Cro. Car.* 201, 486.

For a more ſpeedy remedy the party grieved may complain to any one Juſtice or to a mayor, ſheriff or bailiff, within their liberties; and it is provided by *ſtats.* 15 *R.* 2. *c.* 2: 8 *H.* 6. *c.* 9, that after complaint made to ſuch juſtice, &c. he ſhall within a convenient time at the coſts of the party grieved take ſufficient power of the county, and go to the place where ſuch force is made, and if he ſhall find ſuch force, ſhall cauſe the offenders to be arreſted, and make a record of ſuch force by him viewed; and the offenders ſo arreſted ſhall be put in the next gaol, there to

abide convict by the record of the same justice until they have made fine and ransom to the King.

As to restitution to the party injured, it is enacted by the said *stat.* 8 *H.* 6. *c.* 9, though that the persons making such entry be present, or else departed before the coming of the Justice, he may notwithstanding in some town next to the tenements so entered, or in some other convenient place, have power to enquire by a jury of the county as to the persons making such forcible entry and detainer; and the Justice may make his precept to the sheriff, who is to summon the jury. And if such forcible entry or detainer be found before such Justice, then the said Justice shall cause to reseise the lands and tenements so entered or holden, and shall restore the party put out to the full possession of the same. And by the *stat.* 31 *Eliz. c.* 11, if on an indictment of forcible entry, &c. it is found against the party indicted, he shall pay such costs and damages as the Judges or Justices shall assess.

Under the above *Stat.* 15 *R.* 2. *c.* 2, any Justice of the peace upon view of the *force*, may make a record of it, and commit the offender. And this, without a writ directed to him to execute the statutes: and upon any information without a complaint of the party. So every justice may take the sheriff, and *posse commitatus*, to restrain; or he may break open a house to remove the *force*. *Dalt. c.* 44. The record made by a Justice upon view, shall be a conviction, and is not traversable: and ought to be certified to *B. R.* or the next assises, or quarter-sessions. And if a defect appears, in the conviction, to *B. R.* it shall be quashed. 1 *Sid.* 156. See 8 *Co.* 121. The Justices have power to fine on view: but are not bound to do it on the spot, but may take a reasonable time to consider. See *Str.* 794: *Ld. Raym.* 1515.

The Justices, on *forcible detainer*, may punish the force upon view, and fine and imprison the offenders; *Sid.* 156. And it hath been held, that in *forcible entry* and detainer, the jury are to find *all* or *none*; and not the detainer, without the *forcible entry*. 1 *Vent.* 25.

An indictment will lie at Common law for a forcible entry, though generally brought on the above statutes. But it must shew on the face of it sufficient actual force. 3 *Burr.* 1702, 1732.

An indictment for a *forcible detainer*, ought to shew, *that the entry was peaceable*, *Cro Jac.* 151.

Indictments for *forcibly entry* must set forth, that the entry was *manu forti*, to distinguish this offence from other trespasses *vi et armis*; and there are many niceties to be observed in drawing the indictment, otherwise it will be quashed. *Cro. Jac.* 461: *Dalt.* 298. There must be certainty in this indictment; and no repugnancy, which is an incurable fault. An indictment of *forcible entry* was quashed, for that it did not set forth the estate of the party: so where the *defendant* hath *not* been in *possession peaceably three years* before the indictment, without saying *before the indictment found*, &c. And force shall not be intended when the judgment is generally laid, for it must be always expressed. 2 *Nelf. Abr.* 867, 869.

The Justice may make restitution, (after inquisition found) to the party ousted, by himself, or by his precept to the sheriff. *T. Raym.* 85: *Carth.* 496. So *restitution* shall be made upon an indictment at the quarter-sessions. *H. P. C.* 140.

An indictment of *forcible entry* may be removed from before Justices of peace into the court of *B. R. coram rege*, which court may award restitution. 11 *Rep.* 65. And the justices before whom such indictment was found, may, after traverse tendered, certify or deliver the indictment into the *King's Bench*, and refer the proceeding thereupon to the justices of that court.

So justices of jail delivery, upon an indictment before them. So re-restitution shall be, after an ill restitution awarded. *Sav.* 68: *Cro. Jac.* 151. So restitution shall be to a disseisor ousted by the force of the disseisee. To a lessee, though the lessor, who was disseised, thereby opposes it. To a copyholder though his lord opposes it. vide *Dalt. c.* 132.—*Contrà before Stat.* 21 *Jac. c.* 15. See *Dy.* 142 *a. in marg.*

A copyholder cannot be *disseised*, because he hath no freehold in his estate; but he may be *expelled*. And a copyhold tenant may be restored, where he is wrongfully expelled; but if the indictment be only of disseisin, as he may not be disseised, there can be no restitution but at the prayer of him who hath the freehold. *Yelv.* 81: *Cro. Jac.* 41. Possession of the termor is the possession of him in reversion: and when a lessee for years is put out of possession by force, restitution must be to him in reversion, and not to the lessee; and then his lessee may re-enter. 1 *Leon.* 327. A termor may say that he was expelled, and his landlord in reversion disseised; or rather that the tenant of the freehold is disseised, and he, the lessee for years, expelled. 4 *Mod.* 248: 2 *Nelf. Abr.* 869. If a disseisee within three years makes a lawful claim, this is an interruption of the possession of the disseisor, *H. P. C.* 139. Though it has been adjudged, that it is not the *title* of the possessor, but the *possession* for three years, which is material. *Sid.* 149. Since the *Stat.* 5 *R.* 2. *st.* 1. *c.* 8, if one be seised of lands, and another having good right to enter, doth accordingly enter *manu forti*, he may be indicted notwithstanding his right, &c. 3 *Salk.* 170. For a *forcible* detainer only it is said there is no restitution; the plaintiff never having been in possession. 1 *Vent.* 23: *Sid.* 97, 99.

No *restitution* shall be awarded to an *advowson*, *common*, *rent*, &c. for it shall only be to *land*. *Dalt. c.* 44. Nor, where he, who used force has the possession by *operation of law*: as if a disseisee enters, and afterwards, by force, ousts his disseisor, the possession shall not be restored; for it was revested in the disseisee by his entry. *Dalt. c.* 132. Nor, if a lessor enters by force, upon the lessee, for a forfeiture; nor to any other than him who was ousted by *force*, or to his heir. *Salk.* 587. Or any abator, after the death of the ancestor. *Dalt. c.* 132. Nor if the party tenders a traverse to the inquisition. 1 *Sid.* 287. Upon a *certiorari* delivered to remove an indictment, it shall be stayed. *H. P. C.* 141. Or, if the indictment appears insufficient. *H. P. C.* 140. And in such case *restitution* granted may be stayed before execution. *H. P. C.* 140. So *restitution* shall not be, *after* a *conviction* by a *Justice* upon his *view*. 1 *Vent.* 308. Nor by *justices* of *assise*, *gaol delivery*, or *justices* of *peace*; if the indictment was not found before them, *H. P. C.* 140: *Dalt. c.* 44, 131. So *restitution* shall not be, unless *immediately*; not four or five years afterwards. *Carth.* 496.

A record of justices of peace of *forcible entry*, is not traversable; but the entry and force, &c. may be traversed in writing, and the justices may summon a jury for trial of the traverse. 1 *Salk.* 353. The finding of the force being in nature of a presentment by the jury, is traversable; and if the Justices of peace refuse the traverse, and

and grant reſtitution, on removing the indictment into *B. R.* there the traverſe may be tried; and on a verdict found for the party, &c. a *re-reſtitution* ſhall be granted. *Sid.* 287: 2 *Salk.* 588. If *no force* is found at a trial thereof before juſtices, *reſtitution* is not to be granted; nor ſhall it be had till the force is tried; nor ought the Juſtices to make it in the abſence of the defendant, without calling him to anſwer. 1 *Hawk. P. C. c.* 64.

No other Juſtices of peace but thoſe before whom the indictment was found, may either at ſeſſions, or out of it, award reſtitution; the ſame Juſtices may do it in perſon, or make a precept to the ſheriff to do it, who may raiſe the power of the county to aſſiſt him in executing the ſame. 1 *Hawk. P. C. c.* 64. And the ſame juſtices of peace may alſo ſuperſede the reſtitution, before it is executed; on inſufficiency found in the indictment, &c. But no other Juſtices, except of the court of *B. R.* A *certiorari* from *B. R.* is a *ſuperſedeas* to the reſtitution; and the juſtices of *B. R.* may ſet aſide the reſtitution after executed, if it be againſt law, or irregularly obtained, &c. 1 *Salk.* 154. If juſtices of peace exceed their authority, an information may be brought againſt them. A conviction for *forcible entry*, before a fine is ſet, may be quaſhed on motion; but after a fine is ſet, it may not; the defendant muſt bring writ of error. 2 *Salk.* 450.

If a plaintiff proceeds not criminally by indictment for *forcible entry*, but commences a civil action on the caſe, on *Stat.* 8 *Hen.* 6. *c.* 9, the defendant is to plead *Not guilty*; or *may plead any ſpecial matter, and traverſe the force*; and the plaintiff in his replication muſt anſwer the ſpecial matter, and not the traverſe; and if it be found againſt the defendant, he is convicted of the force of courſe; whereupon the plaintiff ſhall recover treble damages and coſts. 3 *Salk.* 169.

A reverſioner cannot bring action of *forcible entry*, becauſe he cannot be expelled, though he may be diſſeiſed. *Dyer* 141. The words in the writ to maintain the action are, that the defendant *expulit & diſſeiſivit*, &c. yet it is ſaid that every diſſeiſin implies an expulſion in *forcible entry*. *Cro. Jac.* 31.

Though *forcible entry* is puniſhable either by indictment or action; the action is ſeldom brought, but the indictment often. But in many caſes it may be much more for the benefit of the party to bring the action.

If a Forcible entry or detainer ſhall be made by three perſons or more, it is alſo a riot, and may be proceeded againſt as ſuch, if no inquiry hath before been made of the force. *Dalt. c.* 44.

See further on this ſubject. 1 *Hawk. P. C. c.* 64, at length: and *Burn's Juſtice*, title *Forcible Entry*.

FORCIBLE MARRIAGE, See this Dict. titles *Marriage*; *Guardian*.

FORD, *forda*.] A ſhallow place in a river. *Mon. Ang. tom.* 1. *p.* 657. See title *Ferry*.

FORDOL, from Sax. *fore*, before, and *dæle*, a part or portion.] A butt or head-land, ſhooting upon other bounds.

FORECHEAPUM, from Sax. *fore*, *ante*, and *ceapean*, i. e. *Nundinari*, *emere*.] Præ emption. *Chron. Brompton. col.* 897, 898: LL *Æthelredi, c.* 23.

FORECLOSED, Shut out or excluded; as the barring the equity of redemption on mortgages, &c. See title *Mortgage*.

FOREGOERS. The King's Purveyors; They were ſo called from their *going before* to provide for his houſhold. 36 *Ed.* 3. 5.

FOREIGN, Fr. *foraign*, Lat. *forinſecus*, *extraneus*.] Strange or outlandiſh, of another country, or ſociety; and in our law, is uſed adjectively being joined with divers ſubſtantives in ſeveral ſenſes. *Kitch.* 126.

FOREIGN ATTACHMENT, See title *Attachment, foreign*.

FOREIGN COURT. At *Lemſter* (anciently called *Leominſter*) there is the borough and the *foreign court*; which laſt is within the juriſdiction of the manor, but not within the liberty of the bailiff of the borough: ſo there is a *foreign court* of the honour of *Glouceſter*. *Clauſ.* 8 *Ed.* 2. *Foreign bought and ſold* was cuſtom within the city of *London*, which, being found prejudicial to the ſellers of cattle in *Smithfield*, was aboliſhed.

FOREIGN KINGDOM; FOREIGN LAWS AND CUSTOMS. A Foreign Kingdom is one under the dominion of a *foreign* prince; ſo that *Ireland*, or any other place, ſubject to the crown of *England*, cannot with us be called *foreign*; though to ſome purpoſes they are diſtinct from the realm of *England*. If two of the king's ſubjects fight in a *foreign kingdom*, and one of them is killed, it cannot be tried here by the common law: but it may be tried and determined in the court of the *Conſtable and Marſhal*, according to the *civil law*; or the fact may be examined by the Privy Council, and tried by commiſſioners appointed by the king in any county of *England*, by ſtatute 33 *H.* 8. *c.* 23. 3 *Inſt.* 48. One *Hutchinſon* killed Mr. *Colſon* abroad in *Portugal*, for which he was tried there and acquitted, the exemplification of which acquittal he produced under the Great Seal of that kingdom; and the king being willing he ſhould be tried here, referred it to the judges, who all agreed, that the party being already acquitted by the laws of *Portugal*, could not be tried again for the ſame fact here. 3 *Keb.* 785.

If a Stranger of *Holland*, or any *foreign kingdom*, buys goods at *London*, and gives a note under his hand for payment, and then goes away privately into *Holland*; the ſeller may have a certificate from the Lord Mayor, on proof of ſale and delivery of the goods: upon which the people of *Holland* will execute a legal proceſs on the party. 4 *Inſt.* 38. Alſo at the inſtance of an ambaſſador or conſul, ſuch a perſon of *England*, or any criminal againſt the laws here, may be ſent from a *foreign kingdom* hither. Where a bond is given, or contract made in a *foreign kingdom*, it may be tried in the *King's Bench*, and laid to be done in any place in *England*. *Hob.* 11: 2 *Bulſt.* 322.

An agreement made in *France*, on two *French* perſons marrying, touching the wife's fortune, has been decreed here to be executed, according to the laws of *England*; and that the huſband ſurviving ſhould have the whole; but relief was firſt given for a certain ſum, and the reſt to be governed by the cuſtom of *Paris*. *Preced. Chanc.* 207, 208.

A. and *B.* being inhabitants of the United States of *America*, while thoſe States were colonies of *Great Britain*, and before the rebellion of them as colonies, *B.* executes a bond to *A.*—During the rebellion, after the declaration of independence by the *American* Congreſs, but before the Independence of *America* was acknowledged by *Great Britain*, both parties are attainted; their property confiſcated, and veſted in the reſpective States of which they were

were inhabitants, by the legiſlative acts of thoſe States then in rebellion, and a fund provided for the payment of the debts of *B.* Afterwards the independence of *America* is acknowledged by *Great Britain.* Under all theſe circumſtances *A.* may maintain an action on the bond againſt *B.* in *England.*

Judgment of the court of King's Bench (affirming the judgment of *C. P.*) *Affirmed. Bro. P. C.*

Though all theſe judgments appear unanimous, the two former, and perhaps all three of them, were given in ſome meaſure upon different grounds. But it appears upon the two firſt deciſions to be a principle not judicially controverted, that "the *penal laws* of one country cannot be taken notice of, to affect the laws and rights of citizens (or ſubjects of ſuch country, becoming citizens,) of another; the penal laws of foreign countries being ſtrictly local, and affecting nothing more than they can reach, and can be ſeized by virtue of their authority." See 3 *Term Rep.* 733, 5: 1 *H Black. Rep.* 135.

In the caſe of *Dudley* v. *Folliott,* the court having no doubt about the law, and thinking that it would lead to the diſcuſſion of improper topics, *would not permit the queſtion to be argued.* That was the caſe of a covenant in a conveyance of lands in *America,* made during the time of the rebellion, (*April,* 1780) "that the grantor had a legal title, and that the grantee might peaceably enjoy, *&c.* without the leaſt interruption, *&c.* of the grantor and his heirs, or *of any other perſon* whomſoever."—The court were of opinion that this covenant was not broken by the States of *America* ſeizing the lands, as forfeited, for an act done previous to the conveyance, notwithſtanding the ſubſequent acknowledgment of independence. 3 *Term Rep.* 584.

FOREIGN OPPOSER, or *Appoſer.* See *Exchequer.*

FOREIGN PLANTATIONS; AND DOMINIONS OF THE CROWN. As to the former of theſe, ſee this Dict. tit. *Plantations.* As to any foreign dominions which may belong to the perſon of the king by hereditary deſcent, by purchaſe or other acquiſition, as the territory of *Hanover* and his majeſty's other property in *Germany*; as theſe do not in any wiſe appertain to the crown of theſe kingdoms they are entirely unconnected with the laws of *England,* and do not communicate with this nation in any reſpect whatſoever The *Engliſh* Legiſlature, warned by paſt experience, wiſely inſerted in the act of Settlement, which veſted the crown in the preſent family, the following clauſe, "That in caſe the crown and imperial dignity of this realm ſhall hereafter come to any perſon not being a native of this kingdom of *England,* this nation ſhall not be obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of *England,* without conſent of Parliament." *Stat.* 12 & 13. *W.* 3. *c.* 3.

FOREIGN PLEA. A plea in objection to a judge, where he is refuſed as incompetent to try the matter in queſtion, becauſe it ariſes out of his juriſdiction. *Kitch.* 75: *Stat.* 4 *Hen.* 8. *c.* 2. If a plea of iſſuable matter is alledged in a different county from that wherein the party is indicted or appealed, by the common law, ſuch pleas can only be tried by juries returned from the counties wherein they are alledged. But by the *Stat.* 23 *H.* 8. *c.* 14, § 5, all *foreign pleas* triable by the country, upon an indictment for petit treaſon, murder or felony, ſhall be forthwith tried without delay, before the ſame juſtices before whom the party ſhall be arraigned, and by the jurors of the ſame county where he is arraigned, notwithſtanding the matter of the pleas is alledged to be in any other county or counties: though as this ſtatute extends not to treaſon, nor appeals, it is ſaid a *foreign* iſſue therein muſt ſtill be tried by the jury of the county wherein alledged. 3 *Inſt.* 17: *H. P. C.* 255: 2 *Hawk. P. C. c.* 40. §§ 6, 7. In a *foreign plea* in a civil action the defendant ought to plead to that place where the plaintiff alledges the matter to be done in his declaration; and the defendant may plead a *foreign plea* whether the matter is tranſitory, or not tranſitory; but in the laſt caſe he muſt ſwear to it. *Sid.* 234: 2 *Nelſ.* 871. When a *foreign plea* is pleaded, the court generally makes the defendant put it upon oath, that it is true; or will enter up judgment for want of a plea. See 5 *Mod.* 335. *Foreign anſwer* is ſuch an anſwer as is not triable in the county where made; and *foreign matter* is that matter which is done in another county, *&c.* See futher titles *Pleading*; *Indictment.*

FOREIGN SERVICE, Is that whereby a meſne lord holds of another, without the compaſs of his own fee: or that which the tenant performs either to his own lord, or to the lord paramount out of the fee. *Kitch.* 299. See *Bract. lib.* 2. *c.* 16. *Foreign ſervice* ſeems alſo to be uſed for *knight's ſervice,* or *eſcuage* uncertain, *Perkins,* 650.—*Salvo Forinſeco Servitio. Mon. Ang. tom.* 2. *p.* 637.

Felonies in ſerving Foreign States, are reſtrained and puniſhed by *ſtat.* 3 *Jac.* 1. *c.* 4; which makes it felony for any perſon whatever to go out of the realm, to ſerve any foreign Prince or State, without having firſt taken the oath of allegiance before his departure. And it is felony alſo for any Gentleman, or perſon of higher degree, or who hath borne office in the army, to go out of the realm to ſerve ſuch foreign Prince or State, without previouſly entering into a bond with two ſureties, not to be reconciled to the See of Rome, or enter into any conſpiracy againſt his natural Sovereign. See the *ſtat.* §§ 18, 19.—By *ſtat.* 9 *Geo.* 2. *c.* 30, enforced by *ſtat.* 29 *Geo.* 2. *c.* 17, if any ſubject of *Great Britain* ſhall enliſt himſelf, or if any perſon ſhall procure him to be enliſted in any foreign ſervice, or detain or embark him for that purpoſe without licence under the king's ſign manual, he ſhall be guilty of felony without benefit of clergy; but if the perſon ſo ſeduced, ſhall within 15 days diſcover his ſeducer, he ſhall on conviction of the ſeducer be indemnified —By *ſtat.* 29 *Geo.* 2. *c.* 17, it is enacted that to ſerve under the *French King,* as a military officer ſhall be felony without benefit of clergy: and to enter into the *Scotch* brigade in the *Dutch* ſervice without previouſly taking the oaths of allegiance and abjuration ſhall incur a forfeiture of 500 *l.* See further this Dict. titles *Allegiance*; *Contempt*; *Treaſon.*

FOREIGNERS. See title *Alien.*

FOREJUDGER, *forisjudicatio.*] A judgment whereby a perſon is deprived of or put by, the thing in queſtion. *Bract. lib.* 4. To be *forejudged* the court, is when an *officer* or *attorney* of any court is expelled the ſame for ſome offence, or for not appearing to an action, on a bill filed againſt him. See title *Attorneys at Law.*

Form *of a* Forejudger *of an Attorney.*

BE it remembered, *that on the day of,* &c. *this ſame term,* A. B. *came here into this court, by,* &c. *his attorney, and exhibited to the juſtices of our Sovereign Lord the King, his bill againſt* C. D. *Gent. one of the attornies of the* Common

Common Bench *of our ſaid Sovereign Lord the King, perſonally preſent here in court; the tenor of which bill follows in theſe words, that is to ſay, To the juſtices of our ſovereign Lord the King, ſſ. A. B. by, &c. his attorney, complains of* C. D. *one of the attornies, &c. for that whereas,* &c. (ſetting forth the whole bill) *The pledges for the proſecution are* John Doe *and* Richard Roe: *whereupon the ſaid* C. D. *being ſolemnly called, came not; therefore he is* forejudged *from exerciſing his office of attorney of this court, for his contumacy,* &c.

FORESCHOKE, *Derelictum.*] *Forſaken*; in one of ou ſtatutes, it is ſpecially uſed for lands or tenements ſeiſed by a lord, for want of ſervices performed by the tenant, and quietly held by ſuch lord *beyond a year and a day*; now the tenant, who ſeeth his land taken into the hands of the lord, and poſſeſſed ſo long, and doth not purſue the courſe appointed by law to recover it, doth in preſumption of law diſavow or *forſake* all the right he hath to the ſame; and then ſuch lands ſhall be called *foreſchoke*. See *Stat.* 10 *Ed.* 2. *c.* 1.

FOREST.

FORESTA; SALTUS.] A great or vaſt wood; *locus ſylveſtris & ſaltuoſus.* Our law writers define it thus; Foreſta *eſt locus ubi feræ inhabitant vel includuntur*; others ſay it is called *Foreſta, quaſi ferarum ſtatio, vel tuta manſio ferarum. Manwood*, in his *Foreſt Laws*, gives this particular definition of it: A *Foreſt* is a certain territory or circuit of woody grounds and paſtures, known in its bounds and privilege, *for the peaceable being and abiding of wild beaſts, and fowls of* foreſt, *chaſe and warren, to be under the king's protection for his princely delight*: repleniſhed with beaſts of venary or chaſe, and great coverts of *vert* for ſuccour of the ſaid beaſts; for preſervation whereof there are particular laws, privileges and officers belonging thereunto. *Manw. part* 2. *c.* 1.

Foreſts are of that antiquity in *England*, that (except the *New Foreſt* in *Hampſhire*, erected by *William* called *The Conqueror*, and *Hampton Court*, erected by King *Hen.* VIII, (ſee *ſtat.* 31 *H.* 8. *c.* 5,) it is ſaid there is no record or hiſtory doth make any certain mention of their erections and beginnings; though they are mentioned by ſeveral writers; and in divers of our laws and ſtatutes. 4 *Inſt.* 319. Our ancient hiſtorians tell us, that *New Foreſt* was raiſed by the deſtruction of twenty-two pariſh churches, and many villages, chapels and manors, for the ſpace of thirty miles together; which was attended with divers judgments, as they are termed, on the poſterity of King *Will.* I. who erected it; for *William Rufus* was there ſhot with an arrow, and before him *Richard* the brother of *Hen.* I. was there killed; and *Henry*, nephew to *Robert*, the eldeſt ſon of the Conqueror, did hang by the hair of the head in the boughs of the *foreſt* like unto *Abſalom. Blount.*

Beſides the *New Foreſt*, there are ſixty eight other *Foreſts* in *England*; thirteen chaſes, and more than ſeven hundred parks: the four principal *Foreſts* are *New Foreſt* on the Sea, *Shirewood Foreſt* on the *Trent*, *Dean Foreſt* on the *Severn*, and *Windſor Foreſt* on the *Thames*. The way of making a *Foreſt* is thus: Certain commiſſioners are appointed under the Great Seal of *England*, who view the ground intended for a *Foreſt*, and fence it round with metes and bounds; which being returned into the Chancery, the King cauſes it to be proclaimed throughout the county where the land lieth, that it is a *Foreſt*, and to be governed by the laws of the *Foreſt*, and prohibits all perſons from hunting there without his leave; and then he appointeth officers fit for the preſervation of the vert and veniſon, and ſo it becomes a *Foreſt* on record. *Manw. c.* 2. Though the King may erect a *Foreſt* on his own ground and waſtes, he may not do it in the ground of other perſons, *without their conſent*; and agreements with them for that purpoſe ought to be confirmed by parliament. 4 *Inſt.* 300.

Proof of a *Foreſt* appears by matter of record; as by the *eyres* of the juſtices of the *Foreſts*, and other courts, and officers of *Foreſts*, &c. and not by the name in grants. 12 *Rep.* 22. As parks are incloſed with wall, pale, &c. ſo *Foreſts* and chaſes are incloſed *by metes and bounds*; ſuch as rivers, highways, hills; which are an incloſure in law; and without which there cannot be a *Foreſt*. And in the eye of the law, *the boundaries of a* foreſt *go round about it as it were a brick wall, directly in a right line the one from the other, and they are known either by matter of record, or preſcription.* 4 *Inſt.* 317. Bounds of a *Foreſt* may be aſcertained by commiſſion from the Lord Chancellor; and commiſſioners, ſheriffs, officers of *Foreſts*, &c. are impowered to make inqueſts thereof. *Stat.* 16 & 17 *Car.* 1. *c.* 16. Alſo the boundaries of *foreſts* are reckoned *a part* of the *foreſt*; for if any perſon kill or hunt any of the King's deer in any highway, river, or other incluſive boundary of a *Foreſt*, he is as great an offender as if he had killed or hunted deer within the *Foreſt* itſelf. 4 *Inſt.* 318.

By the grant of a *Foreſt*, the game of the *Foreſt* do paſs; and beaſts of the *Foreſt* are the hart, hind, buck, doe, boar, wolf, fox, hare, &c. The ſeaſons for hunting whereof are as follow, *viz.* that of the hart and buck begins at the Feaſt of St. *John Baptiſt*, and ends at *Holy-rood day*; of the hind and doe, begins at *Holy-rood*, and continues till *Candlemas*; of the boar, from *Chriſtmas* to *Candlemas*; of the fox, begins at *Chriſtmas*, and continues till *Lady-day*; of the hare, at *Michaelmas*, and laſts till *Candlemas*. *Dyer* 169: 4 *Inſt.* 316.

Not only game, &c. are incident to a *Foreſt*, but alſo a *Foreſt* hath divers ſpecial properties. 1. A *Foreſt* truly and ſtrictly taken, cannot be in the hands of any but the King; for none but the King hath power to grant commiſſion to any one to be a *Juſtice in eyre of the foreſt*: but if the King grants a *Foreſt* to ſubject, and granteth further that upon requeſt made in Chancery, he and his heirs ſhall have juſtices of the *Foreſt*, than the ſubject hath a *Foreſt* in law. 4 *Inſt.* 314: *Cro. Jac.* 155.

The *ſecond* property of a *foreſt* is the *Courts*; as the *Juſtice-ſeat*, the *Swainmote*, and court of *Attachment*. The *third* property is the officers belonging to it; as firſt, the *juſtices* of the *Foreſt*, the *warden* or warder, the *verderors*, *foreſters*, *agiſters*, *regarders*, *keepers*, *bailiffs*, *beadles*, &c. See title *Attachment of the Foreſt*.

As to the COURTS. The moſt eſpecial court of a *Foreſt* is the *Swainmote*, which is no leſs incident to it than a court of *piepowder* to a fair: and, if this fail, there is nothing remaining of the *Foreſt*, but it is turned into the nature of a *Chaſe*. *Manw. c.* 21: *Compt. Jur.* 146.

The court of *Attachment* or woodmote in *Foreſts*, is kept every forty days; at which the *Foreſters* bring in the attachment *de viridi et venatione*, and the preſentments thereof, and the verderors do receive the ſame, and inroll them; but this court can only inquire, not convict.

vict. The court of *Swainmote* is holden before the verderors as judges, by the ſteward of the ſwainmote, thrice in the year: the ſwains or freeholders within the *Foreſt* are to appear at this court, to make inqueſts and juries; and this court may inquire *de ſuperoneratione Foreſtariorum et aliorum miniſtrorum* Foreſtæ, *et de eorum oppreſſionibus populo noſtro illatis*: and alſo may receive and try preſentments certified from the court of Attachments, againſt offences in vert or veniſon. And this court may inquire of offences, and convict alſo, but not give judgment, which muſt be at the juſtice-ſeat. 4 *Inſt.* 289.

The *Court of Regard*, or Survey of Dogs is holden likewiſe every third year, for expeditation, or lawing of dogs, by cutting off to the ſkin three claws of the fore feet, to prevent their running at or killing of deer. No other dogs but maſtiffs are to be thus lawed or expeditated, for none other were permitted to be kept within the precincts of the Foreſt, it being ſuppoſed that the keeping of theſe, and theſe only, was neceſſary for the defence of a man's houſe. 4 *Inſt.* 303.

The principal court of the Foreſt is the Court of the *Chief Juſtice in Eyre*, or *Juſtice-Seat*, which is a court of record, and hath authority to hear and determine all treſpaſſes, pleas, and cauſes of the *Foreſt*, &c. within the *Foreſt*, as well concerning vert and veniſon, as other cauſes whatſoever; and this court cannot be kept oftener than *every third year*. As before other Juſtices in Eyre, it muſt be ſummoned forty days at leaſt before the ſitting thereof; and one writ of ſummons is to be directed to the ſheriff of the county, and another writ *Cuſtodi* foreſtæ, *Domini Regis vel ejus locum tenenti*, &c. Which writ of ſummons conſiſts of two parts: *Firſt*, to ſummon all the officers of the *Foreſt*, and that they bring with them all records, &c. *Secondly*, All perſons who claim any liberties or franchiſes within the *Foreſt*, and to ſhew how they claim the ſame. It may alſo proceed to try preſentments in the inferior courts of the Foreſt, and to give judgment upon conviction of the Swainmote. And the Chief Juſtice may therefore after preſentment made, or indictment found, but not before, iſſue his warrant to the officers of the Foreſt to apprehend the offenders. *Stats.* 1 *E.* 3. *c.* 8: 7 *R.* 2. *c.* 4.—This court being a court of record, may fine and impriſon for offences within the Foreſt, and therefore if there be erroneous judgment at the juſtice-ſeat, the record may be removed by writ of error into *B. R.* or the Chief Juſtice *in Eyre* may adjourn any matter to that court. 4 *Inſt.* 291, 5, 313.

Theſe Juſtices in *Eyre* were inſtituted by *Henry* II. A. D. 1184: and their courts were formerly held very regularly; but the laſt court of Juſtice-ſeat of any note, was that holden in the reign of *Charles* I. before the Earl of *Holland*; the rigorous proceedings at which are reported by Sir *W. Jones*. After the Reſtoration, another was held, *pro formâ* only, before the Earl of *Oxford*: but ſince the æra of the Revolution in 1688, the Foreſt laws have fallen into total diſuſe, to the great advantage of the Subject. See 3 *Comm.* 73.—Much therefore of what follows is matter rather of curioſity than uſe.

There is but one *Chief Juſtice* of the *Foreſts* on this ſide *Trent*, and he is named *Juſticiarius Itinerans Foreſtarum*, &c. *citra Trentam*; and there is another, *Capitalis Juſticiarius*; and he is *Juſticiarius Itinerans omnium Foreſtarum ultra Trentam*, &c. who is a perſon of greater dignity, than knowlege in the laws of the *Foreſt*; and therefore when *Juſtice ſeats* are held, there are aſſociated to him ſuch as the King ſhall appoint, who, together with him determine *omnia placita foreſtæ*, &c. 4 *Inſt.* 315.—By *Stat.* 32 *H.* 8. *c.* 35, Juſtices of the King's Foreſts may make deputies.

A *Juſtice in Eyre* cannot grant licence to ſell any timber, unleſs it be *ſedente curiâ*, or after a writ of *ad quod damnum*: and it hath been reſolved by all the judges, that though *Juſtices in Eyre*, and the King's officers within his *Foreſts*, have charge of veniſon, and of vert or green-hue, for the maintenance of the King's game, and all manner of trees for covert, browſe and pannage; yet when timber of the *Foreſt* is ſold, it muſt be cut and taken by power under the *Great Seal*, or the *Exchequer Seal*, by view of the *Foreſters*, that it may not be had in places inconvenient for the game: and the Juſtice in Eyre, or any of the King's officers in the *Foreſt*, cannot ſell or diſpoſe of any wood within the *Foreſt* without commiſſion; ſo that the Exchequer and the officers of the *Foreſt* have *diviſum imperium, the one for the profit of the King, the other for his pleaſure:* Alſo no officer of the *Foreſt* can claim windfalls, or dotard trees, for their perquiſites, becauſe they were once parcel of the King's inheritance; but they ought to be ſold by commiſſion, *for the King's beſt benefit. Read on Stat.* 3 *vol. p.* 304, 5.

If any officers cut down wood, not neceſſary for browſe, &c. they forfeit their offices. 9 *Rep.* 50. The lord of a *Foreſt* may by his officers enter into any man's wood within the regard of the *Foreſt*, and cut down browſewood for the deer in winter. A preſcription for a perſon to take and cut down timber-trees in a *Foreſt*, without view of the *Foreſter*, it is ſaid may be good: but of this *quære*, without allowance of a former *eyre*, &c. If a man hath wood in a *Foreſt*, and hath no ſuch preſcription, the law will allow him to fell it, ſo as he does not prejudice the game, but leave ſufficient vert; but it ought to be by writ of *ad quod damnum*, &c. 4 *Inſt*: *Cro. Jac.* 155. And every perſon in his own wood in a *foreſt* may take *houſe-bote* and *hay-bote*, by view of the *Foreſter*; and ſo may freeholders by preſcription, copyholders by cuſtom, &c: 1 *Ed.* 3. *ſt.* 2. *c.* 2. The wood taken by view of the *Foreſter*, ought to be preſented at the next *Court of Attachment*, that it was by view, and may appear of record.

Fences, &c. in *Foreſts* and chaſes, muſt be with low hedges, and they may be deſtroyed, though of forty years continuance, if they were not before. *Cro. Jac.* 156. He whoſe wood is in danger of being ſpoiled, for want of repairing fences by another, ought to requeſt the party to make good the hedges; and if he refuſe, then he muſt do it himſelf, *and have action on the caſe againſt the other that ſhould have done it.* 1 *Jones* 277.

A perſon may have action at Common-law for a treſpaſs in a *Foreſt*, as to wood, &c. to recover his right. *Sid.* 296.

The *Chief Warden* of the *Foreſt* is a great officer, next to the Juſtices of the *Foreſt*, to bail and diſcharge offenders; but he is no judicial officer; and the conſtable of the caſtle where a *Foreſt* is, by the *Foreſt* law is Chief Warden of the *Foreſt*, as of *Windſor Caſtle*, &c.

A *Verderor* is a judicial officer of the *Foreſt*, and choſen in full county, by the King's writ: his office is to obſerve and keep the aſſiſes or laws of the *Foreſts*, and view, receive, and inroll, the attachments and preſentments of all

treſpaſſes of the *Foreſt*, of vert and veniſon, and to do equal right and juſtice to the people: the verderors are the chief judges of the *Swainmote* court; although the Chief Warden, or his deputy, uſually ſits there. 4 *Inſt.* 292.

The *Regarder* is to make regard of the *Foreſt*, and to view and inquire of offences, concealments, defaults of *Foreſters*, &c. Before any juſtice-ſeat is holden, the *Regarders* of the *Foreſt* muſt make their regard, and go thro' and view the whole *Foreſt*, &c. They are miniſterial officers, conſtituted by letters patent of the King, or choſen by writ to the ſheriff. 4 *Inſt.* 291.

A *Foreſter* is, in legal underſtanding, a ſworn officer miniſterial of the *Foreſt*, and is to watch over the vert and veniſon, and to make attachments and true preſentments of all manner of treſpaſſes done within the *Foreſt*: a *Foreſter* is alſo taken for a *Woodward*: this officer is made by letters patent, and it is ſaid the office may be granted in fee, or for life. 4 *Inſt.* 293. Every *Foreſter*, when he is called at a court of juſtice-ſeat, ought upon his knees to deliver his horn to the Chief Juſtice in Eyre; ſo every Woodward ought to preſent his hatchet to my Lord.

A *Riding Foreſter* is to lead the King in his hunting. 1 *Jones* 277. The office of *Foreſter*, &c. though it be a fee-ſimple, cannot be granted or aſſigned over without the King's licence. 4 *Inſt.* 316. If a *Foreſter* by patent for life, is made juſtice of the ſame foreſt *pro hac vice*, *the foreſterſhip* is become void; for theſe offices are incompatible, as the *foreſter* is under the correction of the juſtice, and he cannot judge himſelf. 1 *Inſt.* 313.

An *Agiſter*'s office is to attend upon the King's woods and lands in a *Foreſt*, receive and take in cattle, &c. by agiſtment, that is to depaſture within the foreſt, or to feed upon the pannage, &c. And this officer is conſtituted by letters patent. 4 *Inſt.* 293. Perſons inhabiting in the foreſt may have common of herbage for beaſts commonable within the Foreſt; but by the Foreſt law, ſheep are not commonable there, becauſe they bite ſo cloſe that they deſtroy the vert; and yet it has been held, that *ſheep* may be commonable in Foreſts by preſcription. 3 *Bulſt.* 213.

There may be a preſcription for common in a Foreſt at all times of the year; though it was formerly the opinion of our judges, that the *fence-month* ſhould be excepted. 3 *Lev.* 127. A Foreſt may be *diſafforeſted* and laid open; but right of common ſhall remain. *Poph.* 93. He that hath a grant of the herbage or pannage of a park, or Foreſt, cannot take any herbage or pannage, but of the ſurpluſage over and above a competent and ſufficient paſture and feeding for the game; and if there be no ſurpluſage, he that hath the herbage and pannage cannot put in any beaſts; if he doth, they may be driven out. *Read. on Stat. vol.* 3. 305. None may gather nuts in the Foreſt without warrant.

A *Ranger* of a Foreſt is one whoſe buſineſs is to rechaſe the wild beaſts from the *purlieus* into the Foreſt, and to preſent offences within the purlieu, and the Foreſt, &c. And though he is not properly an officer in the Foreſt, yet he is a conſiderable officer of, and belonging to it.

The *Beadle* is a foreſt officer, that warns all the courts of the Foreſt, and executes proceſs, makes all proclamations, &c. 4 *Inſt.* 313.

There are alſo *Keepers* or *Bailiffs* of walks in Foreſts and chaſes, who are ſubordinate to the Verderors, &c. And theſe officers cannot be ſworn on any inqueſts, or juries out of the Foreſt. If any man hunts beaſts within a Foreſt, although they are not beaſts of the Foreſt, they are puniſhable by the Foreſt laws; becauſe all hunting there, without warrant is unlawful. 4 *Inſt.* 314.

If a deer be hunted in a Foreſt, and afterwards by hunting it is driven out of the Foreſt, and the *Foreſter* follows the chaſe, and the owner of the ground where driven kills the deer there; yet the *Foreſter* may enter into the lands and retake the deer: for property in the deer is in this caſe by purſuit. 2 *Leon.* 201. He that hath any manner of licence to hunt in a Foreſt, chaſe, park, &c. muſt take heed that he do not abuſe his licence, or exceed his authority; for if he do, he ſhall be accounted a treſpaſſer *ab initio*, and be puniſhed for that fact as if he had no licence at all. *Manw.* 280, 288.

Every lord of parliament, ſent for by the King, may, in coming and returning, kill a deer or two in the King's Foreſt or chaſe through which he paſſes; but it muſt not be done privily, without the view of the Foreſter, if preſent; or, if abſent, by cauſing one to blow a horn, becauſe otherwiſe he may be a treſpaſſer, and ſeem to ſteal the deer. *Chart. Foreſt. c.* 11: 4 *Inſt.* 308.

Lex Foreſtæ is a private law, and muſt be pleaded. 2 *Leon.* 209. But it hath been obſerved, that the laws of the Foreſt are eſtabliſhed by act of parliament, and for the moſt part contained *in Charta de Foreſta*, 9 *H.* 3. *ſt.* 2. *c.* 2: 34 *Ed.* 1. *ſt.* 5.

By the law of the Foreſt, receivers or treſpaſſers in hunting or killing of deer, knowing them to be ſuch, or any of the King's veniſon, are principal treſpaſſers; though the treſpaſs was not done to their uſe or benefit, as the Common-law requires; by which the ſubſequent agreement amounts to a commandment: but if the receipt be out of the bounds of the Foreſt, they cannot be puniſhed by the laws of the Foreſt, being not within the Foreſt juriſdiction, which is local. 4 *Inſt.* 317.

If a treſpaſs be done in a Foreſt, and the treſpaſſer dies, it ſhall be puniſhed after his death in the life-time of the heir, contrary to the Common-law. *Hue* and *cry* may be made by the Foreſt law for treſpaſs, as to veniſon; though it cannot be purſued but only within the bounds of the Foreſt. 4 *Inſt.* 294. And for not purſuing hue and cry in the Foreſt, a townſhip may be fined and amerced. In every treſpaſs and offence of the Foreſt in vert or veniſon, the puniſhment is, to be impriſoned, ranſomed, and bound to the good behaviour of the Foreſt, which muſt be executed by a judicial ſentence by the Lord Chief Juſtice in *Eyre* of the Foreſt.

If any Foreſter find any perſon hunting without warrant, he is to arreſt his body, and carry him to priſon, from whence he ſhall not be delivered without ſpecial warrant from the King, or his juſtices of the Foreſt, &c. But by *Stat.* 1 *Ed.* 3. *c.* 8, Perſons are bailable if not taken *in the manner*, as with a bow ready to ſhoot, carrying away deer killed, or ſmeared with blood, &c. Though if one be not thus taken, he may be attached by his goods. 4 *Inſt.* 289.

The Warden of the Foreſt ſhall let ſuch to mainpriſe until the *eyre* of the Foreſt; or a writ may be had out of the Chancery to oblige him to do it; and if he refuſe to deliver the party, a writ ſhall go to the ſheriff to attach the Warden, &c. who ſhall pay treble damages to the party grieved and be committed to priſon, &c. *Stat.* 1 *Ed.* 3.

1 *Ed.* 3. *c.* 8. No Officer of the Foreſt may take or impriſon any perſon without due indictment, or *per main ouure*, with his hand at the work; nor ſhall conſtrain any to make obligation againſt the aſſiſe of the Foreſt, on pain to pay double damages, and to be ranſomed at the King's will. *Stat.* 7 *R.* 2. *c.* 4.

A Foreſter ſhall not be queſtioned for killing a treſpaſſer, who (after the peace cried unto him) will not yield himſelf; ſo as it be not done out of ſome former malice. *ſtat.* 21 *Ed.* 1. *ſt.* 1. But if treſpaſſers in a Foreſt, *&c.* kill a man who oppoſes them, although they bore no malice to the perſon killed, it is murder; becauſe they were upon an unlawful act, and therefore malice is implied. *Rol. Abr.* 548. And if murder be committed by ſuch treſpaſſers, all are principals. *Kel.* 87.

If a man comes into a Foreſt in the night-time, the Foreſter cannot juſtify beating him before he makes reſiſtance; but if he reſiſts, he may juſtify the battery. Perſons may be fined for concealing the killing of deer by others; and ſo for carrying a gun, with an intent to kill the deer; and he that ſteals veniſon in the *Foreſt*, and carries it off on horſeback, the horſe ſhall be forfeited, unleſs it be that of a ſtranger ignorant of the fact. Where heath is burnt in a *Foreſt*, the offenders may be fined: and if any man cuts down buſhes and thorns, and carries them away in a cart, he is fineable, and the cart and horſes ſhall be ſeized by the *Foreſt* laws. But a man may preſcribe to cut wood, *&c.* And every freeman within the *Foreſt* may on his own ground make a mill-dyke, or arable land, without incloſing ſuch arable; but if it be a nuſance to others, it is puniſhable. *Chart. Foreſt. c.* 11: 12 *Rep.* 22. And if any having woods in his own ground, within any *Foreſt*, or chaſe, ſhall cut the ſame by the King's licence, *&c.* he may keep them ſeveral and incloſed, for ſeven years after felling. *Stat.* 22 *E.* 4. *c.* 7

By *Charta de Foreſta*, 9 *H.* 3 *ſtat.* 2. *c.* 2, No man ſhall loſe life or member for killing the King's deer in a *Foreſt*, *&c.* but ſhall be fined; and if he have nothing to pay the fine, he ſhall be impriſoned a year and a day; and then be delivered, if he can give good ſecurity not to offend for the future; and if not, he ſhall abjure the realm: Before this ſtatute, it was felony to hunt the King's deer. 2 *Inſt.* 120. To hunt in a *Foreſt*, park, *&c.* in the night, diſguiſed, if denied or concealed, upon examination before a juſtice of peace, it is *felony*: but if confeſſed, it is only fineable. *Stat.* 1 *H.* 7. *c.* 7. Keepers, *&c.* may ſeize inſtruments uſed in unlawful cutting of trees. *Stat.* 4 *Geo.* 3 *c.* 31.

The cruel and inſupportable hardſhips which the Foreſt laws created to the Subject, occaſioned our anceſtors to be as zealous for their reformation, as for the relaxation of the feodal rigours and the other exactions introduced by the *Norman* family. And accordingly we find, in hiſtory the immunities of *Carta de Foreſta* as warmly contended for, and extorted from the King with as much difficulty, as thoſe of *Magna Charta* itſelf. By this charter confirmed in parliament many Foreſts were diſafforeſted or ſtripped of their oppreſſive privileges; and regulations made in the regimen of ſuch as remained. And by a variety of ſubſequent ſtatutes together with the long acquieſcence of the Crown without exerting the Foreſt laws, this prerogative is become no longer a grievance to the ſubject. *Comm.*

See further as to the Foreſt law titles *Black Act*: *Dear-Stealing*: *Game*: *Chaſe*: *King*: *Park*: *Purlieu*: *Drift of the Foreſt*, &c.

FORESTAGIUM, Duty payable to the King's *Foreſters*. *Chart.* 18 *Ed.* 1.

FORESTALLING, *Foreſtallamentum*, from the Sax. *fore*, before, & ſtal *a ſtall.*] To intercept on the highway. *Spelman* ſays, it is *viæ obſtructio, vel itineris interceptio*; with whom agrees *Coke on Lit.* fol. 161. And, according to *Fleta*, foreſtalling *ſignificat obſtructionem viæ vel impedimentum tranſitûs et fugæ averiorum, &c. lib.* 1. *c.* 24. In our law, *foreſtalling* is the buying or bargaining for any corn, cattle or other merchandiſe, by the way, as they come to fairs or markets to be ſold, before they are brought thither; to the intent to ſell the ſame again, at a higher and dearer price.

All endeavours to inhance the common price of any victuals or merchandiſe, and practices which have an apparent tendency thereto, whether by ſpreading falſe rumours, or buying things in a market before the accuſtomed hour, or by buying and ſelling again the ſame thing in the ſame market, *&c.* are highly criminal by the Common-law; and all ſuch offences anciently came under the general appellation of *foreſtalling*. 3 *Inſt.* 195, 196. And ſo jealous is the Common-law of practices of this nature, which are a general inconvenience and prejudice to the people, and very oppreſſive to the poorer ſort, that it will not ſuffer corn to be ſold in the ſheaf before thraſhed; for by ſuch ſale the market is in effect *foreſtalled*. 3 *Inſt.* 197: *H. P. C.* 152.

Foreſtalling, *Ingroſſing*, and *Regrating*, are offences generally claſſed together as of the ſame nature and equally hurtful to the Public. *Ingroſſing* ſeems derived from the words *in* and *groſs* great or whole; and *regrating* from *re*, again, and *grater* Fr. to ſcrape, from the dreſſing or ſcraping of cloth or other goods in order to ſell the ſame again.

Several ſtatutes were from time to time made againſt theſe offences in general, and alſo ſpecially with reſpect to particular ſpecies of goods according to their ſeveral circumſtances; all of which from the 5 & 6 *E.* 6. *c.* 14, downwards, and all acts for enforcing the ſame are repealed by *ſtat.* 12 *Geo.* 3. *c.* 71; by the preamble of which it ſhould ſeem that the remedy was found worſe than the diſeaſe. But theſe offences ſtill continue puniſhable upon indictment at the Common-law by fine and impriſonment.

The offence of *foreſtalling* the market is an offence againſt public trade. This was deſcribed by the ſaid *Stat.* 5 & 6 *E.* 6. *c.* 14, to be the buying or contracting for any cattle, merchandize or victual coming in the way to the market or diſſuading perſons from bringing their goods or proviſions there; or perſuading them to enhance the price when there; any of which practices makes the market dearer to the fair trader.

Regrating was deſcribed by the ſame ſtatute to be the buying of corn, or other *dead* victual, in any market; and ſelling it again in the ſame market, or within 4 miles of the place. For this alſo enhances the price of the proviſions, as every ſucceſſive ſeller muſt have a ſucceſſive profit.

Ingroſſing was alſo deſcribed to be the getting into one's poſſeſſion or buying up large quantities of corn or other dead victuals with intent to ſell them again. This muſt be

of courſe injurious to the Public, by putting it in the power of one or two rich men to raiſe the price of proviſions at their own diſcretion.

The above deſcriptions given by the ſtatute ſerve as a guide for the indictment of theſe offences at Common-law, and are therefore here preſerved.

The total ingroſſing of any commodity, with intent to ſell it at an unreaſonable price is an offence indictable and fineable at Common-law. *Cro. Car.* 232.

Salt has been held to be within the proviſions againſt foreſtalling, as a neceſſary victual; but not *hops*, nor *apples* or other fruits. See *ſtat.* 2 & 3 *E.* 6. *c.* 15, which ſeems yet in force; prohibiting butchers, brewers, bakers, poulterers, cooks and fruiterers, from conſpiring not to ſell victuals, but at certain prices, on penalty of 10*l.* for the firſt offence, 20*l.* for the ſecond, 40*l.* for the third, &c. and if ſuch conſpiracy be made by any company, or body corporate, the corporation ſhall be diſſolved.

See further 1 *Hawk. P. C. c.* 80; and this Dict. titles *Bricks and Tiles*; *Cattle*; *Monopoly*.

FORETOOTH, Striking out the foretooth is a *Mayhem*. See title *Maihem*.

FORFANG OR FORFENG, from the Sax. *Fore, ante* & fangen, *prendere*. *Antecaptio vel Præventio*.] The taking of proviſion from any one in fairs or markets, before the King's *Purveyors* are ſerved with neceſſaries for his majeſty. *Chart. Hen.* 1. *Hoſp. Sanct. Barth. Lond. Anno* 1133.

FORFEITURE.

FORISFACTURA, from the Fr. *Forfait*.] The effect, or penalty, of tranſgreſſing ſome law. For an ingenious diſcuſſion to prove the propriety and policy of ſuch puniſhment, ſee Mr. *Charles Yorke's* "*Conſiderations on the Law of Forfeitures*" corrected and enlarged 8vo. 1775. —See alſo this Dict. title *Tenures* III. 10.

Forfeiture is defined by *Blackſtone* to be a puniſhment annexed by law to ſome illegal act or negligence in the owner of lands, tenements or hereditaments: whereby he loſes all his intereſt therein, and they go to the party injured, as a recompence for the wrong, which either he alone or the publick together with him hath ſuſtained. 2 *Comm.* 267.

Lands, tenements and hereditaments may be forfeited in various degrees and by various means. Forfeitures may therefore be divided into *civil* and *criminal*. The latter will be preſently conſidered more at large under this title.

Civil Forfeitures ariſe either by alienation contrary to law; as in *mortmain*; for which ſee this Dict. under that title; to *Aliens* ſee title *Alien*; or by particular tenants when they are greater than the law entitles them to make. This latter alienation diveſts the remainder or reverſion and is alſo a forfeiture to him whoſe right is attacked thereby. 1 *Inſt.* 251.

Forfeiture in civil caſes may alſo accrue by non-preſentation to a benefice, when it is called a *Lapſe*; See this Dict. tit. *Advowſon*. By *Simony*; See that title. By non-performance of *Conditions*; See title *Condition*.—By *Waſte*; See that title.—By breach of copyhold cuſtoms; See title *Copyhold*; or laſtly by *Bankruptcy*; See that title.

I. *Of Forfeitures in Civil Caſes.*

II. *Of Forfeitures in Criminal Caſes: and herein.*

1. *Generally for what Crimes ſuch Forfeitures are inflicted; and to what Time they bear relation.*
2. *More particularly; what Eſtates are ſubject to Forfeiture.*
3. *When Forfeitures may be ſeized.*

I. As to alienations *by particular tenants*; if tenant for his own life aliens, by feoffment or fine, for the life of another, or in tail, or in fee; theſe being eſtates, which either muſt or may laſt longer than his own, the creating them is not only beyond his power, and inconſiſtent with the nature of his intereſt, but is alſo a Forfeiture of his own particular eſtate to him in remainder or reverſion. *Litt.* § 415. For this there ſeem to be two reaſons; Firſt, becauſe ſuch alienation amounts to a renuntiation of the feodal connection and dependence; it implies a refuſal to perform the due renders and ſervices to the lord of the fee, of which fealty is conſtantly one, and it tends in it's conſequence to defeat and deveſt the remainder or reverſion expectant: as therefore that is put in jeopardy, by ſuch act of the particular tenant, it is but juſt, that, upon diſcovery, the particular eſtate ſhould be forfeited and taken from him, who has ſhewn ſo manifeſt an inclination to make an improper uſe of it: The other reaſon is, becauſe the particular tenant, by granting a larger eſtate than his own, has by his own act determined and put an entire end to his own original intereſt; and on ſuch determination the next taker is entitled to enter regularly, as in his remainder or reverſion. 2 *Comm.* 274.

Another reaſon aſſigned for theſe Forfeitures is, that the act done is incompatible with the eſtate which the tenant holds, and againſt the implied condition on which he holds it. As in the caſe of a tenant for life or years enfeoffing a ſtranger in fee-ſimple, this is a breach of the condition which the law annexes to his eſtate, *viz.* that he ſhall not attempt to create a greater eſtate than he himſelf is entitled to. 1 *Inſt.* 215. So if tenant for life, or years, or in fee, commit felony, this is a breach of the implied condition annexed to every feodal donation that they ſhould not commit felony. 2 *Comm.* 153.

The ſame law, which is thus laid down with regard to tenants for life, holds alſo with reſpect to all tenants of the mere freehold, or of chattel intereſts: But if tenant in tail aliens in fee, this is no immediate Forfeiture to the remainder-man, but a mere diſcontinuance of the eſtate-tail, which the iſſue may afterwards avoid by due courſe of law: for he in remainder or reverſion hath only a very remote, and barely poſſible intereſt therein, until the iſſue in tail is extinct. See this Dict. tit. *Diſcontinuance*.

But in caſe of ſuch Forfeitures, by particular tenants, all legal eſtates by them before created, (as if tenant for 20 years grants a leaſe for 15,) and all charges by them lawfully made on the lands ſhall be good and available in the law. For the law will not hurt an innocent leſſee for the fault of his leſſor; nor permit the leſſor, after he has granted a good and lawful eſtate, by his own act to avoid it, and defeat the intereſt which he himſelf hath created. 1 *Inſt.* 233: 2 *Comm.* 275.

Equivalent, both in it's nature and it's conſequences, to an illegal alienation by the particular tenant, is the civil crime of *Diſclaimer*; as to which See this Dict. title *Diſclaimer*.

If Tenant, for life, in dower, by the curtesy, or after possibility of issue extinct, or lessee for years, tenant by statute-merchant, staple, or *elegit*, of lands or tenements that lie in *livery*, shall make any absolute or conditional feoffment in fee, gift in tail, lease for any other life than his own, &c. or levy a fine *sur conusance de droit come ceo*, &c. or suffer a common recovery thereof: or being impleaded in a writ of right brought against him, join the *mise* upon the mere right, or admit the reversion to be in another; or in a *quid juris clamat*, claim the fee-simple; or if lessee for years being ousted, bring an assise *ut de libero tenemento*, &c.—by either of these things, there will be a *Forfeiture* of estate. *Plowd* 15: 1 *Rep* 15: 8 *Rep.* 144: *Co. Lit.* 251: *Dyer* 152. 324: 1 *Bulst.* 219.

But where the land granted by tenant for life, or years, is not well conveyed; or the thing does not lie in *livery*, as a rent, common, or the like; he will not *forfeit* his estate: and therefore if a feoffment, gift in tail, or lease for another's life, made by the tenant for life, is not good, for want of words in making it, or due execution in the livery and seisin, this shall *not* produce a *Forfeiture*. 2 *Rep.* 55.

When tenant in tail makes leases, not warranted by the statute; a copyholder commits waste, refuses to pay his rent, or do suit of court; one to whom an estate is granted upon condition, does not perform the same; in all these cases Forfeitures are incurred. 1 *Rep.* 15.

Entry for a *Forfeiture* ought to be by him, who is next in reversion, or remainder after the estate forfeited. As, if tenant for life or years commits a *Forfeiture*, he who has the *immediate* reversion, or remainder, ought to enter; though he has the fee, or only an estate-tail. 1 *Rol.* 857. *l.* 45, 50; 858. *l.* 5.

It shall be a dispensation of the *Forfeiture*, if he in reversion, or remainder be a party to the estate made, and accept it: as, if a husband, seised in right of his wife for life, leases to him in reversion for his own life. 1 *Rol.* 856. *l.* 10.

Also *Offices* may be *forfeited* by neglect of duty, &c. See title *Office*.

II. 1. The true reason, and only substantial ground, of any FORFEITURE FOR CRIMES, consist in this: that all property is derived from Society, being one of those civil rights conferred on individuals in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the State may very justly resume that portion of property, or any part of it which the laws have before assigned him. Hence in every offence of an atrocious kind, the laws of *England* have exacted a total confiscation of the moveables or personal estate; and in many cases perpetual, in others only a temporary loss, of the offender's immoveables or landed property: and have vested them both in the King, as the person supposed to be offended, being the one visible magistrate in whom the majesty of the Public resides. 1 *Comm.* 299.

The offences which induce a Forfeiture of lands and tenements are principally the following six. 1 *Treason.* 2 *Felony.* 3 *Misprision of Treason.* 4 *Præmunire.* 5 *Drawing a weapon on a Judge*; or *striking any one* in the presence of the King's courts of justice. 6 *Popish Recusancy*; or non-observance of certain laws enacted in restraint of papists.

Forfeiture in *criminal Cases* is two-fold; of real and personal estates. First as to *Real Estates*.

By Common-law on attainder of high treason a man forfeits to the King all his lands and tenements of inheritance whether fee-simple or fee-tail, and all his right of entry on lands and tenements, which he had at the time of the offence committed or at any time afterwards: to be for ever vested in the Crown. And also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. *Co. Lit.* 392: 3 *Inst.* 19: 1 *Hal. P. C.* 240: 2 *Hawk. P. C. c.* 49.

This forfeiture relates backwards to the time of the treason committed so as to avoid all intermediate sales and incumbrances, but not those before the fact. 3 *Inst.* 211. A wife's jointure is not forfeitable for the treason of her husband: because settled upon her previous to the treason committed. But her dower is forfeited by the express provision of *Stat.* 5 & 6 *E.* 6. *c.* 11, repealing in that particular *Stat.* 1 *E.* 6. *c.* 12. The husband notwithstanding shall be tenant by the curtesy of the wife's lands if the wife be attainted of treason, for that is not prohibited by the statute. 1 *Hal. P. C.* 359. But though, after attainder, the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits: and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no Forfeiture of his lands; for he never was attainted of treason; and by the express provision of *Stat.* 34 *E.* 3. *c.* 12, there shall be no Forfeiture of lands for treason, of dead persons, not attainted in their lives.—Yet if the Chief Justice of the King's Bench (the supreme coroner of all *England*) in person upon the view of the body of one killed in open rebellion, records it, and returns the record into his own court, both lands and goods shall be forfeited. 4 *Rep.* 57.

Forfeiture of lands and tenements to the Crown for treason is by no means derived from the feodal policy, but was antecedent to the establishment of that system in this island. See this Dict. title *Tenures* III. 10.—But in certain treasons relating to the coin it is provided by some of the more modern statutes which constitute the offence, that it shall work no Forfeiture of lands, save only for the life of the offender: and, by all, that it shall not deprive the wife of her dower. See *Stats.* 5 *Eliz. c.* 11: 18 *Eliz. c.* 1.:—8 & 9 *W.* 3. *c.* 26: 15 & 16 *Geo.* 2. *c.* 28.—And in order to abolish such hereditary punishment entirely, it was provided by *Stat.* 7 *An. c.* 21, that after the decease of the late Pretender no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person other than the traitor himself. By which the law of Forfeitures for high treason would by this time have been at an end, had not a subsequent statute intervened to give them a longer duration, namely the *Stat.* 17 *Geo.* 2. *c.* 39, by which the operation of the indemnifying clauses in *Stat.* 7 *Ann. c.* 21, is still farther suspended till the death of the sons of the late Pretender. See 4 *Comm.* 384; and this Dict. title *Attainder*.

In petit treason, misprision of treason and felony, the offender also forfeits all his chattel interests absolutely; and he profits of all estates of freehold during life; and after his death all his lands and tenements in fee simple, (but not those in tail) to the Crown for a short period of time: for the King shall have them for a year and a day, and may commit therein what waste he pleases; which

is called the King's *Year, Day,* and *Waſte*. 2 *Inſt.* 37: 3 *Inſt.* 39. Formerly the King had a liberty of committing waſte on the lands of felons, by pulling down their houſes, extirpating their gardens, ploughing their meadows, and cutting down their woods. But this tending greatly to the prejudice of the Huſbandry, it was agreed in the reign of *Hen.* I, that the King ſhould have the profits of the land for a year and a day, in lieu of the deſtruction he was otherwiſe at liberty to commit; and therefore *Magna Carta, c.* 22, provides that the King ſhall only hold ſuch lands for a year and day, and then reſtore them to the lord of the fee; without any mention of waſte. See *Mirr. c.* 4. § 16: *Flet. l.* 1. *c.* 28. But the ſtatute 17 *E.* 2, *de prærogativâ regis* ſeems to ſuppoſe that the King ſhall have his year, day, *and* waſte, and not the year and day *inſtead of* waſte: which *Lord Coke* and *the Mirror* very juſtly conſider as an encroachment, tho' a very ancient one, of the royal prerogative. *Mirr. c.* 5. § 2: 2 *Inſt.* 37.

This year, day and waſte are now uſually compounded for; but otherwiſe they regularly belong to the crown, and after their expiration the land would have deſcended to the heir, (as in *gavel-kind* tenure it ſtill does,) did not its feodal quality intercept ſuch deſcent and give it by way of eſcheat to the Lord. See titles *Tenure*; *Eſcheat*.

Theſe Forfeitures of lands for felony alſo ariſe only upon attainder; and therefore a *felo de ſe* forfeits no lands of inheritance or freehold, for he never is attainted as a felon. 3 *Inſt.* 55. They likewiſe relate back to the time of the offence committed, as well as Forfeitures for treaſon; ſo as to avoid all intermediate charges and conveyances. 4 *Comm.* 386.

Theſe are all the Forfeitures of real eſtates created by the Common-law as conſequential upon attainders by judgment of death or outlawry. The particular Forfeitures created by the ſtatutes of *Præmunire* and others are here omitted, being rather a part of the judgment and penalty inflicted by the reſpective ſtatutes, than *conſequences* of ſuch judgment, as in treaſon and felony they are. See *Poſt.* II.

As a part of the Forfeiture of real eſtates, may be mentioned, the Forfeiture of the profits of lands during life: which extends to two other inſtances beſides thoſe already ſpoken of; the ſtriking in *Weſtminſter Hall*, or drawing a weapon upon a judge there ſitting in the King's courts of juſtice. 3 *Inſt.* 141. And it ſeems that the ſame Forfeiture is incurred by reſcuing a priſoner in or before any of the courts there, committed by the judges. *Cro. Jac.* 307.

The Forfeiture of Goods and Chattels accrues in every one of the higher kinds of offence: in high treaſon or miſpriſion thereof; petit treaſon; felonies of all ſorts, whether clergyable or not: ſelf murder, or *felo de ſe*; petit larceny; ſtanding mute; challenging above 35 Jurors; and the above mentioned offences of ſtriking, &c. in *Weſtminſter Hall* For *Flight* alſo, on an accuſation of treaſon, felony, or even petit larceny, whether the party be found guilty or acquitted, if the jury find the flight, the party ſhall forfeit his goods and chattels; for the very flight is an offence, carrying with it a ſtrong preſumption of guilt; and is at leaſt an endeavour to elude and ſtifle the courſe of juſtice preſcribed by the law. But the jury very ſeldom find the flight; Forfeiture, being looked upon, ſince the vaſt increaſe of perſonal property, as too large a penalty for an offence to which a man is prompted by the natural love of liberty. 4 *Comm.* 387.

There are ſome remarkable differences between the Forfeiture of lands, and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before: goods and chattels are forfeited by *conviction*. Becauſe in many of the caſes where goods are forfeited there never is any attainder; which happens only where judgment of death or outlawry is given; therefore in thoſe caſes the Forfeiture muſt be upon conviction, or not at all; and being neceſſarily upon conviction in thoſe, it is ſo ordered in all other caſes: for the law loves uniformity. 2. In outlawries for treaſon or felony lands are forfeited only by the judgment, but the goods and chattels are forfeited by a man's being firſt put in the exigent, without ſtaying till he is *quinto exactus*, or finally outlawed, for the ſecreting himſelf ſo long from juſtice is conſtrued a flight in law. 3 *Inſt.* 232. (See this Dict. tit. *Outlawry*.) 3. The forfeiture of lands has relation to the time of the fact committed ſo as to avoid all ſubſequent ſales and incumbrances; but the Forfeiture of goods and chattels has no relation backwards, ſo that thoſe only which a man has at the time of conviction ſhall be forfeited. Therefore a traitor or felon may *bonâ fide* ſell any of his chattels real or perſonal for the ſuſtenance of himſelf or family between the fact and conviction; 2 *Hawk. P. C. c.* 49. For perſonal property is of ſo fluctuating a nature that it paſſes through many hands in a ſhort time; and no buyer could be ſafe if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treaſon or felony. Yet if they be colluſively and not *bonâ fide* parted with, merely to defraud the crown, the law, and particularly *Stat.* 13 *Eliz. c.* 5. will reach them; for they are all the while truly and ſubſtantially the goods of the offender; and as he, if acquitted, might recover them himſelf, as not parted with for a good conſideration, ſo in caſe he happens to be convicted, the law will recover them for the King. 4 *Comm.* 388.

2. Where land comes to the crown, as forfeited by *attainder of treaſon*, all meſne tenures of common perſons are extinct; but if the King grant it out, the former tenure ſhall be revived, for which a petition of right lies. 2 *Hale's Hiſt. P. C.* 254. In *Treaſon*, all lands of inheritance, whereof the offender was ſeiſed in his own right, were forfeited by the Common-law; and rights of entry, &c. And the inheritance of things not lying in tenure, as of rent-charges, commons, &c. ſhall be forfeited in *high treaſon*: but no *right of action* whatſoever to lands of inheritance is forfeited, either by the common or ſtatute law. 2 *Hawk P. C. c.* 49.

By *Stat.* 26 *H.* 8. *c.* 13, All lands, tenements, &c. are forfeited in *treaſon*. And the King ſhall be adjudged in poſſeſſion of lands and goods forfeited for treaſon on the attainder of the offender, without any office found, ſaving the right of others. See *Stat.* 33 *H.* 8. *c.* 20. Lands and hereditaments in *fee ſimple* and *fee tail*, are forfeited in *high treaſon*: but lands *in tail* could not be forfeited only for the life of tenant in tail, till the ſtatute 26 *H.* 8. *c.* 13, by which ſtatute, they may be forfeited.

Upon *outlawry* in *treaſon* or *felony*, the offender ſhall forfeit as much as if he had appeared, and judgment had been given againſt him; ſo long as the outlawry is in force. 3 *Inſt.* 52, 212.

Gavelkind land in *Kent* is not forfeited by committing of *felony*; and by a *felony only*, *intailed lands* are *not* forfeit. *S. P. C.* 3. 26.

Land

Land that one hath in truſt; or goods and chattels in right of another, or to another's uſe, &c. will not be liable to Forfeiture. Though leaſes for years, in a man's own, or his wife's right, eſtates in jointenancy, &c. and all ſtatutes, bonds, and debts due thereby, and upon contracts, &c. ſhall be forfeited. *Co. Lit.* 42, 151: *Staund.* 188.

A married man guilty of *felony*, forfeits his wife's term; and if a wife kill her huſband, the huſband's goods are forfeited. *Jenk. Cent.* 65. In *manſlaughter*, the offender forfeits *goods* and *chattels*, and in *chance-medley* and *ſe defendendo*, *goods* and *chattels*; but the offenders may have their pardon of courſe. *Co. Lit.* 319.

Thoſe that are hanged by *Martial Law* in the time of war, forfeit no lands. *Co. Lit.* 13. And for robbery or piracy, &c. on the ſea, if tried in the Court of Admiralty, by the *Civil Law*, and not by jury, there is no forfeiture: but if a perſon be attainted before commiſſioners by virtue of the *Stat.* 28 *Hen.* 8. *c.* 15, there it works a Forfeiture. 1 *Lil. Abr.*

In caſes of felony the profits of lands whereof a perſon, attainted of felony, is ſeiſed of an eſtate of inheritance in right of his wife; or of an eſtate for life only in his own right; are forfeited to the King, and nothing is forfeited to the Lord. 3 *Inſt.* 19: *Fitz. Aſſ.* 166.

Goods of perſons that *fly* for a felony, are forfeited to the Lord of the franchiſe, when the flight is found of record. 2 *Inſt.* 281.

In a *præmunire*, *lands in fee-ſimple* are forfeited, *with goods and chattels*. *Co. Lit.* 129.

Before the ſtatute of 1 *E.* 6. *cap.* 12, the wife not only loſt her dower at Common law, but alſo her dower *ad oſtium eccleſiæ*, or *ex aſſenſu patris*, or by ſpecial cuſtom (except that of gavelkind,) by the huſband's attainder of treaſon, or capital felony, whether committed before or after marriage. *Co. Lit.* 31 *b*: 37 *a*: 41 *a*: *F. N. B.* 150: *Perk.* § 308: *Bro.* tit. *Dower* 82: *Plowd.* 261.

But the wife forfeited lands given jointly to her huſband and her, whether by way of frank marriage or otherwiſe, only for the year, day, and waſte. *Co. Lit.* 37: 3 *Inſt.* 216.

By *Stat.* 1 *E.* 6. *cap.* 12. *par.* 17, It was enacted that albeit any perſon ſhall be attainted of any treaſon or felony whatſoever; yet notwithſtanding every woman, that ſhall fortune to be the wife of the perſon ſo attainted, ſhall be endowable and enabled to demand, have, and enjoy her dower, in like manner and form as tho' her huſband had not been attainted, &c. This however was *repealed* as to *treaſon* by 5 & 6 *E.* 6. *cap.* 11. *par.* 9. See *ante* I.

Though Lord *Coke*, expreſsly makes dower *ex aſſenſu patris*, as well as the dowers at Common-law and *ad oſtium eccleſiæ*, liable to be defeated at Common-law, by the huſband's treaſon or felony; 1 *Inſt.* 37 *a*: yet ſome have inclined to think that this *St.* 5 & 6 *E.* 6. *c.* 11, doth not extend to dower *ex aſſenſu patris*, ſo that that ſhall not be forfeitable on the treaſon of the huſband.—And in 1 *Inſt.* 35 *b*, Lord *Coke* mentions that according to ſome opinions the wife loſes dower *ex aſſenſu patris*, if after the aſſent the *father* was attainted of treaſon.—See 1 *Inſt.* 41 *a*: *in note.*

If the huſband ſeiſed of lands in fee, makes a feoffment and then commits treaſon, and is attainted of it, the wife ſhall not recover dower againſt the feoffee. *Bendl.* 56: *Dyer* 140; *Co. Lit.* 111 *a*. So if the huſband is attainted of treaſon, and afterwards pardoned, yet the wife ſhall not recover dower; but of lands purchaſed by the huſband after the pardon, the wife ſhall be endowed. 3 *Leon.* 3: *Perk. ſect.* 391.

If a huſband having levied a fine with proclamation, is erroneouſly attainted of treaſon, and the five years paſs after his death, and then the outlawry is reverſed, the fine and non-claim are no bar till five years are paſſed after the reverſal, becauſe the wife could not ſue for her dower while the attainder ſtood in force, neither could ſhe any way reverſe it. 3 *Inſt.* 216: *Moor* 639. *pl.* 879.

After the making of the above mentioned ſtatute 1 *E.* 6. *cap.* 12, it ſeems to have been doubted, whether the wife ſhould not loſe her dower in caſe of any new felony made by act of parliament; therefore where ſeveral offences have been made felony ſince, care has been taken to provide for the wife's dower. 2 *New Abr.* 584. See 12 *Vin. Abr.* tit. *Forfeiture*. 2 *Hawk. P. C. c.* 49.

If a woman after a *rape*, conſent to the raviſher, ſhe ſhall loſe her dower after the death of her huſband, &c. *Stat.* 6 *R.* 2. *c.* 6. And if any maiden or woman child *above* twelve, and under ſixteen years of age, ſhall agree to be taken away and deflowered, or contract with any man for marriage againſt the will and without the conſent of her father; or, if he be dead, her mother or guardian appointed by her father's will, ſhe ſhall *forfeit* her land of inheritance for her life. 4 & 5 *P. & M. c.* 8.

Artificers going out of the kingdom and teaching their trades to foreigners, are liable to *forfeit* their lands, &c. by *Stat.* 5 *Geo.* 1. *c.* 27. Similar Forfeitures likewiſe are inflicted by ſeveral other penal ſtatutes. See title *Manufacturers*.

In all caſes where a penalty or Forfeiture is given by ſtatute, without ſaying to whom it ſhall be, or a limitation for a recompence for the wrong to the party, it belongs to the King, *Stra.* 50, 828: 2 *Vent.* 267. And ſuch Forfeitures ſhall be conſtrued favourably. *Cowp.* 585, 8.

3. Goods or lands of one arreſted for felony, ſhall not be ſeized before he is convict or attaint of the felony; on pain of *forfeiting* double value. *Stat.* 1 *R.* 3. *c.* 3. Goods of a felon, &c. cannot be ſeized before *Forfeited*; though they may be inventoried, and a charge made thereof before indictment. *Wood's Inſt.* 659 Where goods of a felon are pawned before he is attainted, the King ſhall not have the *Forfeiture* of the goods till the money is paid to him to whom they were pawned. 3 *Inſt.* 17: 2 *Nelſ. Abr.* 874, 875.

After conviction by judgment, or outlawry, for high-treaſon, &c. a commiſſion goes to perſons named by the King or by the Attorney General, to inquire, what lands and tenements the offender had at the time of the treaſon committed, and the value; and that they ſeize them into the King's hands. And the inquiſition taken thereon ſhall be returned to the Court of *Exchequer*, and filed in the office of the King's Remembrancer. *Lut.* 997. So after conviction for felony, a *ſcire facias* ſhall go againſt the vill, or any other, who has the goods in his cuſtody. *S. P. C.* 194. But if any one has title to the goods or lands found by inquiſition to be the goods or lands of the offender, he may make his claim by pleading his title. *Lut.* 998. To which the Attorney General ſhall demur, or reply. *Vid. Com. Dig.* title *Prærogative*, (D. 83, 84.)

A copyholder ſurrenders to the uſe of his will; the deviſee is convicted of felony and hanged before admittance,

tance, the lands are not forfeited to the lord but deſcend to the heir of the ſurrenderor. 2 *Wilſ.* 13.

Forfeiture differs from *confiſcation*, in that *Forfeiture* is more general; whereas *confiſcation* is particularly applied to ſuch as are *forfeit* to the King's *Exchequer*, and *confiſcate* goods are ſaid to be ſuch as nobody doth claim. *Staundf. P. C.* 186.

There is a full *Forfeiture*, *plena foriſfactura*, otherwiſe, called *plena uita*, which is a *Forfeiture* of life and member, and all that a man hath. *Leg. H.* 1 *c.* 88. And there is mention in ſome ſtatutes, of *Forfeiture* at the King's will, of body, lands, and goods, &c. 4 *Inſt.* 66. See further on this ſubject this Dict. titles *Attainder*; *Corruption of Blood*; *Felony*; *Treaſon*, &c. and *Com. Dig.* tit. *Forfeiture*.

FORFEITURE OF MARRIAGE, *Foriſfactura maritagii.*] A writ which anciently lay againſt him, who, holding by knights-ſervice, and being under age, and *unmarried*, refuſed her whom the lord offered him without his diſparagement, and married another. *F. N. B. fol.* 141.: *Reg. Orig. fol.* 163. See title *Tenure*.

FORFEITED ESTATE. Several ſtatutes have been from time to time paſſed, appointing *Commiſſioners of Forfeited Eſtates*, on rebellions in this kingdom and *Ireland*: Thus by *Stat.* 11 & 12 *W.* 3 *c.* 3, all lands and tenements, &c. of perſons attainted or convicted of treaſon or rebellion in *Ireland*, were veſted in ſeveral commiſſioners and truſtees for ſale thereof. And by ſeveral *Stats. temp. Geo.* I, commiſſioners were appointed to inquire of *Forfeited Eſtates* in *England* and *Scotland*, on the rebellion at *Preſton*, &c. And the eſtates of perſons attainted of treaſon were veſted in His Majeſty for public uſes; but afterwards in truſtees to be ſold for the uſe of the Public; and it was provided that the purchaſers ſhould be *Proteſtants*.

FORGAVEL, *Forgabulum.*] A ſmall reſerved rent in money, or quit-rent. *Cartular. Abbat. de Reading MS. f.* 88.

FORGE, *Forgia.*] A ſmith's *Forge*, to melt and work iron. *Chart. Heu.* 2.

FORGERY, From Fr. *Forger*, *i. e. accudere*, *fabricare*, to beat on an anvil, to *forge* or form.] The fraudulent making or alteration of any Deed, Writing, Inſtrument, Regiſter, Stamp, &c. to the prejudice of another man's right. An offence puniſhable, according to its circumſtances, by fine, impriſonment, pillory, tranſportation and death.

By *Stat.* 5 *Eliz. c.* 14, to forge or make, or knowingly to publiſh or give in evidence, any forged *deed*, *court-roll*, or *will*, with intent to affect the right of real property, either freehold or copyhold, is puniſhed by a Forfeiture to the party grieved, of double coſts and damages; by the offender's ſtanding in the pillory and having both his ears cut off and his noſtrils ſlit and ſeared; by Forfeiture to the crown of the profits of his lands, and by perpetual impriſonment. For any Forgery relating to a *term of years*, or *annuity*, *bond*, *obligation*, *acquittance*, *releaſe* or *diſcharge* of any debt or demand of any perſonal chattels, the ſame Forfeiture is given to the party grieved, and on the offender is inflicted the pillory, loſs of one ear, and a year's impriſonment.—The ſecond offence, in both caſes, being felony without benefit of clergy.

Beſides this general act, a multitude of others, ſince the Revolution, when paper credit was firſt eſtabliſhed, have inflicted *capital puniſhment* on the following ſpecies of Forgery, *viz.*—The forging, altering or uttering as true when forged, of any *Bank-notes*, bills or other ſecurities; See *Stats.* 8 & 9 *W.* 3. *c.* 20. § 36: 11 *Geo.* 1. *c.* 9: 12 *Geo.* 1. *c.* 32: 15 *Geo* 2. *c.* 13: 13 *Geo.* 3. *c.* 79; and this Dict. title *Bank of England*.—*Exchequer-bills*; by the ſeveral acts for iſſuing them.—*South ſea Bonds*; See *Stats.* 9 *An. c.* 21: 6 *Geo.* 1. *cc.* 4, 11: 12 *Geo.* 1. *c.* 32.—*Lottery Tickets* or orders: by the ſeveral Lottery-acts.—Army or Navy *Debentures*; *Stats* 5 *Geo.* 1. *c* 14: 9 *Geo.* 1. *c.* 5 —*Eaſt India Bonds*; *Stat.* 12 *Geo.* 1. *c.* 32.—Writings under the Seal of the *London* or *Royal-Exchange Aſſurance*: *Stat.* 6 *Geo.* 1. *c.* 18; and of other Corporations by the *Stats.* eſtabliſhing them.—Of the *hand-writing* of the Receiver of the pre-fines; *Stat.* 32 *Geo.* 2. *c.* 14; or of the Accountant General and other officers of the court of Chancery.—Of a *Letter of Attorney* or other Power to receive or tranſfer *Stock* or annuities; of *tranſfers* and *dividend-warrants*; and on the *perſonating a proprietor* thereof to receive or transfer ſuch funds or dividends. *Stats.* 8 *Geo.* 1. *c.* 22: 9 *Geo.* 1. *c.* 12: 31 *Geo.* 2. *c.* 22. § 77: 33 *Geo.* 3. *c.* 30. —Alſo on the *perſonating* or procuring to be perſonated any ſeaman or perſon entitled to wages, prize-money, &c. for *perjury* in obtaining *probate* or *adminiſtration* to receive ſuch wages, &c. and the forging, procuring to be forged, or publiſhing a forged *ſeaman's will and power*. *Stats.* 31 *Geo.* 2. *c.* 10: 9 *Geo.* 3. *c.* 30. and See *Stat.* 32 *Geo.* 3. *c.* 34.—to which may be added counterfeiting *Mediterranean paſſes* from the Admiralty, *Stat.* 4 *Geo.* 2. *c.* 18.— —the *forging* or imitating *ſtamps*, to defaud the publick revenue; by the ſeveral ſtamp-acts; [the *re-uſing* them is made ſingle Felony by *Stat.* 12 *Geo.* 3. *c.* 48, puniſhable with 7 years tranſportation.]—Forging of any marriage regiſter or licence, *Stat.* 26 *Geo.* 2. *c.* 33.—Counterfeiting or removing *ſtamp* or mark on *plate*, 24 *Geo.* 3. *ſt.* 2. *c.* 53. [a ſimilar offence is puniſhable with 14 years tranſportation by *Stat.* 13 *Geo.* 3 *cc.* 52, 59.]—Forging the *frank* on a general poſt letter. *Stat.* 24 *Geo.* 3. *ſt.* 2. *c.* 37.

Beſides theſe there are certain general laws with regard to Forgery. By *Stat.* 2 *Geo.* 2. *c.* 25, the *firſt offence* in forging or procuring to be forged, acting or aſſiſting therein, or uttering or publiſhing as true any forged *deed*, *will*, *bond*, *bill of exchange*, *promiſſory note*, and indorſement or aſſignment of ſuch bill or note, or any acquittance or *receipt* for money or goods, with an intention to defraud any perſon; (or corporation, *Stat.* 31 *Geo.* 2. *c.* 22. § 78;) is made *Felony* without benefit of clergy.—And by *Stats.* 7 *Geo.* 2. *c.* 22: 18 *Geo.* 3. *c.* 18, it is equally penal to forge or cauſe to be forged, or uttered as true, a counterfeit *acceptance* of a bill of exchange, or the number or principal ſum of any *accountable receipt*, for any note, bill, or other ſecurity for money, or any warrant or order for payment of money, or delivery of goods.

By the above, and a number of other general and ſpecial proviſions, there is now hardly a caſe poſſible to be conceived wherein Forgery that tends to defraud, whether in the name of a real or fictitious perſon, is not made a capital crime. See *Foſt.* 116, and this Dict. title *Bills of Exchange*, V 3.

A deed forged in the name of a perſon who never had exiſtence is within the *Stat.* 2 *Geo.* 2. *c.* 25: for the ſtatute doth uſe the words *the deed of any perſon*, or the deed *of another* or any words of like import, but *any* deed. Lord *Coke*'s deſcription of Forgery (3 *Inſt.* 169,) "When the act is done in the name of another perſon;"

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is apparently too narrow, and only takes in that ſpecies of Forgery which is moſt commonly practiſed; but there are many other ſpecies of Forgery which will not come within the letter of that deſcription. *Foſt.* 116.

There can be no *Forgery* where none can be prejudiced by it but the perſon doing it. 1 *Salk.* 375.

Forgery by the *common law* extends to falſe and fraudulent making or altering of a deed or writing, whether it be a matter of record, in which ſeems to be included a pariſh regiſter; which is puniſhable by fine, impriſonment, and corporal puniſhment at the diſcretion of the court, or any other writing, deed, or will, 3 *Inſt.* 169: 1 *Rol. Abr.* 65: 1 *Hawk. P. C. c.* 70. Not only where one *makes a falſe deed*; but *where a fraudulent alteration is made of a true deed*, in a material part of it, as by making a leaſe of the manor of *Dale*, and it appears to be a leaſe of the manor of *Sale*, by changing the letter *D.* into an *S.* or by altering a bond, *&c.* for 500*l.* expreſſed in figures, to 5000*l.* by adding a new cypher, theſe are *Forgery*: ſo it is, if one finding another's name at the bottom of a letter, at a conſiderable diſtance from the other writing, cauſes the letter to be cut off, and a general releaſe to be written above the name, *&c.* 1 *Hawk. P. C. c.* 70.

Alſo a writing may be ſaid to be *forged*, where one being directed to draw up a will for a ſick perſon, doth inſert ſome legacies therein falſely of his own head; though there be no *Forgery* of the hand or ſeal; for the crime of *Forgery* conſiſts as well in endeavouring to give an appearance of truth to a meer falſity, as in counterfeiting a man's hand, *&c.* 1 *Hawk. P. C. c.* 70: 3 *Inſt.* 170. But a perſon cannot regularly be guilty of *Forgery* by an act of omiſſion; as by omitting a legacy out of a will, which he is directed to draw for another: though it has been held, that, if the wilful omiſſion of a bequeſt to one cauſe a material alteration in the limitation of an eſtate to another, as if the deviſor directs a gift for life to one man, and the remainder to another in fee, and the writer omit the eſtate for life, ſo that he in remainder hath a preſent eſtate upon the death of the deviſor, not intended to paſs, this is *Forgery*. *Noy.* 118: *Moor* 760.

If a feoffment be made of land, and livery and ſeiſin is not indorſed when the deed is delivered, and afterwards on ſelling the land for a valuable conſideration to another, livery is indorſed upon the firſt deed; this hath been adjudged *Forgery* both in the feoffor and feoffee; becauſe it was done to deceive an honeſt purchaſer. *Moor.* 665. And when a perſon knowingly falſifies the date of a ſecond conveyance, which he had no power to make, in order to deceive a purchaſer, *&c.* he is ſaid to be guilty of *Forgery*. 3 *Inſt.* 169: 1 *Hawk. P. C. c.* 70.

It ſeems to be no way material, whether a *forged* inſtrument be made in ſuch manner, that if it were in truth ſuch as it is counterfeited for, it would be of validity or not. 1 *Sid.* 142. The counterfeiting writings of an inferior nature, as letters and ſuch like, it hath been ſaid, is not properly *Forgery*; but the deceit is puniſhable.—But in the caſe of *John Ward*, of *Hackney*, it was determined that to forge a releaſe or acquittance for the delivery of goods, although not under ſeal was Forgery at common law. See *Barn. K. B* 10: *Ld. Raym.* 737, 1461: 5 *Mod.* 137: *Raym.* 81: *Stra.* 747.

Where there is a penalty in an obligation, *&c.* the party grieved by a *forged* releaſe thereof, ſhall recover double the *penalty* as damages, and not double the debt appearing in the condition. 3 *Inſt.* 172. If a perſon is informed by another that a deed is *forged*, if he afterwards publiſhes it as true, he is within the danger of the ſtatute. 3 *Inſt.* 171. The King may pardon the corporal puniſhment of *Forgery* which tends to common example; but the plaintiff cannot releaſe it: if the plaintiff releaſe or diſcharge the judgment or execution, *&c.* it ſhall only diſcharge the coſts and damages; and the judges ſhall proceed to judgment upon the reſidue of the pains, and award execution upon the ſame. 5 *Rep.* 50.

A perſon convicted of *Forgery*, and adjudged to the pillory, *&c.* whereby he becomes infamous, is not allowed to be a witneſs; but ſuch conviction is a good exception to his evidence. And one convicted of this crime, may be challenged on a jury, ſo as to be incapable to ſerve as a juror; and it hath been holden, that exceptions to perſons found guilty of perjury or *Forgery*, as well as felony, *&c.* are not ſalved by a pardon. 2 *Hawk. P. C. c.* 43. § 25. The court of *B. R.* will not ordinarily, at the prayer of the defendant, grant a *certiorari* for a removal of an indictment of *Forgery*, *&c.* 1 *Sid.* 54. See titles *Certiorari*: *Indictment*. See further on this ſubject of *Forgery*. 1 *Hawk. P. C. c.* 70, at length.

FORINSECUS, Outward, or on the outſide. *Kennet's Gloſſ.*

* FORINSECUM MANERIUM, The Manor as to that part of it which lies without the town, and not included within the liberties of it. *Paroch. Antiq.* 351.

FORINSECUM SERVITIUM, The payment of extraordinary aid, oppoſed to *intrinſecum ſervitium*, which was the common and ordinary duties, within the Lord's court. *Kennet's Gloſſ.* See title *Foreign Service.*

FORISBANNITUS. Baniſhed: *Mat. Paris. Ann.* 1245.

FORISFAMILIARI. When a ſon accepts of his father's part of lands, in the life-time of the father, and is contented with it; he is ſaid *foriſfamiliari* to be diſcharged from the family, and cannot claim any more. *Blount.*

FORLAND, or *Foreland*, *Forlandum.*] Lands extending further or lying before the reſt: A *Promontory*. *Mon. Angl. Tom.* 2. *fol.* 332.

FORLER-LAND. Land in the biſhoprick of *Hereford* granted or leaſed *dum epiſcopus in epiſcopatu ſteterit*, ſo as the ſucceſſor might have the ſame for his preſent revenue: this cuſtom has been long ſince diſuſed, and the land thus formerly granted is now let by leaſe as other lands, though it ſtill retains the name by which it was anciently known. *Butterfield's Surv.* 56.

FORM, Is required in law proceedings, otherwiſe the law would be no art; but it ought not to be uſed to enſnare or intrap. *Hob.* 232. Matters of *Form* in pleas that go to the action, may be helped on a general demurrer; as when a plea is only in abatement. 2 *Ld. Raym.* 1015. The formal part of the law or method of proceeding, cannot be altered but by parliament: for, if once thoſe were demoliſhed, there would be an inlet to all manner of innovation in the body of the law itſelf. 1 *Comm.* 142.

FORMA PAUPERIS, See title *Coſts*, II.

FORMEDON, *Breve de formâ donationis.*] A writ that lieth for him who hath right to lands or tenements by virtue of any *intail.*

Upon alienation by a tenant in tail, whereby the eſtate-tail is diſcontinued, and the remainder or reverſion

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is, by failure of the particular eſtate, diſplaced and turned to a mere right, the remedy is by this action of *formedon* (*ſecundum formam doni*) which is in the nature of a writ of right, and is the higheſt action that Tenant in tail can have. *Finch. L.* 267: *Co. Lit.* 316. For Tenant in tail cannot have an abſolute writ of right, which is confined to ſuch only as claim in fee-ſimple: and for that reaſon this writ of *formedon* was granted him by the ſtatute *de donis*; (*Weſtm.* 2. 13 *E.* 1. *c.* 1;) which is therefore emphatically called *his* writ of right. *F. N. B.* 255.

This writ is diſtinguiſhed into three ſpecies; a *Formedon* in the *deſcender*, in the *remainder*, and in the *reverter*.

A writ of *Formedon* in the *deſcender* lieth where a gift in tail is made, and the tenant in tail aliens the lands intailed, or is diſſeiſſed of them and dies; in this caſe the heir in tail ſhall have this writ of formedon in the deſcender, to recover theſe lands ſo given in tail, againſt him who is then the actual tenant of the freehold. In which caſe the demandant is bound to ſtate the manner and form of the gift in tail, and to prove himſelf heir *ſecundum formam doni*. *F. N. B.* 211, 212.

A *Formedon* in the *remainder* lieth where a man giveth lands to another for life or in tail, with remainder to a third perſon in tail or in fee; and he who hath the particular eſtate dieth without iſſue inheritable, and a ſtranger intrudes upon him in remainder, and keeps him out of poſſeſſion. In this caſe the remainder-man ſhall have this writ of formedon in the remainder, wherein the whole form of the gift is ſtated, and the happening of the event upon which the remainder depended. This writ is not given in expreſs words by the *ſtatute de donis*: but is founded upon the equity of the ſtatute, and upon this maxim in law, that if any one hath a right to land, he ought alſo to have an action to recover it. See *F. N. B.* 217.

A *Formedon* in the *reverter* lieth where there is a gift in tail, and afterwards by the death of the donee or his heirs without iſſue of his body, the reverſion falls in upon the donor his heirs or aſſigns; in ſuch caſe the reverſioner ſhall have this writ to recover the lands, wherein he ſhall ſuggeſt the gift, his own title to the reverſion minutely derived from the donor, and the failure of iſſue upon which his reverſion takes place. *F. N. B.* 219: 8 *Rep.* 88. This lay at common law, before the *ſtatute de donis*, if the donee aliened before he had performed the condition of the gift by having iſſue, and afterwards died without any. *Finch. L.* 268.

The time of limitation in a *Formedon*, by *Stat.* 21 *Jac.* 1. *c.* 16, is twenty years, within which ſpace of time after his title accrues, the demandant muſt bring his action, or elſe is for ever barred. See 3 *Comm.* 191—3.

There is a writ of *Formedon in deſcender*, where *partition* of lands, held in tail, is made among parceners, *&c.* and one alieneth her part; in this caſe her heir ſhall have this writ; and by the death of one ſiſter without iſſue, the partition is made void, and the other ſhall have the whole land as heir in tail. Alſo there is a writ of *formedon in ſimul tenuit*, that lies for a coparcener againſt a ſtranger upon the poſſeſſion of the anceſtor; which may be brought without naming the other coparcener who hath her part in poſſeſſion. This writ may be likewiſe had by one heir in *Gavelkind*, *&c.* of lands intailed; and where the lands are held without partition. *New Nat. Brev.* 476, 7, 481.

Where a fee-ſimple is demanded in a *Formedon in reverter*, the taking of the profits ought to be alledged in the donor, and donee: if an eſtate tail is demanded, it muſt be alledged in the donee only. 1 *Lutw.* 96.

There are ſeveral pleas both in bar and in abatement, which the tenant may plead to this action; ſuch as non-tenure, which is a plea in abatement, and by which the tenant ſhews, that he is not tenant of the freehold, or of ſome part thereof, at the time of the writ brought, or at any time ſince; which is called the pleading non-tenure generally. *Booth* 28.

Special non-tenure is where the tenant ſhews what intereſt and eſtate he hath in the land demanded, as that he is tenant for years, in ward, by ſtatute merchant, *elegit*, or the like; and therefore the plea of ſpecial non-tenure muſt always ſhew who is tenant. *Booth* 29. See 1 *Brownl.* 153.

At common law, non-tenure of parcel of an intire thing, as a manor, *&c.* abated the whole writ; but now by the *Stat.* 25 *E.* 3. *cap.* 16, it is enacted, "That by the exception of *non-tenure* of *parcel*, no writ ſhall be abated, but only for *that parcel* whereof the non-tenure was alledged." *Booth* 29: 1 *Mod.* 181.

If the tenant pleads *non-tenure* of the *whole*, he need not ſhew who is tenant: but in a plea of *non-tenure* of *parcel*, he muſt ſhew who is tenant, and this even before the ſtatute; for the common law would not ſuffer a writ, good in part, to be wholly deſtroyed, except the tenant ſhewed the demandant how he might have a better. 1 *Mod.* 181. The tenant cannot, after a general imparlance, plead non-tenure of part, though he may plead non-tenure of the whole. 3 *Lev.* 55.

The writ of *Formedon* is now rarely brought; the trying titles by *Ejectment* ſupplying its place, in an eaſier manner. See *Booth of Real Actions*.

FORMELLA, A certain weight of about 70lbs. mentioned in the *Statute of weights and meaſures*, *Stat.* 51 *H.* 3.

FORNAGIUM, or *Furnagium*, Fr. *Fournage*, *Furnage*.] The fee taken by a lord of his tenant, bound to bake in the lord's common *oven*, (*in furno domini*) or for a permiſſion to uſe their own; this was uſual in the Northern parts of *England*. *Plac. Parl.* 18 *Ed.* 1. And ſee *Aſſiſa panis et cerviſiæ*, 51 *H.* 3.

FORNICATION, *Fornication*; from *the Fornices* in *Rome*, where lewd women proſtituted themſelves for money.] Whoredom, or the act of incontinency in ſingle perſons; for if either party is married, it is *Adultery*. The *Stat.* 1 *H.* 7. *c.* 4, mentions this crime; which by an act made *anno* 1650, during the times of the *Uſurpation*, was puniſhed with three months' impriſonment for the firſt offence; and the ſecond offence, it is ſaid, was made felony. *Scobel's Collect.* The *Spritual Court* hath cogniſance of this offence; but by *Stat.* 27 *Geo.* 3. *c.* 44, the ſuit muſt be inſtituted within eight months, and not at all after the intermarriage of the parties offending: and formerly *courts-leet* had power to inquire of and puniſh *Fornication* and *adultery*; in which courts the king had a fine aſſeſſed on the offenders, as appears by the book of *Domeſday*. 2 *Inſt.* 488.

FORPRISE, *Forpriſum*.] An exception or reſervation: This word is frequently inſerted in leaſes and conveyances, wherein *excepted* and *forpriſed* is an uſual expreſſion. In another ſignification it is taken for any exaction; according to *Thorn. anno* 1285.

FORSES, *Catatudæ.*] Water-falls, ſo called in *Weſtmorland. Camd. Britan.*

FORSPEAKER, An attorney or advocate in a cauſe. *Blount.*

FORTIA, Power, dominion, or juriſdiction: whence *infortiare Placitum*, to enforce a plea by judges aſſembled. *Leg. H.* 1. *c.* 29.

FORTIORI, *à fortiori* or *multo fortiori*, is an argument often uſed by *Littleton*, to this purpoſe: If it be ſo in a feoffment paſſing a new right, *much more* is it for the reſtitution of an ancient right, *&c. Co. Lit.* 253, 260.

FORTILICE AND FORTILITY, *Fortelleſcum.*] A fortified place, bulwark or caſtle; as it is ſaid within the towns and *fortilities* of *Berwick* and *Carliſle. Stat.* 11 *H.*7. *c.* 18.

FORTLET, *Fr.*] A place or fort of ſome ſtrength; or rather a little fort. *Old Nat. Brev.* 45.

FORTS AND CASTLES, The *Stat.* 13 *Car.* 2. *c.* 6, extends to forts and other places of ſtrength within the realm; the ſole prerogative as well of erecting, as manning, and governing of which belongs to the king, in his capacity of General of the kingdom. 2 *Inſt.* 30.

No Subject can build a caſtle or houſe of ſtrength imbattled, or other fortreſs defenſible without the licenſe of the king; for the danger which might enſue, if every man at his pleaſure might do it. 1 *Inſt.* 5: 1 *Comm.* 263.

FORTUNA, Treaſure-trove.

FORTUNE-TELLERS, See title *Conjuration.*

FORTUNIUM, A tournament or fighting with ſpears; or an appeal to *fortune* therein. *Mat. Paris Anno* 1241.

FORTY-DAYS-COURT. The court of *attachment* of the foreſt or *wood-mote.* See title *Foreſt.*

FOSSA, A ditch full of water; wherein women committing felony were drowned: It has been likewiſe uſed for a grave, in ancient writings. See *Furca.*

FOSSATUM, FOSSATURA, *Lat.*] A ditch, or place fenced round with a ditch or trench; alſo it is taken for the obligations of citizens to repair the city ditches. The work or ſervice done by tenants, *&c.* for repairing and maintenance of ditches is called *foſſatorum operatio*; and the contribution for it *foſſagium. Kennet's Gloſſ.*

FOSSEWAY, or the *Foſſe*, from *Foſſus, digged.*] One of the four ancient Roman ways through England. See title *Wattling-ſtreet.*

FOSTERLEAN, *Sax.*] A nuptial gift; the jointure or ſtipend for the maintenance of the wife.

FOTHER OR FODDER, From Teuton. *Fuder.*] A weight of lead containing eight *pigs*, and every *pig* one and twenty ſtone and a half; ſo that it is about a ton or common cart load: Among the *plumbers* in *London* it is nineteen hundred and a half; and at the mines it is two and twenty hundred weight and a half. *Skene.*

FOVEA, A place for burial of the dead. *Stat. Eccl. Paulin. London. MS.* 29.

FOUNDATION, The founding and building of a college or hoſpital is called *foundatio, quaſi fundatio*, or *fundamenti locatio. Co. lib.* 10. The king only can found a *college*; but there may be a college in reputation, founded by others. *Dyer* 267. If it cannot appear by inquiſition, who it was that founded a *church* or *college*, it ſhall be intended it was the king; who has power to *found* a new church, *&c. Moor* 282. The king may *found* and erect an *hoſpital*, and give a name to the houſe, upon the inheritance of another, or licence another perſon to do it upon his own lands; and the words *fundo, creo, &c.* are not neceſſary in every *foundation*, either of a college or hoſpital made by the king; but it is ſufficient if there be words equivalent: The incorporation of a college or hoſpital is the very *foundation*; but he who endows it with land is the *founder*; and to the erection of an hoſpital nothing more is requiſite but the incorporation and *foundation.* 10 *Rep. Caſe of Sutton's Hoſp.*

Perſons ſeiſed of eſtates in fee-ſimple, may erect and *found hoſpitals* for the poor, by deed inrolled in Chancery, *&c.* which ſhall be incorporated, and ſubject to ſuch viſitors as the *founder* ſhall appoint, *&c. Stat.* 39 *Eliz. c.* 5. Where a corporation is named, it is ſaid the name of the *founder* is parcel of the corporation. 2 *Nelſ.* 886. Though the *foundation* of a thing may alter the law, as to that particular thing; yet it ſhall not work a general prejudice. 1 *Lil. Abr.* 634. By *Stat.* 7 & 8 *W.* 3. *c.* 37, The Crown may grant licence to alien in *mortmain.* By *Stat.* 9 *Geo.* 2. *c.* 36, Gifts in *mortmain* by *will, &c.* are reſtrained; but there are exceptions with reſpect to *Univerſities* and *Royal Colleges.* See this Dict. titles *Corporation*; *Univerſity*; *Mortmain.*

FOUNDER OF METAL, From Fr. *Fouudre*, to melt or pour.] He that melts metal, and makes any thing of it by pouring or caſting it into a mould. See *Stat.* 17 *R.* 2. *c.* 1, this Dict. title *Money*: Hence, *Bell-founder*, a *fount* of letter, *&c.*

FOURCHER, Fr. *Fourchir*; Lat. *Furcare*, becauſe it is two-fold.] A putting off, or delaying of an action; and has been compared to ſtammering, by which the ſpeech is drawn out to a more than ordinary length of time; ſo a ſuit is prolonged by *fourching*, which might be brought to a determination in a ſhorter ſpace: The device is commonly uſed when an action or ſuit is brought againſt two perſons, who being jointly concerned, are not to anſwer till both parties appear; and is where the appearance or *eſſoin* of one will excuſe the other's default, and they agree between themſelves that one ſhall appear or be eſſoined one day, and for want of the other's appearing, have day over to make his appearance with the other party; and at that day allowed the other party doth appear, but he that appeared before doth not, in hopes to have another day by adjournment of the party who then made his appearance. *Terms de Ley.*

This is called *fourcher*; and in the ſtatute of *Weſt.* 1. *c.* 42, it is termed *fourcher by eſſoin*; where are words to this effect, *viz.* coparceners, jointenants, *&c.* may not *fourch* by *eſſoin*, to eſſoin ſeverally; but ſhall have only one eſſoin, as one ſole tenant. And in *ſtat. Glouc.* 6 *Ed.* 1. *c.* 10, it is uſed in like manner: The defendants ſhall be put to anſwer without *fourching*, *&c.* 2 *Inſt.* 250.

FRACTION. The law makes no *fraction* of a day; if any offence be committed, in caſe of murder, *&c.* the year and day ſhall be computed from the beginning of the day on which the wound was given, *&c.* and not from the preciſe minute or hour. See *Co. Litt.* 255. and this Dict. titles *Murder*: *Appeal.*

An act of record will not admit any diviſion of a day, but is ſaid to be done the firſt inſtant of the day. *Mo.* 137.

In preſumption of law, when a thing is to be done upon one day, all that day is allowed to do it in, for the avoiding of fractions in time, which the law admits not of, but in caſe of neceſſity. *Sti.* 119.

Inſurance

Insurance for *H.*'s life; *H.* died on the last day; *per Holt* Ch. J. the law makes no fraction in a day; yet, in this case, he dying after the commencement, and before the end of the last day, the insurer is liable, because the insurance is for a year, and the year is not complete till the day be over; yet, if *A.* be born on the 3d day of *September*, and on the second day of *September*, twenty-one years afterwards, he makes his will, this is a good will, for the law will make no fraction of a day, and by consequence he was of age. 2 *Salk.* 625. See titles *Bond*; *Condition*; *Infant*, &c.

FRACTITIUM, Arable land. *Mon. Angl. Tom.* 2. 873.

FRACTURA NAVIUM, Wreck of shipping at sea.

FRAMPOLE FENCES, Such *fences* as the tenants in the manor of *Writtle* in *Essex*, set up against the lord's demesnes; and they are intitled to the wood growing on those *fences*, and as many poles as they can reach from the top of the ditch with the helve of an axe, towards the reparation of their *fences*. It is thought the word *frampole* comes from the Sax. *frempul* profitable; or that it is a corruption of *francpole*, because the poles are free for the tenants to take: But Chief Justice *Brampton*, whilst he was steward of the court of the manor of *Writtle*, acknowledged that he could not find out the reason why those *fences* were called *frampole*; so that we are at a loss to know the truth of this name etymologically. *Blount.*

FRAME-WORK KNITTERS, regulated by *Stat.* 6 *Geo.* 3. *c.* 29. See this Dict. title *Manufacturers.*

FRANCHILANUS, A freeman. *Chart. H.* 4. *Francus homo* is used for a freeman, in *Domesday-book.*

FRANCHISE, Fr.] A privilege or exemption from ordinary jurisdiction; as for a corporation to hold pleas to such a value, &c. And sometimes it is an immunity from tribute, when it is either *personal* or *real*, that is belonging to a person immediately; or by means of this or that place whereof he is a chief or member. *Cromp. Jurisd.* 141.

There is also a *Franchise royal*; which seems to be that where the King's writ runs not. 21 *H.* 6. *c.* 4. But *Franchise royal* is said by some authors to be where the King grants to one and his heirs, that they shall be quit of toll, &c. *Bract. lib.* 2. *c.* 5.

Franchises, are a species of incorporeal hereditaments. *Franchise* and *Liberty* are used as synonimous terms; and their definition is "A royal privilege or branch of the King's prerogative, subsisting in the hands of a Subject." *Finch L.* 164.—Being therefore derived from the crown, they must arise from the King's grant; or in some cases may be held by prescription, which pre-supposes a grant. *Finch. L.* 164. The kinds of them are various and almost infinite: They may be vested either in natural persons or in bodies politick; in one man or many: But the same identical franchise that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant. 2 *Rol. Ab.* 191: *Keilw.* 196.

The *Principality of Wales* is a Franchise.—To be a *County-Palatine* is also a Franchise, vested in a number of persons. It is likewise a Franchise for a number of persons to be incorporated, and subsist as a *Body-politick*; with a power to maintain perpetual succession, and do corporate acts: and each individual member of such corporation is also said to have a Franchise or freedom. Other Franchises are, to hold a *Court-Leet*: to have a *Manor* or Lordship; or at least to have a lordship paramount: to have *Waifs*, *Wrecks*, *Estrays*, *Treasure trove*, *Royal-fish*, *Forfeitures* and *Deodands*: to have a *Court* of one's own, or liberty of holding pleas, and trying causes: to have the *Conusance of Pleas*, which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: (See this Dict. title *Cognizance*:) to have a *Bailiwick*, or liberty exempt from the sheriff of the county, wherein the grantee only and his officers are to execute all process: to have a *Fair* or *Market*, with the right of taking *Toll*, either there or at any other public places, as at bridges, wharfs or the like; which tolls must have a reasonable cause of commencement (as in consideration of repairs, or the like,) else the Franchise is illegal and void: 2 *Inst.* 220: (See this Dict. titles *Fair*; *Toll*:) or lastly to have a *Forest*, *Chase*, *Park*, *Warren* or *Fishery*, endowed with privileges of royalty. *F. N. B.* 230. See this Dict. title *Forest*, &c.

Usage may uphold *Franchises*, which may be claimed by *prescription*, without record either of creation, allowance or confirmation; and wreck of the sea, waifs, strays, fairs and markets, and the like, are gained by *usage*, and may become due without any matter of record. But goods of felons and outlaws, and such like, grow due by *charter*, and cannot be claimed by usage, &c. 2 *Inst.* 281: 9 *Rep.* 27.

It hath been adjudged, that grants of *Franchises*, made before the time of memory, ought to have allowance, within the time of memory, in the *King's Bench*, or before the barons of the *Exchequer*, or by some confirmation on record; and it is said they are not records pleadable, if they have not the aid of some matter of record within time of memory; and such ancient grants, after such allowance, shall be construed as the law was when they were made, and not as it hath been since altered: But *Franchises* granted within time of memory are pleadable without any allowance or confirmation; and if they have been allowed or confirmed as aforesaid, the *Franchises* may be claimed by force thereof, without shewing the charter. 9 *Rep.* 27, 28: 2 *Inst.* 281, 494.

There have been formerly several ancient prerogatives derived from the crown; besides the *Franchises* aforementioned; as power to pardon felony, make justices of assise, and of the peace, &c: But by the *Stat.* 27 *H.* 8. *c.* 24, they were resumed and re-united to the crown. The King cannot grant power to another to make strangers born, denizens here, because such power is by law inseparably annexed to his person. 7 *Rep.* 25.

By *Magna Charta c.* 1, and several ancient statutes, the *Church* shall have all her liberties and *Franchises* inviolable: And the *Lords spiritual* and *temporal* shall enjoy their liberties, &c. and the King may not deprive them of any of them. 14 *Ed.* 3. *st.* 2. *c.* 1: 2 *H.* 4. *c.* 1.

By *Magna Charta*, *c.* 37, The *Franchises* and liberties of the city of *London*, and all other cities, towns, &c. are confirmed. By *Stat.* 27 *H.* 8. *c.* 24, all writs, processes, &c. in *Franchises*, are to be made in the King's name; and stewards, bailiffs, and other ministers of liberties, shall attend the justices of assise, and make due execution of process, &c.

Some *Franchises*, as *York*, *Bristol*, &c. have return of writs, to whom mandates are directed from the courts above, to execute writs and process: And a mayor or

bailiff of a town, may have liberty to keep courts, and hold pleas in a certain place, according to the courſe of the Common-law; and power to draw cauſes out of the King's courts, by an *excluſive juriſdiction*: But the cauſes here may be removed to the ſuperior courts. *Co. Lit.* 114: 4 *Inſt.* 87, 224.

Sheriffs of counties, within which is any *Franchiſe*, the lord whereof is intitled to a return of writs, ſhall, on his requeſt, appoint one or more deputies, to reſide at ſome place near, there to receive all writs in the ſheriff's name, and under his ſeal to iſſue warrants for their due execution; and the Lord Chancellor is to ſettle the charges to be paid any ſuch deputy, &c. *Stat.* 13 *Geo.* 2. *c.* 18.

A *Franchiſe* hath no relation to the county wherein it lies, as has been generally held; for it is not neceſſary to ſet forth the county when any thing is ſhewn to be done within a liberty or *Franchiſe*. *Trin.* 23 *Car. B. R.*

If a *Franchiſe* fails to adminiſter juſtice within the ſame, the *Franchiſe* ſhall not be allowed; but on any ſuch failure, the court of *B. R.* may compel the owners of the *Franchiſe*, &c. to do juſtice; for that court ought to ſee juſtice equally diſtributed to all perſons. 1 *Lill. Abr.* 635.

Wherever the King is party to a ſuit, as in all informations and indictments, the proceſs ought to be executed by the ſheriff, and not by the bailiff of any *Franchiſe*, whether it have the clauſe *non omittas*, &c. or not; for the King's prerogative ſhall be preferred to any *Franchiſe*. 2 *Hawk. P. C.* A ſheriff upon a *non omittas*, or on a *capias vilagatum*, or *quo minùs*, may enter and make arreſts in a *Franchiſe*. 1 *Lill.* 635. An arreſt by the ſheriff within a *Franchiſe* on a common writ, is ſaid to be good, though the officer be ſubject to an action at the ſuit of the lord of the *Franchiſe*, &c. See title *Arreſt*.

Franchiſes may be forfeited and ſeized where they are abuſed, for miſ-uſer, or non-uſer; and when there are many points, a miſ-uſer of any one will make a Forfeiture of the whole on a *quo warranto* brought. *Kitch.* 65. For contempt of the King's writ, in a county palatine, &c the liberties may be ſeized, and the offenders fined; and the temporalities of a biſhop have been adjudged to be ſeized until he ſatisfied the King for ſuch a contempt, on information exhibited, &c. *Cro. Car.* 253. The biſhop of *Durham* pretending he had ſuch a *Franchiſe*, that the King's writ was not to come there, and becauſe one brought it thither he impriſoned him; this being proved upon an information brought againſt him, it was adjudged he ſhould pay a fine to the King, and loſe his liberties. 2 *Shep. Abr.* 250.

If a perſon claims *Franchiſes* which he ought not to have, it is an uſurpation upon the King; and not ſhewing his title, the King ſhall take from him his *Franchiſe*. *Poph.* 180: 1 *Bulſt* 54 The King's Bench will not grant an information on private uſurpation of *Franchiſes*, but the proper remedy is to proceed by *quo warranto*. *Hardw.* 261.

If Franchiſes and liberties are granted to the King, which were before *in eſſe*, as flowers of his crown, and afterwards by eſcheat, ſurrender or otherwiſe, come back to the crown, they are re-united to the crown, and the King has them *in jure coronæ* as before. 9 *Co.* 25 *b*. So if liberties, franchiſes, &c. which were appendant to a manor, come with the manor to the King, the appendancy is extinct, and the King is re-ſeiſed of them *in jure coronæ*. 9 *Co.* 25 *b*: *Cro. Eliz.* 591: 1 *And.* 87.—See *Jon.* 286. But if Franchiſes, liberties, &c. created *de novo*, by the King come back to the crown, they are not merged or extinguiſhed in the crown. 9 *Co.* 25 *b*: 1 *And.* 87.—See *Cro. El.* 592: *Dy.* 327 *a*: *Com. Dig.* title *Franchiſe* (G).

Diſturbance of Franchiſes happens, when a man has the Franchiſe of holding a court-leet, of keeping a fair or market, of free warren, of taking toll, of ſeizing waifs or eſtrays, or, in ſhort, any other ſpecies of Franchiſe whatſoever, and he is diſturbed or incommoded in the lawful exerciſe thereof. As if another by diſtreſs, menaces, or perſuaſions, prevail upon the ſuitors not to appear at my court; or obſtruct the paſſage to my fair or market; or hunts in my free warren; or refuſes to pay me the accuſtomed toll; or hinders me from ſeizing the waif or eſtray, whereby it eſcapes, or is carried out of my liberty: In all caſes of this kind, and which are of a variety too extenſive to be here enumerated, an injury is done to the legal owner of the Franchiſe; his property is damnified: and the profits ariſing from ſuch his Franchiſe are diminiſhed. To remedy which, as the law has given no other writ, he is therefore entitled to ſue for damages by a ſpecial action on the caſe: or in caſe of toll, may take a diſtreſs, if he pleaſes. 3 *Comm.* 236.

See further as to Franchiſes under the ſeveral titles and names of the different ſubjects, above conciſely mentioned; and more at large under title *Quo Warranto*: *Com. Dig.* titles *Franchiſes*: *Liberties*.

FRANCIGENÆ, Was anciently the general appellation of all foreigners. Vide *Englecery*.

FRANCLAINE, Uſed in ancient authors to denote a freeman or a gentleman. *Forteſcue*.

FRANK, A *French* gold coin, worth twenty *ſols*, which is a *livre*, about ten pence ½ *d. Engliſh* money.

FRANKALMOIGN, *Libera Eleemoſyna.*] A tenure by ſpiritual ſervice, where an eccleſiaſtical corporation, ſole or aggregate, holdeth land to them and their ſucceſſors, of ſome lord and his heirs in free and perpetual alms: And *perpetual* ſuppoſes it to be a fee-ſimple; tho' it may paſs without the word *ſucceſſors*. *Litt.* § 133: *Co. Lit.* 94. A lay perſon cannot hold in *free* alms: And when a grant is in *Frankalmoign*, no mention is to be made of any manner of ſervice. *Lit.* 137. None can hold in *Frankalmoign* but by preſcription, or by force of ſome grant made before the ſtatute of *Mortmain*, 7 *Ed.* 1. *ſt.* 2: 18 *Ed.* 1. *ſt.* 1. *c.* 3. So that the tenure cannot at this day be created, to hold of a founder and his heirs in free alms: But the King is not reſtrained by the ſtatutes; nor a Subject licenſed or diſpenſed with by the King, to make ſuch a grant, &c. *Co. Lit.* 98, 99. And if an eccleſiaſtical perſon holds lands by fealty and certain rent, the lord may at this time confirm his eſtate, to hold to him and his ſucceſſors in *Frankalmoign*; for the former ſervices are extinct, and nothing is reſerved but that he ſhould hold of him which he did before; whereby this change and alteration is not within the *Stat.* 18 *Ed.* 1, of *quia emptores terrarum*. *Lit.* § 140, 540: *Co. Lit.* 99, 306.

Tenure in *Frankalmoign* is incident to the inheritable blood of the donor or founder; except in caſe of the King, who may grant this tenure to hold of him and his ſucceſſors. *Lit.* 135. And the reaſon why a grant in *Frankalmoign*, ſince the *Stat.* 18 *Ed.* 1, (*quia emptores*) is void, except

cept in the caſe of the King, &c. is becauſe none can hold land by this tenure, but of the donor; whereas the ſtatute injoins, that it be held of the Chief Lord, by the ſame ſervice by which the feoffor held it; though the King may grant away any eſtate, and reſerve the tenure to himſelf. *Co. Lit.* 99, 223.

The ſervice which eccleſiaſtical corporations were bound to render for lands held in *Frankalmoign* was not certainly defined, but only in general, to pray for the ſouls of the donor and his heirs, dead or alive; and therefore they did no fealty (which is incident to all other ſervices but this) becauſe this divine ſervice was of a higher and more exalted nature. *Lit.* § 134, 5.

This is the tenure by which almoſt all the ancient Monaſteries and Religious houſes held their lands; and by which the parochial clergy and very many eccleſiaſtical and eleemoſynary foundations hold them to this day. The nature of the ſervice being, upon the Reformation, altered and made conformable to the doctrines of the Church of *England*. It was an old *Saxon* tenure, and continued under the *Norman* Revolution; from the reſpect then ſhewn to religion and religious men: which is alſo the reaſon that tenants in *Frankalmoign* were diſcharged of all other ſervices, except the *trinoda neceſſitas* of repairing the highways, building caſtles and repelling invaſions. See *Bract. l.* 4. *tr.* 1. *c.* 28. § 1: *Seld. Jan.* 1. 42.

Even at preſent, this is a tenure of a nature very diſtinct from all others, being not in the leaſt feodal, but merely ſpiritual. For this reaſon, if any perſon that holds lands or tenements in *Frankalmoign*, make any failure in doing ſuch divine ſervice as they ought, the lord may make complaint of it to the Ordinary or viſitor; which is the King, if he be founder; or a Subject where he was appointed viſitor upon the foundation; and the Ordinary, &c. may puniſh the negligence, according to the eccleſiaſtical laws. *Lit.* 136: *Co. Lit.* 96.

In this particular, tenure in *Frankalmoign* materially differs from what was called tenure *by Divine Service*: in which tenants were obliged to do ſome ſpecial divine ſervices in certain: as to ſing ſo many maſſes, to diſtribute ſuch a ſum in alms, and the like; which being expreſsly defined and preſcribed, could with no kind of propriety be called free *alms*; eſpecially as for this, if unperformed, the lord might diſtrain without any complaint to the viſitor. *Lit.* § 137: *Britt. c.* 66.

Theſe donations in *Frankalmoign* are now out of uſe, as none but the King can make them; but they are expreſsly excepted, by name, in the *Stat.* 12 *Car.* 2. *c.* 24, (§ 7,) aboliſhing tenures, and therefore ſubſiſt in many inſtances at the preſent day. 2 *Comm.* 101. *c.* 6.

See further on this ſubject this Dict. title *Mortmain*.

FRANK-CHASE, A liberty of *free chaſe*; by which all perſons that have lands within the compaſs thereof, are prohibited to cut down any wood, &c. without the view of the foreſter, though it be in their own demeſnes. *Cromp. Juriſ.* 187.

FRANKED LETTERS, See title *Poſt*: *Parliament*.

FRANK-FEE Freehold lands which are held exempted from all ſervices, but not from homage. In the *regiſter* of writs we find that is *frank fee*, which a man holds at the Common-law, to him and his heirs; and not by ſuch ſervice, as is required in ancient demeſne, according to the cuſtom of the manor: And that the lands in the hand of King *Edward the Confeſſor*, at the making of the book of *Domeſday*, were ancient demeſne, and all the reſt *frank-fee*; wherewith *Fitz-Herbert* agrees. *Reg. Orig.* 12: *F. N. B.* 161. Theſe lands were exempted from all ſervices, but not from homage.—*Bro.* tit. *Demeſne* 32, ſays, that land which is in the hands of the King or lord of any manor, or being ancient demeſne of the crown (*viz.* the demeſnes) is called *Frank-fee*; and that which is in the hands of the tenant, is ancient demeſne only. The author of the *Terms of the Law* defines a *Free-fee* to be a tenure pleadable at the Common-law; and not in ancient demeſne. *Cowel*: *Blount*. See title *Ancient Demeſne*.

FRANK-FERM. Lands or tenements, changed in the nature of the fee by feoffment, &c. out of knight ſervice, for certain yearly ſervices. *Britton, c.* 66. See title *Fee-farm*.

FRANK-FOLD, See *Foldage*.

FRANK-LAW, *Libera Lex.*] The benefit of the free and Common-law of the land. You may find what it is by the contrary, from *Crompton* in his *Juſtice of Peace*; where he ſays, he that for any offence loſeth his *Frank-law*, falls into theſe miſchiefs, *viz.* He may never be impannelled upon any jury or aſſiſe; or be permitted to give any teſtimony: If he hath any thing to do in the King's courts, he muſt not attend them in perſon, but appoint his attorney therein for him: And his lands ſhall be eſtreated, and his body committed to priſon, &c. *Cromp. Juriſ.* 156: *Lib. Aſſiſ.* 59.

FRANK-MARRIAGE, *Liberum Maritagium.*] A tenure in tail ſpecial where a man ſeiſed of land in fee-ſimple, gives it to another with his daughter, ſiſter, &c. in marriage; to hold to them and their heirs: This tenure groweth from theſe words in the gift, *i. e. Sciant, &c. me* A. B. *dediſſe & conceſſiſſe*, &c. T. B. *filio meo &* Annæ *uxori ejus, filiæ, &c. in* liberum maritagium, *unum meſſuagium, &c. Litt.* § 17: *Weſt. Symb. par.* 1. *lib.* 2. § 303. The effect of which words is, That they ſhall have the land to them and the heirs of their bodies; and ſhall do no ſervices to the donor, except fealty, until the fourth degree. *Glanvil, lib.* 7. *c.* 18. And *Fleta* gives this reaſon why the heirs do no ſervice until the fourth degree: *Ne donatores vel eorum hæredes per homagii receptionem à reverſione repellantur.* And why in the fourth deſcent and downward, they ſhall do ſervices to the donor; *quia in quarto gradu vehementer præſumitur, quod terra eſt pro defectu hæredum donatorum reverſura. Fleta, lib.* 3. *c.* 11; and ſee *Bracton, lib.* 2. *c.* 7.

Bracton alſo divides marriage into *liberum maritagium* and *maritagium ſervitio obligatum*; which laſt was where lands were given in marriage, with a reſervation of the ſervices to the donor, which the donee and his heirs were bound to perform for ever; but neither he, or the next two heirs, were obliged to do homage, which was to be done when it came to the fourth degree, and then, and not before, they were required to be performed both ſervices and homage. *Bract. lib.* 2. A gift of lands by one man to another with a wife in *frank-marriage*, amounts by implication of law to a gift in tail; which in this caſe may be created without the words *heirs* or *body*. *Lit.* 17: *Wood's Inſt.* 120. A gift in *Frank-marriage* might be made as well after as before marriage: And ſuch a gift was a fee-ſimple before the ſtatute of *Weſtm.* 2; but ſince, it is

uſually

uſually a fee-tail: Though this tenure is now grown out of uſe it is ſtill capable of ſubſiſting in law: It is liable to no ſervice but fealty. See 2 *Comm* 115. *c.* 7.

FRANK-PLEDGE, *Franci plegium*, from Fr. *Franc*, Liber, and *pledge*, fidejuſſor.] A *pledge* or ſurety for the behaviour of *Freemen*; it being the ancient cuſtom of this kingdom, borrowed from the *Lombards*, that for the preſervation of the public peace, every free-born man at the age of fourteen, (religious perſons, clerks, *&c.* excepted) ſhould give ſecurity for his truth towards the King and his ſubjects, or be committed to priſon; whereupon a certain number of neighbours, uſually became bound one for another, to ſee each man of their *pledge* forth-coming at all times, or to anſwer the tranſgreſſion done by any gone away: And whenever any one offended, it was forthwith inquired in what *pledge* he was, and then thoſe of that *pledge* either produced the offender within one and thirty days, or ſatisfied for his offence. This was called *Frank-pledge*; and this cuſtom was ſo kept, that the ſheriffs at every *county-court*, did from time to time take the oaths of young perſons as they grew to fourteen years of age, and ſee that they were ſettled in one *decennary* or other; whereby this branch of the ſheriff's authority was called *viſus franci plegii*, or *view of Frank-pledge*. At this day no man ordinarily giveth other ſecurity for the keeping of the peace, than his own oath; ſo that none anſwereth for the tranſgreſſion of another, but every perſon for himſelf. 4 *Inſt.* 78. Living under *Frank-pledge* has been termed living under *law*, *&c.* See this Dict. titles *Court-leet*; *Decennary*; *Deciner*.

FRANK TENEMENT, A poſſeſſion of *freehold* lands and tenements. See *Freehold*.

FRASSETUM, A corruption of *fraxinetum*.] A wood or woody ground, where *aſh-trees* grow. *Co. Lit.* 4.

FRATER CONSANGUINEUS. A brother by the father's ſide.

FRATER NUTRICIUS. Uſed in ancient deeds for a baſtard brother. *Malmſb.*

FRATER UTERINUS. A brother by the mother's ſide.

FRATERIA, A fraternity, brotherhood or ſociety of religious perſons, who were bound to pray for the good health and life, *&c.* of their living brethren, and the ſouls of thoſe that were dead: in the ſtatutes of the cathedral church of St. *Paul* in *London*, collected by *Ralph Baldock*, Dean, A. D. 1295, there is one chapter *de frateria beneficiorum eccleſiæ S. Pauli*, *&c.*

FRATERNITIES, See title *Corporation*.

FRATRES CONJURATI, Sworn brothers or companions; ſometimes thoſe were ſo called who were ſworn to defend the King againſt his enemies. *Hoveden, p.* 445: *Leg. W.* 1: *Leg. Ed.* 1. *c.* 35.

FRATRES PYES, *Pied friars*.] Certain friars, wearing black and white garments; of whom mention is made by *Walſingham. p.* 124.

FRATRIAGIUM. A younger brother's inheritance; Whatever the ſons or brothers poſſeſs of the eſtate of the father, they enjoy it *ratione fratriagii*, and are to do homage to the elder brother for it, who is bound to do homage for the whole to the ſuperior lord. *Bract. lib.* 2. *c.* 35.

FRAUD. *Fraus Lat.*] Deceit in grants and conveyances of lands, and bargains and ſales of goods, *&c.* to the damage of another perſon; which may be either by ſuppreſſion of the truth, or ſuggeſtion of a falſehood.

On this ſubject of FRAUD, we may enquire,

I. *What Acts are fraudulent at Common-law, and in Equity.*

II. *What Acts are fraudulent by Statute.*

I. It may be laid down as a general rule, that, without the expreſs proviſion of any act of parliament, all 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, are condemned by the Common-law, and puniſhable according to the heinouſneſs of the offence. *Co. Lit.* 3 *b*; *Dyer* 295. Such as cauſing an illiterate perſon to execute a deed to his prejudice, by reading of it over to him in words different from thoſe in which it was written, *&c.* 1 *Sid.* 312, 431.

Alſo it is a rule, that a wrongful manner of executing a thing ſhall avoid a matter that might have been executed lawfully. *Co. Litt.* 35: 41 *Aſſ.* 28: 47 *Aſſ.* 29: 1 *Rol. Abr.* 420, 549: *Co. Lit.* 357: *Poph.* 64, 100.

A deed not fraudulent at firſt may become ſo afterwards. And if one add a ſeal to a note which is good without it, he ſhall loſe his ſecurity. 2 *Vern.* 123, 162.

As to frauds in contracts and dealings, the Common-law ſubjects the wrong-doer, in ſeveral inſtances, to an action on the caſe; as if a perſon, having the poſſeſſion of goods, ſell them to another, affirming them to be his own, when in truth they are not, an action on the caſe lies. 1 *Rol. Abr.* 90: *Cro. Jac.* 474. But if *A.* poſſeſſed of term for years, offers to ſell it to *B.* and ſays, that a ſtranger would have given him twenty pounds for this term, by which means *B.* buys it, tho' in truth *A.* was never offered twenty pounds, no action on the caſe lies, tho' *B.* is hereby deceived in the value. 1 *Rol. Abr.* 91, 101: 1 *Sid.* 146: *Yelv.* 20. *S. P.*

If on a treaty for the purchaſe of a houſe, the defendant affirms the rent to be more than it is, whereby the plaintiff is induced to give more than the houſe is worth, this is a fraud. 1 *Salk.* 211: 1 *Lev.* 102: 1 *Sid.* 146: 1 *Keb.* 510, 518, 522. *S. P.* And ſee *Kel.* 24, 81: 1 *Show.* 50, 51.

Where a perſon is party to a Fraud, all that follows by reaſon of that *Fraud* ſhall be ſaid to be done by him. *Cro. Jac.* 469 But when *Fraud* is not expreſsly averred, it ſhall not be preſumed; nor ſhall the court adjudge it to be ſo, till the matter is found by a jury. 10 *Rep.* 56.

All Frauds and deceits, for which there is no remedy by the ordinary courſe of law, are properly cogniſable in equity; and it is admitted, that matters of Fraud were one of the chief branches to which the juriſdiction of Chancery was originally confined. 4 *Inſt.* 84. It would be endleſs to enumerate the ſeveral caſes, wherein relief has been given againſt Frauds: but the following inſtances are too material to be omitted.

Wherever Fraud or ſurpriſe can be imputed to, or collected from the circumſtances of the tranſaction, Equity will interpoſe and relieve againſt it. *Toth.* 101, 2: 2 *Ch. Ca.* 103: *Finch* 161: 2 *P. Wms.* 203, 270: 3 *P. Wms.* 130: 2 *Vern.* 189: 2 *Atk* 324: 2 *Vez.* 407. It is ſaid however that it muſt not be underſtood, from caſes of this kind being generally brought into equity, that the courts of law are incompetent to relieve; for where the Fraud can be clearly eſtabliſhed, courts of law exerciſe a concurrent juriſdiction with courts of equity; and will relieve by making

making void the inſtrument obtained by ſuch corrupt agreement or Fraud. 1 *Burr.* 396: *Wood's Inſt.* 296. Therefore where the obligor was an unlettered man, and the bond was not read over to him, he was allowed to plead this circumſtance in an action on the bond. 9 *H.* 5. 15. *cited* 11 *Co.* 27 *b.* So if the bond be in part read to an unlettered man, and ſome of its material contents be omitted or miſ-repreſented. 2 *Rol. Ab.* 28. *p.* 8. It is obſervable that Lord *Coke* in the ſame paſſage where he confines the juriſdiction of courts of equity to ſuch "frauds covin and deceit, for which there is no remedy by the ordinary courſe of law," ſeems to admit that all frauds were not relievable at law. See 3 *Inſt.* 84.

The Chancery may decree a conveyance to be *fraudulent*, merely for being voluntary, and without any trial at law; yet it has been inſiſted, that *Fraud* or not, was triable only by a jury. *Pre. Ch.* 14, 15.

A poor man was drawn in to ſell an eſtate, at a great under-value; but no *Fraud* appearing, though the purchaſe was not a fair bargain, the ſeller could not be relieved in equity, to ſet it aſide. *Preced. Canc.* 206.

There does not appear to be a ſingle caſe in the books in which it has been held that mere inadequacy of price alone is a ground for a court of equity to annul an agreement, though executory, if the ſame appear to have been fairly entered into, and underſtood by the parties, and capable of being ſpecifically performed; ſtill leſs does it appear to have been conſidered as a ground for reſcinding an agreement actually executed. See *Gilb. Rep.* 155: *Bro. P. C. Keen* v. *Stukeley.*—2 *Atk.* 251: *Ambl.* 18. To ſet aſide a conveyance there muſt be an inequality of price ſo ſtrong, groſs and manifeſt, that it muſt be impoſſible to ſtate it to a man of common ſenſe, without producing an exclamation at the inequality of it. 1 *Bro. C. R.* 9: and ſee 2 *Bro. C. R.* 179 *in n.* A ſtrong argument in ſupport of this rule may be drawn from thoſe caſes in which loſing bargains have been actually eſtabliſhed and decreed. See 2 *Vern.* 423: 1 *Eq. Ab.* 170: 2 *Vez.* 422: 1 *Bro. C. R.* 158.—But tho' courts of equity will not relieve againſt agreements merely on the ground of the conſideration being inadequate, yet if there be ſuch inadequacy as to ſhew that the perſon did not underſtand the bargain he made, or was ſo oppreſſed that he was glad to make it, knowing its inadequacy, it will ſhew a command over him which may amount to a Fraud. 2 *Bro. C. R.* 175. See alſo 1 *Bro. C. R.* 558: *Herne* v. *Meers*: 2 *Vez.* 155: 2 *P. Wms.* 203.

A. being tenant in tail, remainder to his brother *B.* in tail, *A.* not knowing of the intail, makes a ſettlement on his wife for life for her jointure, without levying a fine, or ſuffering a recovery, which *B.* who knew of the intail ingroſſes, but does not mention any thing of the intail, becauſe, as he confeſſed in his anſwer, if he had ſpoke any thing of it, his brother, by a recovery, might have cut off the remainder, and barred him; and altho' after *A.*'s death, *B.* recovered in ejectment againſt the widow by force of the intail; yet ſhe was relieved in Chancery, and a perpetual injunction granted for this Fraud in *B.* in concealing the intail; which if it had been diſcloſed, the ſettlement might have been made good by a recovery. *Preced. Chanc.* 35: 2 *Vern.* 239.

So where a mother being abſolute owner of a term, the ſame being limited to her in tail, is preſent at a treaty for her ſon's marriage, and hears her ſon declare, that the term was to come to him at his mother's death, and is a witneſs to the deed, whereby the reverſion of the term is ſettled on the iſſue of the marriage after the mother's death; ſhe was compelled in equity to make good the ſettlement. 2 *Vern.* 150.

Where the defendant, on a treaty of marriage for his daughter with the plaintiff, ſigned a writing comprifing the terms of the agreement, and afterward deſiring to elude the force thereof, and get looſe from his agreement, ordered his daughter to put on a good humour, and get the plaintiff to deliver up that writing, and then marry him, which ſhe accordingly did, and the defendant ſtood by at the corner of a ſtreet to ſee them go by to be married; The plaintiff was relieved on the point of Fraud. 1 *Eq. Ab.* 20: 2 *Vern.* 373.

It ſeems agreed that if a woman on the point of marriage, charge, or convey her property to a mere ſtranger, for whom ſhe was not under even a moral obligation to provide, that ſuch conveyance will be decreed a Fraud on the marital rights. 2 *C. R.* 41: 2 *Vez.* 264.

If *A.* has a prior incumbrance on an eſtate, and is a witneſs to a ſubſequent mortgage, but does not diſcloſe his own incumbrance; this is ſuch a *Fraud* in him for which his incumbrance ſhall be poſtponed. 2 *Vern.* 151. And ſee 2 *Vern.* 554. So if *A.* having a mortgage on a leaſehold eſtate lends the mortgage deed to the mortgagor, with an intent to borrow more money; that is ſuch a *Fraud* in the mortgagee, for which his mortgage ſhall be poſtponed to the ſubſequent incumbrance. 2 *Vern.* 726: 1 *Eq. Ab.* 321.—See this Dict. title *Mortgage.*

If a copyholder, by his will intending to give the greateſt part of his eſtate to his godſon, and the other part to his wife, is perſuaded by the wife to nominate her to the whole, on a promiſe that ſhe would give the godſon the part deſigned for him; it will be decreed againſt the wife on the point of *Fraud*, though there was no *memorandum* thereof in writing purſuant to the ſtatute of Frauds and Perjuries. *Preced. Canc.* 3.

Since the caſes of *Kerrick* v. *Bransby*, (*Bro. P. C.*) and *Webb* v. *Cleverden*, (2 *Atk.* 424,) it appears to have been ſettled that a will cannot be ſet aſide in equity for Fraud and impoſition; becauſe a will of perſonal eſtate may be ſet aſide for Fraud in the eccleſiaſtical court, and a will of real eſtate may be ſet aſide at law: for in ſuch caſes, as the *animus teſtandi* is wanting, it cannot be conſidered as a will. 2 *Atk.* 324: 3 *Atk.* 17.—Though equity will not ſet aſide a will for Fraud, nor reſtrain the probate of it in the proper court, yet if the Fraud be proved, it will not aſſiſt the party practiſing it, but will leave him to make what advantage he can of it. 2 *Vern.* 76. But if the validity of the will has been already determined and acted upon, equity will reſtrain proceedings in the prerogative court, to controvert its validity. 1 *Atk.* 628. That the party prejudiced by the Fraud may file a bill in equity for a diſcovery of all its circumſtances is unqueſtionable: the invariable practice in ſuch caſes is to ſeek relief, and the iſſue directed is to furniſh the ground upon which the court is to proceed in giving relief. *Fonblanque's Treat. Eq. c.* 2. § 3, *in n.*

If a ſecurity be obtained from a perſon by Fraud and practice, upon a pretence of a demand that is fictitious, it will be relieved againſt in equity. 2 *Vern.* 123, 632.

There are likewiſe ſeveral inſtances, where a parol agreement intended to be reduced into writing, but prevented by *Fraud*, has been decreed in equity, notwithſtanding the ſtatute of Frauds and Perjuries; as where upon

upon a marriage treaty, inſtructions were given by the huſband to draw a ſettlement, which he privately countermanded, and afterwards drew in the woman by perſuaſions and aſſurances of ſuch ſettlement to marry him; It was decreed, that he ſhould make good the ſettlement. 1 *Eq. Ab.* 19. So where a parol agreement was concerning the lending of money on a mortgage, and the covenants propoſed were an abſolute deed from the mortgagor and a deed of defeaſance from the mortgagee, and after the mortgagee had got the deed of conveyance, he refuſed to execute the defeaſance; It was decreed againſt him on the point of Fraud. 1 *Eq. Ab.* 90. See title *Agreement*.

II. By *St.* 1 *R.* 2. *c.* 9, no gift or feoffment of lands or goods ſhall be made by Fraud for maintenance. And the diſſeiſees ſhall have their recovery againſt the firſt diſſeiſors as well of their lands as of double damages, without regard to ſuch alienations. See alſo *Stats.* 4 *H.* 4. *c.* 7: 11 *H.* 6. *c.* 3; and this Dictionary titles *Diſſeiſin*: *Forcible Entry*.

By *Stat.* 3 *H.* 7. *c.* 4, (and ſee *Stat.* 50 *E.* 3. *c.* 6,) All deeds of gift of goods made in truſt for the uſe of perſons making the ſaid gifts, with intent to defraud creditors, ſhall be null and void.

By *Stat.* 13 *Eliz. c.* 5, (made perpetual by *Stat.* 29 *Eliz. c.* 5,) Every feoffment, gift, alienation and conveyance of lands or goods, leaſes, rents, *&c.* and every bond, judgment and execution with intent to defraud creditors or others, ſhall (only againſt creditors and others whoſe actions ſhall be thereby defrauded or delayed) be of none effect; all parties and privies to ſuch conveyances, bonds, *&c.* ſhall forfeit one year's value of the lands and the whole of the goods, or money contained in the bond, *&c.* half to the crown and half to the party grieved; and ſuffer half a year's impriſonment.—This ſtatute not to extend to any eſtate made on good conſiderations *bonâ fide* to perſons not having notice of ſuch Fraud.

By *Stat.* 27 *Eliz. c.* 4, (made perpetual by *Stat.* 39 *Eliz. c.* 18,) Every conveyance, charge, leaſe or incumbrance of any lands made with intent to defraud purchaſers ſhall be deemed utterly void as againſt ſuch purchaſers and all claiming under them.—The parties and privies to ſuch conveyances ſhall forfeit one year's value of the land and ſuffer half a year's impriſonment.—The ſtatute expreſsly excepts any conveyance made for good conſideration and *bonâ fide*.—If any perſon ſhall make any conveyance or limitation of lands with a clauſe of revocation, and after ſuch conveyance ſhall convey or charge the ſame lands for money or other good conſideration, the ſaid firſt conveyance againſt the ſaid vendees ſhall be void.—Lawful mortgages made *bonâ fide* on good conſideration are excepted.—By the ſame act *ſtatutes-merchant* and *ſtatutes-ſtaple* are to be entered in the office of the clerk of the recognizances. See this Dict. thoſe titles.

By *Stat.* 29 *Car.* 2. *c.* 3, (known more commonly by the name of *The Statute of Frauds*, and by which various proviſions are made as to *Contracts*, *Wills*, *&c.* which ſee in this Dict. under titles *Agreement*; *Aſſumpſit*; *Wills*, *&c.*;) All leaſes, eſtates of freehold, or terms for years, or any uncertain intereſt in lands, made by livery and ſeiſin only, or by parol, and not put in writing and ſigned by the parties or their agents ſhall have the force of leaſes at will only.—Except leaſes not exceeding the term of three years at two thirds of the improved value.—And no leaſes, eſtates or intereſts of lands, either of freehold or terms of years, or any uncertain intereſt, not being copyhold, ſhall be aſſigned, granted or ſurrendered, unleſs by deed or note in writing ſigned by the parties or their agents: or by the operation of law.

By *Stat.* 3 (or 3 & 4) *W. & M. c.* 14, made perpetual by *Stat.* 6 *W.* 3. *c.* 14, all wills or appointments of lands, or of any rent, *&c.* out of the ſame ſhall be deemed, only as againſt *Creditors* by bond or ſpecialty binding the heir, to be fraudulent and void.—And every ſuch creditor ſhall have his action of debt upon his bonds and ſpecialties againſt the heir at law of ſuch obligors, and ſuch deviſees jointly.—This ſtatute however excepts diſpoſitions for the payment of debts and raiſing portions for children in purſuance of marriage contracts made before marriage: It further provides that where any heir at law ſhall be liable to pay his anceſtor's debt, in reſpect of lands deſcended to ſuch heir, and ſhall alien the ſame before action brought, ſuch heir ſhall be anſwerable to the creditor in an action of debt to the value of the land aliened; but the lands *bonâ fide* aliened before action brought ſhall not be liable.—Every deviſee however, made liable by the ſtatute, ſhall be chargeable, in the ſame manner as the heir, tho' the lands deviſed ſhall be aliened before action brought.

The *Stats.* 50 *E.* 3. *c.* 6: 3 *H.* 7. *c.* 4, expreſsly declare all gifts, *&c.* of goods and chattels intended to defraud creditors, to be null and void; creditors might however ſtill in ſome caſes be defrauded, by their debtors' executing powers of appointment (veſted in them by ſettlement, *&c.*) in favour of mere volunteers, unleſs courts of equity interpoſed, and made ſuch voluntary appointment in the firſt place ſubject to payment of debts. 2 *Vern.* 319, 465: 2 *Vez.* 1. But tho' courts of equity will ſubject a voluntary appointment to payment of debts, yet they will not interfere where the debtor has not executed his power of appointment. 2 *Vern.* 465: 2 *Vez.* 1. See alſo *Hob.* 9, as to the rule of law.

As the *Stat.* 13 *Eliz. c.* 5, not only declares all deeds made in Fraud of creditors to be null and void, but ſubjects the parties to ſuch Fraud, to the penalties and forfeitures above-mentioned, it ſhould ſeem that the proviſions of this act ought to be conſtrued ſtrictly; but Lord *Manſfield* has ſaid, that the *Stats.* 13 *El. c.* 5: 27 *El. c.* 4, cannot receive too liberal a conſtruction, or be too much extended in ſuppreſſion of Fraud. *Cowp.* 434.

The object of the Legiſlature was evidently to protect creditors from thoſe Frauds which are frequently practiſed by debtors under the pretence of diſcharging a moral obligation: for as to thoſe gifts or conveyances which want even a good or meritorious conſideration for their ſupport, their being voluntary ſeems to have been always a ſufficient ground to conclude that they were fraudulent: but tho' the ſtatute protects the legal right of creditors againſt the Fraud of their debtors, it anxiouſly excepts from ſuch imputation the *bonâ fide* diſcharge of a moral duty. It therefore does not declare all *voluntary* conveyances, but all *fraudulent* conveyances to be void: and whether the conveyance be fraudulent or not is declared to depend on the conſideration being good, *and* alſo *bonâ fide*. 1 *Ch. Ca.* 99, 291: 1 *Vent.* 194: 1 *Mod.* 119: 1 *Atk.* 15: *Cowp.* 708.

A *good*

A *good* conſideration is that of blood, or of natural love and affection. See this Dict. title *Conſideration*. A gift made for ſuch conſideration ought certainly to prevail, unleſs it be found to break in upon the legal rights of others; in that caſe it is equally clear it ought to be ſet aſide. If therefore a man being indebted convey to the uſe of his wife or children, ſuch conveyance would be within the ſtatute; for tho' the conſideration be *good*, yet it is not *bonâ fide*; that is, the circumſtances of the grantor render it inconſiſtent with that good faith which is due to his creditors. *Fonblanque's Treat. Eq. c.* 4. § 12. *in notes.*

If there be a voluntary conveyance of real eſtate, or chattel intereſt by one not indebted at the time, tho' he afterwards becomes indebted, if that voluntary conveyance was for a child, and there is no particular evidence or badge of Fraud to deceive ſubſequent creditors, that will be good; but if any mark of fraud, colluſion or intent to deceive ſubſequent creditors appear, that will make it void. 2 *Vez.* 11: See alſo 2 *Atk.* 481: 1 *Atk.* 13: *Cowp.* 711.

But the grantor's being indebted is not the only badge of Fraud; ſeveral other circumſtances are enumerated in *Twyne's Caſe*, (3 *Rep*:) as furniſhing a ſtrong preſumption that the tranſaction is *malâ fide*. Gifts made in ſecret are liable to ſuſpicion of *Fraud*: a general gift of all a man's goods may be reaſonably ſuſpected to be *fraudulent*, even tho' there be a true debt owing to the party to whom made. The ſeveral marks or badges of *Fraud*, in a gift or grant of goods are, if it be general, without exception of ſome things of neceſſity; if the donor ſtill poſſeſſes and uſes the goods; if the deed be ſecretly made; if there be a truſt between the *parties*; or if it be made pending the action. 3 *Rep.* 80—82.—If alſo the conveyance contain a power of revocation, or a power to mortgage, it will be conſidered as fraudulent againſt creditors. 2 *Vern.* 510.—So if the grantor be allowed to continue in poſſeſſion of lands, the conveyance being abſolute. 2 *Bulſt.* 218.—So if the conveyance or gift be in general of the whole or the greater part of the grantor's property, ſuch conveyance or gift would be preſumed to be fraudulent; for no man can voluntarily diveſt himſelf of all, or the moſt of what he has, without being aware that future creditors will probably ſuffer for it. In ſhort if the tranſaction be chargeable with any circumſtance ſufficiently ſtrong to raiſe a preſumption of its being a Fraud, it cannot be ſupported, unleſs ſome other conſideration be interpoſed to obviate the objection ariſing from the general nature of the tranſaction: as where the huſband after marriage being indebted conveyed an eſtate to truſtees, to the ſeparate uſe of his wife: it was held that the truſtees having undertaken to indemnify him againſt his wife's debts, was ſufficient to ſupport the ſettlement as a valuable conſideration. 2 *Bro. C. R.* 90. But if this tranſaction had been with a view to defraud creditors, it would probably have been ſet aſide; for if the tranſaction be not *bonâ fide*, the circumſtance of its being even for a valuable conſideration will not alone take it out of the ſtatute. *Cowp.* 434: 2 *Atk.* 477.

But tho' creditors may under the above and other circumſtances avoid a voluntary conveyance, yet it is binding on the party making it and all claiming under him. *Cro. Jac.* 270: 1 *Eq. Ab.* 168: 22 *Vin. Ab.* 16—18: 1 *Vern.* 100, 132, 464: 2 *Vern.* 475: 22 *Vin. Ab.* 24. *pl.* 3. And if there be two or more voluntary conveyances, the firſt ſhall prevail, unleſs the latter be for payment of debts. 1 *Ch. Rep.* 92: 2 *Ch. Rep.* 199.

A conveyance, if made of lands by *Fraud*, is not void by the *Stat.* 13 *El. c.* 5, againſt all perſons; but only againſt thoſe who afterwards come to the land upon valuable conſideration. *Cro. Eliz.* 445: *Cro. Jac.* 271.

A diſtinction has been taken between the claims of real creditors, and a debt founded *in maleficio*: for *A.* having brought an action againſt *B.* for criminal converſation with *A's* wife *B.* aſſigned his eſtates to truſtees in truſt to pay the ſeveral debts mentioned in a ſchedule, and ſuch other debts as he ſhould name. *A.* recovered 5000 *l.* damages and brought his bill to ſet aſide this deed as fraudulent, but the Court held that it was not fraudulent either in law or equity: for the plaintiff was no creditor at the time of making the deed: and though it were made with an intent to prefer his real creditors before this debt when it ſhould come to be ſuch, yet it was conſcientious ſo to do. But the plaintiff was held to have an intereſt in the ſurplus after payment of the other debts. *Pre. Ch.* 105.

On the conſtruction of the *Stat.* 27 *Eliz. c.* 4, it has been held that every voluntary conveyance ſhall be preſumed to be fraudulent againſt a ſubſequent purchaſer. 1 *Vent.* 194: 1 *Cha. Ca.* 100, 217: *Cro. Jac.* 158. But if the conveyance, tho' voluntary, appear to have been made for a meritorious conſideration; and without Fraud or covin, it ſhall not be void againſt a ſubſequent purchaſer; for there is no part of the act which affects voluntary ſettlements *eo nomine* unleſs they are fraudulent. *Doe* v. *Routledge*, *Cowp.* 708. See alſo, 2 *Wilſ.* 356: *Forreſt* 64: 2 *Vern.* 44. As to what ſhall be deemed a meritorious conſideration, ſee the above caſes, and alſo, 1 *Vern.* 408, 467: 1 *Atk.* 265. And though a conveyance be covinous in its creation it may acquire validity by ſubſequent matter; as where the land conveyed is afterwards aliened or ſettled for valuable conſideration. 1 *Sid.* 133, 4: *Skin.* 423: 3 *Lev.* 387. It has alſo been held that a purchaſer, to avail himſelf of this act, muſt be a purchaſer for money or other valuable conſideration. 3 *Co.* 83 *a*: *Cro. Eliz.* 444. See alſo *Com. Dig. Fraud.* 4 I. 2: 1 *Eq. Ab.* 353.

Gooch's Caſe, (5 *Co.* 60 *b*,) determines that a purchaſer ſhall avoid a *fraudulent* conveyance, notwithſtanding his notice of the Fraud, but this can by no means bear out the inference that *all voluntary* conveyances are fraudulent, and therefore abſolutely void, though the purchaſer have notice of them. The terms of *Stat.* 27 *Eliz. c.* 4. § 2, ſeem to be ſufficiently diſtinct to confine its operation to ſuch conveyances as are made with an intent to defraud and deceive ſubſequent purchaſers; but it were difficult to maintain that a conveyance was made with intent to defraud a perſon who before he became a purchaſer had full notice of ſuch conveyance. See 2 *Lev.* 105.—The policy of the act was to prevent Fraud; the conſtruction moſt favourable to ſuch purpoſe is that which excludes all temptation to the practice of it. A voluntary deed, as has already been noticed, is binding on the party and all claiming under him as ſubſequent volunteers; and to allow him to defeat his bounty in favour of a purchaſer for valuable conſideration without notice is merely to prefer a higher conſideration: but to allow a purchaſer with notice to ſuperſede the claims of a volunteer ſeems to encourage a breach of the reſpect morally due to the

their claims and intereſts of others: and may render the proviſions of a ſtatute, intended by the legiſlature to be preventive of Fraud, the moſt effectual inſtrument of accompliſhing it.—This point ſeems deſerving of conſideration; for if the conſtruction of this act which has certainly prevailed in favour of purchaſers with notice were traced, it would probably appear to have originated in the opinion, that the ſtatute avoids all *voluntary* conveyances whatever; though, as very ſtrongly obſerved by *Lord Mansfield* in *Doe* v. *Routlege*, (*Cowp.* 708,) it merely affects *fraudulent* conveyances. *Fonblanque, Treat. Eq. c.* 4. § 13. *in n.*

Before the above *Stat.* 3 *W. & M. c.* 14, againſt *fraudulent deviſes* bond and other ſpecialty creditors whoſe debts did not immediately affect the lands of their debtors, were liable to be defrauded, either by their debtor deviſing his lands, or by the alienation of the heir before any action could be brought againſt him. To obviate theſe the ſtatute was made, by the proviſions of which the bond-creditor is in ſome degree protected againſt the Fraud of the debtor or his heir. But the ſtatute having expreſsly excepted deviſes for payment of debts or children's portions, bond and other ſpecialty creditors whoſe demands do in their nature affect the land are ſtill liable to be prejudiced by the right of their debtor to deviſe his real eſtate; for if he deviſe ſubject to the payment of debts, his ſimple contract creditors will be entitled to be paid *pari paſſu* with ſuch bond or other ſpecialty creditors; for in conſcience their debts are to be equally favoured, being equally due. 1 *Ch. Ca.* 32, 248: 2 *Ch. Ca.* 54: 3 *Ch. Rep.* 7: 1 *Vern.* 63, 101: 2 *Vern.* 61, 763.—And even creditors who are barred by the ſtatute of Limitations ſhall be let in. 2 *Vern.* 141. And tho' it has been held in ſome caſes, that if the eſtate be deviſed to the executor for payment of debts, ſuch circumſtance will render the eſtate *legal aſſets*, yet it ſeems now to be ſettled that this ſhall not occaſion the produce of it, when ſold, to be applied as it would in the eccleſiaſtical court, but the eſtate muſt nevertheleſs be conſidered as *equitable aſſets*. *Newton* v. *Bennet*, 1 *Bro. C. R.* 135. and *Silk* v. *Prime*, in the note there. But if the eſtate deſcends to the heir charged with the payment of debts, it will ſtill be legal aſſets. 1 *P. Wms.* 430: 2 *Atk.* 290.—See this Dict. titles *Executor* V. 6: *Aſſets*.

The following caſes may ſerve further to elucidate the foregoing principles.

If a man ſeiſed of land in fee, make a feoffment of it to divers uſes, with remainders over, *&c.* with power of *revocation* by writing under hand and ſeal; here if he for good conſideration doth enter into a recogniſance, the land ſhall be charged with the ſame: ſo if *A.* reſerves to himſelf power to revoke by the aſſent of *B.* and then bargains to another. *Bridg.* 22: *Lane* 22. And where one hath made an eſtate with the power of revocation; and after with intent to deceive a purchaſer he makes a feoffment, *&c.* to a ſtranger, to *extinguiſh the power*, and then ſells the land for a valuable conſideration; in this caſe both the conveyances ſhall be *fraudulent* as to the purchaſer. 2 *Rep.* 83.

A man made a leaſe for twenty-one years, in truſt for his daughter till marriage; and if ſhe married with his conſent, then to her during the term; this, till marriage, has been held *fraudulent* as to a purchaſer: but after marriage it is good, becauſe marriage is an advancement to the daughter, and taking effect made it upon valuable conſideration, which a marriage is always taken to be, and the huſband was drawn in by this conveyance to marry her. 1 *Sid.* 133.

If a father makes a feoffment to another, for the advancement of daughters, or his younger ſons, or for payment of his debts; and afterwards infeoffs his eldeſt ſon or heir, that is not *Fraud* or colluſion within the ſtatute, for he is bound in law to make proviſion for his children: but where there is a grandfather, father, and two ſons, and the grandfather (living the father) conveys his land to either of the ſons, this is out of the *Stat.* 32 *H.* 8. *c.* 1; becauſe it is not a common thing ſo to do, and the father ought to have the immediate care of his children; though if he is dead, then it belongeth to the grandfather. 6 *Rep.* 76. If a man levy a fine to the uſe of himſelf for life, remainder to his ſon in tail, and after ſells the fee-ſimple to another, he as a purchaſer ſhall avoid this conveyance upon the *Stat.* 27 *Eliz. c.* 4; becauſe it was *voluntary*, and therefore *fraudulent*; ſo it had been if he had ſettled the remainder on his wife, unleſs there had been a conſideration on a precedent marriage. *Sid.* 133: 3 *Salk.* 174.

A deed, as has been already ſaid, may be voluntary, and not *fraudulent*; thus where a father having an extravagant ſon, ſettles his land ſo that he may not ſpend all; this is good, though there is no conſideration of money. 1 *Mod.* 119.

An infant promiſed, on his marriage, to ſettle his eſtate when he came of age, upon himſelf and his iſſue; and this was held a ſufficient conſideration, though an infant by law is not compellable to fulfil ſuch promiſe. 2 *Lev.* 147. A perſon, in conſideration that his ſon is to marry the daughter of *A. B.* covenants to ſtand ſeiſed of lands to the uſe of his ſon for life; and after to other ſons in reverſion or remainder: the uſes thus limited in remainder, ſhall be *fraudulent* as to any purchaſer of the land, tho' the firſt be upon good conſideration. And although the conſideration of marriage is good; if there be a power to revoke annexed to the deed, it will be void as to purchaſers. *Lane* 22.

If a man after marriage, make a voluntary conveyance of land for a jointure, or maintenance for his wife, and afterwards ſell the land for money, to one that hath no notice of it; in this caſe the conveyance, made to the uſe of the wife, ſhall be ſaid to be *fraudulent*: and yet if a perſon upon a marriage, before the marriage, and in conſideration thereof, or after marriage, in conſideration of a portion given or money paid, convey his land to the uſe of his wife, *&c.* it will not be a *fraudulent* deed. *Cro. Jac.* 158. A feme covert joins with her huſband in the alienation of her jointure, and hath a new deed of ſettlement of other lands dated the ſame day in lieu thereof, without articles or agreement precedent to this ſecond ſettlement; this is not *fraudulent* againſt a purchaſer, though the lands in the new ſettlement are more in value than thoſe in the firſt; for the old ſettlement being deſtroyed, and a new one made on the ſame day, it ſhall be preſumed that there was an agreement for it. 2 *Lev.* 70, 71.

The huſband who married a wife an inheritrix, promiſed, that if ſhe would join with him in a ſale of her land, and let him have the money to pay his debts, that he would leave her 400 *l.* at his death; about ſix months after

after the lands were ſold, he gave bond to a ſtranger to leave his wife the 400*l.* And it was adjudged, that this was not *fraudulent* as to creditors, but good againſt them. 2 *Lev.* 148. A perſon makes a voluntary conveyance, and then mortgages the ſame land, and the firſt deed is upon a trial found *fraudulent*; then he to whom the deed was made, exhibited his bill in *equity* to redeem the mortgage; and it was held, that though the firſt deed was *fraudulent, quoad* the mortgage money, yet it was good to paſs the equity of redeption. *Chan. Rep.* 59.

Where a leaſe is made with a *proviſo* that if the leſſor pays 10*s.* the leaſe ſhall be void; becauſe 10*s.* is not the value of the leaſe and land, but only limited as a power of revocation, it is fraudulent as to a purchaſer. *Cro. Jac.* 455. And if a man makes an aſſignment of his leaſe, and yet keeps poſſeſſion of the lands, the deed of aſſignment will be adjudged *fraudulent*. In *Chancery* it has been decreed, that if a man conveys his land to friends in truſt, to the uſe of his children, *&c.* to *defraud* a purchaſer, the truſt ſhall go in *equity* to the purchaſer; alſo it ſhall be liable for debts, to ſatisfy the ſame. *Tothil.* 43, 44. A huſband aſſigned a term of his wife's, in truſt for his wife; and it was held *fraudulent* againſt purchaſers. *Chan. Rep.* 225.

By the *Common-law*, an eſtate made by *fraud*, ſhall be avoided only by him who hath a former right, title, intereſt, debt or demand. 3 *Rep.* 83. If one indebted do really ſell lands, though to avoid payment of debts; if the vendee be not privy to the intent, the ſale to him is good: for as to the vendee, there is no *fraud* in the caſe. *Mich.* 24 *Car. B. R.* A man gives his goods to his ſon, they are nevertheleſs liable as to his creditors; but if he gives them to one of his creditors, without any truſt or covin, it ſhall not be *fraudulent* to make him liable to other creditors. 3 *Salk.* 174.

If tenant for life commit a forfeiture, and he in the reverſion enters, this ſhall be as a *fraudulent* conveyance with reſpect to creditors. *Vent.* 257. *Fraudulent* gifts, or grants of goods to *defraud* the lord of his heriot, ſhall be void; and the value of the goods forfeited, under *Stat.* 13 *Eliz. c.* 5.

Fraudulent conveyances to multiply votes at *election of Knights of the ſhire*, ſhall be taken againſt the perſons making them as free and abſolute; and all ſecurities for redeeming and reſtoring, *&c.* to be void. *Stat.* 10 *Ann. c.* 23. See title *Parliament*. A *preſentation* to a benefice; or *adminiſtration* of goods, obtained by *Fraud*, are void; and ſo is ſale of goods by *Fraud*, although in open market, *&c.* Where a *fraudulent* deed or conveyance is aſſigned upon a valuable conſideration, the *Fraud* is purged thereby. 1 *Ld. Raym.* 88.

Groſs criminal Frauds are puniſhable by way of indictment or information; ſuch as playing with falſe dice, cauſing an illiterate perſon to execute a deed to his prejudice, *&c.* for theſe and ſuch like offences the party may be puniſhed not only with fine and impriſonment, but alſo with ſuch farther infamous puniſhment, as the Judges in their diſcretion ſhall think proper. *Cro. Jac.* 497: 2 *Rol. Abr.* 78: 2 *Rol. Rep.* 107: 1 *Keb.* 849: 6 *Mod.* 42: 1 *Sid.* 312, 431: *Noy* 99, 103: *Moor* 630: *Cro. Eliz.* 531: 1 *Mod.* 46: 2 *Jon.* 64: 6 *Mod.* 105: 1 *Salk.* 379. See title *Cheats*.

For further matter relative to Frauds, and fraudulent conveyances, and obtaining relief againſt them; and as to the operation of the ſtatute of Frauds, and other ſtatutes before mentioned, See this Dict. titles *Agreement* III, IV; *Aſſumpſit*; *Bankrupt*; *Bill of Sale*; *Chancery*; *Contract*; *Conveyance*; *Deeds*; *Equity*; *Execution*; *Judgment*; *Will*, *&c.*

FRAUDS AND PERJURIES, Statute of, See tit *Frauds* II.

FRAUNK-FERME, See *Frank-Ferm*: *Fee-Farm*.

FRAUS LEGIS. If a perſon having no manner of title to a houſe, procure an affidavit of the ſervice of a declaration in ejectment, and thereupon gets judgment; and, by virtue of a writ of *hab. fac. poſſeſſionem*, turns the owner out of poſſeſſion of the houſe, and ſeizes and converts the goods therein to his own uſe, he may be puniſhed as a felon; becauſe he uſed the proceſs of the law with a felonious purpoſe, *in fraudem legis*. *Raym.* 276; *Sid.* 254.

FRAXINETUM, A wood of aſh trees. *Domeſday*.

FREDUM, A compoſition anciently made by a criminal, to be freed from proſecution, of which the third part was paid into the *Exchequer*. Formerly compoſitions were paid for crimes in general, particularly for murder. The magiſtrate was to determine the compoſition, and protect the offender againſt the violence of reſentment. See *Monteſquieu's Spirit of Laws*, *l.* 30. *c.* 20: *Robertſon's Charles* V. i. 300.

FREDWIT, A liberty to hold courts, and make amerciaments, *&c. Cowel*.

FREE-BENCH, *Francus bancus*; *ſedes libera*.] That eſtate in copyhold lands which the wife hath on the death of her huſband for her dower, according to the cuſtom of the manor: but it is ſaid the wife ought to be eſpouſed a virgin; and is to hold the land only ſo long as ſhe lives ſole and continent. *Kitch.* 102. Of this *Free-Bench* ſeveral manors have ſeveral cuſtoms; and *Fitzherbert* calls it a *cuſtom*, whereby in certain cities the wife ſhall have the whole lands of the huſband for her dower, *&c. F. N. B.* 150. In the manors of *Eaſt* and *Weſt Embourne* in the county of *Berks*, and the manor of *Torre* in *Devonſhire*, and other parts of the *Weſt* of *England*, there is a cuſtom, that when a copyhold tenant dies, his widow ſhall have her *Free-bench* in all his cuſtomary lands, *dum ſola & caſta fuerit*; but if ſhe commits incontinency, ſhe forfeits her eſtate: yet nevertheleſs, on her coming into the court of the manor, riding backwards on a *black ram*, with his tail in her hand, and ſaying the words following, the ſteward is bound by the cuſtom to re-admit her to her *Free-bench*; the words are theſe,

Here I am,
Riding on a black ram,
Like a whore as I am:
And for my crincum crancum,
I have loſt my bincum bancum;
And for my tail's game,
Have done this worldly ſhame;
Therefore pray Mr. Steward, *let me have my land again.*
Cowel.

FREEBORD, *Franchordus*.] Ground claimed in ſome places more or leſs, beyond, or without the fence: it is ſaid to contain two foot and a half. *Mon. Angl. Tom.* 2. *p.* 141.

FREE BOROUGH-MEN, Such great men as did not engage like the *frank-pledge* men for their *decennier*. See *Friburgh*.

FREE-CHAPEL, *Libera capella.*] A chapel ſo called, becauſe it is exempt from the juriſdiction of the dioceſan. Thoſe *chapels* are properly *Free-chapels* which are of the King's foundation, and by him exempted from the Ordinary's viſitation; alſo *chapels* founded within a pariſh for the ſervice of God, by the devotion and liberality of pious men, over and above the mother-church, and endowed with maintenance by the founders, which were *free* for the inhabitants of the pariſh to come to, were therefore called *Free-chapels*. *Reg. Orig.* 40, 41. The *Free-chapel* of *St. Martin-le-Grand* is mentioned in the *Stat.* 3 *Ed.* 4. c. 4, as are others likewiſe by ancient ſtatutes: but theſe chapels were given to the King, with the *chantries*, *&c.* By *Stat.* 1 *Ed.* 6. *c.* 14. See title *Monaſteries*.

FREEHOLD, *Liberum tenementum.*] That land or tenement which a man *holds* in fee-ſimple, fee-tail, or for term of life. *Bract. lib.* 2. *c.* 9. It is deſcribed to be of two ſorts: *freehold in deed*, and *freehold in law*; the firſt being the real poſſeſſion of lands, *&c.* in fee, or for life; the other, the right a perſon hath to ſuch lands or tenements, before his entry or ſeiſure. *Freehold* is alſo extended to *offices*, which a man holds either in fee, or during life: and, in the regiſter of writs it is ſaid, that he who holds land upon an execution of a *ſtatute-merchant* until he is ſatisfied the debt holds *as* freehold to him and his aſſigns, and the ſame of a tenant by *elegit*; but ſuch tenants are not in fact *Freeholders*, only *as Freeholders* for their time, till they have received the profits of the land to the value of their debt, *Reg. Judic.* 68, 73. A leaſe for ninety-nine years, *&c.* determinable upon a life or lives, is not a leaſe for life to make a *Freehold*, but a leaſe for years, or chattel determinable upon life or lives; and an eſtate for one thouſand years is not a *Freehold*, or of ſo high a nature as an eſtate for life. *Co. Lit.* 6. He that hath an eſtate for the term of his own life, or the life of another, hath a *Freehold*, and no other of a leſs eſtate; though they of a greater eſtate have a *Freehold*, as tenant in fee, *&c. Lit.* 57.

When a man pleads *liberum tenementum* generally, it ſhall be intended that he hath an eſtate in fee; and not a bare eſtate for life, *Cro. Eliz.* 87. An eſtate of *Freehold* cannot by the *Common-law* commence *in futuro*; but it muſt take place preſently in poſſeſſion, reverſion, or remainder. 5 *Rep.* 94.

A man made a deed of gift to his ſon and his heirs, of lands after his death, and no livery was made; now if there had been *livery*, it had been void, becauſe a *Freehold* cannot commence *in futuro*: and it has been held, that it ſhall not enure as a covenant to ſtand ſeiſed, by reaſon of the word *give*; by which was intended a tranſmutation of the eſtate, and not to paſs it by way of uſe. *March. Rep.* 50, 51. Whatſoever is part of, or fixed to the *Freehold* goes to the heir; and glaſs windows, wainſcot, *&c.* affixed to the houſe are parcel of the houſe, and cannot be removed by tenants. 4 *Rep.* 63, 64. But it hath been adjudged, that if things neceſſary for trade, *&c.* are affixed to the *Freehold* by the leſſee, he may take them down and remove them, ſo as he do it before the end of the term, and he do not thereby injure the *Freehold*. 1 *Salk.* 368. See title *Heir*.

Any thing fixed to the *Freehold* may not be taken in diſtreſs for rent or in execution, *&c.* It is not felony at *Common-law*, only trespaſs, to ſteal or take any thing annexed to the *Freehold*; ſuch as lead on a church, or houſe, corn or graſs growing on the ground, apples on a tree, *&c.* Though if they are ſevered from the *Freehold*, whether by the owner or a thief, if he ſevered them at one time, and took them away at another, it was larceny to take them. 12 *Aſſ.* 32: 1 *Hawk. P. C.* And now by *Stat.* 4 *Geo.* 2. *c.* 32, To ſteal lead on houſes, *&c.* is made felony.

The ſtatute of *Magna Charta*, *c.* 29, ordains, "that no perſon ſhall be diſſeiſed of his *Freehold*, *&c.* but by judgment of his peers, or according to the law of the land;" which does not only relate to common diſſeiſins, but the King may not otherwiſe ſeize into his hands the *Freehold* of the ſubject. *Wood's Inſt.* 614. None ſhall diſtrain any freeholders to anſwer for their Freeholds, or any thing touching the ſame, without the King's writ. *Stat.* 52 *H.* 3. *c.* 22. Nor ſhall any perſon be compelled to anſwer for his Freehold, before any lord of a manor, *&c. Stat.* 15 *R.* 2. *c.* 12; See this Dict. title *Liberty*.—As to the Freehold qualifications neceſſary in certain caſes, See this Dictionary titles *Parliament*; *Jury*, *&c.* and further for the definition and deſcription of Freehold eſtates, title *Eſtate*.

FREEHOLDERS, Such as hold any freehold eſtate. By the ancient laws of *Scotland*, Freeholders were called *milites*; and freehold, in this kingdom, hath been ſometimes taken in oppoſition to *villenage*, it being lands in the hands of the gentry and better ſort of tenants, by certain tenure, who were always Freeholders, contrary to what was in the poſſeſſion of the inferior people, held *at the will of the lord. Lambard.*

FREEMAN, *Liber homo.*] One diſtinguiſhed from a ſlave; that is born or made free; and theſe have divers privileges beyond others. In the diſtinction of a Freeman from a vaſſal under the feudal policy, *liber homo* was commonly oppoſed to *vaſſus* or *vaſſallus*; the former, denoting an *allodial* proprietor; the latter, one who held of a ſuperior. See title *Tenures*.

The title of a *Freeman* is alſo given to any one, admitted to the freedom of a corporate town, or of any other corporate body, conſiſting, among other members, of thoſe called *Freemen*. See titles *Corporation*; *London*.

FREIGHT, Fr. *fret.*] The money paid for carriage of goods by ſea; or in a larger ſenſe, it is taken for the cargo, or burthen of the ſhip. Ships are freighted either by the ton, or by the great; and in reſpect of time, the freight is agreed for, at ſo much *per* month, or at a certain ſum for the whole voyage. If a ſhip freighted by the great, happens to be caſt away, the freight is loſt; but if a merchant agrees by the ton, or at ſo much for every piece of commodities, and by any accident the ſhip is caſt away, if part of the goods is ſaved, it is ſaid ſhe ought to be anſwered her freight *pro rata*: and when a ſhip is *inſured* and ſuch a misfortune happens, the inſured commonly transfer thoſe goods over to the aſſurers, towards a ſatisfaction of what they make good. *Lex Mercat.*

If freight is agreed for the lading and unlading of cattle at ſuch a port, and ſome die before the ſhip arrives there, the whole Freight ſhall be paid for the living and the dead; but if the agreement be for *tranſporting* them, Freight ſhall be only paid for the living: it is the ſame of ſlaves. *Ibid.* 85. The lading of a ſhip in conſtruction of law, is bound for the Freight; the Freight being in point of payment preferred before any other debts to which the goods ſo laden are liable, though ſuch debts as to time were precedent to the Freight. *Hil.* 27 *Car.* 2.

B. R.

B. R. If part of the lading be on ſhip-board, and through ſome misfortune happening to the merchant, he has not his full lading aboard at the time agreed, the maſter ſhall have Freight by way of damage, for the time thoſe goods were on board; and is at his liberty to contract with another, leſt he loſe his ſeaſon and voyage: and where a ſhip is not ready to take in, or the merchant not ready to lade his goods aboard, the parties are not only ſo at liberty, but the perſon damnified may bring an action againſt the other and recover his damages ſuſtained. *Leg. Rhod.*

If the freighter of a ſhip ſhall lade on board prohibited goods, or unlawful merchandize, whereby the ſhip is detained, or the voyage impeded; he ſhall anſwer the Freight agreed for *Style* 220. And when goods are laden aboard, and the ſhip hath broke ground, the merchant may not afterwards unlade them; for if he then changes his mind, and reſolves not to venture, but will unlade again, by the marine law the Freight becomes due. If a maſter Freights out his ſhip, and afterwards ſecretly takes in goods unknown to the firſt laders, by the law marine he forfeits his Freight: and if a maſter of a ſhip ſhall put into any other port than what the ſhip was freighted to, he ſhall anſwer damages to the merchant; unleſs he is forced in by ſtorm, enemies, or pirates; and in that caſe he is obliged to ſail to the port agreed, at his own expence. *Leg. Oleron.* A ſhip is freighted ſo much out and ſo much in, there ſhall be no Freight due till the voyage is performed; ſo that if the ſhip be caſt away, coming home, the Freight outwards, as well as inwards, are both gone. 1 *Brownl.* 21: *Mal.* 98, and ſee 2. *Ch. Ca.* 75: 2 *Vern.* 212: and alſo *Dougl.* 541, 2, that where a ſhip periſhes, the whole Freight from the laſt place or time of payment will be loſt. And if no freight be payable till the return, if the ſhip is loſt returning, the freight outwards ſhall be loſt as well as that inwards. *Mal.* 98.

The goods carried, generally, are a ſecurity for the Freight, and the maſter is not bound to deliver them without payment. *Dougl.* 104.

If a freighted ſhip becomes diſabled without the maſter's fault, he has his option to re-fit, (if poſſible, in convenient time) or to hire another ſhip to carry the goods. If the merchant will not agree to this, the maſter is entitled to the full freight for the whole voyage. 2 *Burr.* 882: 1 *Bl. Rep.* 190.

The maſter ſhall have his Freight tho' the goods are ſpoiled, if the merchant takes them.—The merchant may abandon *all*, tho' all are not loſt: but he cannot abandon ſome and take ſome: if he abandon all, he is excuſed Freight.—If the ſhip is diſabled or taken when part of the voyage is performed, without fault of the Maſter, he ſhall be paid a rateable proportion of the Freight. 2 *Burr.* 882.—See further this Dict. titles *Charter-party*: *Inſurance*: *Merchant.*

FRENCH *Language*, anciently uſed in law records. See title *Pleading.*

FRENCHMAN, Heretofore a term for every ſtranger or outlandiſh man. *Bract. lib.* 3. *tract.* 2. *c.* 15. See *Francigenæ.*

FRENDWITE, From Sax. *freond*, amicus, & *wite* mulcta.] A mulct or fine exacted of him who harboured his outlawed friend. *Blount.* But ſee *Fleta, lib.* 1. *c.* 7.

FRESCA, Freſh water, or rain, and land floods. *Chart. Antiq.* in *Somner of Gavelkind, p.* 132.

FRESH DISSEISIN, Friſca *diſſeiſina*, from Fr. *frais* recens; & *diſſeiſir, poſſeſſione ejicere.*] That *diſſeiſin*, which a man might formerly ſeek to defeat of himſelf, and by his own power, without reſorting to the King, or the law; as where it was not above fifteen days old, or of ſome other ſhort continuance. *Britton, c.* 5. Of this, *Bracton* writes at large, concluding it to be arbitrary. *Lib.* 4. *c* 5. See title *Diſſeiſin.*

FRESH FINE, A fine levied within a year paſt: it is mentioned in the ſtatute of *Weſtm.* 2. 13 *Ed.* 1. *ſt.* 2. *c.* 45.

FRESH FORCE, *friſca fortia.*] Is a force newly done in any city, borough, &c. And if a perſon be diſſeiſed of any lands or tenements within ſuch a city, or borough, he who hath a right to the land, by the uſage and cuſtom of the ſaid city, &c. may bring his *aſſiſe*, or *bill of freſh force*, within forty days after the *force* committed; and recover the lands. *F. N. B.* 7: *Old Nat. Br.* 4. This remedy may be alſo had where any man is deforced of any lands, after the death of his anceſtor, to whom he is heir; or after the death of tenant for life, or in tail, in dower, &c. within forty days after the title accrued; and in a bill of *freſh force*, the plaintiff or demandant ſhall make proteſtation to ſue in the nature of what writ he will, as *aſſiſe* of *mortdanceſtor*, of *novel diſſeiſin, intruſion*, &c. *New Nat. Br.* 15. The aſſiſe or bill of *freſh force* is ſued out without any writ from the Chancery; but after the forty days, there is to be a writ out of Chancery, directed to the mayor, &c. But this writ is obſolete ſince Ejectments have come in uſe for recovering the poſſeſſion of lands, &c.

FRESH SUIT, or *Purſuit, Recens inſecutio.*] Such a preſent and earneſt following of an offender, where a robbery is committed, as never ceaſes from the time of the offence done or diſcovered, until he be apprehended. Vide *poſt.* And the benefit of ſuch purſuit of a felon is, that the party purſuing ſhall have his goods reſtored to him; which otherwiſe are forfeited to the King. *Staundf. Pl. Cor. lib.* 3. *cap.* 10. & 12. When an offender is thus apprehended, and indicted, upon which he is convicted, the party robbed ſhall have reſtitution of his goods; and though the party robbed do not apprehend the thief preſently, but that it be ſome time after the robbery, if the party did what in him lay to take the offender; and notwithſtanding in ſuch caſe he happen to be apprehended by ſome other perſon, it ſhall be adjudged *freſh purſuit. Terms de Ley.* It has been anciently holden, that to make a *freſh ſuit*, the party ought to make *hue and cry* with all convenient ſpeed, and to have taken the offender himſelf, &c. But at this day, if the party hath been guilty of no groſs negligence, but hath uſed all reaſonable care in inquiring after, purſuing, and apprehending the felon, he ſhall be allowed to have made ſufficient *freſh ſuit.* 2 *Hawk. P. C. c.* 23. Alſo it is ſaid, that the judging of *freſh ſuit* is in the diſcretion of the court, though it ought to be found by the jury; and the juſtices may, if they think fit, award reſtitution without making any inquiſition concerning the ſame. 2 *Hawk. P. C. c.* 23. See title *Hue and Cry.*

Where a gaoler immediately purſues a felon, or other priſoner, eſcaping from priſon, it is *freſh ſuit*, to excuſe the gaoler: and if a lord follow his *diſtreſs* into another's ground, on its being driven off the premiſſes, this is called *freſh ſuit*; ſo where a tenant purſues his cattle, that eſcape or ſtray into another man's lands, &c. *Freſh ſuit* may

may be either within the *view*, or without; as to which the law makes ſome difference: and it has been ſaid, that *freſh ſuit* may continue for ſeven years. 3 *Rep*: *S. P. C.* See titles *Arreſt*: *Eſcape*; *Diſtreſs*.

FRETUM BRITANNICUM, Is uſed in our ancient writings for the *Streights* between *Dover* and *Calais*.

FRETTUM; FRECTUM, The freight of a ſhip or freight money.—*Acquietari facietis* frettum *navium*, &c. *Claus.* 17. *Joh. m.* 16.

FRIBURGH, or FRITHBURGH, *Fridburgum*, from the Sax. *frid* i. e. pax, & *borge*, fidejuſſor.] The ſame with *frank pledge*; the one being in the time of the *Saxons*, and the other ſince the *Conqueſt*: of theſe *friburghs*, *Bracton* treats, *lib.* 3. *tract.* 2. *c.* 10. And they are particularly deſcribed in the laws of King *Edward*, ſet out by *Lambard*, *fol.* 143. *Fleta* likewiſe writes on this ſubject, *lib.* 1. *cap.* 47. And *Spelman* makes a difference between *friborg* and *frithborg*; ſaying the firſt ſignifies *libera ſecuritas*, and the other *pacis ſecuritas*. Although *friburghs* or *frithburghers* were anciently required as principal pledges or ſureties for their neighbours, for the keeping of the peace, yet certain great perſons, were a ſufficient aſſurance for themſelves, and their menial ſervants. *Skene.* See title *Court Let.*

FRIDSTOLL; FRITHSTOW: Sax. *frid*, pax, & *ſtol*, ſedes.] A ſeat, chair, or place of peace. In the charter of immunities granted to the church of St. *Peter* in *York* by *Hen* I, and confirmed *anno* 5 *H.* 7, *Fridſtoll* is expounded *cathedra pacis & quietudinis*, &c. And there were many ſuch in *England*; but the moſt famous was at *Beverley*, which had this inſcription: *hæc ſedes lapidea* freedſtoll *dicitur*, i. e. *pacis cathedra, ad quam reus fugiendo perveniens, omnimodam habet ſecuritatem. Camd.* See titles *Abjuration*: *Sanctuary*.

FRIENDLESS MAN, The old *Saxon* word for an *outlaw*; becauſe he was, upon his expulſion from the King's protection, denied all help of *friends*, after certain days: *nam forisfecit amicos. Bract. lib.* 3. *tract.* 2. *c.* 12. See title *Frendwite*.

FRIENDLY SOCIETIES. Aſſociations, chiefly among the moſt induſtrious of the lower and middling claſs of tradeſmen for the purpoſe of affording each other relief in ſickneſs; and their widows and children ſome aſſiſtance at their death. Theſe have been thought worthy the protection of the Legiſlature, to prevent frauds which had ariſen from the irregular principles on which many of them were conducted.

The *Stat.* 33 *Geo.* 3 *c.* 54, provides that any number of perſons may form themſelves into a ſociety, and raiſe among themſelves a fund for their mutual benefit, and make rules and impoſe fines.—The rules, declaring the purpoſe for which ſuch ſocieties are eſtabliſhed, are to be exhibited to the Quarter Seſſions, who may annul or confirm them; in which latter caſe they are to be ſigned by the clerk of the peace. No rule thus confirmed to be altered but at a general meeting of the Society, and ſubject to the controul of the Seſſions.—Societies may appoint officers, who are to give ſecurities for their truſt, the treaſurer or truſtees by bond, to the Clerk of the peace and other perſons to the treaſurer or truſtees; which bonds are exempted from the ſtamp duty. Committee of not leſs than 11 members may be appointed: their powers to be declared by the Society and ſubject to their controul.—Treaſurers and truſtees are enabled to lay out ſubſcriptions in purchaſe of ſtock, &c. and to ſell and change funds for the uſe of the Society; to render accounts and pay over balances.—In caſe of miſbehaviour of truſtees, application to be made to the Court of Chancery in which proceedings are to be free of all expence of fees, ſtamps, &c. and counſel to be aſſigned gratis by the court.—Executors or aſſignees of truſtees, &c. dying or becoming bankrupt to pay the demands of the Society in the firſt place.—Effects of the Societies veſted in treaſurers and truſtees who may bring and defend actions.—Societies not to be diſſolved without conſent of five-ſixths of the members; rules entered in a book to be received as evidence.—Societies may receive donations.—Complaints of members againſt ſtewards, &c. to be ſettled by two juſtices.—If rules direct diſputes to be ſettled by arbitration, the award of the arbitrators ſhall be final.—Members of Societies producing certificates of ſteward, &c. not to be removeable from any pariſh till actually chargeable; and ſimilar proviſions are made relative to this, as to other certificates under the poor laws. (See this Dict. title *Poor*.)

Thus have the Legiſlature, with that humanity which peculiarly diſtinguiſhes the *Britiſh* conſtitution, taken under their care a ſet of men who, tho' generally uſeful and induſtrious, are but too apt not to be ſufficiently conſcious of the benefits conferred upon them, by a form of Government in which Charity is enforced and regarded as a ruling principle.

FRIER, Lat. *Frater*, Fr. *Frere*] The name of an order of religious perſons, of which there were four principal branches, *viz.* 1. *Minors*, *Grey Friers*, or *Franciſcans*. 2. *Auguſtines*. 3. *Dominicans*, or *Black Friers*. 4. *White Friers*, or *Carmelites*; of which the reſt deſcend. See *Stat.* 4 *H.* 7. *cap.* 17: *Lyndewood de Relig. Domibus*, *c.* 1.

FRIER-OBSERVANT, *frater obſervans.*] A branch of the *Franciſcan friers*, who were *minors*, as well as the *Conventuals* and *Capuchins*. They were called *Obſervants* becauſe they are not combined together in any cloiſter, convent, or corporation, as the Conventuals are; but tied themſelves to *obſerve* the rules of their order more ſtrictly than the *Conventuals*, and upon a ſingularity of zeal ſeparated themſelves from them, living in certain places of their own chuſing. *Zach. de Rep. Eccleſ. de Regular. c.* 12. They are mentioned in the *Stat.* 25 *H.* 8. *c.* 12.

FRILING, FREOLING, From Sax. *Freoh*, *Liber* & *Ling*, progenies.] A freeman born.

FRIPERER, Fr. *Fripier*, i. e. Interpolator.] One that ſcours and furbiſhes up old cloths to ſell again; a kind of broker. See *Stat.* 1 *Jac.* 1. *c.* 21; and title *Brokers*.

FRISCUS, Freſh uncultivated ground.—*Mon. Angl. Tom.* 2. *p.* 56.

FRITH, *Sax.*] A wood, from *Frid*, *Pax*; for the *Engliſh* Saxons held woods to be ſacred, and therefore made them ſanctuaries. Sir *Edward Coke* expounds it a plain between woods, or a lawn. *Co. Lit.* 5. *Camden* in his *Britannia*, uſeth it for an arm of the ſea, or a ſtreight, between two lands, from the word *Fretum*.

FRITHBRECH, *Pacis violatio.*] The breaking of the ace. *LL. Æthelred*, *c* 6. See *Gribbrieche*.

FRITHGEAR, From Sax. *Frith* or *Frid*, Pax, & *Gear*, Annus.] The year of jubilee, or of meeting for peace and friendſhip. *Somn.*

FRITHGILD, A *Guildhall*; alſo a company or fraternity.

FRITHMAN,

FRITHMAN, One belonging to such fraternity or company. *Blount.*

FRITHMOTE, Is mentioned in the records of the county palatine of *Chester*: *Per* Frithmote J. Stanley, *Ar. clamat capere annuatim de villa de* Olton, *quæ est infra feodum manerium de, &c.* 10 *sol. quos comites Cestriæ ante confectionem chartæ præd. solebant capere. Pl. in Itin. apud Cestriam.* 14 *Hen.* 7.

FRITHSOKE, FRITHSOKEN, From Sax. *Frith, pax* & *socne, libertas.*] Surety of defence, a jurisdiction for the purpose of preserving the peace; according to *Fleta, libertas habendi franci plegii*; *seu immunitatis locus.*—*Cowel*: *Blount.*

FRODMORTEL, rather FREOMORTEL, From Sax *Freo, free,* and *Morthdel, Homicide*] An immunity for committing manslaughter.—*Mon. Ang. Tom.* 1. *p.* 173.

FRUIT, *Stealing of.*] By *Stat.* 4 *Geo.* 2. *c.* 32, To rob orchards or gardens of fruit growing therein, may be punished by fine, whipping, *&c* and by *Stat.* 1 *Geo.* 1. *c.* 48, fine and imprisonment may be inflicted on persons destroying fruit trees —See title *Larceny.*

FRUMGYLD, *Sax.*] The first payment made to the kindred of a person slain, towards the recompence of his murder —*LL. Edmund.*

FRUMSTOL, The chief seat or mansion house; which is called by some the *Homestal. Leg. Inæ. c.* 38.

FRUSCA TERRÆ, Waste and desart lands. *Mon. Angl. tom.* 2. *p.* 327.

FRUSTURA, From Fr. *Froissure.*] A breaking down; also a ploughing or breaking up: Frustura *domorum* is house-breaking: and Frustura *terræ*, new broke land. *Mon. Angl. Tom.* 2. *p.* 394.

FRUSTRUM TERRÆ, A small piece or parcel of land, *Domesday.*

FRUTECTUM, A place where shrubs, or tall herbs do grow. *Mon. Angl. Tom.* 3. *p.* 22.

FUAGE, In the reign of King *Edward* III, The *Black Prince*, having *Aquitain* granted him, laid an imposition of *fuage* upon the subjects of that dukedom, *i. e.* 12 *d.* for every *fire. Rot. Parl.* 25 *Ed.* 3. And it is probable, that the *hearth money* imposed *Anno* 16 *Car.* 2, took its original from hence. See title *Fumage.*

FUEL. If any person shall sell billet-wood or faggots for *fuel* under the assise, *&c.* on presentment thereof upon oath by six persons sworn by a justice of peace, the party may be set on the pillory in the next market town, with a faggot, *&c.* bound to some part of his body. None are to buy *fuel* but such as will burn it, or retail it to those who do; on pain to forfeit the treble value; also no person may alter any mark or *assise of fuel*, on the like forfeiture. *Stats.* 7 *E.* 6. *c.* 7: 43 *Eliz. c.* 14, and see title *Billet Wood.*

FUER, Fr. *Fuir*, Lat. *Fugere.*] *Flight* is used substantively though it be a verb; and is two-fold, *fuer in fait*, or *in facto*, when a man doth apparently and corporally *fly*; and *fuer in ley, in lege*, when being called in the county court he appeareth not, which is *flight* in the interpretation of the law. *Staundf. Pl. Cor. lib.* 3. *c.* 22.

FUGA CATALLORUM, A drove of cattle; *fugatores carrucarum*, waggoners who drive oxen, without beating or goading. *Fleta, lib.* 2. *c.* 78.

FUGACIA. A chase; So *fugatio*, is hunting, or the privilege to hunt. *Blount.*

FUGAM FECIT, Is where it is found by inquisition, that a person *fled* for felony, *&c.* And if *flight* and felony be found on an indictment for felony, or before the coroner, where a murder is committed, the offender shall forfeit all his goods, and the issues of his lands, till he is acquitted or pardoned: and it is held, that when one indicted of any capital crime, before justices of *Oyer*, *&c.* is acquitted at his trial, but found to have fled, he shall, notwithstanding his acquittal, forfeit his goods: but not the issues of his lands, because by acquittal the land is discharged, and consequently the issues. 3 *Inst.* 218. The party may in all cases, except that of the coroner's inquest, traverse the finding of a *fugam fecit*; and the particulars of the goods found to be forfeited, may be always traversed; also whenever the indictment against a man is insufficient, the finding of a *fugam fecit* will not hurt him. 2 *Hawk. P. C. c.* 49. Making default in appearance on indictment, *&c.* whereby *outlawry* is awarded, is a *flight in law.* See this Dict. titles *Exigent*: *Outlawry*: *Forfeiture.*

FUGITIVES GOODS, *Bona Fugitivorum.*] The goods of him that *flies* upon felony, which after the flight lawfully found on record, do belong to the King or Lord of the manor. 5 *Rep* 109.

FUGITIVES OVER SEA. By two ancient and obsolete, if not expired, statutes 9 *E.* 3. *c.* 10: 5 *R.* 2. *st.* 2. *c.* 2, To depart this realm over the sea, without the *King's licence*, except it were great men and merchants, and the King's soldiers, incurred forfeiture of goods: and masters of ships, *&c.* carrying such persons beyond sea, forfeited their vessels; also if any searcher of any port, negligently suffered any persons to pass, he should be imprisoned, *&c.* See titles *Aliens*; *Allegiance*; *Foreign Service*; *Treason.*

FUGITIO, *Pro* Fuga.—*Knighton, Anno* 1537.

FULL-AGE. See titles *Age*; *Infant.*

FULLUM AQUÆ, A fleam or stream of water, such as comes from a mill.

FUMAGE, *Fumagium.*] Dung for soil, or manuring of land with dung.—*Chart. R.* 2: *Pat.* 5 *E.* 4. And this word is as been sometimes used for *smoke-money*, a customary payment for every house that had a chimney. *Domesday.* See 1 *Comm.* 324; and this Dict. title *Taxes.*

FUMADOES. Pilchards garbaged and salted, then hung in the *smoke*, and pressed; so called in *Spain* and *Italy*, whither they are exported in great abundance. See titles *Fish*: *Navigation Acts.*

FUNDITORES, Is used for pioneers, *in Pat.* 10 *Ed.* 2. *m.* 1.

FUNDS, See titles *National Debt*: *Stocks*: *Stock brokers.*

FUNERAL CHARGES, As to the payment of these by an executor, See title *Executor* V. 2.

A person died in debt, and 600 *l.* was laid out in his funeral; decreed the same should be a debt, payable out of a trust estate, charged with payment of debts, he being a man of great estate and reputation in his country, and buried there; but had he been buried elsewhere, it seemed his funeral might have been more private, and the court would not have allowed so much. *Prec. Ch.* 27.

Where a citizen of *London* devised 700 *l.* for mourning, the question was, if it should come out of the whole estate, or out of the legatory part only; it was insisted that if there had been no direction by the will, or if the will had directed, that the expences of the funeral should not exceed such a sum, there the deduction must have been out

out of the whole eſtate. *Per cur.* Mourning deviſed by the will, muſt come out of the legatory part, and not to leſſen the orphanage and cuſtomary part. 2 *Vern.* 240.

Executor is not liable to pay for funeral expences, unleſs he contracts for it. 12 *Mod.* 256.

Settlements for ſeparate maintenance of the wife ſhall never extend to funeral charges; and though ſhe made a will, (according to a power given her) and an executor, and gave ſeveral legacies, but there was no reſiduum for the executor, the huſband's eſtate in the hands of a deviſee ſubject to the payment of debts was made liable to the funeral charges of the wife. 9 *Mod.* 31.

In ſtrictneſs no funeral expences are allowable againſt a creditor, except for the coffin, ringing the bell, parſon, clerk, and bearer's fees; but not for pall or ornaments; *per Holt.* 1 *Salk.* 296. Ten pounds is enough to be allowed for the funeral of one in debt; *per Holt.* Baron *Powell* in his circuit would allow but 11 *s.* 6 *d.* as all the neceſſary charge. *Comb.* 342. *Quære*, If 40 *s.* is not now the uſual ſum in caſe of an inſolvent? See *Salk.* 196: *Godolph. p.* 2. *c.* 26. § 2.

FURCA ET FOSSA; the gallows and the pit.] In ancient privileges granted by our Kings, it ſignified a juriſdiction of puniſhing felons; that is, men by *hanging* and women with *drowning*. And Sir *Edw. Coke*, ſays *foſſa* is taken away, but that *furca* remains. 3 *Inſt.* 58. and ſee *Skene.*

FURCARE AD TASSUM, To pitch corn with a *fork* in loading a waggon, or in making a rick or mow. *Cowel.*

FURCAM ET FLAGELLUM, The meaneſt of all ſervile tenures, when the bondman was at the diſpoſal of his Lord for life and limb. *Placit. Term Mich.* 2 *Jac. Rot.* 7.

FURIGELDUM, A mulct paid for theft: by the laws of King *Ethelred*, it is allowed, that they ſhall be witneſſes *qui nunquam* furigeldum *reddiderunt*, *i. e.* who never were accuſed of theft.

FURLONG, A quantity of ground containing generally forty poles or perches in length, every pole being ſixteen feet and a half; eight of which *Furlongs* make a mile: it is otherwiſe the eighth part of an acre of land in quantity. *Stat.* 34 *Ed.* 1. *ſt.* 5. *c.* 6. In the former acceptation, the *Romans* call it *Stadium*; and in the latter *Jugerum.* Alſo the word *Furlong* has been ſometimes uſed for a piece of land of more or leſs acres.

FURNAGIUM, See *Fornagium.*

FURNARIUS, A baker, who keeps an *oven*; hence *furniare* ſignifies to bake or put any thing in the oven. *Mat. Paris. anno* 1258.

FURR, *Furrura*, from the Fr. *Fourer*, i. e. *Pelliculare.*] The coat or covering of a beaſt. The *Stat.* 24 *H.* 8. *c.* 13, mentions divers kinds of it, *viz. Sables*; which are a rich *Furr*, of colour between black and brown, the ſkin of a beaſt called a *Sable*, of bigneſs between a pole-cat and an ordinary cat, bred in *Ruſſia* and *Tartary. Lucerns*, the ſkin of a beaſt of that name, near the ſize of a wolf, in colour neither red nor brown, but between both, and mingled with black ſpots; which are bred in *Muſcovy*; and is a very rich *Furr. Genets*, a beaſt's ſkin ſo called, in bigneſs between a cat and a weezle, nailed like a cat, and of that nature; and of two kinds, black and grey, the black moſt precious which hath black ſpots upon it hardly to be ſeen; this beaſt is the product of *Spain. Foins*, are of faſhion like the *ſable*, the top of the *Furr* is black, and the ground whiteiſh; bred for the moſt part in *France. Marten* is a beaſt very like the *Sable*, the ſkin ſomething coarſer, produced in *England* and *Ireland*, and all countries not too cold; but the beſt are in *Ireland*, Beſides theſe, there are the *Fitch* or *Pole cat*; the *Calabar*, a little beaſt, in bigneſs near a *Squirrel*: *Miniver* being the bellies of *Squirrels*; and *Shanks*, or what is called *Budge*, *&c.* all of them *Furrs* of foreign countries, ſome whereof make a large branch of their inland traffick.

FURST & FONDONG, *Sax.*] Time to adviſe, or to take counſel.—*Leg. H.* 1. *c.* 46.

FURTUM, Theft, or robbery of any kind,

FUSTIANS. No perſons ſhall dreſs *fuſtians* with any other inſtrument than the broad ſheers, under the penalty of 20 *s.* And the maſter and wardens of the company of *Clothworkers* in *London*, *&c.* have power to ſearch the workmanſhip of ſheermen, as well for *fuſtian*, as cloth. *Stats.* 11 *H.* 7. *c.* 27: 39 *Elix. c.* 13. See this Dict. title *Manufacturers.*

FUSTICK, Wood brought from *Barbadoes*, *Jamaica*, *&c.* uſed by dyers, mentioned in *Stat.* 12 *Car.* 2. *c.* 18: See title *Navigation-acts.*

FYRDERINGA; FYRTHING; FYRDUNG, From Sax. *Firderung*, i. e. *Expeditionis apparatus.*] A going out to war or a military expedition at the King's command; not going upon which, when ſummoned, was puniſhed by fine at the King's pleaſure. *Leg. H.* 1. *c.* 10. *Blount* calls it an expedition; or a fault or treſpaſs for not going upon the ſame.

G.

GAB

GABEL, *Gabella, Gablum, Gablagium,* in French *Gabelle,* i. e. *Vectigal.*] This word hath the ſame ſignification among our ancient writers, as *gabelle* had formerly in *France*: it is a tax; but hath been variouſly uſed; as for a rent, cuſtom, ſervice, *&c.* And where it was a payment of rent, thoſe who paid it were termed *gablatores. Domeſday*: *Co. Lit.* 213. It is by ſome authors diſtinguiſhed from *tribute*; Gabel being a tax on moveables, *Tribute* on immoveables. When the word *Gabel* was formerly mentioned in *France* without any addition to it, it ſignified the *tax on ſalt*; though afterwards it was applied to all other taxes.

GABLE-END, *Gabulum.*] The head or extreme part of a houſe or building. *Paroch. Antiq.* 286.

GABULUS DENARIORUM, Rent paid in money. *Selden on Tithes, p.* 321.

GAFOLD-GILD, *Sax.*] The payment of tribute or cuſtom; it ſometimes denotes uſury.

GAFOLD-LAND, OR GAFUL-LAND, *Terra cenſualis.*] Land liable to taxes; and rented or let for rent. *Sax. Dict.*

GAGE, Fr. Lat. *Vadium.*] A pawn or pledge. *Glanv. lib.* 10. *c.* 6. *Gage deliverance* is where he that hath taken a diſtreſs being ſued, hath not delivered the cattle, *&c.* that were diſtrained; then he ſhall not only avow the diſtreſs, but *gager deliverance*, i. e. put in ſurety, or pledges, that he will deliver them. *F. N. B.* 67, 94. This *gage deliverance* is had on ſuing out *replevins*, upon the plaintiff's praying the ſame: and it is ſaid the parties are to be at iſſue, or there is to be a demurrer in law, before *gage deliverance* is allowed; and if a man claim any property in the goods, or the beaſts are dead in the pound, the party ſhall not *gage*, *&c. Kitch.* 145. See this Dict. titles *Diſtreſs*; *Replevin.*

GAGER DEL LEY, *Wager of Law,*—See that title.

GAINAGE, *Gainagium*, i. e. *Plauſtri apparatus*, Fr. *Gaignage*, viz. *Lucrum.*] The *gain* or profit of tilled or planted land, raiſed by cultivating it; and the draught, plough, and furniture for carrying on the work of tillage, by the baſer kind of *ſoke-men* or *villeins. Gainage* was only applied to arable land, when they that had it in occupation, had nothing thereof but the profit raiſed by it from their own labour, towards their ſuſtenance, nor any other title but at the Lord's will: and *gainer* is uſed for a *ſoke-man*, that hath ſuch land in occupation. *Bract. lib.* 1. *c* 9: *Old Nat. Br.* 117. The word *gain* is mentioned by *Weſt. Symb. par.* 2. *ſect.* 3; where he ſays land in demeſne, but not in *gain*, *&c.* And in the *ſtat.* 51 *H.* 3. *ſt.* 4, there are theſe words; "no man ſhall be diſtrained by his beaſts, that *gain* the land."—In the ſtatute of *Magna Charta*, *c.* 14, by *Gainage* is meant no more than the plough-tackle, or implements of huſbandry, without any reſpect to *gain* or profit: where it is ſaid of the knight and freeholder, he ſhall be amerced *ſalvo contenemento ſuo*; the merchant or trader, *ſalvo merchandiſa ſua*; and the villein or countryman, *ſalvo gainagio ſuo. &c.* In which caſes it was, that the merchant and huſbandman ſhould not be hindered, to the detriment of the public, or be undone by arbitrary fines; and the villein had his *wainage*, to the end that the plough might not ſtand ſtill; for which reaſon the huſbandmen at this day are allowed a like privilege by law, that their beaſts of the plough are not, in many caſes, liable to diſtreſs. See title *Diſtreſs.*

GAM

GAINERY, Fr. *Gaignerie.*] Tillage, or the profit ariſing from it, or of the beaſts employed therein. *Stat. Weſt.* 1. *cc.* 16, 17.

GALEA, A galley, or ſwift ſailing ſhip. *Hoved. p.* 682, 692.

GALLETI, According to *Somner* were *viri Galeati*; but *Knighton* ſays they were *Welchmen.*

GALLIGASKINS, Wide hoſe or breeches, having their name from their uſe by the *Gaſcoigns. Dict.*

GALLI-HALFPENCE, A kind of coin, which with *ſuſkins* and *doitkins*, were forbidden by the *ſtat.* 3 *H.* 5. *c.* 1. It is ſaid they were brought into this kingdom by the *Geneſe* merchants, who trading hither in *galleys*, lived commonly in a lane near *Tower-ſtreet*, and were called *Galley men*, landing their goods at *Galley-key*, and traded with their own ſmall ſilver coin termed *Galley Halfpence. Stow's Survey*, 137. See title *Coin.*

GALLIMAWFRY, A meal of coarſe victuals, given to *Galley Slaves.—Dict.*

GALLIVOLATIUM, (From *Gallus*, a cock.) A cock-ſhoot or cock-glade. *Dict.*

GALOCHES, Fr.] A kind of ſhoe, worn by the *Gauls* in dirty weather; mentioned in the *ſtat.* 14 & 15 *H.* 8. *c.* 9.

GAMBA, GAMBERIA, GAMBRIA, Fr. *Jambiere.*] Military boots or defence for the legs. *Dict.*

GAMBEYSON, *Gambezonum.*] A horſeman's coat uſed in war, which covered the legs: or rather a quilted coat, *cento, veſtimentum ex coactili lanâ confectum*, to put under the armour, to make it ſit eaſy. *Fleta, lib.* 1. *c.* 24.

GAME. *Aucupia*, from *Auceps, Aucupis*, i. e. *Avium Captio.*] Birds, or prey, got by fowling and hunting.

GAME-LAWS.

THE GAME-LAWS are A Syſtem of poſitive regulations introduced and confirmed by ſeveral ſtatutes: the proviſions of which aſcertain and eſtabliſh certain *Qualifications* of property enabling or allowing perſons to kill Game: and impoſing *Penalties*, as well on ſuch qualified perſons for irregularities in killing Game, as on *unqualified* perſons for hunting or killing Game at all.

Theſe Laws have been the ſubject of much diſcuſſion; they have been ſtiled even from the Bench, (See 1 *Term Rep.* 49,) an oppreſſive remnant of the ancient arbitrary Foreſt laws, under which, in darker ages, the killing one of the king's deer was equally penal with murdering one of his Subjects. See this Dict. title *Foreſt*, and 4 *Comm. c.* 33. II. 2. On the other hand the object of them has been well defined to be, the preſervation of the ſeveral ſpecies of theſe animals which would ſoon be extirpated by a general liberty: and the prevention of idleneſs and diſſipation in huſbandmen, artificers and others of lower rank. 2 *Comm.* 411. *b.* 2. *c.* 27. Though when the learned Commentator ſtates the other purpoſe of theſe laws to be the encouragement of agriculture by giving every man an *excluſive dominion* over his own ſoil; and the preventing inſurrections by *diſarming* the bulk of the *people*; he ſeems rather incorrect: as, in the firſt of theſe inſtances, a Freeholder of 99 *l. per annum*, or a leaſeholder of 149 *l.* whatever may be otherwiſe his excluſive dominion, has no right to kill Game on his own eſtate: and the latter motive ſeems more invidiouſly ſtated than is uſual with that great and liberal writer; ſince any perſon, though unqualified, may keep and uſe a gun, provided it is not for the purpoſe of deſtroying the Game. *Andr.* 255: *Stra.* 495, 1098: 2 *Term Rep.* 18.

Our eſteemed Commentator alſo advances a poſition, "That no man but he who has a Chaſe or Free-warren by grant from the Crown, or preſcription, which ſuppoſes one, can juſtify hunting or ſporting upon another man's ſoil; nor indeed, in thorough ſtrictneſs of common law, either hunting or ſporting at all," even on his own ground. 2 *Comm.* 416. *b.* 2. *c.* 27. In conformity to which notion he conſiders the qualifications to kill Game as more properly exemptions from the penalties inflicted by ſtatute-law. 4 *Comm.* 175.

Theſe concluſions he deduces from the two following principles; that the King as ultimate proprietor of all the lands in *England* has a right to take theſe beaſts *feræ naturæ* on the lands of any of his Subjects, and that, being *bona vacantia*, they are the King's by right of his prerogative: It follows then that he has power to grant theſe franchiſes to another, to enable him to do the ſame; and that no perſon is therefore, by the Game-laws, abridged of any right poſſeſſed previouſly to the making them. The above is the ſubſtance of the reaſoning of this celebrated writer on this ſubject; but his premiſes as well as his concluſion are very ſtrenuouſly, and apparently ſucceſsfully, combated by his annotator Mr. *Chriſtian*, in his notes on the paſſages above alluded to: in conformity to which we have already ſtiled the Game-laws, "A Syſtem of poſitive regulations by the ſtatute-law of the kingdom."

Having ſaid thus much on this topic, any further conſiderations on the policy or propriety of theſe laws, would here be unbecoming; ſtrict they certainly are, and by many deemed ſevere; a very general ſtatement of them is here inſerted, under the following heads:

I. *The Qualifications to kill Game.*
II. *Penalties on qualified and unqualified Perſons.*
III. *Of Treſpaſſes in Hunting*, &c.

For further matter connected with this title, ſee this Dict. under the heads, *Foreſt*; *Chaſe*; *Park*; *Warren*; *Deer*; *Fiſh*; *Swans*; *Pigeons*; *Black Act*; and, other appoſite titles: and the *ſtat.* 13 *Geo.* 3. *c.* 54, for preſervation of the Game in *Scotland*.

I. 1. THE QUALIFICATIONS for killing Game, to ſtate them as conciſely as poſſible, are, 1; The having a Freehold Eſtate of 100 *l. per ann.* 2; A Life-eſtate or Leaſehold for 99 years of 150 *l. per annum*: 3; Being the ſon and heir-apparent of an Eſquire, or of any perſon of ſuperior degree: 4; Being the owner or keeper of a foreſt, park, chaſe, or warren. 4 *Comm.* 175. All other perſons are termed Unqualified.

The *qualification* by eſtate for killing Game in the reign of *Richard* II, was 40 *s.* a year; in the reign of *James* I. it was advanced to 10 *l.* a year; and after that, in ſome inſtances to 40 *l.* a year; and at laſt in the reign of *Charles* II. it was raiſed to 100 *l.* a year. Not that the laws became gradually more ſevere; but as the value of money decreaſed, the qualification was raiſed in proportion, the eſtate continuing nearly the ſame; for an eſtate of 40 *s.* a year in the reign of *Richard* II. was not much inferior to an eſtate of 100 *l.* a year in the reign of *Charles* II. And the penalty for deſtroying the Game was even more ſevere then, than it is now. Thoſe antient laws relating to the Game are ſtill in force, and are generally enacted ſo to be by the ſubſequent ſtatutes; it is therefore neceſſary, in order to have a thorough knowledge of this matter, to be acquainted with the proviſions contained in them.

The firſt qualification relating to the Game was by *ſtat.* 13 *R.* 2. *ſt.* 1, *c.* 13; by which it is enacted that no layman which hath not lands or tenements of 40 *s.* a year, nor clergyman if he be not advanced to 10 *l.* a year, ſhall have or keep any greyhound, hound, nor other dog, to *hunt*; nor ſhall uſe ferrets, hays, nets, hare-pipes, nor cords, nor other engines, for to take, or deſtroy *hares* nor *conies*, nor other *Gentlemen's Game*, on pain of a year's impriſonment. And ſee *ſtat.* 16 *Geo.* 3. *c.* 30.

The next qualification by eſtate or degree to kill Game, was by *ſtat.* 1 *Jac.* 1. *c.* 27. § 3; whereby it is enacted, that every perſon who ſhall keep any greyhound for courſing of *deer* or *hare*, or ſetting dog, or net to take *pheaſants* or *partridges*, (except he be ſeiſed, in his own right or the right of his wife, of 10 *l.* a year eſtate of inheritance, or 30 *l.* a year of a lives eſtate, or goods to the value of 200 *l.* or be the ſon of a knight or a lord, or the ſon and heir-apparent of an eſquire,) and be thereof convicted, he ſhall be committed to gaol for three months; or pay 20 *s.* to the uſe of the poor, and become bound with two ſureties not to offend again in like manner.

The next qualification relates to *deer* and *conies* only, in *ſtat.* 3 *Jac.* 1. *c.* 13; by which it is enacted, that if any perſon not having hereditaments of 40 *l.* a year, or not worth in goods 200 *l.* ſhall uſe any gun or bow to kill any deer or conies; or ſhall keep any bu kſtall, nets, or coney dogs (except he have grounds incloſed, and uſed for the keeping of deer or conies, the increaſing of which ſaid conies ſhall amount to the value of 40 *s.* a year; or keepers, or warreners in their parks, warrens, or grounds);

in

in such case any person *having lands or hereditaments of* 100 *l. a year in fee, or for life*, may take from such person to his own use for ever, such guns, bows, bucktalls, nets, and coney dogs.

The next qualification relates to *pheasants* and *partridges* only, and is as follows: Every free warrener, lord of a manor, or freeholder seised in his own or his wife's right of 40 *l.* a year of inheritance, or lives estate of 80 *l.* or worth in goods 400 *l.* may take pheasants and partridges (in the day time only) in his own free warren, manor, or freehold, betwixt *Michaelmas* and *Christmas* yearly. *Stat* 7 *Jac.* 1. *c.* 11. § 7.

The last general qualification by estate or degree to kill Game, and which is now most to be regarded, is in *stat.* 22 and 23 *Car.* 2. *c.* 25; by which, every person not having lands and tenements, or some other estate of interest, in his own or his wife's right, of the clear yearly value of 100 *l per annum*;—Or for term of life, or having lease or leases of 99 years, or for any longer term, of the clear yearly value of 150 *l.* (other than the son and heir apparent of an esquire, or [of] other person of higher degree, and the owners and keepers of forests, parks, chases, or warrens, being stocked with *deer* or *conies* for their necessary use, in respect of the said parks, chases, forests, or warrens,) *is declared to be a person* by the laws of this realm, *not allowed* to have or keep for himself or any other person, any guns, bows, greyhounds, setting dogs, ferrets, coney dogs, lurchers, hays, nets, lowbels, harepipes, gins, snares, or other engines for the taking and killing of Game. § 3.

Every person using any dog, gun, or engine for taking Game (except *Game-keepers*; see that title;) shall deliver his name and place of abode to the clerk of the peace, and take out an annual *certificate* or *licence* on a stamp of three guineas. But these certificates not to authorise unqualified persons to kill Game. *Stats.* 25 *Geo.* 3. *c.* 50: 31 *Geo.* 3. *c.* 21.

One having an estate of 103 *l.* a year, mortgaged a part of it of the value of 14 *l.* a year, which being copyhold was surrendered to the mortgagee, who was thereupon admitted tenant, but never entered on the premises, the mortgagor continuing in possession and paying interest. It was held that the mortgagor under these circumstances was *not* a qualified person. *Cald.* 230. *Burn J.* title *Game* IV.

The *stat.* 22 & 23 *Car.* 2. *c.* 25, is loosely worded, and the stops are no part of the original statute. It has been determined that the clause relative to qualification by freehold estate, terminates with the words *per annum*; and that a *life-estate* being of an inferior quality, ought to be coupled with leasehold, whereof 150 *l.* a year is necessary to constitute a qualification. A clergyman's benefice is a life estate. *Lowndes* v. *Lewis*, *Cl. Cald.* 188.

In the case of *Jones* v. *Smart*, after much argument it was decided, that a diploma conferring the degree of Doctor of Physic granted by either of the Universities in *Scotland*, does not give a qualification to kill Game under *stat.* 22 & 23 *Car.* 2. *c.* 25; and that an *Esquire* or other person of higher degree *as such* is *not* qualified under that act, though *the son of an esquire*, or the son of other person of higher degree *is* qualified. 1 *Term Rep.* 44. A Doctor of Physic of the *English* Universities, is not qualified as such. *Id.* 53.

II. The Penalties, and regulations for recovering them, are so numerous under the various statutes, and sometimes, if not inconsistent, at least not easily reconcilable, that it is scarcely possible to methodize them in the limits prescribed by this work; or to avoid confusion and uncertainty in the recapitulation of them. Several are here enumerated. The exact Student must consult the *Statute book* and *Burn's Justice*, title *Game*: but must be careful not to trust too implicitly to the latter, or to his own interpretation of the former.

It may be observed, as a preliminary provision, that, by *stat.* 8 *Geo.* 1, *c.* 19, where any person for any offence against any law in being, at the making of the said act for the better preservation of the Game, shall be liable to pay any pecuniary penalty or sum of money, on conviction before a Justice of the peace, the prosecutor may either proceed to recover the same in such manner, or he may sue for the same [before the end of the second term after the offence committed 26 *Geo.* 2. *c.* 2;] by action of debt, or on the case, bill, plaint, or information, in any court of record at *Westminster*, wherein if he recovers he shall have double costs: provided that the offender shall not be prosecuted both ways; and in case of a second prosecution, he may plead in his defence the former prosecution pending, or the conviction or judgment thereupon had. And by *stat.* 2 *Geo.* 3. *c.* 19. whereas a moiety of the penalty by several acts is directed to be applied to the use of the poor of the parish where the offence was committed, by reason whereof inhabitants of the said parish have been disallowed to give evidence; it is enacted, that in order to enable the inhabitants to give evidence, it shall be lawful for any person to sue for the whole of such penalty to his own use, and if he recovers he shall have double costs; such action to be brought within six months after the offence committed.

By *stat.* 33 *H.* 8. *c.* 6, which is now considered as obsolete, if not superseded by subsequent statutes, shooting with a cross-bow, hand-gun or demihake, by a person not having 100 *l.* a year, incurs a penalty of 10 *l.* Handguns are to be of a yard in length in the stock and gun; and in this old statute a power is given to qualified persons to seize and destroy unlawful guns.

No person shall take pheasants or partridges with engines in another man's ground, without licence, on pain of 10 *l. stat.* 11 *H.* 7. *c.* 17.—If any person shall take or kill any pheasants or partridges, with any net in the night-time, they shall forfeit 20 *s.* for every pheasant, and 10 *s.* for every partridge taken; and hunting with spaniels in standing corn, incurs a forfeiture of 40 *s. stat.* 23 *Eliz. c.* 10. Those who kill any pheasant, partridge, duck, heron, hare, or other *game*, are liable to a forfeiture of 20 *s.* for every fowl and hare; and selling, or buying to sell again, any hare, pheasant, &c. the forfeiture is 10 *s.* for each hare, or partridge—20 *s.* for a pheasant—40 *s.* for a deer. *Stat.* 1 *Jac.* 1. *c.* 27.

Killing *in the night* a hare, partridge, or pheasant, by a person qualified or unqualified. 5 *l. Stat.* 9 *Ann. c.* 25.

To kill, take, or destroy; or to *use* any gun, dog, snare, net, or engine, *with intent* to kill, &c. any hare, partridge, or other game, *in the night*; (*viz.* between 7 at night, and 6 in the morning, from *October* 12 to *February* 12; and between 9 and 4 from *February* 12 to *October* 12;) or in the day on *Sunday* or *Christmas day*;

firſt offence, from 20*l.* to 10*l.*—*ſecond* offence, from 30*l* to 20*l*—*third* and other offences, 50*l.*—In caſe of a third offence, the party ſhall be bound in a recognizance to be tried at the Seſſions, and if the penalty is not paid, may be puniſhed with from twelve to ſix months' impriſonment. *Stat.* 13 *Geo.* 3. *c.* 80. The information to be laid within *one month*. Penalty, half to the informer, and half to the poor.

Selling Game; qualified or unqualified, 5*l* *Stat.* 28 *Geo.* 2. *c.* 12.—Unqualified perſon ſelling or expoſing to ſale hare, partridge, pheaſant, or other Game; 5*l.* or three months' impriſonment. If Game is found in the ſhop, houſe or poſſeſſion of any poulterer, ſalesman, fiſhmonger, cook, or paſtry-cook, not qualified to kill, this ſhall be deemed an expoſing to ſale. *Stats.* 5 *Ann. c.* 14: 9 *Ann. c.* 25. § 2: 28 *Geo.* 2. *c.* 12.

Higlers, chapmen, carriers, inn keepers, victuallers, *&c.* having in their cuſtody, hare, pheaſant, partridge, heath-game, *&c.* (except ſent by ſome perſon qualified to kill *game*) ſhall forfeit for every hare and fowl 5*l.* to be levied by diſtreſs and ſale of their goods, being proved by one witneſs, before a Juſtice; and for want of diſtreſs ſhall be committed to the houſe of correction for three months: one moiety of the forfeiture to the informer, and the other to the poor. And if any perſons ſhall drive wild fowls with nets, between the firſt day of *July* and the firſt of *September*, they ſhall forfeit 5*s.* for every fowl. *Stats* 5 *Ann. c.* 14: 9 *Ann. c.* 25. Penalties for killing and deſtroying *game*, are recoverable not only before juſtices of peace by the ſeveral ſtatutes; but alſo by action of debt, bill, plaint, or information, in any of his Majeſty's courts at *Weſtminſter*; and the plaintiff, if he recovers, ſhall likewiſe have double coſts. *Stat.* 8 G. 1. *c.* 19.

No *certiorari* ſhall be allowed to remove any conviction or other proceeding on the *ſtat.* 5 *Ann. c.* 14. into any court at *Weſtminſter*, unleſs the party convicted become bound to the party proſecuting with ſufficient ſureties, in the ſum of 50*l.* to pay the proſecutor his coſts and charges, *&c.* after the conviction confirmed, or a *procedendo* granted. *Stat.* 5 *Ann. c.* 14.

Perſons convicted of entering warrens, in the night-time, and taking or killing conies there, or aiding or aſſiſting therein, may be puniſhed by tranſportation, or by whipping, fine or impriſonment. Perſons convicted on this act, not liable to be convicted under any former act. This act does not extend to the deſtroying conies in the day-time, on the ſea and river banks in the county of *Lincoln*, *&c.* No ſatisfaction to be made for damages occaſioned by ſuch laſt mentioned entry, unleſs they exceed 1*s.* *Stat.* 5 *Geo.* 3. *c.* 14.

Killing, carrying, ſelling, buying, or having in poſſeſſion, a *partridge* between *February* 12, and *September* 1, or *pheaſant* between *February* 1, and *October* 1; by any perſon qualified or not qualified, 5*l.* *Stat.* 2 *Geo.* 3. *c.* 19. *Hawking*, to catch ſuch game between *July* 1, and *Auguſt* 31; 40*s.* for hawking, and 20*s.* for each partridge, *&c.* *Stat.* 7 *Jac.* 2. *c.* 11. § 2.

Keeping or uſing grey-hounds, ſetting dogs, lurchers, hays, or engines to kill or deſtroy game, by one unqualified, 5*l.* *Stat.* 5 *Ann. c.* 14.—Keeping or uſing the above named, or any other dogs or engines for ſuch purpoſe 20*s.* or not leſs than 5*s.* *Stat.* 22 & 23 *Car.* 2. *c.* 25. § 2.

Trading a hare in the *ſnow*; by a perſon qualified or unqualified; 6*s.* 8*d.* *Stat.* 14 & 15 *H.* 8. *c.* 10.—Three months' impriſonment or 20*s.* fine. *ſtat.* 1 *Jac.* 1. *c.* 27.

Uſing Snares for hares; by one qualified, or unqualified; one month's impriſonment or 10*s.* fine. *Stat.* 22 & 23 *Car.* 2. *c.* 25. § 6. deſtroying Game with engines; 20*s.* for each pheaſant, *&c.* *Stat.* 1 *Jac.* 1. *c.* 27.

A Juſtice of peace, or Lord of a manor within his manor, may take away Game out of the poſſeſſion of an unqualified perſon. *Stat.* 5 *Ann. c.* 14. § 4.—Unqualified perſons having Game in their poſſeſſion and not giving an account how they came by it, ſhall forfeit from 20*s.* to 5*s.* or ſuffer confinement to hard labour for from one month to ten days. *Stat.* 4 & 5 *W.* & *M. c.* 23. § 3.

Perſons deſtroying, buying, or ſelling Game, informing againſt others buying, or ſelling Game, or offering ſo to do, to be indemnified. *Stat.* 5 *Ann. c.* 14. § 3.

Uſing dogs, guns, or engines for taking or killing Game, without a certificate 20*l.*—Refuſing to produce certificate, or to tell his true name and place of abode to a certificated perſon, 50*l.* *Stat.* 25 *Geo.* 3. *c.* 50.

By the yearly mutiny-acts, if any Officer or Soldier ſhall, without leave of the lord of the manor under his hand and ſeal, deſtroy any hare, coney, pheaſant, partridge, pigeon, or other fowl, poultry, or fiſh, or his Majeſty's Game, and be convicted thereof, on oath of one witneſs, before one Juſtice; every officer ſo offending ſhall forfeit 5*l.* to the poor, and the commanding officer upon the place, for every offence committed by any ſoldier under his command, ſhall forfeit 20*s.* in like manner. And if upon conviction by the juſtices, and demand made thereof by the conſtable or overſeers of the poor, he ſhall not in two days pay the ſaid penalties, he ſhall forfeit his commiſſion. *Burn J.*

By *Stat.* 4 & 5 *W.* 3. *c.* 23. § 10, It is provided, that whereas great miſchiefs do enſue by *inferior tradeſmen*, *apprentices* and other diſſolute perſons, neglecting their trades and employments, who follow hunting, fiſhing, and other Game, to the ruin of themſelves and damage of their neighbours, therefore if any ſuch perſon ſhall preſume to hunt, hawk, fiſh, or fowl (unleſs in company with the maſter of ſuch apprentice duly qualified) he ſhall not only be ſubject to other penalties (according to the various ſtatutes,) but if he be proſecuted for treſpaſs in coming on any perſon's lands, and be found guilty, the plaintiff ſhall not only recover damages againſt him, but alſo full coſts.

An unqualified perſon may go out to beat the hedges, buſhes, *&c.* with a qualified perſon; and to ſee the Game purſued or deſtroyed; provided the unqualified perſon has no gun or other engine with him for the deſtruction of the Game; without being ſubject to any penalty. *R. v. Newman*, *Lofft.* 178: *Burn. J.* tit. *Game*, IV.

Two perſons, uſing a greyhound together to deſtroy Game cannot be convicted in ſeparate penalties under *ſtat.* 5 *Ann. c.* 14. § 4; for it is only one offence, and the Magiſtrate ſhould only convict them in one penalty. 4 *Term Rep.* 809. So if a man not qualified goes a hunting and kills never ſo many hares on the ſame day, it is but one offence, and the ſtatute impoſes the penalty for the keeping and uſing the dogs and engines, and not for killing the hares. 10 *Mod.* 26: *Com. Rep.* 274. and *Roſe's notes p.* 278: *Cowp.* 646.

In an *Action, qui tam*, on the Game laws, it is ſufficient to ſay that a perſon is not *qualified* generally, without

out ſhewing that he had not 100*l.* a year, or any other eſtate which makes a qualification. 2 *Com. Rep.* 522. But on *Conviction* it is neceſſary that all the qualifications ſhould be negatively ſet out in the information; and it muſt be averred that the defendant had not the particular qualifications mentioned in the ſtatute 22 & 23 *C.* 2 *c.* 25; becauſe it muſt be made out before the Juſtice that he had no ſuch qualification as the law requires: and therefore the Juſtice ought to return that he had no manner of qualification, before he can convict the defendant. See 1 *Burr.* 148: 2 *Lord Raym.* 1415: 1 *Stra.* 66: *Dougl.* 345: But the *evidence* need not (and indeed how can it?) negative every ſpecific qualification. 1 *Term Rep.* 125.

A perſon was convicted before a Juſtice of peace upon the ſtatute, for keeping a gun, not having 100*l. per ann.* and the conviction being removed into *B. R.* was quaſhed, for not ſaying *when* the defendant had not 100*l.* a year; for it might be he had ſuch eſtate at the time when he kept the gun, though not at the conviction, and the offence and time ought to be certainly alledged. 3 *Mod.* 280.

To convict an offender there muſt be an information on oath, and a ſummons to appear. 2 *Burn. B. R.* 34, 77, 101. The informer muſt be ſworn, and examined in the preſence of the defendant; and it is not ſufficient if his depoſition previouſly made is read over in the defendant's preſence. 1 *Term Rep.* 125. Or he may be convicted on his own confeſſion before a Juſtice. *Stra.* 546. The informer cannot be a witneſs. *Lord Raym.* 1545: *Andr.* 240. Theſe offences, where the juſtices have ſummary juriſdiction, are not indictable. *Stra.* 679.

In an action of debt on *ſtat.* 5 *Ann. c.* 14, for keeping and uſing a *dog* to kill the Game, it is neceſſary to ſhew what ſort of dog it was. 2 *Com. Rep.* 575. The word Hound is not ſufficiently deſcriptive, not being mentioned in the ſtatute. 2 *Stra.* 1126. See *Reſe's Com. Rep.* 577, *in n* —Keeping a forbidden dog is penal, though he is not uſed; keeping and uſing are diſtinct offences. *Stra.* 496: *Cald.* 175.

It ſeems that an Apothecary is not an inferior tradeſman within the *ſtat.* 4 & 5 *W.* 3 *c.* 23. § 10: though the word Inferior ſeems applicable rather to the man than to the trade; ſo that two perſons of the ſame trade may be, one ſuperior, and the other inferior. 2 *Wilſ.* 70: *Burn J.* tit. *Game*, IV. A huntſman going out with hounds without his maſter, is not a diſſolute perſon within the meaning of that act. He may however be a treſpaſſer; but if the damages recovered againſt him are under 40*s.* he ſhall not be liable to full coſts. 2 *Black. Rep.* 900.

III. One General Remark on this ſubject is the moſt forcible ſtatement of the greateſt hardſhip impoſed by the Game laws; and which might probably be remedied without great inconvenience. Though a freeholder of leſs than 100*l.* a year, *&c.* is forbidden to kill a partridge, even upon his own eſtate, yet nobody elſe (not even the lord of the manor, unleſs he hath a grant of free warren) can do it without committing a treſpaſs and ſubjecting himſelf to an action. 4 *Comm. c.* 33. II. 2.

If a man ſtarts any Game within his own grounds, and follows it into another's, and kills it there, the property remains in himſelf. 11 *Mod.* 75. And this is grounded on reaſon and natural juſtice: for the property conſiſts in the poſſeſſion; which poſſeſſion commences by the finding it in his own liberty, and is continued by the immediate purſuit. And ſo if a ſtranger ſtarts Game in one man's *chaſe, or free warren*, and hunts it into another liberty, the property continues in the owner of the chaſe or warren, this property ariſing from privilege, and not being changed by the act of a mere ſtranger. Or if a man ſtarts Game on another's private grounds and kills it there, the property belongs to him in whoſe ground it was killed, becauſe it was alſo ſtarted there, the property ariſing *ratione ſoli*: *Lord Raym.* 251. Whereas if, after being ſtarted there, it is killed in the *grounds* of a third perſon, the property belongs not to the owner of the firſt ground, becauſe the property is local; nor yet to the owner of the ſecond, becauſe it was not ſtarted in his ſoil; but it veſts in the perſon who ſtarted and killed it; though guilty of a treſpaſs againſt both the owners. *Lord Raym. ib*: 7 *Mod.* 18.—See 2 *Comm.* 419, and Mr. *Chriſtian*'s note there; in which he obſerves that theſe diſtinctions never could have exiſted, if the doctrine were true, that all the Game was the property of the king, for in that caſe the maxim *in æquali jure potior eſt conditio poſſidentis*, muſt have prevailed. 2 *Comm. c.* 27. II. *ad fin.*

The Common Law allows the hunting of foxes, and other ravenous beaſts of prey, in the ground of another perſon; though a man may not dig and break the ground to un-earth them, without licence; if he doth, the owner of the ground may maintain an action of treſpaſs for it. 2 *Roll.* 538: *Cro. Jac.* 321. An action was brought againſt a perſon for entering another man's warren: the defendant pleaded that there was a pheaſant on his land, and his hawk purſued it into the plaintiff's ground; it was reſolved that this doth not amount to a ſufficient juſtification, for in this caſe he can only follow his hawk, and not take the *game*. *Poph.* 162. Though it is ſaid to be otherwiſe where the ſoil of the plaintiff is not a warren. 2 *Rol. Abr.* 567. If a man in hunting ſtarts a hare upon his own ground, and follows and kills it on the ground of another, yet ſtill the hare is his own, becauſe of the freſh ſuit; but if a man ſtarts a hare upon another perſon's ground, and hunts and kills it there, he is ſubject to an action. *Cro. Car.* 553.

If a perſon hunt upon the ground of another, ſuch other perſon cannot juſtify killing of his dogs; as appears by 2 *Roll. Abr.* 567. But ſee *Cro. Jac.* 44. *contrà* & 3 *Lev.* 28.

A perſon may juſtify a treſpaſs in following a *fox* with hounds over the grounds of another, if he do no more than is neceſſary to kill the fox; becauſe foxes are noxious animals. 1 *Term Rep.* 334. See *Nicholas* v. *Badger*, 2 *Ro. Ab.* 558. *B. p.* 2. *S. P.*

Game Keeper] One who has the care of keeping and preſerving the Game, being appointed thereto by a Lord of a Manor.

Game keepers were firſt introduced by the preſent qualification act, 22 & 23 *Car.* 2. *c.* 25; and various regulations have been made reſpecting them by ſubſequent ſtatutes. As all theſe ſtatutes ſeem to be in force in ſome degree at preſent, and as it is a ſubject intereſting to Sportſmen, a ſhort abſtract of them according to their chronology, will be acceptable.

The *ſtat.* 22 & 23 *Car.* 2. *c.* 25, authoriſes Lords of manors of the degree of an eſquire to appoint under their hands and ſeals Game-keepers, who ſhall have power within the manor to ſeize guns, dogs, nets, and engines, kept by unqualified perſons, to deſtroy Game; and by a warrant from a Juſtice of peace, to ſearch in the day time

time the houſes of unqualified perſons upon good ground of ſuſpicion, and to ſeize for the uſe of the Lord, or to deſtroy guns, dogs, nets, &c. kept for the deſtruction of the Game. This ſtatute does not limit the number of thoſe to whom ſuch power and authority may be given. The *ſtat.* 4 & 5 *W. & M. c.* 23. § 4. gives to theſe Game-keepers the ſame protection in reſiſting offenders in the night-time, as the law affords to the keepers of antient parks. The *ſtat.* 5 *Ann. c.* 14. § 4, permits any lord or lady of a manor to empower Game-keepers to kill Game within the manor.

The *ſtat.* 9 *Ann. c.* 25. § 1, enacts, that no lord or lady of a manor ſhall appoint more than one Game-keeper, within one manor, with the power of killing Game; and his name ſhall be entered with the clerk of the peace. And by *ſtat.* 3 *Geo.* 1. *c.* 11, the Game-keeper who ſhall have the power to kill Game within the manor, ſhall either be a qualified perſon, a domeſtic ſervant, or a perſon employed to kill for the ſole uſe of the Lord or Lady of the manor. The only uſe of appointing a qualified perſon a Game-keeper is, to give him the power, as before deſcribed, of ſeizing the dogs, guns, and other engines of unqualified perſons within the manor.

By *ſtat.* 3 *Geo.* 1. *c.* 11, no Lord of a manor is to make or appoint any perſon to be a *Game-keeper*, with power to take and kill hare, pheaſant, partridge, or other *game*, unleſs ſuch perſon be qualified by law ſo to do; *or* be truly and properly a ſervant to the ſaid lord, or immediately employed to take and kill *game* for the ſole uſe or benefit of the ſaid lord: and any perſon not qualified, or not employed as aforeſaid, who, under pretence of any qualification from any lord of a manor, ſhall take or kill any hare, &c. or keep or uſe any dogs to kill and deſtroy the *game*, ſhall for every ſuch offence incur ſuch forfeitures, pains, and penalties, as are inflicted by the *ſtats.* 5 *Ann. c.* 14: 9 *Ann. c.* 25. By this laſt ſtatute, no *game-keeper* can qualify any perſon to kill *game*, or to keep guns, dogs, &c.

Where *game-keepers* ought to have a Juſtice of peace's warrant, to take away guns from unqualified perſons, ſee *Comb.* 305.

By *ſtats.* 25 *Geo.* 3. *c.* 50; 31 *Geo.* 3. *c.* 21, every deputation of a Game-keeper ſhall be entered with the Clerk of the peace of the county in which the manor lies; and for a certificate thereof ſhall be charged one guinea.

By *ſtat.* 5 *Ann. c.* 14. § 4, any Juſtice of peace may within his county take either game, or dogs, and inſtruments kept for the deſtruction of Game, from unqualified perſons, and retain them for his own uſe. But it has been decided, that though Game-keepers are liable to the ſame penalties as unqualified perſons for killing Game out of their reſpective manors, yet no one is juſtified in taking from them their dogs and guns when they are out of the limits of their lord's manor, even in purſuit of Game. 2 *Wilſ.* 387.

No Lord of a manor can grant to another perſon the power of appointing a Game-keeper, without a conveyance alſo of the manor. A right to a manor cannot be tried in a penal action under the Game laws. 5 *Term Rep.* 19. This power of appointing a Game-keeper has, no doubt, introduced the very erroneous notion, that a lord of a manor has a peculiar right to the Game, ſuperior to that of any other land-owner within the manor, although the eſtate of ſuch land-owner be a ſufficient qualification to entitle him to follow the amuſements of a ſportſman.

Game-keepers we have ſeen, were firſt created by *ſtat.* 22 & 23 *Car.* 2. *c.* 25; by the preceding qualification-act, 7 *Jac.* 1. *c.* 11, their power was given to the conſtable and headborough; and it ſeems that it was transferred to the perſons appointed by Lords of manors for no other reaſon than becauſe it was probable they were the moſt intereſted in the preſervation of the Game, by having in general the moſt extenſive range to purſue it in, *viz.* upon their own eſtates and waſtes. And the *ſtat.* 22 & 23 *Car.* 2. *c.* 25, appears to be the firſt inſtance, either in our ſtatutes, reports, or law treatiſes in which Lords of manors are diſtinguiſhed from their land-owners with regard to the Game. 2 *Comm.* 418. *n.*

Appointment of a Game-keeper, by a Lord of a Manor.

TO all People *to whom theſe preſents ſhall come*, I. T. *lord* A. *lord of the manor of* B. *in the county of*, &c. *have* (*by virtue of ſeveral acts of parliament lately made for the preſervation of the Game*) *nominated, authoriſed and appointed, and by theſe preſents do nominate, authoriſe and appoint* E. D. *of*, &c. *to be my* Gamekeeper *of and within my manor*, &c. *in the county of*, &c. *aforeſaid, with full power and authority, according to the direction of the ſtatutes in that caſe made, to kill Game for my uſe; and to take and ſeize all ſuch guns, greyhounds, ſetting dogs, and other dogs, ferrets, trammels, hays, or other nets, ſnares or engines, for the taking, killing or deſtroying of hares, pheaſants, partridges, or other Game, as within the ſaid manor, of*, &c. *and the precincts thereof, ſhall be kept or uſed by any perſon or perſons not legally qualified to do the ſame; and farther to act and do all and every thing and things which belong to the office of a* Game-keeper, *purſuant to the direction of the ſaid acts of parliament, during my will and pleaſure; for which this ſhall be his ſufficient warrant.* Given *under my hand and ſeal*, &c.

GAMING, OR GAMES UNLAWFUL, *Ludi vani.* The playing at tables, dice, cards, &c. King *Ed.* III. in the 39th year of his reign, injoined the exerciſe of ſhooting and of artillery, and forbad the caſting of the bar, the hand and foot-balls, cock-fighting, & *alios ludos vanos*; but no effect followed from it, till they were ſome of them forbidden by act of parliament. 11 *Rep.* 87. In the 28*th* of *Hen.* VIII. proclamation was made againſt all unlawful games, and commiſſions awarded into all the counties of *England*, for the execution thereof; ſo that in all places, tables, dice, cards and bowls, were taken and burnt. *Stow's Annals*, 527. At length by *ſtat.* 33 *H.* 8. *c.* 9, the Legiſlature interfered; and Juſtices of peace, and head officers in corporations, are by that act impowered to enter houſes ſuſpected of unlawful Games; and to arreſt and impriſon the *gameſters*, till they give ſecurity not to play for the future: alſo the perſons keeping unlawful *gaming*-houſes, may be committed by a juſtice, until they find ſureties not to keep ſuch houſes; who ſhall forfeit 40*s.* and the Gameſters 6*s.* 8*d.* a time: and if the King licenſe the keeping of Gaming-houſes, it is againſt law, and void.—The ſame ſtatute alſo provides that, no artificer, apprentice, labourer, or ſervant, ſhall play at any tables, tennis, dice, cards, bowls, &c. out of *Chriſtmas* time, on pain of 20*s.* for every offence; and at *Chriſtmas*, they are to play in their maſter's houſe, or preſence: but any nobleman, or gentleman, having 100*l.* *per annum*

num eſtate, may licenſe his ſervants or family to play within the precincts of his houſe, or garden, at cards, dice, tables, or other games, as well among themſelves, as others repairing thither. This act is to be proclaimed once a quarter, in every market-town by the reſpective mayors, *&c.* and at every aſſiſes and ſeſſions.

A perſon was convicted of keeping a cock pit; and the Court reſolved it to be an unlawful Game, within the *ſtat.* 33 *Hen.* 8. *c.* 9, and fined him 40*s.* a day. *Keb.* 510. But if the gueſts in an inn or tavern, call for a pair of dice, or tables, and for their recreation play with them, or if any neighbours play at bowls, for their recreation, or the like, theſe are not within the ſtatute; if the houſe be not kept for Gaming, nor the Gaming be for lucre or gain. *Dalt. c.* 46.

By the *ſtat.* 16 *Car.* 2. *c.* 7, if any perſon, of what degree ſoever, ſhall by fraud, deceit, or unlawful device, in playing at cards, dice, tables, bowls, cock-fighting, horſe-races, foot-races, or other Games or paſtimes, or bearing a ſhare in the ſtakes, betting, *&c.* win any money, or valuable thing, he ſhall forfeit treble the value, one moiety to the crown, and the other to the party grieved, proſecution being in ſix months; in default whereof, the laſt mentioned moiety is to go to ſuch other perſon as will proſecute within one year, *&c.* And by the ſaid ſtatute if any perſon ſhall play at cards, *&c.* other than for ready money; or bet, and ſhall loſe above 100*l.* at one time or meeting, upon tick (*i. e. ticket*) he ſhall not be bound to make it good, but the contract or tick and ſecurity ſhall be void, and the winner ſhall forfeit treble the value.

By the *ſtat.* 9 *Ann. cap.* 14, all *notes, bills, bonds, judgments, mortgages,* or *other ſecurities,* given for money won by playing at cards, dice, tables, tennis, bowls, or other Games; or by betting on the ſides of ſuch as play at any of thoſe Games, or for repayment of any money knowingly lent for ſuch *gaming* or betting, ſhall be void: And where lands are granted by ſuch mortgages or ſecurities, they ſhall go to the next perſon, who ought to have the ſame as if the grantor were actually dead, and the grants had been made to the perſon ſo intitled after the death of the perſon ſo incumbering the ſame. If any perſon playing at cards, dice, or other Game, or betting, ſhall *loſe the value of* 10*l.* *at one time,* to *one or more perſons,* and *ſhall pay the money,* he may *recover the money loſt by action of debt,* within three months afterwards; and if the loſer do not ſue, *any other perſon may* do it, and recover the ſame, and *treble the value with coſts,* one moiety to the proſecutor, and the other to the poor: And the perſon proſecuted ſhall anſwer upon oath, on preferring a bill to diſcover what ſums he hath won.—Perſons by *fraud* or *ill practice,* in *playing* at cards, dice, or by bearing a ſhare in the ſtakes, *&c.* or by *betting, winning any ſum above* 10*l.* ſhall *forfeit five times the value* of the thing won, and *ſuffer ſuch infamy and corporal puniſhment,* as in caſes of *wilful perjury,* being convicted thereof on indictment or information; and the penalty ſhall be recovered by action, by ſuch perſon as will ſue for the ſame. And if any one ſhall *aſſault* and *beat,* or *challenge* to fight any other perſon, on account of money won by *gaming,* upon conviction thereof, he ſhall *forfeit all his goods and ſuffer impriſonment for two years.* Alſo by this ſtatute, any two or more Juſtices of peace, may cauſe ſuch perſons to be brought before them as they ſuſpect to have no viſible eſtates, *&c.* to maintain them; and if they do not make it appear that the principal part of their expences is got by other means than *gaming,* the Juſtices ſhall require ſecurities for their good behaviour for a twelvemonth; and in default of ſuch ſecurity, commit them to priſon until they find it: And playing or betting during the time, to the value of 20*s.* ſhall be deemed a breach of good behaviour, and a forfeiture of their recogniſances.

Where it ſhall be proved before any Juſtice of peace, that any perſon hath uſed unlawful *games* contrary to *Stat.* 33 *Hen.* 8. *c.* 9, the Juſtice may commit ſuch offender to priſon, till he enter into a recogniſance that he ſhall not from thenceforth, at any time to come, play at any unlawful Game. *Stat.* 2 *Geo.* 2 *cap.* 28.—For better preventing exceſſive and deceitful *gaming*; the ace of hearts, faron, baſſet, and hazard, are declared to be lotteries by cards or dice; and perſons ſetting up theſe *games* are liable to the penalty of 200*l.* And every perſon who ſhall be an adventurer, or play or ſtake therein, forfeits 50*l.* Likewiſe the ſale of any houſe, plate, *&c.* in the way of lottery by cards, *&c.* is adjudged void, and the things to be forfeited to any perſon that will ſue for the ſame. 12 *Geo* 2. *cap.* 28.—The *game* of paſſage, and all other *games* with one or more dice, or any thing in that nature, having figures or numbers thereon, (back-gammon and *games* now played with thoſe tables only excepted) ſhall be deemed *games* or lotteries by dice, within the *ſtat.* 12 *Geo.* 2. *c.* 28: And ſuch as keep any office or table for the ſaid *game, &c.* or play thereat, are ſubject to the penalties in that act. *Stat.* 13 *Geo.* 2. *cap.* 19.

Playing at, or keeping any houſe or place for playing at the *game* of roulet, otherwiſe roly-poly, or any other *game* with cards or dice already prohibited, incurs the penalties in *Stat.* 12 *Geo.* 2. *cap.* 28. Perſons loſing 10*l.* and paying the ſame, may ſue the the winner, and recover the ſame with coſts: And on a bill in equity the court may decree the ſame to be paid. The perſons who have juriſdiction to determine informations on the ſtatutes againſt *gaming,* may ſummon witneſſes, who, on refuſing to appear and give evidence, ſhall forfeit 50*l.* No privilege of parliament ſhall be allowed on proſecutions for keeping a Gaming-houſe. Perſons *loſing* or *winning* 10*l.* at one time, or 20*l.* in 24 hours, may be indicted and fined five times the value to be paid to the poor. *Stat.* 18 *Geo.* 2. *c.* 34.

By *ſtat.* 30 *Geo.* 1. *c.* 24, If any perſon licenſed to ſell liquors ſhall knowingly ſuffer any *gaming* in their houſe or grounds, with cards, dice, draughts, ſhuffle boards, miſſiſſippi, or billiard tables, ſkittles, or ninepins, by any *Journeymen,* labourers, ſervants, or apprentices, he ſhall forfeit 40*s.* for the firſt, and 10*l.* for every ſubſequent, offence; three-fourths to the poor, and one-fourth to the informer.—Any journeyman, *&c.* ſo gaming, ſhall forfeit from 20*s.* to 5*s.*—No *certiorari* to be granted; but appeal given to the next Seſſions; and perſons puniſhed by this act, not to be puniſhed by any other law.

See the *ſtat.* 25 *Geo.* 2. *c.* 36, againſt unlicenſed houſes for muſick, dancing, *&c.* the keeper of which, ſhall forfeit 100*l.* and further this Dict. title *Bawdy houſe*: *Play-houſes*; and 1 *Salk.* 344, 5: 5 *Mod.* 13: *Mod. Ca.* 122.

From the above ſtatutes and the ſeveral determinations in the books, it may be obſerved, that at common law, the

playing at cards, dice, &c. when practiſed innocently, and as a recreation, was not unlawful. 2 *Vent.* 175. But common *gaming-houſes* were always conſidered as nuiſances in the eye of the law. 1 *Hawk. P. C. c.* 75. § 6: and as the practice was found to encourage idleneſs and debauchery, the *ſtat.* 33 *H.* 8. *c.* 9, was paſſed to reſtrain it among the inferior ſort of people. And on this ſtatute *Noy* had a writ to remove *bowling-alleys* as common nuiſances. 3 *Keb.* 465. Gentlemen were however ſtill left free to purſue their pleaſure in this way, until the *ſtat.* 16 *Car.* 2. *c.* 7; the preamble of which ſtates the inconveniences to be remedied as ariſing from the immoderate uſe of Gaming. The proviſions of this ſtatute however were ſoon found to be inſufficient; and the *ſtat.* 9 *Ann. c.* 14, was made for the more effectually ſuppreſſing this pernicious vice. The ſubſequent ſtatutes, already enumerated above, ſuperadded further penalties to reſtrain this faſhionable crime: which may ſhew, ſays *Blackſtone*, that our laws againſt Gaming are not ſo deficient, as ourſelves and our magiſtrates in putting thoſe laws in execution. 4 *Comm.* 173.

Betting on *horſe-races* is within the general words of the *ſtat.* 9 *Ann. c.* 14; (other Game whatſoever;) 2 *Stra.* 1159: 2 *Wilſ.* 309. See *Black. Rep.* 706, and this Dict. tit. *Horſe-races.*—So is *Cricket.* 1 *Wilſ.* part 1, *p.* 220. So is a *foot-race*: and a foot-man running againſt time is a foot-race: but to bring it within the ſtatute, it muſt appear that a perſon was engaged in ſuch Game, and a wager was laid on his ſide. 2 *Wilſ.* 36.—But on a wager between two perſons on the lives of their two fathers, the winner has been allowed to maintain an action. *Burr.* 2802.

Where two perſons played at *all-fours* for two guineas a game, from *Monday* evening to *Tueſday* evening, without any interruption, except for an hour or two at dinner, the plaintiff loſt fourteen guineas, for which he brought his action on *ſtat.* 9 *Ann. c.* 14, and this was held to be *one ſitting.*—One *time* in the act means one ſtake or bet; and is diſtinguiſhed from *one ſitting*, which means a courſe of play where the company never parts though the party may not be actually gaming the whole time. 2 *Black. Rep.* 1226.

On a conviction for Gaming under *ſtat.* 9 *Ann. c.* 14, the judgment is only that the defendant is *convicted*: and the Court cannot ſet a fine of five times the value, but a new action muſt be brought upon that judgment for the forfeiture. 2 *Stra.* 1048.

The ſtatutes againſt Gaming have rendered it now leſs frequently neceſſary to reſort to Courts of Equity, which appear to have often interpoſed, prior to the *ſtat.* 16 *Car.* 2, for the purpoſe of reſtraining the winner from proceeding at law againſt the loſer upon the ſecurity which he had obtained for the money won. See 14 *Vin. Ab.* 8. *pl.* 1, 3: 2 *Eq. Ab.* 184: *Chan. Rep.* 47.

It is obſervable that the *ſtat.* 16 *Car.* 2, declares that the *contract* for money loſt at play, *and all ſecurities* given for it ſhall be utterly void; but the *ſtat.* 9 *Ann*, confines itſelf to the *ſecurities* for money won or lent at play.—Upon which it has been determined that though both the ſecurity and the contract are void as to money *won* at play, only the ſecurity is void as to money *lent* at play: and that the contract remains, and the lender may maintain his action for it. 2 *Burr.* 1077: 2 *Stra.* 1249.

The ſtatutes having declared the ſecurity void, a bill of exchange given for money won at play, cannot be recovered upon, even by an indorſee for valuable conſideration, and without notice; the original vice of the conſideration affecting the ſecurity, even in the hands of an innocent and *bonâ fide* holder. 2 *Stra.* 1155: *Dougl.* 636, 736. And it ſeems that if money be paid on ſuch ſecurity, it may be recovered back: for payment under a void ſecurity cannot be ſupported: nor does the limitation of three months, (within which time the loſer of money actually paid at the time it is loſt muſt bring his action to recover it back,) extend to payments on account of ſuch void ſecurities. *Ambl.* 269.

For further matter relative to Gaming, ſee alſo this Dict. titles *Lottery*: *Nuiſance*: *Wager.*

GANG-DAYS. *Dies Luſtrationis.*] And *gang-weeks* are mentioned in the laws of King *Athelſtan.* See *Rogation Week.*

GAOL AND GAOLER.

GAOLA, Fr. *Geole*, i. e. *Caveola*, a cage for birds; uſed metaphorically for a priſon.] A ſtrong place or houſe for keeping of debtors, &c. and wherein a man is reſtrained of his liberty to anſwer an offence done againſt the laws: Every County hath two *gaols*, one for Debtors, which may be any houſe where the Sheriff pleaſes; the other for the peace and matters of the crown, which is the *County Gaol.*

I. *Of Erecting and Repairing Gaols.*
II. *To what Place, and at whoſe Charge, Offenders are to be committed; and how they are to be kept and regulated.*
III. *Of the Offence of breaking Gaol.*

I. GAOLS are of ſuch univerſal concern to the Public, that none can be erected by any leſs authority than an act of parliament. 2 *Inſt.* 705. All priſons and *gaols* belong to the King, although the Subject may have the cuſtody or keeping of them. 2 *Inſt.* 100, 589. It is ſaid, that none can claim a priſon as a franchiſe, unleſs they have alſo a gaol-delivery; and that therefore the Dean and Chapter of *Weſtminſter*, though they have the cuſtody of the *Gatehouſe* priſon, yet as they have no gaol-delivery, muſt ſend a kalendar of the priſoners to *Newgate.* 1 *Salk.* 343: 7 *Mod.* 31.

By *ſtat.* 14 *Ed.* 3. *cap.* 10, it is enacted, that the Sheriffs ſhall have the cuſtody of the *Gaols* as before, and ſhall put in under-keepers for whom they will anſwer. This ſtatute is confirmed by *ſtat.* 19 *H.* 7. *cap.* 10.

Although divers lords of liberties have the cuſtody of priſons, and ſome in fee, yet the priſon itſelf is the King's, *pro bono publico*; and therefore it is to be repaired at the common charge. 2 *Inſt.* 589.

The Juſtices, or the greater number of them within the limits of their commiſſion, upon preſentment of the Grand Jury at the aſſizes (or ſeſſions; *ſtat.* 12 *Geo.* 2. *c.* 29. § 13;) of the inſufficiency or inconveniency of the County-gaol may contract with any perſon for the building, finiſhing or repairing the ſame. *Stats.* 11 & 12 *W.* 3. *c.* 19. §§ 1, 2. The expence thereof to be paid by the Treaſurer out of the general county rates, *ſtat.* 12 *Geo.* 2. § 29. But this, (by ſaid *Stat.* 11 & 12 *W.* 3,) not to extend to gaols held by inheritance, nor to charge any perſons in any town

town or liberty, which have common gaols for felons, and commiſſioners of aſſiſe or gaol-delivery, with any aſſeſſment to the making the common gaol of the ſhire.

By *ſtat.* 24 *Geo.* 3. *ſt.* 2. *c.* 54, the Juſtices, at their general quarter ſeſſions, or the major part of them, not being leſs than ſeven, on preſentment made by the Grand jury, of the inſufficiency, inconveniency, or want of repair of the gaol, may contract for the building, repairing, or enlarging the ſame: or for erecting any new gaol upon any ſcite within two miles from that of the old gaol; and in that caſe for the ſelling the old gaol, and the ſcite thereof, and the materials and land belonging thereto. In certain caſes alſo Juſtices may build a new gaol in any part of the county; which is always to be divided into ſeparate apartments with divers conveniences for the benefit of the health and morals of the priſoners, which are enforced by *ſtat.* 31 *Geo.* 3. *c.* 46.

II. Juſtices of peace may not commit felons, and other criminals to the *counters* in *London*, or other priſons, but the common *gaols*, for legally they cannot impriſon any where but in the common *gaol*. *Co. Lit.* 9, 119. But the houſe of correction, and the *counters* of the *ſheriffs of London*, are the common priſons for offenders for the breach of the peace, *&c.*

By *ſtat.* 5 *H.* 4. *cap.* 10, it is enacted, "That none ſhall 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."—This ſtatute is only declaratory of the common law. 2 *Inſt.* 43.

But the court of King's Bench may commit to any priſon *in the kingdom* which they ſhall think moſt proper, and the offender ſo committed or condemned to impriſonment cannot be removed or bailed by any other court. *Moor* 666. *pl.* 913: 1 *Sid.* 145. See *ſtat.* 31 *C.* 2. *c.* 2. § 12.

And as priſoners ought to be committed at firſt to the proper priſon, ſo ought they not to be removed from thence, except in ſome ſpecial caſes. To which purpoſe, by the ſaid *ſtat.* 31 *Car.* 2. *c.* 2. *ſect.* 9, it is enacted, "That if any Subject of this realm ſhall be committed to any priſon, or in cuſtody of any officer, for any criminal or ſuppoſed criminal matter, he ſhall not be removed into the cuſtody of any other; unleſs it be by a *habeas corpus*, or other legal writ; or where the priſoner is delivered to the conſtable, *&c.* to be carried to ſome common gaol; or where any perſon is ſent by order of any judge of aſſiſe, or juſtice of the peace, to any common work-houſe, or houſe of correction; or where the priſoner is removed from one priſon 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 *one hundred pounds* for the *firſt* offence, *two hundred pounds* for the *ſecond*, *&c.*" See *ſtat.* 19 *Car.* 2. *cap.* 4, for impowering juſtices of the peace to remove priſoners in caſe of infection.

By *ſtat.* 11 & 12 *Will.* 3. *c.* 10, All murderers and felons ſhall be impriſoned in the common *gaol*, and the ſheriffs ſhall have the keeping of the *gaol*.

Offenders committed to priſon, are to bear the charges of their conveying to *gaol*; or, on refuſal, their goods ſhall be ſold for that purpoſe, by virtue of a juſtice of peace's warrant; and if they have no goods, a tax is to be made by *conſtables*, *&c.* on the inhabitants of the pariſh where the offenders were apprehended. *Stat.* 3 *Jac.* 1. *cap.* 10. And by *ſtat.* 27 *Geo.* 2. *c.* 3, The expence of conveying poor offenders to *gaol*, or the houſe of correction, ſhall be paid by the treaſurer of the county, except in *Middleſex*.

For the *Relief of Priſoners* in *gaols*, juſtices of peace in ſeſſions have power to tax every pariſh in the county, not exceeding 6*s.* 8*d.* *per* week, leviable by conſtables, and diſtributed by collectors, *&c.* 14 *Eliz. cap.* 5. See alſo *ſtat.* 12 *C.* 2. *c.* 29. And by *ſtat.* 31 *Geo.* 3. *c.* 46, the Juſtices in ſeſſions may order ſuch ſums as they ſhall think neceſſary to be paid out of the county-rate towards aſſiſting ſuch priſoners as are not able to work, or being able, cannot procure employment ſufficient to maintain themſelves in food and raiment, and not otherwiſe provided for by law.

Various proviſions have been, from time to time, made for the relief of poor priſoners, and ſetting them to work. By *ſtat.* 22 & 23 *Car.* 2. *c.* 20, It is enacted, "That all ſheriffs, gaolers, *&c.* ſhall permit their priſoners to ſend for neceſſary food where they pleaſe; nor demand any greater fee for their commitment or diſcharge, than what is allowable." Alſo it is thereby directed, that an inquiry be made into all charities given for the benefit of poor priſoners.

By *ſtat.* 29 *Geo.* 3. *c.* 67, Every gaoler is, on forfeiture (of 50 *l.* if a county gaoler, and 20 *l.* if another;) to deliver in at the *Michaelmas* ſeſſions yearly, a certificate ſtating how far the proviſions made by various ſtatutes for the benefit of priſoners, are obſerved in his gaol.—The following are the ſtatutes to be particularized in ſuch Certificate:

"The *ſtat.* 22 & 23 *Car.* 2. *c.* 20, enacts, that felons and debtors ſhall be kept ſeparate.—*Stat.* 24 *Geo.* 2. *c.* 40, enacts, That no gaoler ſhall ſell, lend, uſe, give away, or ſuffer any ſpirituous liquors within any gaol; and that a copy of the clauſes prohibiting thereof ſhall be hung up in the gaol.—*Stat.* 32 *Geo.* 2. *c.* 28, enacts, The clerk of the peace ſhall cauſe a liſt of the fees payable by debtors, and the rules and orders for the government of gaols and priſons, to be hung up in the court where the aſſiſes or ſeſſions are held, and ſend another copy to the gaoler, who ſhall cauſe the ſame to be hung up in a conſpicuous part of the gaol.—*Stat.* 13 *Geo.* 3. *c.* 58, enacts that clergymen may be provided to officiate in gaols.—*Stat.* 14 *Geo.* 3. *c.* 20, enacts that perſons acquitted, or diſcharged on proclamation for want of proſecution ſhall be diſcharged immediately in open court and *without fee*.—*Stat.* 14 *Geo.* 3. *c.* 59, enacts that the walls and ceilings of cells in gaols ſhall be ſcraped and white-waſhed, at leaſt once a year: that the cells ſhall be kept clean and ſupplied with freſh air by ventilators, *&c.*—that there ſhall be two rooms ſet apart, for the ſick—that a warm and cold bath or bathing tubs ſhall be provided—that a Surgeon or Apothecary ſhall be appointed with a ſalary—That this act ſhall be hung up in the gaol." And by *ſtat.* 32 *Geo.* 3. *c.* 45, Priſoners diſcharged may, on application, be conveyed to their ſettlement by a vagrant paſs. See title *Vagrant*.

Thus humane have the Legiſlature continually ſhewn themſelves, in repeatedly interfering for the health and comfort of thoſe who are conſidered generally as the mere out-caſts of Society; to employ them alſo in uſeful induſtry, and thus turn their minds to good from evil, has been another attempt no leſs praiſe-worthy than the former.

The Juſtices in general ſeſſions may provide a convenient ſtock of materials for ſetting poor priſoners to work, to be paid for by the treaſurer out of the general county-rate: and may pay and provide fit perſons to overſee and ſet ſuch priſoners on work; and make the orders needful as to regulating the accounts, for puniſhing neglects and abuſes, and for beſtowing the profits of their labour for the relief of the priſoners. *Stats.* 19 *C.* 2. *c.* 4. § 1: 12 *Geo.* 2. *c.* 29: 31 *Geo.* 3. *c.* 46.

As to other matters relative to the eaſe, or to prevent the oppreſſion, of Priſoners, ſee this Dict. title *Habeas Corpus*: *Tranſportation*: *Arreſt*: and *Burn's J.* tit. *Gaol.*

III. The offence of *Priſon-breaking* by the common law, was no leſs than felony; and this whether the party were committed in a criminal, or civil caſe, or whether he were actually within the walls of the priſon, or only in the ſtocks, or in the cuſtody of any perſon who had lawfully arreſted him, or whether he were in the King's priſon, or one belonging to a lord, or franchiſe. 2 *Inſt.* 589: *Staundf. P. C.* 31: *Cro. Car.* 210.

But now, by the ſtatute 1 *Ed.* 2. *ſtat.* 2. *de frangentibus priſonam*, "None from henceforth that breaketh priſon ſhall have judgment of life, or member, for breaking of priſon only, except the cauſe for which he was taken and impriſoned did require ſuch judgment, if he had been convict thereupon according to the law and cuſtom of the realm; albeit in times paſt it hath been uſed otherwiſe." So that to break priſon and eſcape, when one is lawfully committed for any treaſon or felony, remains ſtill felony, as at the common law: and to break priſon, (whether it be the county gaol, the ſtocks, or other uſual place of ſecurity,) when lawfully confined upon any other inferior charge is ſtill puniſhable as a high *miſdemeanor* by fine and impriſonment. 4 *Comm. c.* 10: 2 *Hawk. P. C. c.* 18.

Any place whatſoever, wherein a perſon under a lawful arreſt for a ſuppoſed capital offence is reſtrained from his liberty, whether in the ſtocks or ſtreet, or in the common gaol, or the houſe of a conſtable, or private perſon, or the priſon of the Ordinary, is a priſon within the ſtatute. 2 *Inſt.* 589: *Dyer.* 99. *pl.* 60: *Crom.* 38: *Cro. Car.* 210: *Hale's P. C.* 107.

There muſt be an actual breaking, for the words *felonicè fregit priſonam*, which are neceſſary in every indictment for this offence, cannot be ſatisfied without ſome actual force or violence; and therefore if the priſoner, without the uſe of any violent means, go out of the priſon doors, which he finds open by the negligence or conſent of the gaoler, or if he eſcape through a breach made by others without his privity, he is guilty of a *miſdemeanor* only, and not of felony. 2 *Inſt.* 589: *Hale's P. C.* 108: *Staundf. P. C.* 31.

Nor will the breaking of priſon, which is neceſſitated by any accident, happening without any default of the priſoner, as where the priſon is fired by lightning, or otherwiſe, without his privity, and he breaks out to ſave his life, come within the ſtatute. *Plowd.* 136: 2 *Inſt.* 590: *Hale's P. C.* 108. Nor is it felony to break a priſon, unleſs the priſoner eſcape. *Keilw.* 87. *a.*

If the impriſonment be for any offence made capital by a ſubſequent ſtatute, the breach of priſon is as much within the act of 1 *Ed.* 2. *ſtat.* 2, as if the offence had always been felony; but if the offence, for which a man is committed, were but a treſpaſs at the time when he breaks the priſon, and afterwards become felony by a ſubſequent matter; as where one committed for having dangerouſly wounded a man, who afterwards dies, breaks the priſon before he dies, the fiction of law, (which to many purpoſes makes the offence a felony *ab initio*,) ſhall not be carried ſo far as to make the priſon-breach alſo a felony, which, at the time when it was committed, was but a miſdemeanor. *Hale's P. C.* 108: 2 *Inſt.* 591: *Plowd.* 258.

It ſeems the better opinion, that if the offence, for which the party was committed, be in truth but a treſpaſs, the calling it felony in the *mittimus*, will not make the breaking of the gaol amount to felony; and that on the other ſide, if the offence were in truth a capital one, the calling it a treſpaſs in the *mittimus* will not bring it within the ſtatute; for the cauſe of impriſonment is what the ſtatute regards; and that is the offence, which can neither be leſſened, nor increaſed by a miſtake in the *mittimus*. But for this, ſee 2 *Hawk. P. C. c.* 18.

The offence of breaking priſon is but felony, whatſoever the crime were for which the party was committed, unleſs his intent were to favour the eſcape of others who were committed for treaſon, for that will make him a principal in the treaſon. 2 *Hawk. P. C. c.* 18.

The felony of breach of priſon is within clergy, though the offence for which the party was committed be excluded clergy. 1 *Hal. H. P. C.* 612.

He that breaks priſon may be proceeded againſt for ſuch crime before he be convicted of the crime for which he is committed, becauſe the breach of priſon is a diſtinct independent offence; but the ſheriff's return of a breach of priſon is not a ſufficient ground to arraign a man, without an indictment. 2 *Hawk. P. C. c.* 18.

It is not ſufficient to indict a man generally, for having felonioufly broken priſon; but the *caſe muſt be ſet forth ſpecially*, that it may appear he was lawfully in priſon, and for a capital offence. *Hale's P. C.* 109: 2 *Inſt.* 591.

If *A.* arreſt *B.* for ſuſpicion and carry him to the common gaol, and *there* deliver him; if he *breaks priſon* and be indicted on it, there muſt be the following averments in the indictment: that there was a felony done, and that *A.* having probable cauſe to ſuſpect *B.* had arreſted and committed him, and that he broke the priſon; all which muſt be proved on the trial. But where a felon is taken by *capias* and committed, and breaks priſon, there needs no ſuch averment, *&c.* becauſe all appears by matter of record. 2 *Inſt.* 590: *Hal. Hiſt. P. C.* 10.

For further matter relative to *Gaols* and *Priſoners*, ſee this Dict. titles *Arreſt*: *Commitment*: *Debtor*: *Eſcape*: *Execution*: *Falſe Impriſonment*: *Inſolvent*: *Marſhalſea*: 2 *Hawk. P. C.* and the title (*Gaoler*) immediately following.

GAOLER. The maſter of a priſon; one that hath the cuſtody of the place where priſoners are kept. Sheriffs muſt make ſuch *gaolers* for which they will anſwer. But if there is a default in the *gaoler*, action lies againſt him for an eſcape, *&c.* 2 *Inſt.* 592. In common caſes, the *ſheriff*, or *gaoler*, is chargeable at the diſcretion of the party; though the *ſheriff* is moſt uſually charged. He who hath the cuſtody of the gaol wrongfully, or of right, ſhall be charged with the eſcape of priſoners; and if he that hath the actual poſſeſſion be not ſufficient, his ſuperior ſhall anſwer. 2 *Hawk. P. C.*

It is ſaid that for his own ſecurity a gaoler may *hamper* a felon with irons to prevent his eſcape. 1 *Hal. H. P. C.* 601: *Dalt. c.* 170: and that a gaoler is no way puniſhable for keeping even a debtor in irons. 2 *Hawk. P. C.*

But

But it has been obſerved that this proceeding, even in the caſe of a felon, (much more in that of a debtor,) can only be intended where the officer has juſt reaſon to fear an eſcape; as where the priſoner is unruly, or makes any attempt to that purpoſe: but otherwiſe notwithſtanding the too common practice of gaolers, it ſeems altogether unwarrantable, and contrary to the mildneſs and humanity of the laws of *England*, by which gaolers are forbidden to put their priſoners to any pain or torment: and Lord *Coke*, 2 *Inſt.* 381, is expreſs, that by the common law it might not be done. 1 *H. H.* 601. And if the gaoler keep the priſoner more ſtrictly than he ought of right, whereof the priſoner dieth, this is felony in the gaoler by the common law. And this is the cauſe that if a priſoner die in gaol the coroner ought to ſit upon him: and if the death was owing to cruel and oppreſſive uſage on the part of the gaoler, or any officer of his, it will be deemed wilful murder in the perſon guilty of ſuch dureſs. 3 *Inſt.* 91: *Foſt.* 321, 2. But if a criminal endeavouring to break the gaol, aſſault his gaoler, he may be lawfully killed by him in the affray. 1 *Hawk. P. C.*: 1 *H. H.* 496. See *ante Gaol* III. and this Dict. titles *Eſcape*: *Murder*.

A perſon in execution in the King's Bench priſon was put in irons by the Marſhal: and the Court ordered the Marſhal to keep his priſoner *according to law*: and in this caſe they ſaid the gaoler might juſtify putting him in irons if he feared an eſcape; or if the priſoner was unruly. 7 *Mod.* 52. In the ſecond year of *Geo.* II, Sir *William Rich* being laid in irons in the Fleet priſon, had his irons taken off by order of the Houſe of Commons; who thereupon began an inquiry into the conduct of Gaolers, which produced ſome of the wholeſome laws mentioned hereafter, and under title *Gaol*.

By *ſtat.* 14 *Ed.* 3. *cap.* 10, "If any keeper of a priſon, or under-keeper, by too great dureſs of impriſonment, and by pain, make any priſoner that he hath in his ward to become an appellor againſt his will, he is guilty of felony." See title *Acceſſary*.

By *ſtat.* 4 *Ed.* 3. *c.* 10, It is enacted, that the Sheriffs and *gaolers* ſhall receive, and ſafely keep in priſon, from henceforth ſuch thieves and felons, by the delivery of the conſtables and townſhips, without taking any thing for the receipt; and *the juſtices to deliver the gaol, ſhall have power to hear their complaints, that will complain againſt the Sheriffs and* Gaolers *in ſuch caſe*, and moreover to *puniſh* the Sheriffs and *Gaolers*, if they be found guilty.

By *ſtat.* 3 *H.* 7. *c.* 3, The Sheriff and every other perſon, having authority or power of keeping of *gaol*, or of priſoners for felony, ſhall certify the names of all priſoners in his cuſtody to the juſtices of gaol-delivery.

If any perſon aſſault a *gaoler*, for keeping a priſoner in ſafe cuſtody, he may be fined and impriſoned. 1 *Hawk. P. C.* Where a Gaol is broken by thieves, the *Gaoler* is anſwerable; not if it be broken by enemies. 3 *Inſt.* 52.

It ſeems clearly agreed, that a Gaoler by ſuffering voluntary eſcapes, by abuſing his priſoners, by extorting unreaſonable fees from them, or by detaining them in *gaol*, after they have been legally diſcharged, and paid their juſt fees, forfeits his office; for that in the grant of every office it is implied, that the grantee execute it faithfully and diligently. *Co. Lit.* 233: 9 *Co.* 5: 3 *Mod.* 143.

By *ſtat.* 8 & 9 *W.* 3. *c.* 27, The Marſhal of the King's Bench and Warden of the Fleet taking any reward to connive at priſoners' eſcape, ſhall forfeit 500 *l.* and their office, and be rendered for ever after incapable of executing any ſuch office.

It hath been reſolved, that a forfeiture by a Gaoler who hath but a particular intereſt, as of him who hath cuſtody of a gaol for life, or years, does not affect him in remainder, or reverſion, who hath the inheritance, but that upon ſuch forfeiture his title ſhall accrue, and not go to the King. *Popb.* 119: 2 *Lev.* 71: *Raym.* 216: 3 *Lev.* 288.

By *ſtat.* 8 & 9 *W.* 3. *c.* 27, It is enacted, That the office of Marſhal of the King's Bench, and Warden of the Fleet, ſhall be executed by thoſe who have the inheritance of the ſaid priſons, or their deputies, &c. and the profits of their office may be ſequeſtered on motion to the Court of *B. R.* to ſatisfy a judgment had againſt them for eſcape.

By *Stat.* 3 *Geo.* 1. *cap.* 15, None ſhall purchaſe the office of *Gaoler*, or any other office pertaining to the high ſheriff, under pain of 500 *l.*

By *ſtat.* 24 *Geo.* 3. *ſt.* 2. *c.* 54, a Gaoler ſhall not directly or indirectly ſell liquors to the priſoners, or keep, or be concerned in, or benefited by any tap-houſe, tap-room, tap, or licenſe for that purpoſe, on pain of 10 *l.* for each offence: The Juſtices in ſeſſions may make allowance to Gaolers in lieu of profits formerly derived to them from the ſale of liquors.

By *Stat.* 31 *Geo.* 3. *c.* 46. § 8, Gaolers are, on the firſt day of every aſſiſes to make a return of the ſize and condition of Gaols, the number of priſoners, &c. therein. See further title *Gaol*.

GAOL-DELIVERY. The adminiſtration of juſtice being originally in the crown, in former times our Kings in perſon rode through the realm once in ſeven years, to judge of and determine crimes and offences; afterwards *Juſtices in eyre* were appointed; and ſince *Juſtices of Aſſiſe* and *gaol-delivery*, &c. A commiſſion of a *gaol delivery* is a patent in nature of a letter from the King to certain perſons, appointing them his juſtices, or two, or three, of them, and authoriſing them to deliver his *gaol*, at ſuch a place, of the priſoners in it; for which purpoſe, it commands them to meet at ſuch a place, at the time they themſelves ſhall appoint; and informs them that for the ſame purpoſe the king hath commanded his ſheriff of the ſame county to bring all the priſoners of the *gaol*, and their attachments before them, at the day appointed. *Cromp. Juriſd.* 125: 4 *Inſt.* 168.

By *Stat.* 3 *H.* 7. *c.* 3, Thoſe that have the cuſtody of gaols muſt certify the names of all the priſoners to the juſtices of gaol-delivery in order to their trial or diſcharge, on pain of 5 *l.*

Juſtices of *gaol-delivery* are impowered by the Common law to proceed upon indictments of felony, treſpaſs, &c. and to order execution or reprieve: And they have power to diſcharge ſuch priſoners, as upon their trials ſhall be acquitted; alſo all ſuch againſt whom, upon proclamation made, no evidence appears to indict them; which Juſtices of *oyer and terminer*, &c. may not do. 2 *Hawk. P. C.* But theſe juſtices *have nothing to do with any perſon not in cuſtody of the priſon*, except in ſome ſpecial caſes; as if ſome of the accomplices to a felony be in ſuch

priſon, and ſome of them out of it, the juſtices may receive an appeal againſt thoſe who are out of the priſon, as well as thoſe who are in it; which appeal, after the trial of ſuch priſoners, ſhall be removed into *B. R.* and proceſs iſſue from thence againſt the reſt. *Fitz. Coron.* 77: *S. P. C.* 64. Such juſtices have no more to do with one let to mainpriſe, than if he were at large; for ſuch perſon cannot be ſaid to be a priſoner, ſince it is not in the power of his ſureties to detain him in their cuſtody: And where any perſon is bailed there he is in the cuſtody of his ſureties, and they may detain him where they pleaſe. 2 *H. P. C.* 25. Though *per Holt.* Ch. J. If a perſon be let to bail, yet he is in law in priſon, and his bail are his keepers; and therefore the juſtices of *gaol delivery* may take an indictment againſt him, as well as if he was actually in gaol. And they may take indictments not only of felony, but alſo of high treaſon, if the offenders are in priſon, and try and give judgment upon them, like unto commiſſioners of *oyer and terminer*; though it has been formerly held otherwiſe. 2 *Hale's Hiſt. P. C.* 35. Juſtices of *gaol-delivery* may puniſh thoſe who unduly bail priſoners; as being guilty of a negligent eſcape, *S. P. C.* 77: 25 *Ed.* 3. 39. They are alſo to puniſh ſheriffs and gaolers, refuſing to take felons into their cuſtody from conſtables, &c. *Stat.* 4 *Ed.* 3. *c.* 10; and have authority to puniſh many particular offences by ſtatute.

The granting a new commiſſion of *gaol-delivery*, or of the peace, in a town corporate, ſhall not avoid the former commiſſion. 2 & 3 *Ph. & Mar. c.* 18. Juſtices of *gaol-delivery* may act in their counties. 12 *Geo.* 2. *c.* 27.—See titles *Aſſiſe*: *Circuits*: *Judges*: *Juſtices*.

GARB, *Garba*, from the Fr. *Garbe*, alias *Gerbe*, i. e. *faſcis.*] A bundle or ſheaf of corn. *Chart. Foreſt. cap.* 7. And in ſome places it is taken for an handful, *viz.* Garba *aceris ſit ex triginta peciis. Fleta lib.* 2. *cap.* 12. *Garba ſagittarum* is a ſheaf of arrows containing twenty-four. *Skene.*

GARBLE, Is to ſever the droſs and duſt from ſpice, drugs, &c. *Garbling* is the purifying and cleanſing the good from the bad; and may come from the Italian *Garbo*, i. e. Finery or neatneſs; and thence probable we ſay, when we ſee a man in a neat habit, that he is in a handſome *Garb. Cowel.*

GARBLER OF SPICES, An officer of antiquity in the city of *London*, who may enter into any ſhop, warehouſe, &c. to view and ſearch drugs and ſpices, and *garble* and make clean the ſame, or ſee that it be done. And anciently all drugs, &c. were to be cleanſed and garbled before ſold, on pain of forfeiture, or the value. By *Stat.* 6 *Ann. cap.* 16. this officer is to be appointed by the Court of Lord Mayor, Aldermen and Common Council to Garble ſpices at the requeſt of the owner, but not otherwiſe.

GARCIO, Fr. *Garçon.*] A groom or ſervant. *Pla. Cor.* 21 *Ed.* 1. *Garcio ſtolæ*, groom of the ſtole to the King: And in the *Iriſh* language, (according to *Toland*) *garſon* is an appellative for any menial ſervant. *Kennet's Gloſſ.*

GARCIONES. Servants who follow the camp.—*Ingulph.* 886: *Walſing.* 242.

GARD, GARDIAN, &c. See *Guard* and *Guardian.*

GARDEBRACHE, Fr. *Gardebrace.*] An armour or vambrace for the arm. *Chart. K. Hen.* 5.

GARDENS. Robbing of orchards or gardens of fruit growing therein, is puniſhable criminally by whipping, ſmall fines, impriſonment, and ſatisfaction to the party wronged, according to the nature of the offence. See *ſtat.* 43 *Eliz. c.* 7: and title *Trees*; *Treſpaſs*: *Felony.*

GARDEROBE, *Garderoba.*] A wardrobe; a cloſet or ſmall apartment, for hanging up clothes. See 2 *Inſt.* 255.

GARDIA, Is a word uſed by the *feudiſts* for *cuſtodia*: *Lib. Feud.* 1.

GARE, A coarſe wool, full of ſtaring hairs, ſuch as grow about the ſhanks of ſheep. See *ſtat.* 31 *Ed.* 3. *cap.* 2.

GARLANDA, A chaplet, coronet, or garland. *Mat. Paris.*

GARNESTURA, Victuals, arms, and other implements of war, neceſſary for the defence of a town or caſtle. *Mat. Paris. Ann.* 1250.

To GARNISH, To warn; to *garniſh* the heir, ſignifies in law to warn the heir. *Stat.* 27 *Eliz. cap.* 3.

GARNISHMENT, Fr. *Garnement*, from *Garnir*, i. e. *inſtruere.*] In a legal ſenſe intends a warning given to one for his appearance, for the information of the Court and explaining a cauſe. For example; one is ſued for the *detinue* of certain writings delivered; and the defendant alledging that they were delivered to him by the plaintiff, and another perſon, upon condition, prays that the other perſon may be warned to plead with the plaintiff, whether the condition be performed or not; in this petition he is ſaid to pray *Garniſhment*; which may be interpreted either a warning of that other, or a *furniſhing* the court with all parties to the action, whereby it may thoroughly determine the cauſe; and until he appears and joins, the defendant is as it were out of the court. *Cromp. Juriſ.* 211: *F. N. B.* 106. A writ of *ſcire facias* is to go forth againſt the other perſon to appear and plead with the plaintiff; and when he comes and thus pleads, it is called *enterpleader*: If the *garniſhee* be returned *ſcire feci*, and make default, judgment will be had to recover the writings, and for their delivery, againſt the defendant; and if the *Garniſhee* appears and pleads, if the plaintiff recovers, he ſhall have damages. *Raſt.* 213: 1 *Brownl.* 147.

Garniſhment is generally uſed for a warning; as *garniſher le court* is to warn the court; and *reaſonable Garniſhment*, is where a perſon hath reaſonable warning. *Kitch.* 6. In the *Stat.* 27 *Eliz. cap.* 3, we read, upon a *Garniſhment* or two *nihils* returned, &c. And further, ſome contracts are naked, *ſans garnement*, and ſome furniſhed, &c.—See title *Interpleader.*

GARNISHEE; Such third perſon or party in whoſe hands money is *attached* within the liberties of the city of *London*, by proceſs out of the ſheriff's court; ſo called, becauſe he hath had *Garniſhment* or warning, not to pay the money to the defendant, but to appear and anſwer to the plaintiff creditor's ſuit. Vide *Attachment Foreign.*

GARNISTURE, A furniſhing or providing. *Pat.* 17 *Ed.* 3. Vide *Garneſtura.*

GARSUMMUNE, *Gerſuma*, or *Gerſoma*, A Fine or amerciament. *Domeſday*; *Spelm. Gloſſ.*

GARTER, *Garterium*, Fr. *Jartier*, i. e. *Periſcelis*, *Faſcia poplitaria.*] Signifies in divers ſtatutes, and elſewhere a ſpecial *garter*, being the enſign of a noble order of knights, inſtituted by King *Ed.* III. *anno Dom.* 1344, called *Knights of the Garter*: It is alſo taken for the principal *King at arms*, among our *Engliſh heralds*, attending upon the Knights thereof; created by King *Hen.* V.

The firſt dignity after that of nobility, is that of a Knight of the Order of Saint *George*, or of the Garter. Indeed many Sovereign Princes have been proud of the order,

order, and considered themselves as highly honoured by our Sovereign's conferring it on them. See titles *Knights*: *Precedency*.

GARTH, A little back-side or close in the *North of England*; being an ancient *British* word; *gardd* in that language signifying *garden*, and pronounced and writ *garth*; also a *dam* or wear, &c.

GARTHMAN As there are *fishgarths* or wears for catching of fish, so there are *Garthmen*; for by statute 17 *R.* 2. *c.* 9, it is ordained, that no fisher nor *Garthman* shall use any nets or engines to destroy the fry of fish, &c. This word is supposed to be derived from the Scottish *gart*, which signifieth inforced, or compelled; the fish being forced by the wear to pass in at a loop where they are taken.

GASTALDUS, A governor of the country, whose office was only temporary, and who had jurisdiction over the common people. *Blount*.

GATE, At the end of the names of places, signifies a way or path, from the Sax. *geat*, i. e. *porta*, the custody of the *gates* of the city of *London*, is granted to the Lord Mayor, &c. by *Chart.* King *Hen.* 4. See *London*.

GAVEL, Sax. *gafel*.] Tribute, toll, custom or yearly revenue; of which we had in old time several kinds. See title *Gabel*.

GAVELET, *gaveletum*.] An ancient and special kind of *cessavit* used in *Kent*, where the custom of *gavel-kind* continues, whereby a tenant, if he with-holds his rents and services due to the lord, shall forfeit his land: it was intended where no distress could be found on the premisses, so that the lord might seize the land itself in the nature of a distress, and keep it a year and a day; within which time, if the tenant came and paid his rent, he was admitted to his tenement to hold it as before; but if not, the lord might enter and enjoy the same. The lord was to seek by the award of his court, from three weeks to three weeks, to find some distress upon the land or tenement, until the fourth court; and if in that time he could find none, at the fourth court it was awarded that the tenement should be seized as a distress, and kept in the lord's hands a year and a day without manuring; and if the tenant did not in that time redeem it, by paying the rent and making amends to the lord, the lord having pronounced his process by witnesses at the next *county court*, was awarded by his court to enter and manure the tenement as his own: and if the tenant would afterwards have it again, he was to make agreement with the lord. *Fitz. Cess.* 60: *Terms de Ley*.

Gaveletum is as much as to say to cease, or to *let* to pay the rent; and *consuetudo de gavelet* was not a rent or service, but a rent or service *with-held*, denied or detained, causing the forfeiture of the tenement. *Dict.*

The word *gavelet* in its original signification imported *rent*: but it means also *a process for the recovery of rent* peculiar to *Kent*, and *London*.—The gavelet thus prevailing by the custom of *Kent* may be used whether there is a sufficient distress on the land or not; but is restricted to gavelkind tenure. *Robins. on Gavelk.* 243. To *London* this writ was given for rent-service generally by *Stat.* 10 *E.* 2; which is therefore called the statute of Gavelet. But by the words of the statute this latter gavelet only lies where the lord cannot obtain payment by distress. See *Spelm voc. Gaveletum*: *Wright's Ten.* 197.

This remedy of gavelet as well as that of *cessavit* is now fallen wholly into disuse; nor, whilst they continued in use, were they applicable except where the tenure was in fee. *Booth on Real Act.* 133. See 1 *Inst.* 142. *n.* 2. and this Dict. titles *Cessavit*: *Distress*: *Tenure*.

GAVELET IN LONDON, *breve de gaveleto in* London, *pro redditu ibidem, quia tenementa fuerunt indistringibilia*.] The writ used in the *hustings* of *London*; where the parties, tenant and demandant, appear by *scire facias*, to shew cause why the one should not have his tenement again on payment of his rent, or the other recover the lands, on default thereof.

GAVELGELD, Payment of tribute or toll. *Mon. Ang. tom.* 3.

GAVELKIND.

A Tenure or Custom, annexed and belonging to lands in *Kent*, whereby the lands of the father are equally divided at his death among all his sons; or the land of the brother among all the brethren, if he have no issue of his own. *Lit.* 210. See title *Tenures* III. 12.

All the lands in *England*, it is said were of the nature of *Gavelkind* before the year 1066, and descended to all the issue equally; but after the Conquest (as it is called) when *knight-service* was introduced, the descent was restrained to the eldest son for the preservation of the tenure. *Lamb.* 167: 3 *Salk.* 129. Except in *Kent*, for the supposed reason of which see *Blount* in v. *Gavelkind*, who relates the story of the *Kentish men* surrounding *Will.* I. with a *moving wood* of boughs, and thus obtaining a confirmation of their ancient rights.

In the reign of *Hen.* VI. there were not above thirty or forty persons in all *Kent* that held by any other tenure than this of *Gavelkind*; which was afterwards altered upon the petition of divers *Kentish* gentlemen, in much of the land of that county, so as to be descendible to the eldest son, according to the course of the Common-law, by the *Stat.* 31 *H.* 8. *cap.* 3. Though the custom to devise *Gavelkind* land, and the other qualities and customs remain. *Co. Lit.* 140. By the *Stat.* 34 & 35 *Hen.* 8. *cap.* 26. all *Gavelkind* lands in *Wales* were made descendible to the heir, according to the Common-law; whereby it appears, that the tenure of *Gavelkind* was likewise in that Principality.

Blackstone relies on the nature of *tenure in Gavelkind* as a pregnant proof that *tenure in free socage* was a remnant of *Saxon* Liberty. It is universally known what struggles the *Kentish-men* made to preserve their ancient liberties, and the success with which those struggles were attended. And as it is principally here that we meet with the custom of Gavelkind, we may fairly conclude that this was a part of those liberties; agreeable to Mr. *Selden's* opinion that *Gavelkind*, before the *Norman* Conquest was the general custom of the realm.—The distinguishing properties of this tenure are various. Some of the principal are; that the tenant is of sufficient age to alien his estate, by feoffment, at the age of fifteen.—That the estate does not escheat in case of an attainder and execution for *felony*.—That in most places the tenant had power of devising lands by will before the *statute* for that purpose was made. *Fitz. N. B.* 198: *Cro. Car.* 561.—The descent of the lands, as above-stated; which was indeed anciently the most usual course of descent all over *England*. *Glanvil, l.* 7. *c.* 3, though in particular cases particular customs prevailed.

These

These among other properties distinguished this tenure in a more remarkable manner; and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands, being holden by suit of court and fealty, which is a service in its nature certain. *Wright* 211. See this Dict. title *Tenure* III. 12. Wherefore by a charter of King *John*, *Hubert* Arch-bishop of *Canterbury* was authorited to exchange the Gavel-kind tenures holden of the See of *Canterbury* into tenures by Knight's service: and by the above mentioned statute of 31 *Hen.* 8. *c.* 3, for disgavelling lands in *Kent*, they are directed to be descendible, for the future, *like other lands which were never holden by service of Socage.* Now the immunities which the tenants in Gavelkind enjoyed were such as cannot be conceived should be conferred on mere plowmen and peasants: from all which the learned Commentator conceives it to be sufficiently clear that tenures in free socage are in general of a nobler original than is assigned by *Littleton*, or after him by the bulk of common lawyers. 2 *Comm.* 84, 5. *c.* 6.

A father having *Gavelkind* lands, had three sons, one of whom died in the life-time of his father, leaving issue a daughter; and it was held that the daughter shall inherit the part of her father *jure repræsentationis*, and yet she is not within the words of the custom of dividing the land between the heirs male, for she is the daughter of a male and heir by representation. 1 *Salk.* 243. The heir at the age of fifteen years, it is said, may give and sell his lands in *Gavelkind*, and shall inherit. *Co. Lit.* 111. The custom of *Gavelkind*, is not altered, though a fine be levied of the lands at Common-law; because it is a custom that runs with the land. 6 *E.* 6.

Land in *Gavelkind* was devised to the husband and wife for life, remainder to the next heir male of their bodies, *&c.* They had three sons, and it was adjudged that the eldest son should not have the whole. *Dyer* 133. A donee in tail, of *Gavelkind* lands had issue four sons; and it was held, that all should inherit: but if a lease for life is made of *Gavelkind*, remainder to the right heirs of *A. B.* who hath issue four sons, in this case the eldest son shall inherit the remainder, because, in case of purchase, there can be but one right heir. 1 *Rep.* 102. If *Gavelkind* lands come to the crown, and are regranted to hold *in capite*, *&c.* the land shall descend to all the heirs male as *Gavelkind*. *Nelf. Abr.* 895.

A wife shall be endowed of *Gavelkind* land, of a moiety of the land whereof her husband died seised, during her widowhood. *Co. Lit.* 111. And it has been adjudged, that the widow cannot have election to demand her thirds or dower at Common-law, so as to avoid the custom, by which she shall lose her dower, if she marry a second husband. *Moor* 260. But see 1 *Leon.* 62. See title *Dower*.

The husband shall be tenant by the curtesy of half the *Gavelkind* lands of the wife, during the time he continues unmarried, without having any issue by his wife; but if he marry, he shall forfeit his tenancy by the curtesy. *Co. Lit.* 111. If the husband had issue by his wife, and she die, he shall be tenant by the curtesy of the whole land; and though he marry, he shall not forfeit his tenancy. *Mich.* 21 *Car. B. R*: 1 *Lil. Abr.* 649.

It was formerly supposed that although a father was attainted of *treason* or felony, the heir of *Gavelkind* land should inherit, for the custom, as said, was, 'the father to the bough and the son to the plough.' *Doct. & Stud. c.* 10. But, it has been held, that, in matters of *treason*, which strike at the foundations of policy and government, even *Gavelkind* lands are forfeitable, and *always were*. See title *Forfeiture*.

A rent in fee granted out of *Gavelkind* lands, shall descend in *Gavelkind* to all the heirs male, as the lands would have done; it being of the same nature with the land itself. 2 *Lev.* 138: 1 *Mod.* 97.

All lands in *Kent* shall be taken to be *Gavelkind*, except those which are *disgavelled* by particular statutes. 1 *Mod.* 98. If lands are alledged to be in *Kent*, it shall be intended that they are *Gavelkind*; if the contrary doth not appear. 2 *Sid.* 153. By *Hale* Ch. J. *Gavelkind law*, is the law of *Kent*, and is never pleaded, but presumed; and it has been held, that the superior courts may take notice of *Gavelkind* generally without pleading: though not of the special custom of devising it, which ought to be pleaded specially. 1 *Mod.* 98: *Cro. Car.* 465: *Lutw.* 236, 754.

The Gavelkind descent of lands in *Ireland* was an incident to the custom of *Tanistry*: and as such fell to the ground with its Principal, in consequence of a solemn judgment against the latter in a case *Ann.* 5 *Jac.* 1. See *Dav. Rep.* 28. But in the reign of Queen *Ann* the policy of weakening the Roman-Catholick interest in *Ireland* was the cause of an *Irish* statute to make the lands of Papists descendible according to the gavelkind custom unless the heir conformed within a limited time. See *Rob. on Gavelk. c.* 17. However now by an *Irish statute* of the present reign (17 & 18 *Geo.* 3. *c.* 49,) the descent of the lands of Papists is again reduced to the course of the Common-law. 1 *Inst.* 176. *n.* 1.

GAVELMAN, A tenant liable to tribute.—*Somner of Gavelkind, pag.* 33. And hence *Gavelkind* has been thought to be land in its nature taxable. *Blount.* See *Tenures* III. 12.

GAVELMED, The duty or work of mowing grass, or cutting of meadow land, required by the lord from his customary tenants; *Consuetudo falcandi quæ vocatur* gavelmed. *Somn.*

GAVELCESTER, Sax. *Sextarius Vectigalis.*] A certain measure of rent-ale: and among the articles to be charged on the stewards and bailiffs of the manors belonging to the *church* of *Canterbury* in *Kent*, according to which they were to be accountable, this of old was one; *de* gavelceſter *cujuslibet bracini braciati infra libertatem manerionum, viz. unam lagenam & dimidiam cervisiæ.* This duty elsewhere occurs under the name of *tolcester*; in lieu whereof the *Abbot of Abingdon* was wont of custom to receive the penny mentioned by *Selden* in his Dissertation annexed to *Fleta*, *cap.* 8. Nor does it differ from what is called *oak-gavel* in the Glossary at the end of *Hen.* 1. *Law's Sax. Dict.*

GAVEL-WERK, *Sax.*] Was either *manu opera*, by the hands and person of the tenant, or *carropera*, by his carts or carriages. *Philips of Purvey.*

GAUGETUM, A *gauge* or *ganging*, done by the gauger; and the true *English gauge* is mentioned, in *Rot. Parl.* 32 *Ed.* 1.

GAUGER,

GAUGER, *Gaugeator*, Fr. *gauchir*, i. e. *in gyrum torquere.*] An officer appointed by the King, to examine all tuns, pipes, hogſheads, barrels and terces of wine, oil, honey, &c. and to give them a mark of allowance, as containing lawful meaſure, before they are ſold in any place: and becauſe his mark is a circle made with an iron inſtrument for that purpoſe, it ſeems to have its name from thence. Of this officer and his office, there are many ſtatutes; as by *Stat.* 27 *Ed.* 3. *cap.* 8, all wines, &c. imported, are to be gauged by the King's *gaugers*, or their deputies. By *Stat.* 31 *Ed.* 3. *c.* 5, Selling wine before gauged, incurs forfeiture of the value. And by *Stat.* 23 *Hen.* 6. *cap.* 15, the *gauge-penny* is to be paid *gaugers*, on gauging wines. The *Stat.* 31 *Eliz. c.* 8, ordained, that beer, &c. imported, ſhall be gauged by the Maſter and Wardens of the Coopers' company. See *ſtat.* 12 *Car.* 2. *c.* 4.

The wardens of the Coopers, ſhall attend to gauge veſſels upon requeſt, 23 *Hen.* 8. *c.* 4. Gaugers may take ſamples not exceeding half a pint, 32 *Geo.* 2. *c.* 29. See titles *Brewers*: *Exciſe*.

GEASPECIA. In a charter of the privileges of *Newcaſtle upon Tyne*, renewed *anno* 30 *Eliz.* we find *ſturgiones*, *porpecias*, (i. e. *porpoiſes*) *delphinos*, geaſpecia, viz. *grampois*, &c.

GEBURSCIP, *Geburſcipa*] Neighbourhood or adjoining diſtrict. *Leg. Edw. Confeſſ. cap.* 1.

GEBURUS, A country inhabitant of the ſame *geburſhip*, or village; from the Sax. *gebure*, a carl ploughman, or farmer. *Cowel.*

GELD, *Geldum. Mulcta*; *compenſatio delicti & pretium rei.*] Hence, in our antient laws, *wergeld* or *weregild* was uſed for the value or price of a man ſlain; and *orfgeld* of a beaſt: likewiſe money or tribute; for it is ſaid, *Et ſint quieti de* geldis, *danegeldis, hengeldis, hlodwita*, &c. Chart. Rich. 2. Priorat. de H. in Devon. Pat. 5 E. 4. *Angeld* is the ſingle value of a thing, *twigeld*, double value, &c.

GELDABLE, *Geldabilis.*] That is liable to pay tax or tribute. *Camden*, dividing *Suffolk* into three parts, calls the firſt *geldable*, becauſe ſubject to taxes; from which the other two parts were exempt, as being *eccleſiæ donatæ*. The word is mentioned in the *Stat.* 27 *Hen.* 8. *cap.* 26. But in an old *MS.* it is expounded to be that land, or lordſhip, which is *ſub diſtrictione curiæ vicecom.*' 2 *Inſt.* 701.

GEMOTE, Sax. i. e. *conventus.*] An aſſembly. Leg. Edw. Conf. cap. 35. See *Alderman*: *Ealdorman*: *Folc-mote*: *Mote*: *Wittena-gemote*: *Parliament.*

GENEATH, *Villanus*; *Regis Geneath*, is the King's villain. *LL. Inæ, MS. cap.* 19.

GENERAL ISSUE, Is a plea to the fact of *Not Guilty*, in criminal caſes, in order to trial, by the country, or by peers, &c. *H. P. C.* 254. In civil ſuits, there are various pleas, which are general iſſues, according to the ſpecies of the action, as in *Treſpaſs*, *Not Guilty*, in Caſe on *promiſes*, *non aſſumpſit*, &c. See title *Pleading.*

GENERATIO. When an old abbey, or religious houſe had ſpread itſelf into many colonies, or depending cells, that iſſue or offſpring of the mother monaſtery was called *generatio*; *quaſi proles & ſoboles matricis domus. Annal. Waverl.* 1232.

GENERALE. The ſingle commons, or ordinary proviſion of the religious, were termed *generale*, as their general allowance, diſtinguiſhed from their *pietantiæ*, or pittances; which on extraordinary occaſions were thrown in as over commons. Theſe are deſcribed amongſt other cuſtoms. *Cartular. Glaſton. MS. fol.* 10.

GENERALS OF ORDERS, Chiefs of the ſeveral orders of *monks*, *friars*, and other religious ſocieties.

GENEVA, A ſtrong water or ſpirit. Vide *Diſtillers.*

GENTLEMAN, *Generoſus.*] Is compounded of two languages, from the Fr. *gentil*, i. e. *honeſtus, vel honeſto loco natus*, and the Sax. *mon.* a man; thus meaning a man well born. The *Italians* call thoſe *gentil homini* whom we ſtyle *gentleman*; the *French* (*heu quantum mutati!*) under their ancient monarchy, diſtinguiſhed ſuch by the name of *gentilhomme*: and the *Spaniards* keep up to the meaning of the word, calling him *hidalgo* or *hijo d' alga*, who is the ſon of a man of account; ſo that gentlemen are ſuch whom their blood or race doth make known.

Under the denomination of Gentlemen, are compriſed all above yeomen: whereby noblemen are truly called Gentlemen. *Smith de Rep. Ang. lib.* 1. *cc.* 20, 21. A Gentleman is generally defined to be one, who, without any title, bears a *coat of arms*, or whoſe anceſtors have been freemen; and by the coat that a Gentleman giveth, he is known to be, or not to be, deſcended from thoſe of his name, that lived many hundred years ſince.

There is ſaid to be a Gentleman by office, and in reputation, as well as thoſe that are born ſuch. 2 *Inſt.* 668. And we read that *J. Kingſton* was made a Gentleman by King *Rich.* II. *Pat.* 13 *R.* 2. *par.* 1. *Gentilis homo* for a Gentleman, was adjudged a good *addition. Hil.* 27 *Ed.* 3. But the addition of eſquire, or Gentleman, was rare before 1 *Hen.* 5. tho' that of knight is very ancient. 2 *Inſt.* 595, 667. See title *Precedency.*

GENTLEWOMAN, *generoſa.*] Is a good addition for the eſtate and degree of a woman, as *generoſus* is for that of a man; and if a Gentlewoman be named *ſpinſter* in any original writ, appeal, &c. it hath been held that ſhe may abate and quaſh the ſame. 2 *Inſt.* 668. But it ſeems that *Spinſter* is in general, a good addition, for an *unmarried* woman, as *ſingle woman* is, for one who being *unmarried* hath had a *baſtard.*

GENTILITY, *gentilitas.*] Is loſt by attainder of treaſon, or felony, by which perſons become baſe and ignoble, &c.

GENU. A generation.—*Succeſſit* Ethelbaldo *Offa quinta* Genu. *Malmſb. lib.* 1. *c.* 4.

GENUS, Lat.] The general ſtock, extraction, &c. as the word office in law is the *genus*, or general; but the Sheriff, &c. is the *ſpecies* of it, or particular. 2 *Lill. Abr.* 528.

Genus, among metaphyſicians and logicians, denotes a number of beings, which agree in certain general properties, common to them all; ſo that a *genus* is, in fact, only an *abſtract* idea, expreſſed by ſome general name or term; or rather a general name or term, to ſignify what is called an *abſtract* idea.

GEORGE NOBLE, A piece of gold, current at ſix ſhillings and eight-pence, in the reign of King *Hen.* VII. *Lowndes's Eſſay upon Coins, p.* 41.

GEORGIA, In *America*, its colony eſtabliſhed, by *ſtat.* 6 *G.* 2. *c.* 25. § 7. See title *Plantations.*

GERSUMA, See *Garſummune.*

GESTU ET FAMA, An antient writ where a perſon's good behaviour was impeached, now out of uſe. *Lamb. Eiren. lib.* 4. *cap.* 14. See *Surety for the Peace.*

GEWINEDA,

GEWINEDA, Sax.] The public convention of the people, to decide a cauſe: *et pax quam aldermanus Regis in quinque hergorum* gewineda *dabit emendatur* 12 *libris.* LL. Æthelred. cap. 1.

GEWITNESSA, The giving of evidence. *Leg. Ethel. cap.* 1. *apud Brompton.*

GIFT, *donum, donatio.*] A conveyance, which paſſeth either lands or goods. A Gift is of a larger extent than a Grant, being applied to things moveable and immoveable; yet as to things immoveable, when ſtrictly taken, it is applicable only to lands and tenements given in tail; but gifts and grants are ſaid to be alike in nature and often confounded. *Wood's Inſt.* 260.

The conveyance of *lands* by *Gift* is properly applied to the creation of an eſtate-tail, as Feoffment is to that of an eſtate in fee, and Leaſe to that of an eſtate for life or years. It differs in nothing from a feoffment but in the nature of the eſtate paſſing by it: for the operative words of conveyance in this caſe are *Do*, or *Dedi—I give*, or *Have given*; and Gifts in tail are equally imperfect without livery of ſeiſin as feoffments in fee-ſimple. *Lit.* § 59. And this is the only diſtinction that *Littleton* ſeems to take when he ſays, "it is to be underſtood that there is feoffor and feoffee; donor and donee; leſſor and leſſee." *Litt.* § 57; *viz.* feoffor is applied to a feoffment in fee-ſimple; donor to a Gift in tail, and leſſor to a leaſe for life or years or at will. In common acceptation Gifts are frequently confounded with *Grants*. See title *Grant*. 2 *Comm.* 316. *c.* 20.

Gifts or *Grants* for the transferring of *perſonal property* are thus to be diſtinguiſhed from each other: that Gifts are always gratuitous; Grants are upon ſome conſideration or equivalent: and they may be divided with regard to their ſubject matter into Gifts or grants of chattels real, and Gifts or grants of chattels perſonal. Under the former head may be included all leaſes for years of land, aſſignments and ſurrenders of theſe leaſes; and all the other methods of conveying an eſtate leſs than freehold. See this Dict. titles *Deed*; *Conveyance*; *Eſtate*. Theſe however very ſeldom carry the outward appearance of a Gift, however freely beſtowed: being uſually expreſſed to be made in conſideration of blood, or natural affection; or of 5*s.* or 10*s.* nominally paid to the Grantor: and in caſe of leaſes, always reſerving a rent, though it be but a pepper corn; any of which conſiderations will in the eye of the law convert the gift, if executed, into a grant: if not executed, into a contract. 2 *Comm.* 440. *c.* 30.

Grants or Gifts of chattels-perſonal are the act of transferring the right and the poſſeſſion of them, whereby one man renounces, and another immediately acquires, all title and intereſt therein: which may be done either in writing or by word of mouth, atteſted by ſufficient evidence, of which the delivery of poſſeſſion is the ſtrongeſt and moſt eſſential. But this conveyance, when merely voluntary, is ſomewhat ſuſpicious: and is uſually conſtrued to be fraudulent, if creditors or others become ſufferers thereby; and particularly, by *Stat.* 3 *H.* 7. *c.* 4, all deeds of gift of goods, made in truſt to the uſe of the donor ſhall be void, becauſe otherwiſe perſons might be tempted to commit treaſon or felony without danger of forfeiture: and the creditors of the donor might alſo be defrauded. And by *Stat.* 13 *Eliz. c.* 5, every grant or gift of chattels as well as lands with an intent to defraud creditors or others, ſhall be void as againſt ſuch perſons to whom ſuch fraud would be prejudicial, but as againſt the grantor or giver himſelf ſhall ſtand good and effectual: and all perſons, partakers in, or privy to ſuch fraudulent grants, ſhall forfeit the whole value of the goods, one moiety to the King, and the other to the party grieved; and alſo on conviction ſuffer half a year's impriſonment. See 3 *Rep.* 82: and this Dict. title *Fraud.*

A true and proper Gift or Grant is always accompanied with delivery of poſſeſſion, and takes effect immediately: as if *A.* gives to *B.* 100 *l.* or a flock of ſheep, and puts him in poſſeſſion of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any conſideration or recompence; *Jenk.* 109; unleſs it be prejudicial to creditors, or the donor were under any legal incapacity, as infancy, coverture, dureſs, or the like: or if he were drawn in, circumvented, or impoſed upon, by falſe pretences, ebriety, or ſurpriſe. But if the Gift does not take effect by delivery of immediate poſſeſſion, it is then not properly a Gift but a contract; and this a man cannot be compelled to perform, but upon good and ſufficient conſideration. 2 *Comm.* 441. *c.* 30. See this Dict. title *Aſſumpſit*: *Conſideration*: *Contract.*

A Gift may be by deed, in word, or in *law*: all goods and chattels perſonal may be given without deed, except in ſome ſpecial caſes; and a free Gift is good without a conſideration. *Perk.* 57.

Whenever any Gift ſhall be made, in ſatisfaction of a debt, it is proper to make it in a public manner before neighbours, that the goods and chattels be appraiſed to the full value, and the Gift expreſsly made in ſatisfaction of the debt; and that on the Gift, the donee take poſſeſſion of them, *&c. Hob.* 230. See title *Fraud.*

If a man intending to give a jewel to another, ſay to him, *Here I give you my ring with the ruby in it, &c.* and with his own hand delivers it to the party, this will be a good gift; notwithſtanding the ring bear any other jewel, being delivered by the party himſelf, to the perſon to whom given. And if a perſon give a horſe to another, being preſent, and bid him take the horſe, though he call the man by a wrong name, it will be a good Gift; but it would be otherwiſe if the horſe were delivered for the uſe of another perſon, being abſent: there a miſtake of the name would alter the caſe. *Bac. Max.* 87. A Gift muſt be certain; therefore to give or grant another his horſes or cows, that may be ſpared, will be void; though if one give to *A. B.* his horſe, or his cow, he may take which he will. *Bro. Done* 90.

As to *Gifts in law*, when a man is married to a woman, all her goods and chattels by gift in law become the huſband's; but then he is liable for her debts: ſo if a man is made executor, the law gives him all the goods and chattels of the teſtator, ſubject to his debts. 1 *Inſt.* 351. See titles *Baron and Feme*: *Executor.*

If a perſon make a ſuit of cloaths for another, and put it upon him to uſe and wear, this will be a gift or grant in law of the apparel made. *Co. Lit.* 351. This muſt mean if there was not any employment, and if the taylor, therefore, meant to give the cloaths.

A man by deed did *give* and *grant*, *bargain* and *ſell*, *alien*, *enfeoff* and *confirm* to his daughter certain lands: but no conſideration of money was mentioned, nor was the deed inrolled; there was likewiſe no conſideration of natural affection expreſſed, (other than what was implied

implied in naming the grantee his daughter,) and there was no livery indorſed, or any found to have been made; nor was the daughter in poſſeſſion at the time of the deed made: and in *B. R.* it was adjudged by the court that the deed was good, and carried the eſtate to the daughter by way of covenant to ſtand ſeiſed, *&c.* 1 *Mod.* 157.

The words *give* and *grant*, in deeds of Gift, *&c.* of things which lie in grant, will amount unto a grant, a feoffment, a Gift, releaſe, confirmation or ſurrender, at the election of the party, and may be pleaded as a Gift, or grant, releaſe, *&c.* at his election. *Co. Lit.* 301. And words ſhall be marſhalled ſo in Gifts and grants, that where they cannot take effect according to the letter, the law will make ſuch conſtruction as that the Gift by poſſibility may take effect: *benignè ſunt interpretationes chartarum propter ſimplicitatem laicorum. Co. Lit.* 183. If a perſon gives or grants land, and does not ſay in what pariſh or county it lies; yet if there be any other thing to deſcribe it, as lately belonging to ſuch a perſon, *&c.* or other circumſtantial matter, it may be averred where the land lieth, and ſo the Gift be good. *Bro. Grant* 53: 9 *Rep.* 47. All corporeal and immoveable things that lie in livery, ſuch as manors, meſſuages, cottages, lands, woods, and the like, may be given and granted in fee, for life, or years at firſt; and be aſſignable over after, from man to man *in infinitum.* 1 *Rol. Abr.* 44. And where a man gives and grants wood to another on his lands, or 20 *s.* for it to be received out of the ſame lands, *&c.* here the wood paſſes by the Gift preſently, with power to chooſe to have the money. 1 *Rol. Abr.* 47. A deed of Gift of lands or goods may be made upon condition; and on a Gift or ſale of goods, the delivery of 6 *d.* or a ſpoon, *&c.* is a good *ſeiſin* of the whole. *Wood's Inſt.* 234. See titles *Conveyance*; *Fraud*; *Deed*; *Grant*; *Eſtate*; *Limitation*, *&c.*

GIFTA AQUÆ, The ſtream of water to a mill.—*Mon. Angl. tom.* 3.

GIGMILLS, A kind of fulling mills for fulling and burling of woollen cloth, prohibited by *Stat.* 5 & 6 *Ed.* 6. *c.* 22.

GILD, A fraternity, or company, *&c.* See *Guild.*

GILDA MERCATORIA, A mercantile meeting or aſſembly. If the King grants to a ſet of men to have *gildam mercatoriam*, this is alone ſufficient to incorporate and eſtabliſh them for ever. 10 *Rep.* 30: 1 *Ro. Ab.* 513. See titles *Corporation*; *Guild.*

GILDING METALS. By certain ancient ſtatutes, now obſolete, the gilding any metal but ſilver, and church ornaments; or ſilvering any thing except the apparel of peers, *&c.* and metal for knights' ſpurs, is liable to forfeiture of ten times the value, and a year's impriſonment. None ſhall gild rings or other things made of copper or latten, on pain to forfeit 5 *l.* to the King, and damages to the party deceived. For gilding ſilver wares, no perſon may take above 4 *s.* 8 *d.* for a pound of troy weight, under penalties. *Stats.* 5 *H.* 4. *c.* 13: 2 *H.* 5. *c.* 4: 8 *H.* 5. *c.* 3. See titles *Gold Lace*; *Goldſmiths.*

GISARMS, OR GUISARMES, An halbert or hand-ax, from the Lat. *bis arma*, becauſe it wounds on both ſides. *Skene—Spelm.* It is mentioned in the ſtatute 13 *Ed.* 1. *c.* 6.

GIST OF ACTION, From the Fr. *giſt*, is the cauſe for which the action lieth; the ground and foundation thereof, without which it is not maintainable. 5 *Mod.* 305. See title *Action.*

GLADIOLUM, A little ſword or dagger; alſo a kind of ſedge. *Matt. Paris.* 1206.

GLADIUS. *Jus gladii*, is mentioned in our *Latin* authors, and the *Norman* laws; it ſignifies a ſupreme juriſdiction. *Cambd.* And it is ſaid that from hence, at the creation of an earl, he is *gladio ſuccinctus*; to ſignify that he had a juriſdiction over the county of which he was made earl. See *Pleas of the Sword.*

GLAIRE, *Fr.*] A ſword, lance, or horſeman's ſtaff. *Gleyre* was one of the weapons allowed the contending parties in a trial by *combat. Orig. Juriſd.* 79.

GLASS, Certain duties granted on all glaſs ware, *&c.* by *Stat.* 6 & 7 *W.* 3; which duties were continued for ever by a ſubſequent act; But were afterwards taken off, by *Stat.* 10 *and* 11 *W.* 3. *cap.* 18. By *Stat.* 19 *Geo.* 2. *cap.* 12, An exciſe duty is laid upon glaſs of 8 *d. per* pound, upon all crown, plate, and flint glaſs imported; 2 *d. per* pound on green glaſs imported, and 2 *s. per* dozen on flaſks and bottles imported; and on all materials or metal uſed in making crown, plate or flint glaſs 9 *s.* 4 *d. per* hogſhead; and for making common bottles, or green glaſs 2 *s.* 4 *d. per* hogſhead; and higher duties by ſubſequent acts.

GLASS-MEN, Are reckoned amongſt wandering rogues and *vagrants*, by the old ſtatutes, 39 *Eliz. c.* 17: 1 *Jac.* 1. *c.* 7.

GLAVEA, An hand dart. *Blount.*

GLEANING, LEASING OR LESING, From Fr. *Glaner*, *quaſi graner*; *colligere grana.—Teuton. Abrleſen*, *ex* ahr, *ſpica*, & leſen, *colligere.—Minſhew in* v. *Glean.*] It hath been ſaid, that by the Common-law and cuſtom of *England*, the poor are allowed to enter and glean upon another's ground, after the harveſt, without being guilty of treſpaſs; which humane proviſion ſeems borrowed from the *Moſaical* law. 3 *Comm.* 212, 213: *Trials per pais c.* 15. *p.* 438, 534.

But it is now poſitively ſettled by a ſolemn judgment of the Court of Common Pleas that a right to glean in the harveſt-field cannot be claimed by any perſon at Common-law. Neither have the poor of a pariſh, legally ſettled, ſuch right. *Gould* J. diſſented from this opinion, quoting the paſſages in the Moſaical law, (*Levit. c.* 19. *vv.* 9, 10; *c.* 23. *v.* 22. and See *Deut. c.* 24. *v.* 19,) and 4 *Burr.* 1927, together with the recognition of the cuſtom or privilege in a private act of parliament for an incloſure in *Baſingſtoke* pariſh. The other Judges however were of opinion that it would be dangerous and impolitic to admit Gleaning to be *a right*, and in fact would be prejudicial to the poor themſelves, now provided for under various poſitive ſtatutes. They alſo remarked that the cuſtom of Gleaning or Leaſing was various in various places, and was in many places reſtricted to particular corn, and could not therefore be ſet up as an univerſal Common-law right; that it would be opening a tempting door, to fraud and idleneſs, and had never been ſpecifically recognized by any judicial determination. 1 *H. Black. Rep.* 51—63.

GLEBE, *gleba.*] Church-land; moſt commonly taken for the land belonging to a pariſh church, beſides the tithes. If any parſon, vicar, *&c.* hath cauſed any of his Glebe-land to be manured and ſown at his own coſts, with any corn or grain, the incumbents may deviſe all

the profits and corn growing upon the ſaid Glebe by will, under *Stat.* 28 *Hen.* 8. *c.* 11. And if a parſon ſows his Glebe and dies, the executors ſhall have the corn ſown by the teſtator. But if the Glebe be in the hands of a tenant, and the parſon dies after ſeverance of the corn, and before his rent due; it is ſaid, neither the parſon's executors, nor the ſucceſſor, can claim the rent, but the tenant may retain it, and alſo the crop, unleſs there be a ſpecial covenant for the payment to the parſon's executors proportionably, &c. *Wood's Inſt.* 163. *Sed qu*; If this caſe would not come within the equity of *Stat.* 11 *Geo.* 2. *c.* 19. *ſ.* 15, which gives right of action to the repreſentative of *tenant for life*, for any portion of rent in arrear at the time of his death?

Exchange of Glebe land, will not bind the ſucceſſor. *Noy* 5.

Prohibition was moved for to a parſon for digging new coal-mines in his Glebe, and alſo for felling trees; for it is waſte, and prohibited by the ſtatute *de non proſternend' arbores*, &c. The court held it lay not for the mines; for then no mines in Glebe could ever be opened. *Lev.* 107.

By the ſaid *Stat.* 28 *H.* 8. *c.* 11, Every ſucceſſor, on a month's warning, after induction, ſhall have the manſion-houſe and the Glebe belonging thereto, not ſown at the time of the predeceſſor's death. He that is inſtituted may enter into the Glebe-land before induction, and has right to have it againſt any ſtranger; *per Coke* Ch. J. *Roll. R.* 192.

There is a writ grounded on the *Stat. articuli cleri*, *cap.* 6; where a parſon is diſtrained in his Glebe-lands by ſheriffs, or other officers; againſt whom attachment ſhall iſſue. *New Nat. Br.* 386, 387. See titles *Parſon*; *Vicar*; *Church*; *Tithes*, &c.

GLEBARIÆ, Turfs dug out of the ground.—*In Sylvis, Campis, Semitis, Moris*, Glebariis, &c.

GLISCYWA, An old *Saxon* word for a Fraternity. *Leg. Athelſtan. cap.* 12.

GLOMERELLS, Commiſſaries appointed to determine differences between ſcholars of a *School* or *Univerſity*, and the townſmen of the place: in the edict of the biſhop of *Ely*, *anno* 1276, there is mention of the *Maſter of the Glomerells.*

GLOVE-SILVER. Money cuſtomarily given to ſervants to buy them gloves, as an encouragement for their labours.—*Glove money* has been alſo applied to extraordinary rewards given to officers of courts, &c. It is now given on the circuits, by the barriſters, to the judges' crier.

GLOVES. The *Stat.* 6 *Geo.* 3. *c.* 19, reſtrains the importation and ſale of foreign Gloves and mitts: and one ſection of the *Stat.* 25 *Geo.* 3. *c* 55. alſo reſtrains the importation of foreign leather not completely made into Gloves, but cut into ſhapes, or tranks.—By this latter act a ſtamp duty was impoſed on Gloves ſold, which is now repealed.

GLYN, A valley; according to the book of *Domeſday.*

GO. This word is ſometimes uſed in a judicial ſignification, as to *go* without day, is to be diſmiſſed the court; ſo in old phraſe, to *go* to God. *Broke Kitch.* 190.

GOATS, No man may common goats within the foreſt without eſpecial warrant. *Nota, Capriolus non eſt beſtia venationis foreſtæ. Manwood's Foreſt Laws, cap.* 25. *numb.* 3. See title *Common.*

GOAT'S HAIR, To what duties liable, 4 *W.* & *M. c.* 5.

GOD-BOTE, *Sax.*] An eccleſiaſtical or church fine, paid for crimes and offences committed againſt God.

GOD-GILD, That which is offered to God, or his ſervice. *Sax.*

GOD AND RELIGION, *Offences againſt. Apoſtacy* is an offence againſt God and religion. It was formerly the object only of the Eccleſiaſtical courts, which corrected the offender *pro ſalute animæ*. But now, by *Stat.* 9 & 10 *W.* 3 *c.* 32. If any perſon educated in, or having made profeſſion of, the Chriſtian religion, ſhall by writing, printing, teaching, or *adviſed* ſpeaking, deny the Chriſtian religion to be true, or the Holy Scriptures to be of divine authority, he ſhall upon the firſt offence be rendered incapable to hold any office or place of truſt; and for the ſecond, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaſer of lands, and ſhall ſuffer three years' impriſonment without bail. To give room however for repentance, if within four months after the firſt conviction the delinquent will in open court publickly renounce his error, he is diſcharged for that once, from all diſabilities.

Hereſy is another offence, for which the offender is ſubject only to eccleſiaſtical cenſure, by *Stat.* 29 *Car.* 2. *c.* 9. See 4 *Comm.* 42, 65. As to *Reviling of the ordinances, Non-conformity, Blaſphemy, Swearing and Curſing, Witchcraft, Religious Impoſtors, Simony, Sabbath-breaking, Drunkenneſs* and *Lewdneſs*; and this Dict. under thoſe ſeveral titles.

GOLDA, A mine, according to *Blount. Mon. Ang. tom.* 2. *pag.* 610.

GOLD AND SILVER LACE and *Thread.* Perſons that ſell orrice lace, mixed with other metal or materials than *gold, ſilver*, ſilk and vellum, ſhall forfeit 2*s.* 6*d.* for every ounce: and there ſhall be allowed at leaſt ſix ounces of *gold* and *ſilver* prepared and reduced into plate, to cover four ounces of ſilk, except large twiſt, frize, &c. And laying the ſame on greater proportions of the ſilk, or in any other manner than directed, incurs the like forfeiture of 2*s.* 6*d.* the ounce. Copper, and lace inferior to *ſilver*, is to be ſpun upon thread, yarn or incle, and not on ſilk; but this does not extend to *Tiſſel* apparel, uſed in theatres. No gold or ſilver lace, thread, fringe or wire, &c. may be imported, on pain of being forfeited and burnt, and 100*l.* penalty. *Stat.* 15 *Geo* 2. *c.* 20. See 28 *Geo.* 3. *c.* 7. The importation and making up of gold and ſilver lace, embroidery, brocade, &c. is prohibited, by *Stat.* 22 *Geo.* 2. *c.* 36. See further titles *Wire-Drawers*: *Embroidery*: *Navigation-Acts.*

GOLDSMITHS. *Gold* and *ſilver* manufactures are to be aſſayed by the warden of the *Goldſmiths'* Company in *London*, and marked; and gold is to be of a certain touch. *Stat.* 28 *E.* 1. *c.* 20. By *Stat.* 37 *E.* 3. *c.* 7, *Goldſmiths* were to have their own marks on plate, after the ſurveyors have made their aſſay; and falſe metal was to be ſeized and forfeited to the King. Work of ſilver made by *Goldſmiths*, &c. is to be as fine as *Sterling*, except the ſolder neceſſary; and marking other work, incurs a forfeiture of double value. *Stat.* 2 *H.* 6. *c.* 14.

Goldſmiths, ſhall not take above 1*s.* the ounce of gold beſide the faſhion, more than the buyer may be allowed for it at the King's exchange: and if the work of any *Goldſmith* be marked and allowed by the maſter and wardens of the myſtery, and afterwards found faulty; the wardens and

and corporation ſhall forfeit the value of the thing ſo ſold or exchanged. *Stat.* 18 *Eliz. c.* 15.

Molten ſilver is not to be tranſported by *Goldſmiths* before it is marked at *Goldſmiths' Hall*, and a certificate made thereof on oath; and officers of the Cuſtoms may ſeize ſilver ſhipped otherwiſe. *Stat.* 6 & 7 *W.* 3. *c.* 17. The cities of *York*, *Exeter*, *Briſtol*, *Cheſter*, *Norwich*, and town of *Newcaſtle*, are alſo appointed places for aſſaying and marking wrought plate of *Goldſmiths*, &c. *Stats.* 12 *W.* 3. *c.* 4: 1 *Ann. c.* 9.

A duty is granted on ſilver plate of 6 *d. per* ounce; and *Goldſmiths* are to make entries thereof with the weight, on pain of 100 *l.* &c. And *Goldſmiths* muſt work their plate according to the old *ſtandard*; which is to be touched, aſſayed and marked before expoſed to ſale. *Stat.* 6 *Geo.* 1. *c.* 11.

Gold plate made by *Goldſmiths* ſhall contain 22 carrats of fine gold: and ſilver plate 11 ounces and two pennyweight of ſilver, in every pound troy, or they forfeit 10 *l.* And no *Goldſmith* ſhall ſell any ſuch plate, until marked with the firſt letters of the maker's chriſtian and ſurname, the marks of the city of *London* being the leopard's head, lion paſſant, &c. and thoſe made uſe of by the aſſayers at *York*, *Exeter*, &c. All perſons making plate, are to enter their marks, names and places of abode in the aſſay-office; they are likewiſe to ſend with the plate required to be marked, a particular account thereof, in order to be entered, &c. or forfeit 5 *l.* The *Aſſayers* determine what ſolder is neceſſary about plate, and judge of the workmanſhip, and for good cauſe may refuſe to aſſay it; and if any parcel be diſcovered of a coarſer allay than the ſtandard, it may be broke and defaced; alſo the fees for aſſaying and marking are particularly limited, &c. *Stat.* 12 *Geo.* 2. *c.* 26. See further title *Wire-drawers*.

GOLDWIT, or GOLDWICH, Perhaps a golden mulct; in the records of the *Tower*, there is mention of *conſuetudo vocata*, Goldwith *vel* Goldwich.

GOLIARDUS, A jeſter or buffoon. *Mat. Paris.* 1229.

GOOD ABEARING, *Bonus Geſtus.*] Signifies an exact *carriage* or *behaviour* of a ſubject towards the King and the people; whereunto ſome perſons, upon their miſbehaviour are bound; and he that is bound to this, is ſaid to be more ſtrictly bound than to the *peace*; becauſe where the peace is not broken, the ſurety *de bono geſtu* may be forfeited by the number of a man's company, or by their weapons. *Lamb. Eiren. lib.* 2. *c.* 2: See *Stat.* 34 *Ed.* 3. *c.* 1.

GOOD BEHAVIOUR, Surety for the *Good behaviour* is ſurety for the *peace*, and differs very little from *Good abearing*. A Juſtice of peace may demand it *ex officio*, according to his diſcretion, when he ſees cauſe; or at the requeſt of any other under the King's protection: his warrant alſo is to be iſſued when he is commanded to do it by writ of *ſupplicavit* out of *Chancery* or *B. R.* See further titles *Juſtices of Peace* and *Surety of the Peace*; at large.

GOOD CONSIDERATION, See *Conſideration*.

GOODS AND CHATTELS, *Bona & cattalla*, See *Chattels*.

GOOLE, Fr. *Goulet.*] A breach in a ſea-bank or wall; or a paſſage worn by the flux and reflux of the ſea. *Stat.* 16 & 17 *Car.* 2. *c.* 11.

GORCE, From Fr. *Gort.*] A wear: by *Sat.* 25 *E.* 3. *ſt.* 4. *c.* 4. it is ordained, that all *Gorces*, mills, wears, &c. levied and ſet up, whereby the King's ſhips and boats are diſturbed and cannot paſs in any river, ſhall be utterly pulled down, without being renewed. Sir *Edward Coke* derives this word from *Gurges*, a deep pit of water, and calls it a *Gors*, or *Gulf*; but this ſeems to be a miſtake, for in *Domeſday* it is called *Gourt* and *Gort*, the *French* word for a wear. *Co. Lit.* 5.

GORE, A narrow ſlip of ground. *Paroch. Antiq.* 393.

GOTE, Sax. *Geotan*, i. e. *Fundere.*] A ditch, ſluice or gutter, mentioned in *ſtat.* 23 *H.* 8 *c.* 5.

GOVERNMENT.

By this word, in common ſpeech, is underſtood the Conſtitution of our country as exerciſed, according to the principles of *Limited Monarchy*, under the Legiſlature of *King*, *Lords* and *Commons*. For the principles of this Government and Conſtitution, and its peculiar excellencies in preference to all others, ſee this Dict. *paſſim*; and particularly under titles *King*; *Parliament*; *Treaſon*; *Tenure*; *Habeas Corpus*; *Liberties*; *Jury*; and other appoſite titles.

When Civil Society is once formed, Government at the ſame time reſults of courſe, as neceſſary to preſerve and to keep that ſociety in order. Unleſs ſome Superior be conſtituted, whoſe commands and deciſions all the members are bound to obey, they would ſtill remain as in a ſtate of nature without any judge upon earth to define their rights and redreſs their wrongs. But as all the members which compoſe this ſociety were naturally equal, it may be aſked, in whoſe hands are the reins of Government to be entruſted? To this the general anſwer is eaſy; but the application of it to particular caſes has occaſioned one half of thoſe miſchiefs, which are apt to proceed from miſguided political zeal. In general, all mankind will agree that Government ſhould be repoſed in ſuch perſons, in whom thoſe qualities are moſt likely to be found, the perfection of which is among the attributes of him who is emphatically ſtiled *The Supreme Being*; the three grand requiſites of wiſdom, of goodneſs and of power: wiſdom to diſcern the real intereſt of the community; goodneſs to endeavour always to purſue that real intereſt: and ſtrength or power, to carry this knowledge and intention into action. Theſe are the natural foundations of Sovereignty, and theſe are the requiſites that ought to be found in every well conſtituted frame of Government.

How the ſeveral forms of Government we now ſee in the world at firſt actually began, is matter of great uncertainty, and has occaſioned infinite diſputes. However they began, or by what right ſoever they ſubſiſt, there is and muſt be in all of them a Supreme, irreſiſtible, abſolute, uncontrolled authority, in which the *jura ſummi imperii*, or the rights of Sovereignty reſide. And this authority is placed in thoſe hands wherein, (according to the opinion of the founders of ſuch reſpective States, either expreſsly given or collected, from their tacit approbation,) the qualities requiſite for ſupremacy, wiſdom, goodneſs, and power, are the moſt likely to be found.

The political writers of antiquity will not allow more than three regular forms of government. The firſt when the Sovereign Power is lodged in an aggregate aſſembly conſiſting of all the free-members of a community, which is called a *Democracy*; the ſecond when it is lodged in a council, compoſed of ſelect members, and then it is

ſtiled an *Ariſtocracy*; the laſt when it is entruſted in the hands of a ſingle perſon, and then it takes the name of a *Monarchy*. All other ſpecies of Government, they ſay are either corruptions of, or reducible to, theſe three.

By the Sovereign Power, is meant the power of making laws; for wherever that power reſides, all others muſt conform to, and be directed by it, whatever appearance the outward form and adminiſtration of the Government may put on. For it is at any time at the option of the Legiſlature to alter that form and adminiſtration by a new edict or rule, and to put the execution of the laws into whatever hands it pleaſes; by conſtituting one or a few, or many executive magiſtrates: and all the other powers of the State muſt obey the legiſlative power in the diſcharge of their ſeveral functions, or elſe the Conſtitution is at an end.

In a *Democracy*, where the right of making laws reſides in the People at large, public virtue, or goodneſs of intention is more likely to be found, than either of the other qualities of Government. Popular aſſemblies are frequently fooliſh in their contrivance, and weak in their execution; but generally mean to do the thing that is right and juſt, and have always a degree of patriotiſm or public ſpirit. In *Ariſtocracies* there is more wiſdom to be found, than in the other frames of Government; being compoſed, or intended to be compoſed, of the moſt experienced citizens. But there is leſs honeſty than in a Republic, and leſs ſtrength than in a Monarchy. A *Monarchy* is indeed the moſt powerful of any; for by the entire conjunction of the legiſlative and executive powers all the ſinews of Government are knit together, and united in the hand of the Prince; but then [in abſolute Monarchies] there is imminent danger of his employing that ſtrength to improvident or oppreſſive purpoſes.

Thus theſe three ſpecies of Government have, all of them, their ſeveral perfections and imperfections. *Democracies* are uſually the beſt calculated to direct the end of a law, *Ariſtocracies* to invent the means by which that end ſhall be obtained; and *Monarchies* to carry thoſe means into execution. The antients, had in general no idea of any other permanent form of Government but theſe three: for though *Cicero* declares himſelf of opinion, "*eſſe optimè conſtitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, ſit modicè confuſa,*" yet *Tacitus* treats this notion of a mixed Government, formed out of them all, and partaking of the advantages of each, as a viſionary whim, and one that, if effected, could never be laſting or ſecure.

But, happily for us of this *Iſland*, THE BRITISH CONSTITUTION has long remained, and it is to be hoped will long continue, a ſtanding exception to the truth of this obſervation. For, as with us, the Executive Power of the laws is lodged in a ſingle perſon, they have all the advantages of ſtrength and diſpatch, that are to be found in the moſt abſolute Monarchy: and as the Legiſlature of this kingdom is intruſted to three diſtinct powers, entirely independent of each other; firſt the *King*; ſecondly the *Lords* ſpiritual and temporal, which is an Ariſtocratical aſſembly of perſons ſelected for their piety, their birth, their wiſdom, their valour, or their property; and thirdly, the Houſe of *Commons*, freely choſen by the People from among themſelves, which makes it a kind of Democracy; as this aggregate body, actuated by different ſprings, and attentive to different intereſts, compoſes the *Britiſh Parliament*, and has the ſupreme diſpoſal of every thing; there can be no inconvenience attempted by either of the three branches, but which will be withſtood by one of the other two; each branch being armed with a negative power, ſufficient to repel any innovation which it ſhall think inexpedient or dangerous.

Here then is lodged the *Sovereignty of the Britiſh Conſtitution*; and lodged as beneficially as is poſſible for Society. For in no other ſhape could we be ſo certain of finding the three great qualities of Government ſo well and ſo happily united. If the ſupreme power were lodged in any of the three branches ſeparately, we muſt be expoſed to the inconveniences, of either Abſolute Monarchy, Ariſtocracy, or Democracy, and ſo want two of the three principal ingredients of good policy, either virtue wiſdom, or power. If it were lodged in any two of the branches; for inſtance in the King and houſe of Lords, our laws might be providentially made, and well executed, but they might not have always the good of the people in view: If lodged in the King and Commons, we ſhould want that circumſpection and mediatory caution which the wiſdom of the Peers is to afford: if the ſupreme rights of Legiſlature were lodged in the two houſes only, and the King had no negative upon their proceeding, they might be tempted to incroach upon the royal prerogative, or perhaps to aboliſh the kingly office, and thereby weaken (if not totally deſtroy) the ſtrength of the Executive Power. But the conſtitutional Government of this Iſland is ſo admirably tempered and compounded, that nothing can endanger or hurt it, but deſtroying the equilibrium of power between one branch of the Legiſlature and the reſt. For if ever it ſhould happen that the independence of *any one* of the three ſhould be loſt, or that it ſhould become ſubſervient to the views of either of the other two, there would ſoon be an end of our Conſtitution. 1 *Comm.* 48,—52. *Introd.*

The effect of ſo dire a change, or the means of judging whether in any ſuppoſable event, it may or may not have taken place, is a theme that may ſerve to agitate politicians, but which it would not be proper to diſcuſs in this place. Revolutions in Government are ſubject to no fixed previous laws; and the dreadful experience of *France* at this moment, (*October* 1794) will teach every true lover of the *Britiſh* Conſtitution to be cautious of violating its principles, either through too fond an attachment to the *perſon* or *privileges* of the *Monarch*, or too ardent and dangerous a zeal for the *Liberties of the People*. Theſe, in our Conſtitution are not oppoſed to, but dependent on, each other, and an exaggeration of either would inevitably lead to the ruin of both.

Contempts and miſpriſions againſt the King's perſon and Government, may be by ſpeaking or writing againſt them; curſing or wiſhing him ill, giving out ſcandalous ſtories concerning him, or doing any thing that may tend to leſſen him in the eſteem of his ſubjects, may weaken his government, or may raiſe jealouſies between him and his people. It has alſo been held an offence of this ſpecies to drink to the pious memory of a traitor; or for a clergyman to abſolve perſons at the gallows, who there perſiſt in the treaſons for which they die; theſe being acts which impliedly encourage rebellion. And for this ſpecies of contempt, a man may not only be fined and impriſoned, but ſuffer the pillory, or other infamous corporal puniſhment. 1 *Hawk. P. C.*: 4 *Comm.* 13. *c.* 9.

In

In cases of conspiracy or meditated treason against, the King and Government, it is not unusual to vest a power in the King of apprehending and detaining suspected persons without bail or mainprise; which *as to them* operates as a suspension of the *Habeas Corpus* Act. For this purpose the *Stats.* 1 *W. & M. c.* 2: 6 *Anne c.* 15: 1 *Geo.* 1. *c.* 8, 39, and divers others have been from time to time passed: The last of this kind was *Stat.* 34 *Geo.* 3. *c.*—— when, after the example of *France*, several conspiracies were carrying on to establish a *Democracy* in these kingdoms to the overthrow of that Constitution; which is the deserved subject of panegyrick by the learned Commentator, from whom the preceding extracts on this subject are submitted to the attention of the Student.

GOVERNORS *of the Chest at Chatham*, Officers appointed to take care of, and relieve the *poor* and maimed *seamen* belonging to the Royal *Navy*.

GRACE. Acts of parliament for a general and free *pardon*, are called *Acts of Grace*.

GRADUATES, *Graduati.*] Are scholars who have taken *degrees* in an university.

GRAFFER, Fr. *Greffier*, i. e. *Scriba.*] A notary or scrivener, used in the ancient *Stat.* 5 *H.* 8. *c.* 1.

GRAFFIO, GRAVIO, A landgrave, or earl—*Nec princeps, nec* Graffio, *hanc lenitatem mutare audeat. Mon. Angl. tom.* 1. *p.* 100.

GRAFFIUM, A writing-book, register, or cartulary of deeds and evidences. *Annal Eccl. Menevensis apud. Angl. Sacr. par.* 1. *p.* 653.

GRAIL, *Gradale*, or *Graduale.*] A *gradual* or book, containing some of the offices of the *Romish* church.—Gradale, *sic dictum, a gradalibus in tali libro contentis. Lyndewood. Provincial. Ang. lib.* 3. It is sometimes taken for a *mass-book*, or part of it, instituted by *Pope Celestine*, *Anno.* 430.

GRAIN, The twenty-fourth part of a penny-weight. *Merch. Dict.* Also *grain* signifies any corn sown on ground; and there is what is so called in the top of the ear, less than corn. *Lit. Aleyn's Rep.* 80.

GRAND ASSISE, A writ in a real action to determine the right of property in lands. See titles *Jury*; *Magna Assisa*.

GRAND CAPE, A writ on plea of land, where the tenant makes default in appearance at the day given, for the King to take the land into his hands, *&c. Reg. Jud.* 1. See *Cape Magnum*.

GRAND DAYS, Those days in the *Terms* which are solemnly kept in the *Inns of Court* and Chancery, i. e. *Candlemas Day* in *Hilary* term, *Ascension Day* in *Easter* term, *St. John the Baptist's Day* in *Trinity* term, and *All Saints Day* in *Michaelmas* term; which days are *Dies non Juridici*, or no days in court.

GRAND DISTRESS, is a writ so called, not for the quantity of it, for it is very short, but for its quality; for the extent thereof is very great, being to all the goods and chattels of the party distrained within the county: it lies in two cases, either when the tenant or defendant is attached, and appears not, but makes default; or where the tenant hath once appeared, and after makes default, then this writ is had by the *Common law* in lieu of a *Petit Cape. Stats. West.* 1. *cap.* 44: 52 *H.* 3. *c.* 9.

GRAND JURY, The jury that find bills of indictment before Justices of peace, and gaol-delivery or of *Oyer & Terminer*, *&c.* They ought only to hear witnesses for the King; and to find a bill on probable evidence; because it is but an accusation, and the party is to be put upon his trial afterwards. But if the bill be against *A.* for murder, and the *Grand Jury*, on the evidence before them, be satisfied it was *se defendendo*, *&c.* and so return it specially; the court may remand them to consider better thereof, or hear the evidence at the bar, and accordingly direct the *Grand Jury*. 2 *Hale's Hist. P. C.* 157, 158. Where a *Grand Jury* refuses to present things, within their charge, *&c.* a new *Grand inquest* may be impanelled, to inquire of the concealment of the former; on whose defaults presented, they shall be amerced. 2 *Hale's P. C.* 155. A *Grand Juror* disclosing to any one indicted, the evidence that appeared against him, is guilty of a high misprision, and liable to be fined and imprisoned. 4 *Comm.* 126. See at large titles *Indictment*; *Jury*.

GRAND SERJEANTY, An ancient tenure, by military service. See titles *Chivalry*; *Tenure*; *Serjeanty*.

GRANGE, *Grangia.*] A house or farm where corn is laid up in barns, *granaries*, *&c.* and provided with stables for horses, stalls for oxen, and other things necessary for husbandry. This definition is agreeable to *Spelman*. According to Mr. *Warton*, *Grange* is strictly and properly the farm of a monastery, where the religious reposited their corn. *Grangia Lat.* from *Granum*. But in *Lincolnshire*, and other Northern counties, they call every lone house, or farm, which stands solitary, a *Grange*. *Steveens's Shakespear*.

Dr. *Johnson* in his dictionary derives the word from *Grange*, French, and defines it, a farm, generally: a farm with a house, at a distance from neighbours.

GRANGEARIUS, Is the person who has the care of such a place, for corn and husbandry: and there was anciently a *granger*, or *grange*-keeper belonging to religious houses, who was to look after their *granges*, or farms in their own hands. *Fleta, lib.* 2. *c.* 8: *Cartular. St. Edmund, MS.* 323.

GRANT.

DONATIO; CONCESSIO In the Common-law, a conveyance in writing of incorporeal things, not lying in livery and which cannot pass by word only; as of reversions, advowsons in gross, tithes, rents, services, common in gross, *&c.* It has also been taken generally, for every gift and *Grant* of any thing whatsoever. *Co. Lit.* 172: 3 *Rep.* 63. *Grants* are made by such persons as cannot give but by deed: he that granteth is termed the Grantor, he to whom the *Grant* is made is the Grantee. *West. Symb.* 234.

Grant is the regular method, by the Common-law, of transferring the property of incorporeal hereditaments or such things whereof no livery can be had. *Co. Litt.* 9. For which reason all corporeal hereditaments as lands and houses are said to *lie in livery*, and the others as advowsons, commons, rents, reversions, *&c. to lie in Grant. Ib.* 172. And the reason is given by *Bracton*, "*Traditio*, [livery] nihil aliud est quàm rei corporalis, de personâ in personam, de manu in manum translatio, aut in possessionem inductio: sed res incorporales quæ sunt ipsum jus rei vel corpori inhærens, traditionem non patiuntur." *Bract. l.* 2, *c.* 18. Incorporeal hereditaments therefore pass merely by delivery of the deed. And in seignories or reversions of lands, such Grant, together with the attornment of the tenant,

tenant, (while attornments were requiſite) were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate poſſeſſion. It therefore differs but little from a feoffment, except in its ſubject-matter, for the operative words therein commonly uſed are *Dedi et conceſſi*; *Have given and granted*; 2 *Comm.* 316. *c.* 20. See further this Dict. titles *Conveyance*; *Deed*; *Gift*.

I. *What Things and Intereſts may be granted*; *by what Deſcription*; *and how Grants ſhall be conſtrued.*

II. *Who may make Grants*; *and who may take by Grant.*

I. A Man cannot *grant* that which he hath not, or more than he hath: though he may covenant to purchaſe an eſtate, and levy a fine to uſes, which will be good. A perſon may *grant* a reverſion, as well as a poſſeſſion; but the law will not allow *Grants* of titles only, or imperfect intereſts, or of ſuch intereſts as are merely future. *Bac. Max.* 58. A bare poſſibility of an intereſt, which is uncertain; a right of entry, or thing in action, cauſe of ſuit, &c. may not be granted over to a ſtranger. *Perk. Sect.* 65: 2 *Inſt.* 214: 4 *Rep.* 66.

It was formerly held, that by a *Grant* of all a man's goods and chattels, bonds would paſs; now it is held the contrary, that the words *Goods and Chattels* do not extend to bonds, deeds or ſpecialties, being things in action, unleſs in ſpecial caſes. 8 *Rep.* 33: *Co. Lit.* 152: The *ſtat.* 2 *Geo.* 2. *cap.* 25, was found neceſſary to make the ſtealing ſuch bonds, &c. felony, as in caſe of other goods and chattels.

In *Grants* there muſt be a foundation of intereſt, or they will not be binding: If a perſon *grants* a rent-charge out of lands, when he hath nothing in the land, the grant will be void. *Perk.* 15. Though it is ſaid, if a man *grant* an annual rent out of land, wherein he hath no kind of intereſt, yet it may be good to charge the perſon of the *grantor*. *Owen Rep.* 3. A man may *grant* an annuity for him, and his heirs, to commence after his death, and it ſhall charge the heir. *Bac. Max.* 58. And after the *Grant* of an annuity, &c. is determined, debt lies for the arrears; and the perſon of the tertenant will be charged. 7 *Rep.* 39. If a common perſon *grants* a rent, or other thing that lies in *Grant*, without limitation of any eſtate, by the delivery of the deed, a freehold paſſes: but if the *King* make ſuch a *Grant* of a rent, &c. it is void for uncertainty. *Danv. Rep.* 45 *a*.

A *Grant* to a man, with a blank for his chriſtian name is void, except to an officer known by his office, when it muſt be averred: and it is the ſame where the *grantee's* chriſtian name is miſtaken. *Cro. Eliz.* 328.

Grants may be void by incertainty, impoſſibility, being againſt law, on a wrong title, to defraud creditors, &c. *Co. Lit.* 183. Such things as lie in *Grant*, may not be granted or held without deed: and if any thing not grantable, is granted with other things, the *Grant* will be void for all. 2 *Shep. Abr.* 269, 271, 273. Truſts and confidences are perſonal things, and may not be granted over to others in moſt caſes; as offices of truſt, and the like: but all kinds of chattels real and perſonal, are grantable, *Perk.* § 90: *Plowd.* 141, 379.

If one *grant* any thing that lies in livery, or *Grant*, and that is *in eſſe* at the time of the *Grant*, in fee, or for life, and the eſtate is to begin at a day to come; this for the moſt part will be void: but a leaſe or *Grant* for years, may be good *in futuro*; and may be to one for term of years, or years determinable on lives, and after to another, to begin at the end of that eſtate. 5 *Rep.* 1: *Dyer* 58. Where a man hath a reverſion after an eſtate for life of land, and he *grants* a rent out of it; the *Grant* is good, and will faſten upon the land after the eſtate of the tenant for life is ended: and if a perſon *grant* rents, &c. and a ſtranger take them at that time; in this caſe the *Grant* will be good, for one may not be out of poſſeſſion of theſe things but at his pleaſure. *Perk.* 92, 98. If a man *grants* that to one, that he hath granted before to another, for the like term, &c. the ſecond *Grant* will be void. *Dyer* 23: *Perk.* § 102. *Grants* are uſually made by theſe words, *viz. Have Given*, *Granted* and *Confirmed*, &c. And words in *Grants* ſhall be conſtrued according to a reaſonable ſenſe, and not be ſtrained to what is unlikely. *Hob.* 304. Alſo it hath been adjudged, that *Grants* ſhall be expounded according to the ſubſtance of the deed, not the ſtrict grammatical ſenſe; and agreeable to the intention of the parties. *Co. Lit.* 146, 313.

To every good *Grant* the following things are requiſite: 1. That there be a perſon able to *grant*. 2. A perſon capable of the thing *granted*. 3. That there be a thing *grantable*. 4. That it be *granted* in ſuch manner as the law requires. 5. That there be an agreement to, and acceptance of, the thing granted, by him to whom made. And 6. There ought to be an attornment where needful. *Co. Lit.* 73. But *Grants* and conveyances are good without attornment of tenants, notice being given them of the *Grants*, by *ſtat.* 4 *Ann. c.* 16. § 9. *Grants* are taken moſt ſtrongly againſt the *grantor* in favour of the *grantee*: the *grantee* himſelf is to take by the *Grant* immediately, and not a ſtranger, or any *in futuro*; and if a *Grant* be made to a man and his heirs, he may aſſign at his pleaſure, though the word *Aſſigns* be not expreſſed. *Lit.* 1: *Saund.* 322. The uſe of any thing being *granted*, all is *granted* neceſſary to enjoy ſuch uſe: and in the *Grant* of a thing, what is requiſite for the obtaining thereof is included. *Co. Lit.* 56. So that if timber trees are *granted*, the *grantee* may come upon the *grantor's* ground to cut and carry them away. 2 *Inſt.* 309: *Plowd.* 15.

Where the principal thing is *granted*, the *incident* ſhall paſs; but the *principal* will not paſs by the *Grant* of the *incident*. *Co. Lit.* 152. A lord of a manor cannot *grant* the ſame, and reſerve the Court Baron, it being inſeparably incident. *Co. Lit.* 313. A *Grant* of a manor, without the word *cum pertinentiis*, will paſs all things belonging to the manor: the *Grant* of a farm will alſo paſs all lands belonging to it; but a *Grant* of a meſſuage paſſes only the houſe, out-houſes and gardens. *Owen's Rep.* 51. *Tot' il' maner' de A.* may be taken in the ſingular, or plural number; and daſhes and abbreviations in *Grants* ſhall be ſo taken that the *Grant* be not void. 9 *Rep.* 48. When lands are *granted* by deed, the houſes which ſtand thereon will paſs; houſes and mills paſs by the *Grant* of all lands, becauſe that is the moſt durable thing on which they are built. 4 *Rep.* 86: 2 *And.* 123. By *Grant* of all the lands, the woods will paſs: and if a man *grant* all his trees in a certain place, this paſſeth the ſoil; though an exception of wood extends to the trees only, not the ſoil. 1 *Rol. Rep.* 33. *Dyer* 19: 5 *Rep.* 11.

Trees

Trees in boxes will not paſs by the *grant* of the land, *&c.* as they are ſeparate from the freehold. *Mod. Caſes*, 170. A man *grants* all his wood that ſhall grow in time to come; it is a void *grant*, not being *in eſſe*. 3 *Leon.* 37. A *grant de veſturâ terræ* paſſeth not the freehold; therefore the *grantee* hath no authority to dig in it by virtue of ſuch a *grant*. *Ow.* 37. By the *grant* of lands in the poſſeſſion of another, it is good if ſuch other be in poſſeſſion, let the poſſeſſion be by right, or wrong. 1 *Rol. Rep.* 23. If a *grant* is general, and the lands *granted* reſtrained to a certain vill, the *grantee* ſhall have no lands out of the vill. 2 *Rep.* 33. It has been held, that where a *grant* is made of lands and tenements in *D.* copyhold lands will not paſs; for they cannot paſs otherwiſe than by ſurrender. *Owen*, 37.

Where lands are certainly deſcribed in a Grant, with a recital as *granted* to *A. B. &c.* though they were not thus *granted*, it has been adjudged, that the *grant* was good. 10 *Rep.* 110. If a firſt deſcription of lands in a *grant* is falſe, notwithſtanding the ſecond be true, nothing will paſs by it; though if the firſt be true, and the ſecond falſe, the *grant* may be good. 3 *Rep.* 10. The word *grant*, where it is placed among other words of demiſe, *&c.* ſhall not enure to paſs a property in the thing demiſed; but the *grantee* ſhall have it by way of demiſe. *Dyer*, 56.

Of *grants* ſome charge the *grantor* with ſomething he was not charged with before; others diſcharge the *grantee* of ſomething wherewith he was before charged, or chargeable. If a man *grant* to me a rent-charge; and after I *grant* to him, that he ſhall not be ſued for this rent; this is good to bar me of bringing an action, though I may ſtill diſtrain for the rent: And if one *grants* to his leſſee for life or years, that he ſhall not be impeached for waſte; it will be a good diſcharge, and may be pleaded. 7 *H.* 6. 43: *Bro. Grant*, 175: *Keilw.* 88. See 1 *Rep.* 147: 10 *Rep.* 48. and this Dict. tit. *Condition.*

II. Any Natural Perſon, or Corporate Body, (not prohibited by law, as infants, feme coverts, monks, *&c.*) may make a *grant* of lands, and be a *grantor*; and an infant, or woman covert, may be a *grantee*. Though the infant at his full age may diſagree to the *grant*, and the huſband diſagree to the *grant* to his wife. *Perk.* 3, 4, 43. See titles *Infant*: *Baron and Feme*, &c.

But herein the law diſtinguiſhes between ſuch *grants* as are *void*, and only *voidable*; the firſt of which are all ſuch gifts, grants or deeds, made by an infant, which do not take effect by delivery of his hand; as if an infant give a horſe, and no delivery of the horſe with his hand, and the donee take the horſe by force of the gift, the infant ſhall have an action of treſpaſs, for the *grant* was merely void. But if an infant enters into an obligation, makes a feoffment, levies a fine, or ſuffers a recovery, theſe are not void, only voidable. *Perk.* §§ 12, 13, 19. See title *Infant*.

A grant by a feme covert is void, for no act of her's can transfer that intereſt which the inter-marriage has veſted in the huſband. See 2 *New Abr.* 648: *Perk.* §6. See title *Baron* and *Feme*.

Grants made by perſons *non ſanæ memoriæ*, are good againſt themſelves; but they are voidable by their heirs, *&c.* A man that is born dumb, or dumb and deaf, if he have underſtanding, by making ſigns, he may grant his land to another; not one who is born deaf, dumb, and blind alſo. *Co. Lit.* 2. See title *Ideot*. A perſon attainted of treaſon, or felony, may make a deed of gift, or grant, and it ſhall be good againſt all perſons, except the King, and the lord of whom the lands are held; and for relief in priſon, they may be good againſt them likewiſe. *Co. Lit.* 2: *Perk.* § 26, 31.

The grants of perſons under dureſs are *void*; that is, if they were made under an apprehenſion of ſome bodily hurt, or if the grantor were impriſoned without cauſe, and the grantee refuſed to releaſe or diſcharge him, unleſs he made ſuch grant. 2 *Inſt.* 483. But menacing to burn houſes, or ſpoil or carry away the party's goods, are not ſufficient to avoid the grant; for if he ſhould ſuffer what he is threatened, he may ſue and recover damages in proportion to the injury done him. 4 *Inſt.* 485: *Perk.* § 18. See title *Dureſs*.

If there be father and ſon of the ſame name, and the father grants an annuity by his name, without any addition, it ſhall be intended the grant of the father; and if the ſon being of the ſame name with his father grant an annuity without any addition; yet the grant is good, for he cannot deny his deed. *Perk.* § 37.

There are but few (if any) perſons excluded from being grantees, therefore a man attainted of felony, murder, or treaſon, may be a grantee; ſo the King's villein, an alien, one outlawed in a perſonal action, or a baſtard, may be grantees. *Perk.* § 48. A baſtard who is known to be the ſon of ſuch a one, may purchaſe, or be a grantee by ſuch reputed name; for all ſurnames were originally acquired by reputation. *Co. Lit.* 3. 2 *Rol. Abr.* 43, 4.

A feme covert may be a *grantee*, therefore if a rent-charge be granted to a feme covert, and the deed is delivered to her without the privity of her huſband, and the huſband dies before any diſagreement made by him, and before any day of payment, the grant is good, and ſhall not be avoided, by ſaying, that the huſband did not agree, *&c.* but the diſagreement of the huſband ought to be ſhewn. *Perk.* § 43. See title *Baron* and *Feme*.

Although aggregate Corporations are inviſible, and exiſt only in ſuppoſition of law, yet they are capable of taking by grant, for the benefit of the members of the corporation. *Co. Lit.* 9: 1 *Saund.* 344.

GRANTS OF THE KING.—The King's grants are matters of public record: for the King's excellency is ſo high in the law, that no freehold may be given to, nor derived from him, but by matter of record. *Doct.* and *Stud. b.* 1. *d.* 8.—To this end a variety of offices are erected, communicating in a regular ſubordination one with another, through which all the King's grants muſt paſs, and be tranſcribed and enrolled; that the ſame may be narrowly inſpected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. Theſe grants whether of lands, honors, liberties, franchiſes, or aught beſides are contained in charters or letters patent; that is open letters, *literæ patentes*; ſo called becauſe they are not ſealed up, but expoſed to open view, with the great ſeal pendant at the bottom: and are uſually directed or addreſſed by the King to all his ſubjects at large. And therein they differ from certain other letters of the King, ſealed alſo with his great ſeal, but directed to particular perſons and for particular purpoſes: which

which therefore not being designed 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. *c.* 21.

Grants or letters-patent must first pass by *bill*; which is prepared by the Attorney and Solicitor-General, in consequence of a warrant from the crown: and is there signed, that is subscribed at top, with the King's own *sign manual*, and sealed with his *privy signet*, which is always in the custody of the principal Secretary of State: and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, *per ipsum regem*, *By the King himself*.—Otherwise the course is to carry an extract of the bill to the keeper of the *privy seal* who makes out a writ or warrant thereupon to the Chancery, so that the sign manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal: and in this last case the patent is subscribed, *per breve de privato sigillo*; *By writ of privy seal*. But there are some grants which only pass through certain offices, as the *Admiralty* or *Treasury*, in consequence of a sign-manual, without the confirmation of either the signet, the great, or the privy seal. 2 *Comm. c.* 21. See 9 *Rep.* 18: 2 *Inst.* 555.

The manner of granting by the King does not more differ from that by a Subject, than the construction of his grants when made. A grant made by the King *at the suit of the grantee*, shall be taken most beneficially for the King, and against the party; whereas the grant of a Subject is construed most strongly against the grantor. Wherefore it is usual to insert in the King's grants, that they are made, not at the suit of the grantee, but *ex speciali gratiâ, certâ scientiâ, et mero motu regis*; *of the King's special favour, certain knowledge, and mere motion*, and then they have a more liberal construction. *Finch L.* 100: 10 *Rep.* 112.

A Subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress and regress to cut and carry away those profits are also inclusively granted; and if a feoffment of land was made by a lord to his villein, this operated as a manumission, for he was otherwise unable to hold it. *Co. Litt.* 56: *Litt.* § 206. But the King's grant shall not enure to any other intent, than that which is precisely expressed in the grant. As if he grants land to an alien, it operates nothing; for such grant shall not also enure to make him a denizen, that so he may be capable of taking by grant. *Bro. Ab. Patent*, 62: *Finch L.* 110.

When it appears from the face of the grant that the King is mistaken, or deceived, either in matter of fact or of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law, in any of those cases the grant is absolutely void. *Fretm.* 172. For instance, if the King grants lands to one and his heirs-male, this is merely void: for it shall not be an estate-tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue: neither is it a fee-simple as in common grants it would be, because it may reasonably be supposed that the King meant to give no more than an estate-tail: the grantee is therefore, if any thing, nothing more than tenant at will. *Finch*, 101, 2: *Bro. Ab. Estates*, 34; *Patents*, 104: *Dy.* 270: *Dav.* 45: 5 *Rep.* 94: *More* 293.

To prevent deceits of the King with regard to the value of estates granted, it is particularly provided by *stat.* 1 *H.* 4. *c.* 6, that no grant of his shall be good, unless in the grantee's petition for them, express mention be made of the real value of the lands. Other statutes have also been passed relative to this subject. The King's grantee shall not forfeit for non-payment of rent, where the rent has been answered before process issued. *Stat.* 21 *Jac.* 1. *c.* 25. Grants of felons' goods how to be inrolled.—*Stat.* 4 & 5 *W.* & *M. c.* 22. § 1. The Crown restrained from granting lands, except for thirty-one years, &c. Forfeited estates excepted. *Stat.* 1 *Ann. stat.* 1. *c.* 7. §§ 5, 8. See title *Forfeiture*.

Before the statute *de prerogativa Regis*, dowers, advowsons, and other things, have passed by the general *grant of the King*; but by that statute they are to be *granted* in express words. 1 *Rep.* 50.

The King's *grant* is good for himself and successors, though his successors are not named. *Yelv.* 13.

The King may not *grant* away an estate tail in the Crown, &c. And the law takes care to preserve the inheritance of the King for the benefit of the successor. 2 *And.* 154: *Style* 263: See *Jenk. Cent.* 307. A *grant* may not be made by the King which tends to a monopoly, against the interest and liberty of the Subject: Nor can the King make a *grant non obstante* any statute made, or to be made; if he doth, any subsequent statute prohibiting what is *granted*, will be a revocation of the *grant*. 11 *Rep.* 87: *Dyer* 52. Where the King is restrained by the Common law to make a *grant*, if he makes a *grant non obstante* the Common law, it will not make the *grant* good: but when he may lawfully make a *grant*, and the law requires he should be fully apprised of what he *grants*, and not be deceived, a *non obstante* supplies it, and makes the *grant* good: If the words are not sufficient to pass the thing granted, a *non obstante* will not help. 4 *Rep.* 35: *Nelf. Abr.* 904. If a *grant* is made by the King, and a former *grant* is in being of the same thing, if it be not recited, the *grant* will be void: And reciting a void *grant*, when there is another good, may make the King's *grant* void. *Dyer* 77: *Cro. Car.* 143. And there may be a *non obstante* to a former *grant*. 5 *Rep.* 94: *Moor*, 293.

The King's *grants* may be void, by reason of uncertainty; as if debts and duties are granted, without saying in particular what duties, &c. 12 *Rep.* 46. But where there is a particular certainty preceding they shall not be destroyed by any incertainty or mistake which follows: and there is a distinction where a mistake of title is prejudicial to the King, and when it is in some description of the thing which is supplemental only, and not material or issuable. 1 *Mod.* 195. The King *grants* the manor of *D.* which he has by the attainder of a certain person, &c. and in fact the King hath it not so; this *grant* is void. 10 *Rep.* 109.

If the King *grants* a messuage of the value of 5*l.* a year to *A. B.* and it be of the yearly value of 10*l.* the value being in the same sentence with the *grant*, will make it void: Though if it be mentioned in another sentence it may be good. *Jenk. Cent.* 261. The *grant* of the

the King to a Corporation, that they ſhall not be impleaded for lands, nor for any cauſe ariſing there, elſewhere than before themſelves, doth not bind the King where he is party: and the king by his *grant* cannot exclude himſelf from proſecuting pleas of the crown; for it concerns the public government. *Keilw.* 88: *Dyer* 376: *Jenk. Cent.* 190.

The King cannot grant a thing *intruſted to him in reſpect of his ſovereignty*: as, the lapſe of a church, before, or after it becomes void. 2 *Rol.* 187. *l.* 32, 35. Nor purveyance, butlerage, priſage, *&c.* 2 *Rol.* 187. *l.* 35. Nor, the power to make a diſpenſation of a ſtatute. 7 *Co.* 36 *b.* So he cannot grant the lands, or goods, of a recuſant-convict, before the commiſſion returned. 2 *Rol.* 184. *l.* 20. Nor the lands or goods of one attainted of treaſon, before his attainder. *Dyer* 108. *a.*

So the King cannot grant the proſecution, or execution of any penal ſtatute to another; for it is intruſted with him as the head of the public-weal. *R.* 7 *Co.* 37 *a.* Nor, the penalty or benefit of a penal ſtatute, before it be recovered. 7 *Co.* 36 *b*; 37 *a.* Nor any fine or forfeiture of a particular perſon, before he be convicted.—Declared by *Stat.* 1 *W. & M. ſtat.* 2. *c.* 2, that ſuch grant or promiſe is illegal and void. See title *Forfeiture*; and further as to the ſubject of this article, title *King*.

GRANTZ, Is uſed for *grandees*, in the *Par. Roll* 6 *Ed.* 3 *m.* 5, 6.—*Et les d.tz Countz, Barons, & autre* Grantz, *&c.*

GRASS-HEARTH, The *graſing* or turning up the earth with a plough; whence the cuſtomary ſervice for the inferior tenants of the manor of *Amerſden*, in *Oxfordſhire*, to bring their ploughs and do one day's work for their lord, was called *graſs-hearth* or *graſs hurt*: and we ſtill ſay the ſkin is *graſed* or ſlightly hurt, and a bullet *graſes* on any place, when it gently turns up the ſurface of what it ſtrikes upon. *Parech. Antiq.* 496, 497.

GRAVA, A little wood or grove:—*Mon. Ang. Tom.* 2. *p.* 198: *Co. Lit.* 4.

GRAVARE ET GRAVATIO, An accuſation or impeachment. *Leg. Etheld. cap.* 19.

GRAVE. The names of places ending with *grave* come from the Sax. *graf*, a wood, thicket, den or cave.

GRAVERS, Of ſeals and ſtones ſhall give to every one their weight of ſilver and gold, on pain of impriſonment. *Stat.* 7 *Ed.* 3. *cap.* 7; now obſolete.

GRAZIER, *Pecuarius.*] A breeder or keeper of cattle, mentioned in the *Stat.* 25 *Hen.* 8. *cc.* 2, 13. See *Cattle*.

GREAT MEN. This expreſſion is ſometimes, in ancient ſtatutes, underſtood of the Temporal Lords in the higher houſe of Parliament, and ſometimes of the members of the Houſe of Commons. See tit. *Parliament*.

GREAT SEAL OF ENGLAND. See titles *Chancellor*; *Treaſon*.

GREE, Fr. *Gre. i. e.* Good liking or allowance.] *Satisfaction*; as to make *gree* to the parties, is to *agree* with and ſatisfy them for an offence done. And where it is ſaid in our ſtatutes, that judgment ſhall be put in ſuſpence till *gree* is made to the King of his debt; it is taken for *ſatisfaction*. *Stats.* 1 *R.* 2. *c.* 15: 25 *Ed.* 3. *c.* 19.

GREEN CLOTH, Of the *King's Houſhold*, ſo termed from the *green* cloth on the table, is a court of juſtice compoſed of the *Lord Steward*, Treaſurer of the Houſehold, Comptroller, and other officers; to which is committed the government and overſight of the King's court, and the keeping of the peace within the verge, *&c.*

GREENHEW OR GREENHUE, The ſame as *vert* in foreſts, *&c. Manwood, par.* 2. *cap.* 6. *num.* 5. See title *Foreſt*.

GREENLAND COMPANY. A joint ſtock of 40,000 *l.* was, by ſtatute, to be raiſed by ſubſcribers, who were incorporated: And the Company to uſe the trade of catching whales, *&c.* into and from *Greenland*, and the *Greenland* ſeas; they might make By-laws for government, and of perſons employed in their ſhips, *&c. Stat.* 4. & 5 *W.* 3. *cap.* 17. But by *ſtat.* 1 *Ann c.* 16, any perſons who will adventure to *Greenland* for whale fiſhing, ſhall have all privileges granted to the *Greenland Company*. See this Dict. titles *Fiſh*, *Fiſheries, and Fiſhing*; *Navigation Acts*.

GREEN SILVER. There is an ancient cuſtom within the manor of *Writtel*, in the county of *Eſſex*, that every tenant whoſe fore-door opens to *Greenbury*, ſhall pay a halfpenny yearly to the lord, by the name of *green ſilver*. The term *ſilver*, here, muſt mean *rent*.

GREEN-WAX. Is where eſtreats are delivered to the ſheriffs out of the *Exchequer*, under the ſeal of that court, made in *green wax*, to be levied in the ſeveral counties: this word is mentioned in *Stat.* 7 *H.* 4. *c.* 3.

GREENWICH HOSPITAL. A duty was laid on all foreign-built ſhips for the relief of decayed ſeamen in *Greenwich Hoſpital*, *&c.* by *Stat.* 1 *Jac.* 2. *cap.* 18. And every ſeaman ſhall allow out of his wages 6 *d.* a month, for the better ſupport of the ſaid hoſpital: for which duty receivers are appointed, who may depute officers of the cuſtoms, *&c.* to collect the ſame, and examine on oath maſters of ſhips, *&c. Stats.* 8 & 9 *W.* 3. *c.* 23, *&c*: 10 *Ann. c.* 17: 2 *Geo.* 2. *c.* 7. Proviſions for ſecuring the payment of the 6 *d. per* month from privateers. 18 *Geo.* 2. *c.* 31. The governors empowered to grant out-penſions to decrepit ſeamen. 3 *Geo.* 3. *c.* 16.—See titles *Navy*; *Mariner*.

GREVE, Sax. *Gereſa.*] or rather *Reve*. A word of power and authority, ſignifying as much as *Comes* or *vicecomes*; and hence comes our *ſhrieve*, *portreve*, &c. which by the *Saxons* were written *Scirgereſa*, *portgereſa*. *Lambert* in his expoſition of *Saxon* words, *verbo* præfectus, makes it the ſame with *reve*. See *Hoveden Part. poſter. Annal. fol.* 346.

GRILS, A kind of ſmall fiſh. *Stat.* 22 *Ed.* 4. *c.* 2.

GRITH, *Sax.*] Peace. *Terms de ley.*

GRITHBRECHE, Sax. *Grythbryce*, i. e. *Pacis fractio.*] Breach of the peace.—*In cauſis Regis* Grithbreche 100 *Sol. emendabit. Leg. Hen.* 1. *c.* 36

GRITHSTOLE, Sax. *Sedes Pacis.*] A place of ſanctuary. See *Fridſtol*.

GROCERS, Were formerly thoſe who ingroſſed merchandiſe. *Stat.* 37 *Ed.* 3. *c.* 5. It is now a particular and well-known *trade*; and the cuſtom duties for *grocery* wares and drugs, are particularly aſcertained, by ſtatutes. See title *Cuſtoms*; *Navigation-Acts*.

GRONNA, A deep pit, or bituminous place, where turfs are dug to burn. *Hoved.* 438: *Mon. Ang. Tom.* 1. *p.* 243.

GROOM, The name of a ſervant in ſome inferior place; generally applied to ſervants in ſtables: But it hath a ſpecial ſignification, extending to *Groom of the Chamber*; *Groom of the Stole*, &c. which laſt is a great Officer of the King's houſhold, whoſe precinct is properly the King's bed-chamber, where the Lord Chamberlain hath nothing to do; *ſtole* ſignifies a robe of honour. *Lex Conſtitutionis, p.* 182. See *Garcio*.

GROOM-PORTER, An officer or ſuperintendant over the royal *gaming-tables*; in *Latin* he is ſtiled *Aulæ Regiæ Janitor Primarius.*

GROSS, *Groſſus.*] *In groſs*, abſolute, intire, not depending on another; as anciently a *villein in groſs* was ſuch a ſervile perſon as was not appendant or annexed to the Lord, or manor, nor to go along with the tenure as appurtenant to it; but was like the other perſonal goods and chattels of his lord, at his lord's pleaſure and diſpoſal: ſo alſo *advowſon in groſs* differs from *advowſon appendant*, being diſtinct from the manor. *Co. Lit.* 120. See 2 *Comm.* 22.

GROSSE BOIS, Fr. *Gros bois*, i. e. great wood.] Signifies ſuch wood as by the common law or cuſtom is reputed timber. 2 *Inſt.* 642.

GROSS, (COMMON IN, or *Common at large*,) is ſuch as is neither appendant nor appurtenant, to land, but is annexed to a man's perſon; being granted to him and his heirs by deed: or it may be claimed by preſcriptive right, as by parſon of a church, or the like corporation ſole. This is a ſeparate inheritance, entirely diſtinct from any landed property. See tit. *Common.*

GROSS-WEIGHT, The whole weight of goods or merchandiſe, duſt and droſs mixed with them, and of the cheſt, bag, &c. out of which *tare* and *tret* are allowed. *Merchant's Dict.*

GROT, Fr.] A den, cave, or hollow place in the ground; alſo a ſhady woody place, with ſprings of water. *L. Fr. Dict.*

GROUNDAGE, A cuſtom or tribute paid for the ſtanding of a ſhip in a port.

GROUSE, The red and black *heath game*, for preſerving of which, no heath, furze or fern ſhall be burnt on any heaths, moors or other waſtes, between the 2d of *February* and 24th of *June*. *Stat.* 4 & 5 *W. & M. c.* 23. See title *Game.*

GROWME. An engine to ſtretch woollen cloth after it is woven; See the ancient *ſtat.* 43 *Ed.* 3. *c.* 10.

GROWTH-HALFPENNY, A rate ſo called; and paid in ſome places for the *tithe* of every fat beaſt, ox, or other unfruitful cattle. *Clayton's Rep.* 92.

GRUARII, From the Fr. *Gruyer.*] The principal officers of the foreſt in general.

GUARD, Fr. *Garde*, Lat. *Cuſtodia.*] A cuſtody or care of defence. And ſometimes it is uſed for thoſe that attend upon the ſafety of the Prince, called the *life-guard*, &c. ſometimes ſuch as have the education and *guardianſhip* of *infants*; ſometimes for a *writ* touching *wardſhip*, as *droit de garde*, *ejectione de gard*, and *raviſhment de gard.* F. N. B. 139. See title *Guardian.*

GUARDIAN.

FR. *Gardein*, LAT. *Cuſtos*, *Guardianus.*] One who hath the charge or cuſtody of any perſon or thing; but commonly he who hath the cuſtody and education of ſuch perſons as are not of ſufficient diſcretion to guide themſelves and their own affairs, as children and ideots; (uſually the former); being as largely extended in the common law as *Tutor* and *Curator* among the civilians. *Blount.*

I. *The ſeveral kind of Guardians; who may be Guardians; and how Appointed.*

II. *Of the Guardian's Intereſt in the Body and Lands of the Ward, and what he may lawfully do, ſo as to bind the Infant.*

III. *Of the Infant's remedy againſt the Guardian, and of obliging him to Account.*

I. A *Guardian* is either *legitimus*, *teſtamentarius*, *datus*, or *cuſtumarius*: he that is a legitimate or lawful *Guardian* is ſo *jure communi*, or *jure naturali*; the firſt as *Guardian* in *chivalry*, in fact, or in right; the other *de jure naturali*, as father or mother: A *teſtamentary Guardian* was allowed even by the common law; the body of the minor was to remain with him who was appointed, till the age of fourteen; and as for his goods it might be longer, or as long as the teſtator appointed; *Guardianus datus*, was one appointed by the father in his life-time, or by the Lord Chancellor after the death of the father; and where there is a *Guardianſhip* by the common law, the Lord Chancellor can order and intermeddle; but where by ſtatute, he cannot remove either the child, or the *Guardian*: *Guardianſhip* by *cuſtom*, is of orphans by the cuſtom of *London*, and other cities and boroughs; and in copyhold manors, by the cuſtom it may belong to the lord of the manor to be guardian himſelf, or to appoint one. 3 *Salk. Rep.* 176, 177.

The *Guardianſhips* by the *common law*, were *Guardians in chivalry*; *Guardians by nature*, ſuch as the father or mother; *Guardians in ſocage*, who are the next of blood, to whom the inheritance cannot deſcend, if the father does not order it otherwiſe; and *Guardian* becauſe of *nurture*, when the father by will appoints one to be *Guardian* of his child. *Co. Lit.* 18: 2 *Inſt.* 305: 3 *Rep.* 37.

The ſeveral Guardians now in uſe, may be thus enumerated: 1 By Nature; 2. For Nurture; 3. In Socage; 4. By Statute; 5. By Cuſtom of *London* and other cities and boroughs; (which however, from particular exceptions, do not fall under the general law.) 6. By Election of the Infant; 7. By appointment of the Chancellor; 8. *Ad litem*; 9. By appointment of the Eccleſiaſtical Court.

1. The Father and (in ſome caſes) the Mother of the child are Guardians by nature. For if an *eſtate* be left to an infant, the father is by common law the Guardian, and muſt account to his child for the profits. 1 *Inſt.* 88. But an executor may not pay to a father a *legacy* left to an infant; 1 *P. Wms.* 285. See titles *Executor*: *Legacy.* And with regard to daughters it ſeems by conſtruction of *ſtat.* 4 & 5 *P. & M. c.* 8, that the father might by deed or will aſſign a Guardian to any woman child under the age of 16: and if none be ſo aſſigned, the mother ſhall in this caſe be *Guardian.* 3 *Rep.* 39.

The ſaid *ſtat.* 4 & 5 *P. & M.* provides, under ſevere penalties, as fine and impriſonment for years, "That nobody ſhall take away any maid or woman child unmarried, being within the age of ſixteen years, out of or from the poſſeſſion, cuſtody or governance, and againſt the will of the father of ſuch maid or woman child, or of ſuch perſon or perſons to whom the father of ſuch maid, or woman child by his laſt will and teſtament, or by any other act in his life-time, hath [appointed] or ſhall appoint, aſſign, bequeath, give or grant, the order, keeping, education and governance of ſuch maid or woman child." See this Dict. titles *Marriage*: *Rape.*

The

The direct object of the above ſtatute, was to prevent the taking away or marrying maidens under 16, againſt the conſent of their parents. But the ſtatute has prohibited it in terms which imply that the cuſtody and education of ſuch females ſhould belong to the father and mother, or the perſon appointed by the former. It is obſervable on this ſtatute that though the title is confined to maidens being *inheritors*, and the preamble ſpeaks only of ſuch as be heirs apparent, or have real or perſonal eſtate, yet the enacting part mentions maidens under 16 generally. See 1 *Inſt.* 88 *b. n.* 14. For determinations on this ſtatute ſee *Ratcliff's Ca.*; 3 *Co.* 57: *Poph.* 204: *Cro. Car.* 465: 1 *Sid.* 362: 2 *Mod.* 128: 3 *Mod.* 84, 168.

Many books, eſpecially ſome of modern date, are very indiſcriminate when they mention Guardianſhip by *nature*. Sometimes the Father is ſtiled Guardian by nature, of his *heir apparent*, for the time, in general terms; ſuch as at firſt appear to intimate that no other anceſtor except the father, not even the mother, is entitled to the Guardianſhip in that right: and accordingly *Comyns* makes this inference from the language of the books; though perhaps too haſtily. See *Com. Dig.* tit. *Guardian*, (C): 3 *Co.* 38. *a*: 6 *Co.* 22 *b*; there cited. In other caſes it appears that the father being dead, the mother may have a writ of treſpaſs *quare conſanguineum et hæredem cepit*; which imports that *ſhe* may alſo be Guardian by nature of her heir apparent. The ſilence in one book as to other anceſtors, and the expreſs excluſion of the grandfather in another book, without the neceſſary explanation, tend to an opinion that all anceſtors, except the father and mother, are really excluded. See 1 *Inſt.* 84 *b*: 6 *Co.* 22 *b*. However in another place it appears that the grandfather and other anceſtors may be Guardians by nature of their heirs apparent, as well as the father and mother; though being liable to be poſtponed to others, where the father is not, both they and the mother have a a title diſtinguiſhable from his, in point of inferiority. 3 *Co.* 38 *a*. Further, ſome modern books do not confine Guardianſhip by nature to *heirs apparent*, but denominate the father and mother the natural Guardians of *all* their children: and ſometimes even the parents of illegitimate iſſue, ſeem to have been treated as their natural Guardians. 1 *Vez.* 158: 2 *Atk.* 15, 70: 9 *Mod.* 117. Sometimes alſo the Guardianſhip of female children under 16, as impliedly given to the father and mother, by the above mentioned *ſtat.* 4 & 5 *P. & M. c.* 8, is ſaid to be *jure naturæ*. See the *ſtat.* & 3 *Co.* 38 *b.*

On the whole it ſeems, that not only the Father but alſo the Mother and every other anceſtor may be Guardians by nature, though with conſiderable differences, ſuch as denote the ſuperiority of the father's claim. The father hath the firſt title to Guardianſhip by nature, the mother the ſecond: as to other anceſtors, if the ſame infant happens to be heir-apparent to two, perhaps priority of the poſſeſſion of the perſon of the infant might probably be allowed to decide the queſtion. While the tenure by Knight's ſervice continued there was another difference, which more ſtrongly marked the ſuperiority of the father's claim: for he was intitled to the cuſtody of the infant's perſon even againſt the Lord in chivalry; a preference not allowed to the mother or other relations; and this diverſity appears to reconcile the determinations in the old books, which apply only to caſes in which the right to the infant's perſon was in conteſt with the lord in chivalry. 3 *Co.* 38 *b. Ratcliffe's Ca.* According to the *ſtrict* language of our law, only an heir apparent can be the ſubject of Guardianſhip by nature: which reſtriction is ſo true that it hath even been doubted, whether ſuch Guardianſhip can be of a daughter whoſe heirſhip, though denominated *apparent*, yet being liable to be ſuperſeded by the birth of a ſon, is in effect rather of the *preſumptive* kind. 3 *Co.* 38 *b*: 1 *Inſt.* 84 *a*. Therefore when the term of Guardianſhip by nature is extended to children in general, or to any beſides ſuch as are heirs apparent, it is not conformable to its legal ſenſe, but muſt be underſtood to have reference to ſome rule independent of the common law; as the dictates of nature, and the principles of general reaſon. Yet we muſt not however conclude that parents have not a right to the cuſtody of their other children, for the law gives them this cuſtody till the age of 14 by the Guardianſhip for *nurture*, next mentioned, which though it differs from that by nature, not only in name, but alſo in duration, and ſome other particulars, is founded on a like conformity to the order of nature. 1 *Inſt.* 88 *b. n.* 12.

This Guardianſhip by nature continues till the infant attains the age of 21; it extends no further than the cuſtody of the infant's *perſon*. *Carth.* 386: 1 *Inſt.* 84. It yields, as to the cuſtody of the perſon, to Guardianſhip in ſocage, where the title to both Guardianſhips concur in the ſame individuals. 1 *Inſt.* 88 *b.* (See *poſt* 3.) but Guardianſhip in ſocage ending at 14, it ſeems that after that age the father, or other anceſtor having a like title to both Guardianſhips becomes Guardian by nature till the infant's age of 21. See *Carth.* 384. Laſtly the father may diſappoint the mother and other anceſtors of the Guardianſhip by nature, by appointing a teſtamentary Guardian under the *ſtats.* 4 & 5 *P. & M.* & 12 *Car.* 2. See *poſt.* 4.

2. *Guardians for nurture* are of courſe the Father or Mother till the infant attains the age of 14 years. *Moor*, 738: 3 *Rep.* 38. In default of father or mother the Ordinary uſually aſſigns ſome diſcreet perſon to take care of the infant's perſonal eſtate, and to provide for his maintenance and education. 2 *Jones*, 90: 2 *Lev.* 163. See *poſt.* 9. This Guardianſhip by nurture, only occurs where the infant is without any other Guardian; and it has been ſaid that none can have it except the father or mother. 8 *E.* 4. 7 *b*: *Bro. Gard.* 70: 3 *Co.* 38. It extends no further than the cuſtody and government of the infant's perſon; and determines at 14 in the caſe both of males and females. *ibid. Comyns* refers to *Fleta*, as if according to that ancient book, grandfathers and great grandfathers might be Guardians by nurture. But the ſtatute cited by him doth not point at this ſpecies of Guardian, it deſcribing the *patria poteſtas* in general, and being apparently borrowed from the text of the *Roman* Law; nor will it bear the leaſt application to Guardianſhip as our own law regulates it. 1 *Inſt.* 88 *b. in n.* 13. *ad fin.*

3. *Guardians in Socage*, are alſo called Guardians by the common law. Wardſhip is incident to tenure in ſocage, but of a nature very different from that which was formerly incident to knight-ſervice. For if the inheritance deſcend to an infant under 14, the wardſhip of him does not, nor ever did, belong to the lord of the fee: becauſe in this tenure no military or other perſonal ſervice being required, there was no occaſion for the lord to take the

rofits in order to provide a proper ſubſtitute for his inant tenant. See this Dict. title *Tenure*.

This kind of Guardianſhip takes place only when the minor is entitled to ſome eſtate in lands; and then by the common law the Guardianſhip devolves upon his Next-of-kin, to whom the inheritance cannot poſſibly deſcend; as where the eſtate deſcended from his father, in this caſe his uncle by the mother's ſide cannot poſſibly inherit this eſtate, and therefore ſhall be the Guardian. *Litt.* § 123. For the law judges it improper to truſt the perſon of an infant in his hands, who may by poſſibility become heir to him; that there may be no temptation, nor even ſuſpicion of temptation, for him to abuſe his truſt. 1 *Comm. c.* 17. And though this proviſion has been conſidered as ariſing from harſh and barbarous principles, experience ſhews that it is founded in ſound policy and humanity. See 2 *P. Wms.* 262: 1 *Inſt.* 88.

Guardianſhip in ſocage, like that in chivalry, ſprings wholly out of tenure. It is for this reaſon that the title to it cannot ariſe, unleſs the infant is ſeiſed of lands, or other hereditaments, *lying in tenure*, holden by ſocage. 1 *Inſt.* 87 *b*. Like Guardianſhip in chivalry, it is deemed to take place on a deſcent only, though the contrary has been argued. 2 *Mod.* 176. The title to this Guardianſhip is without any diſtinction between the whole and the half blood. If there are two or more diſintereſted relations in equal degree, he who firſt gains poſſeſſion of the heir ſhall have the cuſtody of him; except where they happen to be brothers or ſiſters, or to be the infant's lineal anceſtors, the law preferring the eldeſt in the former caſe, and the father or other male anceſtor in the latter. But if the infant derives lands both by deſcent *ex parte paternâ* and *ex parte maternâ*, in which caſe it may be poſſible not to find any next of kin incapable of inheriting to the infant, the next of kin on either ſide firſt ſeizing the infant is entitled to the cuſtody of his perſon; and the cuſtody of the lands coming *ex parte paternâ* goes to the maternal heir, and ſo *vice-verſâ*. Should, however, the infant derive lands by deſcent in ſuch a way, as lets in both the paternal and maternal blood ſucceſſively to the inheritance, but with a preference of the former, it ſeems unſettled who ſhall have the Guardianſhip. If the perſon entitled to be Guardian in ſocage is himſelf under cuſtody of a Guardian, the latter is entitled to the cuſtody of both, to the former in his own right, and to the latter *pur cauſe de Ward*, that is, in right of his wardſhip of the former; A ſpecies of Guardianſhip diſtinct from all others above enumerated. And it ſeems that only Guardian in chivalry and in ſocage could be Guardian *pur cauſe de Ward*. See 2 *Ro. Ab.* 35, 40: *Vaugh.* 184.

Guardianſhip in ſocage, being wholly for the infant's benefit and not in any reſpect for the Guardian's profit, is not a ſubject either of alienation, forfeiture or ſucceſſion, as Wardſhip in chivalry was; and conſequently if the Guardian in ſocage becomes incapable or dies, the Wardſhip devolves on the perſon next in degree of kindred to the infant, not being inheritable to him. Some ancient caſes ſeem to ſhew that under certain circumſtances Guardianſhip in ſocage might be aſſignable. See *F. N. B.* 143. *P.*: *Fitz. Ab. Garde* 161. But according to the doctrine and practice of later times, the acknowledged qualities of Guardianſhip in ſocage being, that it is a perſonal truſt wholly for the infant's benefit, and neither tranſmiſſible by ſucceſſion nor deviſable, they are not conſiſtent with its being aſſignable; and there is Lord Chief Juſtice *Vaughan*'s authority for ſaying, that even in his time common experience proved the contrary. See *Plowd.* 293: *Vaugh.* 181: *Gilb. Rep. Eq.* 177.

This Guardianſhip extends not only to the perſon and ſocage-eſtates of the infant, but alſo to his hereditaments not lying in tenure; and even to his copyhold eſtates, unleſs there is a ſpecial cuſtom for the Lord's appointing a Guardian of them. 1 *Inſt.* 87 *b*: 1 *Ro. Ab.* 40; *Egleton's Ca*: *Hutt.* 17: 2 *Lutw.* 1181. But whether the Guardian in ſocage is intitled to take into his cuſtody the infant's perſonal eſtate, is not aſcertained by any expreſs authority. It ſeems however that perſonalty is included except where by the cuſtom of a particular place it happens to be liable to a different cuſtody: and this opinion is founded on the idea that the cuſtody of an infant's perſon draws after it the cuſtody of every ſpecies of property for which the law hath not otherwiſe provided: which receives ſome countenance from the inſtances of copyholds, and hereditaments not lying in tenure: for including which it will be difficult to account by any other reaſon than that above given for including perſonalty. It is alſo ſtrongly confirmed by the manner in which the *ſtat.* 12 *C.* 2. *c.* 24, regulates the power of the Guardian, which it enables a father to appoint: after authoriſing ſuch Guardian to take the cuſtody of the infant's *perſonal eſtate*, as well as of his lands, tenements, and hereditaments, it provides that he may bring ſuch action or actions in relation thereunto, as by law a Guardian in common ſocage might do; words almoſt neceſſarily importing that the perſonal eſtate is equally an object of the cuſtody of Guardian in ſocage with the infant's real property; though a contrary opinion is hinted by *Vaughan.* C. J. See *Vaugh.* 186.

Guardianſhip in ſocage is ſuperſeded both as to the body and lands, if the father exerciſes his power, of appointing a teſtamentary or other Guardian according to *ſtat.* 12 *C.* 2. *c.* 24. (See *poſt.* 4.) And regularly it ends, when the infant whether male or female, attains 14: though ſome ſay that this muſt be underſtood only where another Guardian, either by election of the infant or otherwiſe, is ready to ſucceed; and that the Guardianſhip in ſocage continues in the mean time. *Andr.* 313. At that age however it ſeems the heir may ouſt the Guardian in ſocage and call him to account for the rents and profits. *Litt.* § 123: *Co. Litt.* 89. It was in this particular of Wardſhip as alſo in that of marriage, and in the certainty of the render or ſervice, that the ſocage tenures had ſo much the advantage of the military ones. See tit. *Tenure*. But as the Wardſhip ceaſed at 14, this diſadvantage attended it; that young heirs being left at ſo tender an age to chooſe their own Guardians till 21, might make an improvident choice. Therefore when almoſt all the lands in the kingdom were turned into ſocage tenures, by the *ſtat.* 12 *Car.* 2. *c.* 24, that ſtatute, gave the power of appointing the teſtamentary Guardian next mentioned. If no ſuch appointment be made, the Court of Chancery will frequently interpoſe, and name a Guardian, to prevent an infant heir from improvidently expoſing himſelf to ruin. 2 *Comm.* 88. *c.* 6. See *poſt.* 7.

4. *The Statute* 12 *Car.* 2. *c.* 24, conſidering the imbecility of judgment in children of the age of 14, and the abolition of Guardianſhip in chivalry; (which laſted till 21. See *poſt.* 11;) enacts, that any Father, under age or of full age, may by deed or will atteſted by two witneſſes, diſpoſe

diſpoſe of the cuſtody of his child, either born or unborn, to any perſon, except a popiſh recuſant, either in poſſeſſion or reverſion till ſuch child attains the age of 21. Theſe are called Guardians by ſtatute; or Teſtamentary Guardians.

The ſubſtance of this Parliamentary regulation is, that the father ſhall have the power, though under 21.—That he ſhall have it as to *all* his children under 21, and unmarried at his deceaſe, or born after—That he may appoint any perſon except popiſh recuſants—That the appointment may be either in poſſeſſion or remainder—That he may appoint the Guardianſhip to laſt till 21; or any *leſs* time—That the appointment ſhall be effectual againſt all claiming as Guardians in ſocage or otherwiſe—That the Guardian ſo appointed ſhall have raviſhment of ward or treſpaſs, and recover damages for the Ward's benefit—That the Guardian ſhall have the cuſtody of the infant's eſtate both real and perſonal, and have the ſame actions in relation to them as a Guardian in ſocage.—Finally, that the ſtatute ſhall not prejudice the cuſtom of *London*, or any other city or corporate town. For caſes on the conſtruction of this ſtatute, See *Vin. Ab.* and *Com. Dig.* tit. *Guardian*. The nature of this new kind of Guardianſhip, which the ſtatute profeſſedly models after that in ſocage, except as to duration, is particularly diſcuſſed in the caſe of *Bedell* v. *Conſtable*; *Vaugh.* 177; and in Lord *Shaftesbury's Caſe*, 2 *P. Wms.* 102: *Gilb.* 172.

A father cannot appoint Guardians under this ſtatute to a natural child; but where he has named Guardians by his will to an illegitimate child, the Court of Chancery will appoint the ſame perſons Guardians without any reference to a maſter for his approbation. 2 *Bro. C. R.* 583.

Though there is no decided caſe that Guardians can be appointed for a child, by a *Stranger*, during the life of the parent, yet the law will take care that the child ſhall be educated according to his expectations; in caſes where the child is benefited by the will, &c. of ſuch ſtranger. See *Powell* v. *Clever*, 2 *Bro. C. R.* 500.

A grandfather cannot appoint Guardians to his grandſon under this ſtatute: but he may give his eſtate to him on condition that certain perſons be his Guardians; and if the father of the legatee do not ſubmit to the will, the Chancery will make the father's oppoſition work a forfeiture of his ſon's eſtate. *Ambl.* 306.

5. We may here juſt mention that there is another ſpecies of *cuſtomary Guardianſhip* beſides that in *London* and certain cities and boroughs; where by the ſpecial cuſtom of a manor the Lord names, or is himſelf the Guardian of an infant copyholder. See *Com. Dig.* tit. *Copyhold.* (K. 5.)—The nature of this Guardianſhip, depends wholly on the cuſtom of the particular manor; and though it is not expreſsly ſaved by the *ſtat.* 12 *Car.* 2; yet it has been held that the father's appointment of the cuſtody of his child under that ſtatute, will not extend to copyhold eſtates. 2 *Lutw.* 1181: 3 *Lev.* 395: *Comb.* 253.

6. The right of *electing* a Guardian by an infant, ariſes only when from a defect in the law, (or rather in the execution of it,) the infant finds himſelf wholly unprovided with a Guardian. This may happen either *before* 14, when the infant has no ſuch property as attracts a Guardianſhip by tenure, and the father is dead without having executed his power of appointment, and there is no mother; or *after* 14, when the cuſtody of the Guardian in ſocage terminates, and there is no appointment by the father under the *ſtat.* 12 *Car.* 2. Lord *Coke* only takes notice of ſuch election where the infant is under 14; and as to this omits to ſtate how, and before whom it ſhould be made; ſee 1 *Inſt.* 87 *b*; nor does this defect ſeem ſupplied by any prior or cotemporary writer. As to a Guardian after 14, it appears from the ending of Guardianſhip in ſocage, at that age, as if the common law deemed a Guardian afterwards unneceſſary. However ſince the *ſtat.* 12 *Car.* 2. *c.* 24, it has been uſual in defect of an appointment under the ſtatute, to allow the infant to elect one for himſelf; and this practice appears to have prevailed even in ſome degree before the Reſtoration. Such election is ſaid to be frequently made before a Judge on the circuit. 1 *Veſ.* 375. But this form does not ſeem eſſential. The late Lord *Baltimore* when he was turned of 18, having no Teſtamentary Guardian, and being under the neceſſity of having one for ſome ſpecial purpoſes relative to his proprietary government of *Maryland*, named a Guardian by deed; a mode adopted by the advice of Counſel—It ſeems in fact as if there was no preſcribed form of an infant's electing a Guardian after 14, any more than there is before, and therefore election by parol, though unſolemn, might be legally ſufficient. The deficiency in precedents on this occaſion is eaſily accounted for; this kind of Guardianſhip being of very late origin, unnoticed as it ſeems by any writer before *Coke* except *Swinburn*; (*Teſtam. edit.* 1590. 97 *b*;) and there being yet no caſes in print to explain the powers incident to it, or whether the infant may change a Guardian ſo conſtituted by himſelf. *Coke*, though profeſſing to enumerate the different ſorts of Guardianſhip, omits this in one place; whence perhaps it may be conjectured that in his time it was in ſtrictneſs ſcarcely recogniſed as legal. 1 *Inſt.* 88 *b.* in *n.*

7. As to Guardian by appointment of the Lord *Chancellor*; it is not eaſy to ſtate how this juriſdiction was acquired: It is certainly of no very ancient date, though now indiſputable. The firſt inſtance of ſuch a Guardian, appointed on petition without bill, was in the year 1696, in the caſe of one *Hampden*. But ſince that time the Court of Chancery has exerciſed this power, without its being once called in queſtion; therefore in the caſe of Lady *Teynham* v. *Leonard*, in *Dom. Proc. An.* 1724, the Counſel for the reſpondent ſtated it as a thing fixed, that the Lord Chancellor was entruſted with that part of the Crown's prerogative, which concerned the Guardianſhip of infants. *Bro. P. C.* Under the ſame idea too, the marriage Act, *ſtat.* 26 *Geo.* 2. *c.* 33, (§ 11,) refers to the Chancellor for the appointment of a Guardian, to conſent to marriage, where the infant is without a Guardian and the mother is not living. 1 *Inſt.* 88 *b.* in *n.* See alſo 1 *Bro. C. R.* 556. The Court never appoints a Guardian to a woman after marriage. 1 *Vez.* 157.

8. All Courts of Juſtice have a power to aſſign a *Guardian* to an infant to ſue, or defend actions, if the infant comes into court and deſires it: or a Judge at his chambers, at the deſire of the infant, may aſſign a perſon named by him to be his *Guardian*; but this laſt is no record until entered and filed by the clerk of the rules: *F. N. B.* 27. *L*: 1 *Inſt.* 88 *b. n.* (16): 135 *b. n.* (1): 1 *Lil.* 656: 2 *Leon.* 238. And this is called a Guardian *ad litem*. See title *Equity*.

9. Guardian

9. Guardian by appointment of the *Eccleſiaſtical Court* ſeems now perfectly inſignificant, and merely on a par with other Guardians *ad litem*. The right of appointment is however *claimed* by that Court, as to perſonal eſtate; and, if there is no other Guardian by tenure or otherwiſe, for the perſon alſo; but the following detail will ſhew with how little effect.

Swinburne takes notice of ſuch a Guardian; but confines his obſervations on the appointment, and his extent of power, to the cuſtom within the province of *York*. *Teſtam.* 1*ſt ed.* 99 *b*. In a caſe in the court of *K. B.* Lord *Hale* admitted the right of the Eccleſiaſtical Court to appoint a Curator of the perſonal eſtate; and after that Judge's death the Court inclined to the ſame opinion. 2 *Lev.* 162: *T. Jo.* 90. In another caſe, ſoon after, the ſame court allowed the right as to the infant's portion but denied it over the perſon. 3 *Keb.* 384. In the next caſe, the queſtion as to the right was largely debated on a plea in prohibition. This alleged that by the common law, uſed and approved in *England*, if any perſon by his will deviſes any goods to his children, the Ordinary before whom the will is proved hath uſed to commit the cuſtody of the ſons and their portions till 14, and of the daughters and their portions till 12, except where they are in the cuſtody of any other by reaſon of tenure, or by the father's appointment: and if any perſon detained ſuch infants, or their portions, the Ordinary hath alſo uſed to compel the delivery of them by Eccleſiaſtical cenſures. 2 *Lev.* 217. But on a demurrer this plea was over-ruled, and the prohibition ordered to ſtand, the latter being founded on the libel in the ſuit in the Eccleſiaſtical Court, which had ſtated the right in a more extenſive way, *viz.* that by the Eccleſiaſtical Law, every perſon having the tuition of any infant under age, by the will of the father, or *per judicem competentem*, ought to have the cuſtody of the infant and ſuit in the Eccleſiaſtical Court for the detainer. After this caſe nothing appears in the books on the ſubject for a long time, but a curſory notice by *Lee, J.* of the Eccleſiaſtical Court's appointment without objection, ſaying the courſe of that court is, that if the infant is under ſeven years of age, they chooſe a *Curator*, but if he is ſeven, he chooſes. *Fitzgib.* 164. By a looſe note of a later caſe it appears that Lord *Hardwicke* ſaid, that only Guardians *ad litem* can be appointed by the Eccleſiaſtical Court. 14 *Vin. Abr.* 176. *pl.* 7. in *n*. In another caſe however, reported more at length, the ſame Judge reprobated it as a preſumption in the Eccleſiaſtical Court to appoint a Guardian of the perſon and eſtate, and declared their appointment except when a ſuit was depending to be an interference with his power as Chancellor; and even recommended to the Attorney General to conſider whether a *quo warranto* would not lie in ſuch a caſe againſt the Eccleſiaſtical Court. 3 *Atk.* 631. In a ſubſequent caſe in *B. R.* (Miſs *Catley's*) the power of appointment in the Eccleſiaſtical Courts was conſidered as confined to Guardians *ad litem*, and therefore perfectly inſignificant. 3 *Burr.* 1436. See 1 *Inſt.* 88 *b*. in *n*.

The above recapitulation, as to Guardians, is excluſive of any thing relative to the Royal family. See the arguments in the caſe on the King's right, in reſpect to the education and marriage of his grand-children, which was referred to the Judges in the reign of *Geo.* I. *Fort.* 401. See alſo the *ſtat.* 12 *Geo.* 3. *c.* 11; and this D. tit. *King*.

The following miſcellaneous obſervations may ſerve further to illuſtrate the above propoſitions:

Guardianſhip is a thing cogniſable by the temporal courts, where a deviſe is made of it, which courts are to judge whether the deviſe be purſuant to the ſtatute. 1 *Vent.* 207.

The huſband of a woman under age cannot diſavow a *Guardian* made by the court for his wife. 1 *Vent.* 185. An infant, it is ſaid, cannot revoke the authority of the *Guardian:* but the court may diſcharge one *Guardian*, and aſſign another at their diſcretion; and the juſtices of *Niſi prius*, *&c.* may aſſign a new *Guardian*. *Palm.* 252: *Style* 456: *Noy.* 49: 1 *Danv. Abr.* 604.

The eldeſt ſon of the half blood ſhall be Guardian in ſocage, to a ſon by a ſecond venter; and when the minor attains the age of fourteen years, he may chuſe his Guardian before a judge, at his chambers, or in court, or in the Chancery. *Cro. Jac.* 219. Though a father is Guardian by nature, yet a man may be Guardian to an infant againſt his father, for prevention of waſte; which is a forfeiture of Guardianſhip. *Hard.* 96.

If a woman hath iſſue a ſon by a former huſband, and marries a ſecond huſband, ſeiſed of ſocage lands, by whom ſhe has iſſue another ſon, and the huſband and wife die, leaving the ſecond ſon under fourteen, his brother of the half blood ſhall be Guardian in ſocage; as next of kin, to whom the inheritance cannot deſcend. *Cro. Eliz.* 825: 2 *And.* 171: *Moor* 635: 2 *Jon.* 17.

An infant, ideot, lunatick, *non compos*, one blind and dumb, deaf and dumb, or leper removed, cannot be Guardian in ſocage. *Co. Lit.* 88 *b*.

It is clearly agreed, That the King, as *pater patriæ*, is univerſal Guardian of all *infants*, *ideots* and *lunaticks*, who cannot take care of themſelves; and as this care cannot be exerciſed otherwiſe than by appointing them proper curators or committees, it ſeems alſo agreed, that the King may, as he has done, *delegate the authority to his Chancellor*; therefore at this day, the *court of Chancery* is the only proper court which hath juriſdiction in *appointing* and *removing Guardians*, and in *preventing them* and *others* from *abuſing* their *perſons* or *eſtates*. 2 *Inſt.* 14: 4 *Co.* 126: *Staundf. Præ.* 37. See title *Ideots* and *Lunaticks*, and *ante* 7.

And as the Court of Chancery is now inveſted with this authority, hence in every day's practice we find that court determining, as to the right of Guardianſhip, who is the next of kin, and who the moſt proper *Guardian*; as alſo orders are made by that court on petition, or motion, for the proviſion of infants during any diſpute herein; as likewiſe Guardians removed or compelled to give ſecurity; they and others puniſhed for abuſes committed on infants, and effectual care taken to prevent any abuſes intended them in their perſons or eſtates; all ſuch wrongs and injuries being reckoned a contempt of that court, it having by an eſtabliſhed juriſdiction, the protection of all perſons under natural diſabilities. 2 *Mod.* 177.

II. Though *Guardianſhip in Chivalry* is now aboliſhed by *ſtat.* 12 *C.* 2. *c.* 24, already ſo often mentioned; it may be uſeful as well as curious to conſider the following ſummary concerning it. See 1 *Inſt.* 88 *b*; *n.* 11.

This guardianſhip could only be where the eſtate veſted in the infant by *deſcent*.—All males under 21 at the anceſtor's death were liable to it; but not females unleſs they were under 14.—It extended not only to

the perſon of the infant, but alſo to all ſuch of his lands and tenements as were within the Guardian's ſeigniory; and if the King was Guardian in reſpect of a tenure *in capite*, then to the whole of the infant's eſtate of whomſoever holden, whatever the tenure; and whether lying in tenure or not.—If the infant heir held lands by knight's ſervice of ſeveral lords, each had the wardſhip of the land within his ſeigniory; and as to the body, the wardſhip of it belonged to that lord of whom the tenure was moſt ancient, he being ſtiled the lord by priority, and the others lords by poſteriority: but if any lands of the infant were holden of the King by knight's ſervice *in capite*, he was intitled to the wardſhip both of the infant's body and all his lands ſo held of the crown or of others by knight's ſervice.

This guardianſhip continued over males till 21, over females till 16 or marriage, when it determined; if the tenure were of a Subject, the heir might enter on the lord immediately; but if the King had the wardſhip, then the heir was not entitled to take poſſeſſion of the land without ſuing for livery to the Crown, which was a proceſs both nice and expenſive. See 1 *Inſt.* 77 *a*.—It had a preference with reſpect to the cuſtody of the infant's body over every other ſpecies of wardſhip, except only that of the father where the infant was his heir apparent; even the mother being excluded.—It entitled the lord to make ſale of the marriage of the infant, ſubject only to the reſtriction of not diſparaging; and if the infant refuſed the marriage tendered by the lord, or married after ſuch a tender and againſt the lord's conſent; in the former caſe the infant was liable to the payment of a ſum equal to the value of the marriage, that is to the profit which the lord might have made by the ſale of it; in the latter caſe, the heir female paid the ſame ſum as for a refuſal, but the heir male was charged the double value, which was called a forfeiture of marriage.—The Guardian in chivalry was not accountable for the profits made of the infant's land during the wardſhip, but received them for his own private emolument, ſubject only to the bare maintenance of the infant.—Laſtly, Guardianſhip in chivalry being deemed more an intereſt for the profit of the Guardian, than a truſt for the benefit of the Ward, was ſaleable and transferrable like the ordinary ſubjects of property, to the beſt bidder; and if not diſpoſed of was tranſmiſſable to the lord's perſonal repreſentatives.

The above general explication of the nature of wardſhip in chivalry may well excite a ſtrong idea of the evils neceſſarily incident to it: and it is natural to wonder how this ſpecies of Guardianſhip ſhould be patiently endured for ſeveral centuries after the conqueſt, and even remain unreformed by any effectual checks to ſoften its rigour till it was wholly taken away at *the Reſtoration*; the true period when *Britons* gained more real liberty, than any other that can be named in hiſtory; by no means even excepting *the Revolution*: and of this propoſition the *Habeas-corpus*-act and the ſtatute for aboliſhing *tenures* are moſt pregnant proofs; ſtatutes both made in the reign of *Car.* II. and as far preferable to the vaunted *Bill of rights*, as practical liberty is to theoretical doctrines.

Perhaps the facility of evading this Guardianſhip in chivalry, which could only be on a *deſcent*, may account both for its being ſo long ſubmitted to, and for its producing conſequences leſs extenſively pernicious than ſeem almoſt neceſſarily incident to it. Various modes of preventing the deſcent were practiſed. One was enfeoffing the heir in the anceſtor's life time: another, the enfeoffing ſtrangers on condition to pay a ſum, far exceeding the value of the land, at a time ſo fixed as to correſpond with the heir's coming of age, who might then enter for breach of the condition. See *Stat. Marlebridge*, 52 *H.* 3 *c.* 6: 2 *Inſt.* 109. When theſe modes were declared to be fraudulent, and therefore checked by the ſaid ſtatute, a third more fit to attain the ſame end ſucceeded; for *uſes* and *truſts* being invented, and Guardianſhip in chivalry being only of *legal* eſtates, it became the faſhion to make feoffments to uſes, as well for preventing wardſhip, as for avoiding reliefs and forfeitures, and indirectly exerciſing the power of deviſing; and thus the heir taking only the uſe of the land on a deſcent, inſtead of becoming the legal tenant, he of courſe eſcaped being in wardſhip. This evaſion continued in practice till 4 *Hen.* VII, when the Legiſlature thought proper once more to interfere, in favour of the lord, and made the heir of *ceſtui que uſe* liable to wardſhip in chivalry. See *Stat.* 4 *Hen.* 7. *c.* 17: 1 *Inſt.* 84 *b*: 2 *Inſt.* 110. For ſome time after this there ſeems to have been no other means of preventing wardſhip in chivalry than the anceſtor's making a leaſe for life, with remainder to his heir apparent in fee; but this protection of wardſhip in chivalry was ſoon followed by a great diminution of its profits, for in the ſucceeding reign the ſtatutes of Wills gave the power of deviſing, ſo as to deprive the lord of the wardſhip of two thirds of the land holden by knight's ſervice: in which contracted ſtate this odious ſpecies of Guardianſhip was ſuffered to languiſh, till it was entirely aboliſhed, with the other oppreſſive appendages of military tenures, by the famous ſtatute 12 *Car.* 2. *c.* 24.—See 2 *Inſt.* 110, 111: *Smith's Rep. Angl.* (*Engliſh edit.*) *b.* 3. *c.* 5; *Staunf. P. C.* 4 *Inſt.* 188: *Cromp. Juriſd.* 112 *a*.—125: *Mad. Exch.* 221: *Ley* on *Wards*, and *Liv*: 1 *Inſt. lib.* 2. *c.* 4: and the abridgments tit. *Garde* and *Gardian*.

Guardian in Socage ſhall make no waſte, nor ſale of the inheritance, but keep it ſafely for the heir: and where there hath been ſome doubt of the ſufficiency of a *Guardian* in ſocage, the Chancery hath obliged him to give ſecurity. 2 *Mod.* 177. Alſo a Guardian may be ordered to enter into ſecurity by recogniſance, not to ſuffer a female infant to marry whilſt in his cuſtody; and to permit other relations to viſit her, *&c.* 2 *Lev.* 128. And the court of Chancery will make ſuch *Guardian* give ſecurity not to marry the infant without the court is firſt acquainted with it. 2 *Chan. Rep.* 237.

Before the *ſtat.* 12 *Car.* 2. *c.* 24, Tenant in ſocage might have diſpoſed of his land, in truſt for the benefit of the heir; but it is ſaid he could not deviſe or diſpoſe of the Guardianſhip or cuſtody of the heir from the next of kin to whom the land could not deſcend, becauſe the law gave the Guardianſhip to ſuch next of kin. *Keilw.* 186. But now tenant in ſocage may nominate whom he pleaſes to have the cuſtody of the heir, and the land ſhall follow the Guardianſhip, as an incident given by law to attend the cuſtody; and ſuch ſpecial *Guardian* cannot aſſign the cuſtody by any act, the truſt being perſonal; nor ſhall it go to the executor or adminiſtrator of the *Guardian*, but determines by his death. *Vaugh* 180: *Dyer* 189.

As

As the law hath inveſted *Guardians* not with a bare *authority* only, but alſo with an *intereſt* till the *Guardianſhip* ceaſes; ſo it hath provided ſeveral remedies for *Guardians* againſt thoſe who violate that intereſt: at Common-law there were remedies both droitural and poſſeſſory, to recover the *Guardianſhip*. 2 *Inſt.* 90: 9 *Co.* 72.

A *Guardianſhip* of a minor is an intereſt in the body and lands, &c. of one within age. *Guardians* to infants, appointed by the court to ſue, may acknowledge ſatisfaction upon the record, for a debt recovered at law for the infant. *Trin.* 23 *Car.* 2. *B. R.* A *Guardian* in ſocage may keep courts, in the infant's manors, in his own name, grant copies, &c. He is *dominus pro tempore*, and hath an intereſt in the lands. *Cro. Jac.* 91. Such *Guardian* may let the land for years, and avow in his own name and right; and his leſſee for years may maintain ejectment: but he cannot preſent to an advowſon, for which he may not lawfully account; and the infant muſt preſent of whatſoever age. *Cro. Jac.* 98, 99. Though it is ſaid, if the infant be within the age of diſcretion, his *Guardian* may preſent. 8 *E.* 2. 10. See 1 *Inſt.* 89 *a*; and this Dict. tit. *Advowſon*.

In another place Lord *Coke* extends the doctrine ſo far as to ſay that the infant ſhall preſent whatſoever his age may be. 3 *Inſt.* 156. But ſome ſuppoſe the Guardian to have the right of preſenting in the name of the infant, in general; others admit the right of the infant; but add that if he be of ſuch tender years as not to have any diſcretion, then the Guardian ſhould preſent for him. *Vin. Abr.* tit. *Guardian* 2. *pl.* 2. But the law ſeems now ſettled in the full extent of Lord *Coke*'s opinion; by a determination of Lord Chancellor *King*. An advowſon was conveyed to truſtees on truſt to preſent ſuch perſon as the grantor his heirs and aſſigns ſhould by deed appoint: and, on the principle that an infant of any age may preſent, the Chancellor confirmed an appointment by an infant heir, though it appeared that the child was not a year old, and that the Guardian guided the child's hand in making his mark and putting his ſeal. 2 *Eq. Ab.*; *Infant B pl.* 3: *Vin. Abr*; *Collation. A. pl.* 10. and ſee 3 *Atk.* 710. It ſtill remains however undecided whether the want of diſcretion might not induce a court of equity to controul the exerciſe of this right by an infant, in caſe a preſentation ſhould be obtained without the concurrence of his Guardian. 1 *Inſt.* 89 *a. in n.* 1.

A *Guardian* for nurture of the minor, appointed by will, hath power to make leaſes at will only. *Cro. Eliz.* 678, 734. A teſtamentary Guardian cannot make a leaſe of the infant's lands; but ſuch leaſe is abſolutely void. 2 *Wilſ.* 129, 135. *Guardians* are to take the profits of the minor's lands, &c. to the uſe of the minor, and account for the ſame: they ought to ſell all moveables in a reaſonable time, and turn them into land or money, except the minor is near of age, and may want ſuch goods himſelf: and they ſhall pay intereſt for money in their hands, which might have been put out at intereſt; in which caſe it ſhall be preſumed the *Guardians* made uſe of it themſelves. 3 *Salk.* 177.

III. The Power and reciprocal duty of a Guardian and Ward are the ſame *pro tempore* as that of a parent and child; but the Guardian when the Ward comes of age is bound to give him an account of all that he has tranſacted on his behalf, and muſt anſwer for all loſſes by his wilful default or negligence. In order therefore to prevent diſagreeable conteſts with young gentlemen, it has become a practice for many Guardians, of large eſtates eſpecially, to indemnify themſelves by applying to the Court of Chancery, acting under its direction and accounting annually before the officers of that court. And that court in caſe any Guardian abuſes his truſt will check and puniſh him, and ſometimes proceed to the removal of him and appoint another in his ſtead. 1 *Sid.* 424: 1 *P. Wms.* 703. See 1 *Comm.* 463. *c.* 17, and ante I. 7.

At Common-law, both a *prohibition* of waſte, and an *action* of *waſte*, lay againſt a guardian in chivalry and a guardian in ſocage, for *voluntary*, but not for *permiſſive waſte*, or *waſte* done by a *ſtranger*. 2 *Inſt.* 305.

By the Common-law, guardians in ſocage are accountable to the infant, either when he comes to the age of fourteen years, or at any time after, as he thinks fit. *Co. Lit.* 87. And ſo is one who is Guardian by nature after the infant's age of 21. See ante I. 1; and 1 *Inſt.* 886. *n.* 9. But the Guardian on his account, ſhall have allowance of all reaſonable expences; and if he is robbed of the rents and profits of the land, *without his default or negligence*, he ſhall be diſcharged thereof upon his account; for he is in the nature of a bailiff or ſervant to the infant, and undertakes no otherwiſe than for his diligence and fidelity. *Co. Lit.* 89 *a*.

But againſt a teſtamentary or other Guardian, whoſe authority doth not determine till the infant is 21, or being a female attains that age or marries, the infant cannot have action of account before; for the rule of the Common-law is that account ſhall not lie while the Guardianſhip continues. But in equity the infant may by *prochein amie* ſue his Guardian for an account during the minority. 2 *Vern.* 342: 2 *P. Wms.* 119: 1 *Ves.* 91: 3 *Atk.* 625.

A Guardian cannot be charged in account as a receiver: becauſe then he would loſe his coſts and expences: theſe it is ſaid being in general allowed only to Guardians and bailiffs and not to receivers. See 1 *Inſt.* 89 *a*; *n.* 2; 172 *a*.

If a Guardian takes a bond for the arrears of rent, he thereby makes it his own debt, and ſhall be charged with it. 2 *Chan. Rep.* 97. If a man during a perſon's infancy receives the profits of an infant's eſtate, and continues to do ſo for ſeveral years after the infant comes of age, before any entry is made on him; yet he ſhall account for the profits throughout, and not during the infancy only. 1 *Eq. Abr.* 280. A receiver to the *Guardian* of an infant, who has had his account allowed him by the *Guardian*, ſhall not be obliged to account over again to the infant when he comes of age. *Preced. Chan.* 535.

A *Guardian* ſhall anſwer for what is loſt by his *fraud*, *negligence* or *omiſſion*; but *not* for any *caſual events*, as where the thing had been well but for ſuch an accident. *Litt.* 123. By ſtatute *Mag. Cart.* 9 *H.* 3. *c.* 3, *Guardians* were to retain the lands till the heir comes of age, and then reſtore the ſame as fully ſtocked, &c. as received. By *ſtat.* 6 *An. c.* 18, Perſons who are Guardians or truſtees for infants holding over, without the conſent of the perſon next intitled, ſhall be adjudged treſpaſſers, and be accountable for profits, &c. By *ſtat.* 4 *Ann. c.* 16. § 27, Action of account may be brought againſt the executors or adminiſtrators of a Guardian, &c.

FORM of ELECTION of a GUARDIAN by a MINOR.

KNOW all Men *by these presents, That I* A. B. *son and heir, of,* &c. *deceased, being now about the age of eighteen years,* have *elected and chosen, and by these presents do elect and chuse* C. D. *of* &c. *to be Guardian of my person and estate, until I shall attain the age of twenty-one years, and I do hereby promise to be ruled and governed by him in all things touching my welfare; and I do authorise and impower the said* C. D. *to enter upon and take possession of all and every my messuages, lands, tenements, hereditaments and premisses whatsoever, situate, lying and being in,* &c. *in the county of,* &c. *or elsewhere, whereunto I have or may have any right or title, and to let and set the same, and receive and take the rents, issues and profits thereof, for my use and benefit, during the term aforesaid; giving and hereby granting unto the said* C. D. *my full power in the said premisses; and whatsoever he shall lawfully do or cause to be done in the premisses, by virtue hereof, I do hereby promise to ratify and confirm.* In witness, &c.

As to *Orphans* under the custom of *London*, See that title.

GARDIAN DE L' ESTEMARY, The *Guardian* or warden of the *Stannaries*, or mines in the county of *Cornwall*, &c. See title *Stannaries*.

GUARDIANS DE L' EGLISE, Churchwardens. See that title.

GUARDIANS OF THE PEACE, Those that have the keeping of the peace; *wardens* or *conservators* thereof. *Lamb. Eiren. lib.* 1. *c.* 3. See title *Justices of the Peace*.

GUARDIAN (OR WARDEN) OF THE CINQUE PORTS. A Magistrate that hath the jurisdiction of the ports or havens, which are commonly called the *Cinque Ports*, who has there all the authority and jurisdiction the Admiral of *England* has in places not exempt: and *Camden* believes this *Warden of the Cinque Ports* was first erected among us in imitation of the *Roman* policy, to strengthen the sea coasts against enemies, &c. *Camd. Br.* 238. See title *Cinque Ports*.

GUARDIAN OF THE SPIRITUALTIES, The person to whom the *spiritual jurisdiction* of any diocese is committed, during the *vacancy* of the see, is called by this name. See *stat.* 25 *H.* 8. *cap.* 21. and also *stat.* 3 *E.* 1. *c.* 21, in which the word *Guardian* seems applicable to this officer. The *Archbishop* is *Guardian of the Spiritualties* on the vacancy of any *see* within his province; but when the *archiepiscopal see* is vacant, the dean and chapter of the archbishop's diocese are *Guardians of the Spiritualties, viz.* the Spiritual jurisdiction of his province and diocese is committed to them. 2 *Rol. Abr.* 22, 223. The *Guardian of the Spiritualties* it is said may be either *Guardian in law, jure magistratûs*, as the archbishop is of any diocese in his province; or *Guardian by delegation*, being he whom the *archbishop* or *vicar general* doth for the time appoint. The *Guardian of the Spiritualties* hath all manner of ecclesiastical jurisdiction of the courts, power of granting licences and dispensations, probate of wills, &c. during the vacancy, and of admitting and instituting clerks presented; but such Guardians cannot, as such, consecrate or ordain, or present to any benefices. See *stat.* 13 *Eliz. c.* 12: *Wood's Inst.* 25, 27.

GUARDIAN OF THE TEMPORALTIES. *Custos Temporalium.*] The person to whose custody a vacant see or abbey was committed by the King.—Who as steward of the goods and profits was to give an account to the escheator, and he into the Exchequer.—His trust continued till the vacancy was supplied, and the successor obtained the King's writ *de restitutione temporalium*, which was usually after consecration. *Dict.*

GUEST, Sax. *Gest*, Fr. *Gist*. a stage of rest in a journey. A lodger or stranger in an *inn*, &c. See titles *Inns and Innkeepers*.

GUIDAGE, *Guidagium.*] An old legal word, signifying that which is given for safe conduct through a strange land, or unknown country. *Est* guidagium *quod datur alicui, ut tuto conducatur per terram alterius. Consuetud. Burgund. p.* 119: 2 *Inst.* 526.

GUILD, from Sax. *Guildan*, to pay.] A fraternity or company, because every one was *gildare*, i. e. to pay something toward the charge and support of the company. The original of these guilds and fraternities is said to be from the old *Saxon* law, by which neighbours entered into an association and became bound for each other, to bring forth him who committed any crime, or make satisfaction to the party injured, for which purpose they raised a sum of money among themselves, and put into a common stock, whereout a pecuniary compensation was made according to the quality of the offence committed. From hence came our fraternities and guilds; and they were in use in this kingdom long before any formal licences were granted for them: though at this day they are a company combined together, with orders and laws made by themselves, by the prince's licence. *Camd.*

Guilda Mercatoria, or the *Merchants' Guild*, is a liberty or privilege granted to merchants, whereby they are enabled to hold certain pleas of land, &c. within their own precinct. 37 *Ed.* 3: 15 *R.* 2. King *Ed.* III. in the 14th year of his reign, granted licence to the men of *Coventry* to erect a *Merchants' Guild*, and also a fraternity of brethren and sisters, with a master or warden, and that they might make chantries, bestow alms, do other works of piety, and constitute ordinances touching the same, &c. And King *Hen.* IV. in the 4th year of his reign gave licence to found a *Guild* of the *Holy Cross* at *Stratford upon Avon. Antiq. Warwickshire.* 119, 522. *Guild*, or *Gild*, is also used for a tribute, or tax, an amercement, &c. 27 *Ed.* 3: 11 *H.* 6: 15 *Car.* 2. See *Geld*; and more fully titles *Corporation*: *London*.

GUILD-HALL, The chief hall of the city of *London*, for the Meeting of the Lord Mayor and Commonalty of the city, making laws and ordinances, holding of courts, &c. Gildarum *nomine continentur non solum minores fraternitatus, sed ipsæ etiam civitatum communitates. Spelm.* It also signifies the chief hall of other cities and corporate towns; the *Sessions-hall* in *King-Street, Westminster*, is called the *Guild-hall*.

GUILDHELDA TEUTONICORUM. The fraternity of *Easterling* merchants in *London*, called the *Still-yard*. See *Stat.* 22 *Hen.* 8. *c.* 8.

GUILD-RENTS, Rents payable to the crown, by any guild or fraternity; or such rents as formerly belonged to *religious Guilds*, and came to the crown at the general dissolution of monasteries, being ordered to be sold by the *Stat.* 22 *Car.* 2. *cap.* 6.

GUILDER, A Foreign coin: the *German* guilder is 3 *s.* 8 *d.* and the golden one in ſome parts of *Germany* 4 *s.* 9 *d.* In *Portugal* it paſſes for 5 *s.* but the *Poland* and *Holland gelder* is but 2 *s.* In *Holland*, merchants keep their accounts in *Guilders*, &c.

GULE OF AUGUST, *Gula Auguſti, Goule d' Aout.*] The day of *St. Peter ad Vincula*, which is celebrated on the *1ſt of Auguſt*, and called the *Gule of Auguſt*, from the Lat. *Gula* a throat; for this reaſon, (as pretended) that one *Quirinus*, a tribune, having a daughter that had a diſeaſe in her *throat*, went to Pope *Alexander*, (the ſixth from St. *Peter*,) and deſired of him to ſee the chains that St. *Peter* was chained with under *Nero*, which requeſt being granted, ſhe the ſaid daughter kiſſing the chains, was cured of her diſeaſe; whereupon the Pope inſtituted this feaſt in honour of St. *Peter*; and, as before, this day was termed only the *calends of Auguſt*, it was on this occaſion called indifferently either St. *Peter's day ad Vincula*, from what wrought the miracle, or the *Gule of Auguſt*, from that part of the virgin whereon it was wrought. *Durand's Rationale Divinorum, lib.* 7. *cap.* 19. It is mentioned *F. N. B.* 62: *Plowd.* 316: *Stat. Weſtm.* 2. *cap.* 30.

GUNS. See titles *Arms*: *Game.*

GUNPOWDER. It is lawful for all perſons, as well ſtrangers as natural-born ſubjects, to import any quantities of *Gunpowder* or ſalt-petre, brimſtone, and other materials for the making thereof, and to make and ſell *Gunpowder*, &c. *Stat.* 16 *Car.* 1. *cap.* 21.

To obtain an excluſive patent for the ſole making or importation of gunpowder or arms, or to hinder others from importing them, incurs the penalties of *præmunire* by *Stats.* 16 *Car.* 1. *c.* 21: 1 *Jac.* 2. *c.* 8.

The *Stat.* 12 *Geo.* 3. *c.* 61, reduces into one and repeals all former acts relative to the making, keeping, and carrying of Gunpowder.

By this act it is provided, that no perſon ſhall make gunpowder but in the regular manufactories, eſtabliſhed at the time of making the ſtatute, or licenſed by the Seſſions purſuant to the proviſions in § 13, &c. on forfeiture of the Gunpowder and 2 *s. per* pound, § 1.—*Peſtle mills* not to be uſed; on the like penalty, § 2.—Only 40 pounds of powder to be made at one time under one pair of ſtones; except *battle-powder* a fine fowling powder ſo called, made at *Battel* and elſewhere in *Suſſex*, §§ 3. 5.—Not more than 40 hundred weight to be dried at one time in one ſtove. § 6.—only the quantity abſolutely neceſſary for immediate uſe to be kept in or near the place of making, except in brick or ſtone magazines 50 yards at leaſt from the mill, § 7. All Gunpowder makers to have a brick or ſtone magazine near the *Thames* below *Blackwall* to keep the Gunpowder when made, on penalty of 25 *l. per* month; and 5 *l.* a day for not removing it when made, with all poſſible diligence. § 8. Charcoal not to be kept within 20 yards of the mill, § 10.—No dealer to keep more than 200 pounds of powder, nor any perſon not a dealer more than 50 pounds, in the cities of *London* and *Weſtminſter* or within 3 miles thereof; or within any other city, borough or market town or one mile thereof; or within two miles of the King's palaces or magazines, or half a mile of any parith church; on pain of forfeiture and 2 *s. per* pound; except in licenſed mills; or to the amount of 300 pounds for the uſe of collieries within 200 yards of them. § 12.—§§ 13, 14, 15. 16, contain proviſions reſpecting the licenſing mills, building magazines, &c.—Not more than 25 barrels to be carried in any land carriage, nor more than 200 barrels by water (unleſs going beyond ſea or coaſt-wiſe;) each barrel to contain not more than 100 pounds.—Various means are directed for the ſafe conveyance, in both caſes, and to prevent all danger and delay, § 18.—22. Juſtices of peace may ſearch mills, houſes, carriages, &c. § 23.—Outward bound ſhips to take in, and homeward bound to diſcharge their gunpowder at or below *Blackwall*; and be ſearched by the officers of the *Trinity* houſe. § 24, 5. Penalties to be recovered before two juſtices; and proſecutions to be within 14 days, § 26, 7.—General exceptions are made as to his majeſty's mills, ſtorehouſes and magazines; and as to powder ſent with the army or militia; and exported or carried coaſtwiſe below *Blackwall* § 29, 30.

It ſeems that erecting powder mills, or keeping magazines near a town is a nuiſance at Common-law, puniſhable by indictment or information. *Stra.* 1169: And ſee § 15, of the above mentioned ſtatute.

GURGITES, Wears. *Black Book Hereford, f.* 20. See *Gorce.*

GUTI AND GOTTI, Engl. *Goths*, called ſometimes *Jutæ*, and by the Romans *Getæ*, is derived from the old word *Jet*, which ſignifies a *Giant*: they were one of thoſe three nations or people who left *Germany*, and came to inhabit this iſland. *Leg. Edw. Conſeſſ. cap.* 35.

GUTTERA, A gutter or ſpout to convey the water from the leads and roofs of houſes: and there are *guttertiles*, eſpecially to be laid in ſuch *gutters*, &c. mentioned in the *Stat.* 17 *Ed.* 4. See title *Bricks.*

GWABR MERCHED, A *Britiſh* word, which ſignifies a payment or fine, made to the lords of ſome manors, upon the marriage of their tenant's daughters; or otherwiſe on their committing incontinency. See *Marchets.*

GWALSTOW, *Sax.*] A place of execution: *omnia* gwalſtowa, i. e. *occidendorum loca, totaliter regis ſunt in ſocâ ſuâ. Leg. H.* 1. *cap.* 11.

GYLPUT, The name of a court held every three weeks, in the liberty or hundred of *Pathbew* in the county of *Warwick. Inquiſit.* 13 *Ed.* 3.

GYLTWITE, A compenſation or amends for treſpaſs, &c. *Mulcta pro tranſgreſſione.* LL *Edgar. Regis, Anno* 964.

GYPSIES, See tit. *Egyptians.*

GYROVAGI, Wandering *monks*, who pretending great piety left their own cloiſters, and viſited others. *Matt. Paris. p.* 490.

H.

HABEAS CORPUS,

THE SUBJECT'S WRIT OF RIGHT, in cases where he is aggrieved by illegal imprisonment: Founded on the Common law, and secured by various statutes; of which the last and most powerful, the *stat.* 31 *Car.* 2. *c.* 2, is emphatically stiled THE HABEAS CORPUS ACT; and is at least next in importance, if not indeed as relates to modern times, superior in its beneficial effect, to *Magna Charta*. See 2 *Inst.* 55, 615: 4 *Inst.* 182: *Cro. Jac.* 543: 2 *Ro. Ab.* 69: *Com. Journ. April* 1st, 1628.

Next to *Personal Security* the law of *England* regards, asserts, and preserves, the *personal Liberty* of individuals against all imprisonment or restraint, unless by due course of law —This is a right strictly natural, and the laws of *England* have never abridged it without sufficient cause; nor can it ever be abridged in this kingdom at the mere discretion of the magistrate, without the explicit permission of the laws.—The language of the Great Charter is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. *Mag. C. c.* 29. And many subsequent old statutes expressly direct that no man shall be taken or imprisoned by suggestion or petition to the King or his Council, unless it be by legal indictment, or the process of the Common law. See *Stats.* 5 *E.* 3. *c.* 9: 25 *E.* 3. *st.* 5. *c.* 4: 28 *Ed.* 3. *c.* 3. By the *Petition of Right*, 3 *Car.* 1, it is enacted that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law.—By *stat.* 16 *Car.* 1. *c.* 10, if any person be restrained of his liberty, by order or decree of any illegal court, or by command of the King's Majesty in person, or by warrant of the council board, or of any of the privy council, he shall upon demand of his counsel have a writ of *Habeas Corpus*, to bring his body before the court of *King's Bench* or *Common Pleas*; who shall within three court days determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by the *Habeas Corpus Act*, *stat.* 31 C. 2. *c.* 2. the methods of obtaining this writ are so plainly pointed out and enforced, that so long as this statute remains unimpeached, no Subject of *England* can be long detained in prison, except in those cases in which the law requires and justifies such detainer: And lest this act should be evaded by demanding unreasonable Bail or sureties for the prisoner's appearance, it is declared by *stat.* 1 *W. & M st.* 2. *c.* 2, that excessive bail ought not to be required. 1 *Comm.* 135. *c.* 1.

Of great importance to the Public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, Magistrate to imprison arbitrarily, whenever he or his officers thought proper, there would soon be an end of all other rights and immunities. And yet sometimes when the State is in real danger, even this measure may be necessary. But the happiness of our Constitution is, that it is not left to the Executive Power to determine when the danger of the State is so great as to render this measure expedient; for it is the Parliament only, or Legislative Power, consisting of King, Lords and Commons, that, wherever it sees proper, can authorize one branch of it, the Crown, by suspending the *Habeas Corpus Act* for a short and limited time, and in certain specified particulars, to imprison suspected persons without giving any reason for so doing. An experiment which ought only to be tried, and which we believe has never been tried, but in cases of extreme emergency: and in these the nation parts with a portion of its liberty for a while in order to preserve the whole for ever. See 1 *Comm. c.* 1; 136,—and this Dict. title *Government*; *ad fin.*

Having said thus much in general we may pursue our enquiries under the following heads.

I. *The Nature, various kinds, and Effects of this Writ.*
II. *Further, by whom, and in what cases, it is grantable.*
III. *What shall be a Proper return of such Writ.*
IV. *Of Bailing, Discharging or Remanding a Prisoner, brought up on a Habeas Corpus.*

For other matters connected with this subject see this Dict. titles *Bail*; *Commitment*; *Arrest*; *Gaoler*, &c. and as to the *Habeas corpora Juratorum*, See title *Jury*. I.

I. THE WRIT of *Habeas Corpus* is the most celebrated writ in the *English* law. Various kinds of it are made use of by the courts at *Westminster* for removing prisoners from one court into another for the more easy administration of justice.

One of those is the *Habeas corpus ad respondendum*, when a man hath a cause of action against one, who is confined by the process of some inferior court; in order to remove the Prisoner and charge him with this new action in the court above. 2 *Mod.* 198. For inferior courts being tied down to causes arising within their own jurisdiction, the party would be without remedy, unless allowed to sue in another court; but it seems, that regularly a person confined in *B. R.* cannot be removed to *C. B.* by this writ, nor *vice versa*; for in these cases there can be no defect of justice, as these courts have conusance as well of local, as transitory actions. *Dyer* 197 *a*: 249. *pl.* 84; 296, 307: 1 *Mod.* 235: *Style Pract. Regist.* 330.

The *Habeas corpus ad satisfaciendum*, is used when a Prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. 2 *Lill. Prac. Reg.* 4.

On this writ the attorney for the plaintiff must endorse the number roll of the judgment on the back of the writ. *Style Regist.* 331.

Habeas Corpus upon a *capi*, where the party is taken in execution in the court below.—So upon an attachment out of Chancery, and a *capi corpus* returned by the sheriff, the next step is a *Habeas Corpus*; for the sheriff having executed the command of the writ of attachment by taking the body, he cannot carry him out of the county without the King's writ. *Dist.*

Of the same nature are writs of *Habeas Corpus ad prosequendum, testificandum, deliberandum*, &c. which issue when it is necessary to remove a prisoner, in order to *prosecute*, or *bear testimony* in any court, or to be *tried* in the proper jurisdiction wherein the fact was committed. See *Sty. Reg.* 331, 119, 126, 230: *Comb.* 17, 48.

Lastly, as relates to writs of *Habeas Corpus* for these confined purposes, may be mentioned the common writ *ad faciendum et recipiendum*; which issues only in civil cases out of any of the courts in *Westminster Hall*, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer; whence this writ is frequently denominated an *Habeas Corpus cum causâ*; to *do and receive* whatsoever the King's court shall consider in that behalf.—In this case the body is to be removed by *Habeas Corpus*; but the proceedings, by *certiorari*. 3 *Bac. Abr.* This is a writ grantable of common right without any motion in court; and instantly supersedes all proceedings in the court below. 2 *Mod.* 306. But in order to prevent the surreptitious discharge of prisoners, it is ordained by *Stat.* 1 & 2 *P. & M. c.* 13, that no *Habeas Corpus* shall issue to remove any prisoner out of any gaol, unless signed by some Judge of the Court out of which it is awarded. And to avoid vexatious delays by removal of frivolous causes, it is enacted by *Stat.* 21 *Jac.* 1. *c.* 23, that where the Judge of an inferior court of record is a barrister of three years' standing, no cause shall be removed from thence by *Habeas Corpus* or other writ, after issue or demurrer deliberately joined.—That no cause, if once remanded to the inferior court by writ of *procedendo* or otherwise, shall ever afterwards be again removed; and that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of 5 *l.*—But an expedient having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for 5 *l.* or upwards; (when by the course of the Court the *Habeas Corpus* removed both actions together;) it is therefore enacted by *stat.* 12 *Geo.* 1. *c.* 29, that the inferior court may proceed in such actions as are under the value of 5 *l.* notwithstanding other actions may be brought against the same defendant to a greater amount. And by *stat.* 19 *Geo.* 3. *c.* 70, no cause under the value of 10 *l.* shall be removed by *Habeas Corpus*, or otherwise, into any superior court unless the defendant so removing the same shall give special bail for payment of the debt and costs. See 3 *Comm. c.* 8.

No writ of *Habeas Corpus*, or other writ to remove a cause out of an inferior court, shall be allowed, except delivered to the Judge of the court, before the jury to try the cause have appeared, and before any of them are sworn. *Stat.* 3 *Eliz. cap.* 5.

See further, *Impey's Practice in K. B.* as to the mode of suing out a *Habeas Corpus* for the purpose of removing a Debtor to the King's Bench prison.

But the *Great and efficacious Writ* in all manner of illegal confinement, is that of HABEAS CORPUS AD SUBJICIENDUM: directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum et recipiendum*; to *do, submit to*, and *receive* whatsoever the Judge or court awarding such writ shall consider in that behalf. 8 *St. Tr.* 142.

This is a high prerogative writ, and therefore, by the Common law, issuing out of the court of *King's Bench*, not only in term-time, but also during the vacation, by a *fiat* from the Chief Justice or any other of the Judges; and running into all parts of the King's dominions: for the King is at all times entitled to have an account why the liberty of any of his Subjects is restrained, whenever that restraint may be inflicted. *Cro. Jac.* 543. If it issues in vacation, it is usually returnable before the Judge himself who awarded it, and he proceeds by himself thereon, unless the term should intervene, and then it may be returned in Court. *Burr.* 856, 460, 542, 606.

If the party were privileged in the Courts of *Common Pleas* and *Exchequer*, as being, or supposed to be, an officer or suitor of the Court, this *Habeas Corpus ad subjiciendum* might also by Common-law have been awarded from thence. 2 *Inst.* 55: 4 *Inst.* 290: 2 *Hal. P. C.* 144: 2 *Vent.* 22. And if the cause of imprisonment were palpably illegal, they might have discharged him. *Vaugh.* 155. But if he were committed for any criminal matter, they could only have remanded him or taken bail for his appearance in the Court of *K. B.* which occasioned the Common Pleas for some-time to discountenance such applications. *Carter* 221: 2 *Jon.* 13. But since the *stat.* 16 *Car.* 2. *c.* 10, above recited, expressly mentioned the Courts of *K. B.* and *C. P.* as co-ordinate in this jurisdiction, it hath been holden that every Subject of the kingdom is equally entitled to the benefit of the Common-law writ in either of those courts at his option. 2 *Mod.* 198. It hath also been said that the like *Habeas Corpus* may issue out of the Court of Chancery in vacation; but upon the famous application to *Lord Nottingham* by *Jenks*, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation, and therefore his Lordship refused it. See 4 *Inst.* 182: 2 *Hal. P. C.* 147: 3 *Comm.* 132. *c.* 8.

In the *King's Bench* and *Common Pleas* it is necessary to apply for it by motion to the Court, as in the case of all other prerogative writs; (as *Certiorari*, *Prohibition*, *Mandamus*, &c;) which do not issue as of mere course, without shewing some probable cause why the extraordinary power of the crown is called in to the party's assistance. 2 *Mod.* 306: 1 *Lev.* 1. For, as was argued, by Lord Chief Justice *Vaughan*, "it is granted on motion because it cannot be had of course; and there is therefore no *necessity* to grant it: for the Court ought to be satisfied that the party hath a probable cause to be delivered." 2 *Jon.* 13. And this seems the more reasonable, because, when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. *Cro. Jac.* 543. So that if it issued of mere course, without shewing to the court or Judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the

the King's ſervice, a wife, a child, a relation, or a domeſtick confined for inſanity or other prudential reaſons might obtain a temporary enlargement by ſuing out an *Habeas Corpus*, tho' ſure to be remanded as ſoon as brought up to the Court. And therefore *Coke* when Chief Juſtice did not ſcruple to deny a *Habeas Corpus* to one confined, by the Court of Admiralty, for piracy; there appearing on his own ſhewing ſufficient grounds to confine him. 3 *Bulſt.* 27: and ſee 2 *Ro. Rep.* 138. On the other hand if a probable ground be ſhewn, that the party is impriſoned without juſt cauſe, and therefore hath a right to be delivered, the writ of *Habeas Corpus* is then a *Writ of Right* which "may not be denied, but ought to be granted to every man that is committed, or detained in priſon, or otherwiſe reſtrained tho' it be by command of the King, the privy council, or any other." *Com. Journ. Ap.* 1, 1628. See 2 *Inſt.* 615.

The perſonal liberty of the Subject, as has been already obſerved, is a natural inherent right which cannot be ſurrendered or forfeited, unleſs by the commiſſion of ſome great and atrocious crime; and which ought not to be abridged in any caſe without the ſpecial permiſſion of law. To aſſert an abſolute exemption from impriſonment *in all caſes* is inconſiſtent with every idea of law and political ſociety; and in the end would deſtroy all civil liberty, by rendering it's protection impoſſible: but the glory of the *Engliſh* law conſiſts in clearly defining the times, the cauſes, and the extent, when, wherefore, and in what degree, the impriſonment of the Subject may be lawful. This it is which induces the abſolute neceſſity of expreſſing upon every commitment the reaſon for which it is made; that the Court upon an *Habeas Corpus* may examine into its validity; and according to the circumſtances of the caſe may diſcharge, admit to bail, or remand the priſoner.—Yet early in the reign of *Charles* I. the Court of *K. B.* determined that they could not upon an *Habeas Corpus* either bail or deliver a priſoner, tho' committed without any cauſe aſſigned, in caſe he was committed by the ſpecial command of the King, or by the Lords of the privy council. 7 *St. Tr.* 136. This drew on a parliamentary enquiry, and produced the *Petition of right* 3 *Car.* I, already mentioned; which recites this illegal judgment, and enacts that no freeman hereafter ſhall be ſo impriſoned or detained. Some evaſions however of this ſtatute, in favour of the Crown, gave riſe to the *ſtat.* 16 *Car.* I. *c.* 10, already ſtated; and even after this ſome ſhifts and devices, not very creditable to the Judges of that time, were made uſe of to the ſame unpopular end. See 3 *Comm.* 134, 5; § 8.

Other abuſes had alſo crept into daily practice, which had in ſome meaſure defeated the benefit of this great conſtitutional remedy. The party impriſoning was at liberty to delay his obedience to the firſt writ, and might wait till a ſecond and a third, called an *alias* and a *pluries*, were iſſued, before he produced the party; and many other vexatious ſhifts were practiſed to detain State Priſoners in cuſtody. But whoever will attentively conſider the *Engliſh* Hiſtory may obſerve, that the flagrant abuſe of any power, by the Crown or its miniſters, has always been productive of a ſtruggle which either diſcovers the exerciſe of that power to be contrary to law, or (if legal) reſtrains it for the future. This was the caſe in the preſent inſtance. The oppreſſion of an obſcure individual gave birth to the famous HABEAS CORPUS ACT, 31 *Car.* 2. *c.* 2; which is frequently conſidered as another *Magna Charta* of the kingdom; and by conſequence and analogy has alſo in ſubſequent times reduced the general method of proceeding on theſe writs, (though not within the reach of that ſtatute, but iſſuing merely at the common law,) to the true ſtandard of Law and Liberty.

The *Statute* itſelf enacts, 1. That on complaint and requeſt in writing by or on behalf of any perſon committed and charged with any crime; (unleſs committed for Treaſon or Felony expreſſed in the warrant; or as acceſſary, or on ſuſpicion of being acceſſary, before the fact, to any *petit* treaſon or felony, plainly expreſſed in the warrant; or unleſs he is convicted or charged in execution by legal proceſs;) the Lord Chancellor or any of the twelve Judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, ſhall (unleſs the party has neglected for two terms to apply to any court for his enlargement,) award a *Habeas Corpus* for ſuch priſoner, returnable immediately before himſelf, or any of the Judges; and upon the return made, ſhall, within two days, diſcharge the party, if bailable, upon giving ſecurity to appear and anſwer to the accuſation in the proper court of Judicature.—2. That ſuch writs ſhall be indorſed, as granted in purſuance of this act, and ſigned by the perſon awarding them.—3. That the writ ſhall be returned, and the priſoner brought up within a limited time, according to the diſtance, not exceeding in any caſe twenty days; upon tender of the charges not exceeding 1*s.* per mile, and ſecurity by his own bond to pay the charges of his return, if remanded, and not to eſcape —4. That any officer or keeper neglecting to make due returns, or not delivering to the priſoner or his agent, within ſix hours after demand, a copy of the warrant of commitment, or ſhifting the cuſtody of a priſoner from one to another, without ſufficient reaſon or authority (ſpecified in the act) ſhall for the firſt offence forfeit 100 *l.* and for the ſecond offence 200 *l.* to the party grieved, and be diſabled to hold his office.—5. That no perſon once delivered by *Habeas Corpus*, ſhall be recommitted for the ſame offence on penalty of 500 *l.*—6. That every perſon committed for Treaſon or Felony ſhall, if he requires it, the firſt week of the next term, or the firſt day of the next ſeſſion of *Oyer* and *Terminer*, be indicted in that term or ſeſſion, or elſe admitted to bail; unleſs the King's witneſſes cannot be produced at that time: and if acquitted, or if not indicted and tried in the ſecond term or ſeſſion, he ſhall be diſcharged from his impriſonment for ſuch imputed offence: but that no perſon after the aſſizes ſhall be opened for the county, in which he is detained, ſhall be removed by *Habeas Corpus*, till after the aſſizes are ended; but ſhall be left to the juſtice of the Judges of aſſize.—7. That any ſuch priſoner may move for and obtain his *Habeas Corpus*, as well out of the Chancery or Exchequer, as out of the King's Bench or Common Pleas; and the Lord Chancellor or Judges denying the ſame, on ſight of the warrant, or oath that the ſame is refuſed, ſhall forfeit ſeverally to the party grieved, the ſum of 500 *l.*—8. That this writ of *Habeas Corpus* ſhall run into the counties Palatine, Cinque-ports, and other privileged places, and the iſlands of *Jerſey* and *Guernſey*.—9. That no inhabitant of *England* (except perſons contracting, or convicts praying, to be tranſported; or perſons having committed ſome capital offence in the place to which they are ſent

to be tried;) shall be sent prisoner to *Scotland*, *Ireland*, *Jersey*, *Guernsey*, or any places beyond the seas, within or without the King's dominions: on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party grieved, a sum not less than 500*l.* to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire*; and shall be incapable of the King's pardon.

This is the substance of that great and important statute, which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the *Habeas Corpus* at common law. But even upon writs at the common law it is now expected by the Court, agreeable to ancient precedents, and the spirit of the act of Parliament, that this writ should be immediately obeyed, without waiting for any *alias* or *pluries*; otherwise an attachment will issue. 4 *Burr.* 856.

By all these admirable regulations, judicial as well as parliamentary, the remedy is now complete for *removing* the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill nature, but sometimes from the mere inattention, of Government. For it frequently happens in foreign countries, (and has happened in *England* during temporary suspensions of the statute,) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten. 3 *Comm.* 135, 8; *c.* 8.

II. IT IS CLEAR, that both by the Common law, as also by the statute, the Courts of Chancery and King's Bench have jurisdiction of awarding this writ of *Habeas Corpus*, and that without any privilege in the person for whom it is awarded; but it seems, that by the common law the court of King's Bench could only have awarded it in term time, but that the Chancery might have done it as well out of as in term, because that court is always open. 2 *Inst.* 55: 4 *Inst.* 290: 2 *And.* 297: 2 *Jon.* 13, 14, 17. Any of the courts at *Westminster* may award it. See *Vaugh.* 155; and the *Habeas Corpus Act*; *Ante* I.

If the *Habeas Corpus* issues out of Chancery, and on the return thereof the Lord Chancellor finds that the party was illegally restrained of his liberty, he may discharge him, or if he finds it doubtful, he may bail him; but then it must be to appear in the court of King's Bench, for the Chancellor hath no power in criminal causes; or the Chancellor may commit the party to the *Fleet*, and in term-time may *propriis manibus* deliver the record into the King's Bench, together with the body; and thereupon the court of King's Bench may proceed to bail, discharge, or commit the prisoner. 2 *Hal. Hist. P. C.* 247: 2 *Hawk. P. C.* 114, 115.

No *Habeas Corpus* lies for an enemy, prisoner of war, however ill used or deceived. 2 *Black. Rep.* 1324. Nor for a prisoner of war, the subject of a Neutral Power, taken in the enemy's service, into which he was forced, when taken prisoner by them in an *English* ship. 2 *Burr.* 765.

If sailors on board a ship are to be produced as witnesses, and have been served with a subpœna, and say they will not attend; a *Habeas Corpus ad testificandum* may be applied for to the Chief Justice, on affidavit of that fact, and that they are material witnesses; but without which no *Habeas Corpus* can issue. *Comp.* 672.

The Court thought there could be no *Habeas Corpus* to bring up a prisoner at war to be a witness. Lord *Mansfield* said the presence of witnesses who are prisoners of war, was generally obtained by an order from the Secretary of State: and an application was made for a *Habeas Corpus* to bring up such a prisoner, but without success. Afterwards a rule was granted to shew cause why the defendant should not consent either to admit of the fact of the capture, or that the prisoner should be examined upon interrogatories. *Dougl.* 420. (403) *Furley* v. *Newnham.*

Besides the efficacy of the writ of *Habeas Corpus* in liberating the Subject from illegal confinement in a public prison, it also extends it's influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband or a father; but when women or infants are brought before the Court by a *Habeas Corpus*, the court will only set them free from an unmerited or unreasonable confinement, and will not determine the validity of a marriage, or the right to the guardianship, but will leave them at liberty to chuse where they will go; and if there be any reason to apprehend they will be seized in returning from the court, they will be sent home under the protection of an officer. But if a child is too young to have any discretion of its own, then the court will deliver it into the custody of its parent, or the person who appears to be its legal guardian. See 2 *Burr.* 1434; where all the prior cases are considered by Lord *Mansfield*. See also 1 *Black. Rep.* 386: *Stra.* 982: 2 Lord *Raym.* 1354: 4 *Burr.* 1991.

If a party be imprisoned against law, though he is intitled to a *Habeas Corpus*, yet he may have an action of false imprisonment, in which he shall recover damages in proportion to the injury done him. *Fitz. Corpus cum Causa* 2: 9 *H.* 6. 44 *a*: 2 *Inst.* 55: 10 *H.* 7. 17: 5 *Co.* 64: 11 *Co.* 98, 99.

If a person be in custody, and also indicted for some offence in the inferior court, there must, besides the *Habeas Corpus* to remove the body, be a *certiorari* to remove the record; for as the *certiorari* alone removes not the body, so the *Habeas Corpus* alone removes not the record itself, but only the prisoner with the cause of his commitment; therefore, although upon the *Habeas Corpus*, and the return thereof, the court can judge of the sufficiency or insufficiency of the return and commitment; and bail or discharge, or remand the prisoner, as the case appears upon the return; yet they cannot upon the bare return of the *Habeas Corpus* give any judgment, without the record itself be removed by *certiorari*: but the same stands in the same force it did, though the return should be adjudged insufficient, and the party discharged thereupon of his imprisonment; and the court below may issue new process upon the indictment. 2 *Hal. Hist. P. C.* 210, 211: 1 *Salk.* 352: *Comb.* 2.

If the Chief Justice of the King's Bench, commit one to the Marshall by his warrant, he ought not to be brought to the bar by rule, but by *Habeas Corpus*. 1 *Salk.* 349.

III. IN extrajudicial commitments, the warrant of commitment ought to be returned *in hæc verba* on a *Habeas Corpus*: but when a man is committed by a court of record, it is in the nature of an execution for a contempt, and in such case the warrant is never returned.

5 *Mod.*

5 *Mod.* 156. The cauſe of impriſonment muſt be particularly ſet forth in the return of the *Habeas Corpus*, or it will not be good, for by this the court may judge of it; and with a *paratum habeo*, that they may either diſcharge, bail, or remand the priſoner. 2 *Nelſ. Abr.* 915: *Cro. Jac.* 543. If a commitment is without cauſe, or no cauſe is ſhewn, a priſoner may be delivered by *Habeas Corpus*. 1 *Salk.* 348.

It has been adjudged, that on a commitment by the Houſe of Commons, of perſons for contempt and breach of privilege, no court can deliver on a *Habeas Corpus*: but *Holt* Ch. J. was of a contrary opinion. 2 *Salk.* 404, 503. See this Dict. tit. *Bail* II: *Commitment*.—A writ of error may be allowed by the King in ſuch a caſe, &c. and it is not to be denied *ex debito juſtitiæ*; though it has been a doubt, whether any writ of error lay upon a judgment given on a *Habeas Corpus*. 2 *Salk* 404, 503. A man may not be delivered from the commitment of a court of *Oyer* and *Terminer*, by *Habeas Corpus*, without writ of error: and where there appears to be good cauſe, and a defect only in the form of the commitment, he ought not to be diſcharged. 1 *Salk.* 348.

For a falſe return there is regularly no other remedy againſt the officer, than an action on the caſe at the ſuit of the party grieved, and an information or indictment at the ſuit of the King. 6 *Mod.* 90: 1 *Salk.* 349. But no action lies until the return be filed. 1 *Salk.* 352.

As upon the return of the writ the court is to judge, whether the cauſe of the commitment and detainer be according to law, or againſt it; ſo the officer or party in whoſe cuſtody the priſoner is, muſt, according to the command of the writ, certify on the return thereof, the day, cauſe of caption, and detainer. *Vaugh.* 137.

Where a man is committed for any crime either at common law or by act of Parliament, for which he is puniſhable by indictment, a return that he was committed, *till diſcharged by due courſe of law*, is good. But if the commitment be in purſuance of a ſpecial authority, the terms of the commitment muſt be ſpecial and exactly purſue that authority; and therefore if it do not appear on the return to have been according to that authority, the return will be bad. 2 *Black. Rep.* 806, 7.

It ſeems to be agreed, that no one can in any caſe controvert the truth of the return to a *Habeas Corpus*, or plead or ſuggeſt any matter repugnant to it; yet it hath been holden, that a man may confeſs and avoid ſuch a return by admitting the truth of the matters contained in it, and ſuggeſting others not repugnant, which take off the effect of them. *Cro. Eliz.* 821: 5 *Co.* 71 *b.* 2 *Hawk. P. C. c.* 15. § 78.

It ſeems, that, before the return filed, any defect in form, or the want of an averment of a matter of fact, may be amended; but this muſt be at the peril of the officer, in the ſame manner as if the return were originally what it is after the amendment. 1 *Mod.* 102, 103.

But after the return is filed, it becomes a record of the court, and cannot be amended. 1 *Mod.* 102, 103.

IV. Upon the return of the *Habeas Corpus* the priſoner is regularly to be diſcharged, bailed or remanded; but if it be doubtful which the Court ought to do, it is ſaid that the priſoner may be bailed to appear *de die in diem* till the matter is determined. 5 *Mod.* 22: *Style* 16.

By the Petition of Right, 16 *Car.* 1. *cap.* 10, already mentioned, the court muſt within three days after the return of the *Habeas Corpus*, either diſcharge, bail or remand the priſoner. But it ſeems that a commitment by the court of King's Bench to the Marſhalſea, is a remanding, being an impriſonment within the ſtatute. 5 *Mod.* 22.

Alſo it hath been ruled, that the court of King's Bench, may, after the return of the *Habeas Corpus* is filed, remand the priſoner to the ſame gaol from whence he came, and order him to be brought up from time to time, till they ſhall have determined whether it is proper to bail, diſcharge, or remand him abſolutely. 1 *Vent.* 330.

And though in doubtful caſes the court is to bail, or diſcharge the party on the return of the *Habeas Corpus*, yet if a perſon be convicted, and the conviction on the return of the *Habeas Corpus* appears only defective in point of form, it is at the election of the court either to diſcharge the party, or oblige him to bring his writ of error. 1 *Salk.* 348: 5 *Mod.* 19, 20.

If a perſon be committed by the Admiralty in execution, he is not removable by *Habeas Corpus* into *B. R.* to anſwer an action brought againſt him there; but it might be otherwiſe if an action had been before depending. 1 *Salk.* 351. Where there is an action in *B. R.* precedent to the King's ſuit, on which the party is out on bail, *Habeas Corpus* may be brought by the bail, &c. and the priſoner turned over; though this was greatly oppoſed in favour of the King's execution. *Ibid.* 353.

If the Steward of an inferior court proceeds, after an *Habeas Corpus* delivered and allowed, the proceedings are void; and the court of *B. R.* will award a *ſuperſedeas*; and grant an attachment againſt the ſteward for the contempt. *Cro. Car.* 79, 256. An *Habeas Corpus* ſuſpends the power of the court below, ſo that if they proceed, it is void, and *coram non judice*. And on a *Habeas Corpus*, if the record be filed, no *procedendo* can go to the court below; but where a record below is not filed, or not returned, it may be granted. 1 *Salk* 352.

A *Habeas Corpus cum cauſâ* removes the body of the party for whom granted, and all the cauſes depending againſt him; (but ſee *ſtat.* 12 *Geo.* 1. *c.* 29. *ante* I;) and if upon the return thereof the officer doth not return all the cauſes, &c. it is an eſcape in him. 2 *Lil. Abr.* 2. A judge will not grant a *Habeas Corpus* in the vacation, for a priſoner to follow his ſuits; but the court may grant a ſpecial *Habeas Corpus* for a priſoner to be at his trial in the vacation-time. *Ibid.* 3. And the court may grant a *Habeas Corpus* to bring a priſoner, not in priſon on execution, out of priſon, to be a witneſs at a trial; though it is at the peril of the party ſuing out the writ, that the priſoner do not eſcape. *Style* 119. And where there is no colluſion, even a priſoner in execution may be brought up as a witneſs. 3 *Burr.* 1440. But no perſon ought to take out a *Habeas Corpus* for any one in priſon, without his conſent; except it be to turn him over to *B. R.* or charge him with an action in court. 2 *Lil.* A man brought into *B. R.* by *Habeas Corpus*, ſhall not be removed thence till he has anſwered there; he ſhall be detained until then, and after he may be removed. 1 *Salk.* 350.

A perſon is in cuſtody upon a criminal, and alſo on a civil, matter; if he would move himſelf by *Habeas Corpus*, there

there ought to be but one *Habeas Corpus* on the crown side or plea side, and both causes are to be returned. *Mod. Cas.* 133. If there be judgment against a defendant in the court of *B. R.* and another in *C. B.* on which he is in execution in the *Fleet*, he may have an *Habeas Corpus* to remove himself into *B. R.* where he shall be in custody of the Marshal for both debts. *Dyer*, 132.

Where an action is founded on the custom of *London*, for a thing actionable there, and not elsewhere; if it be removed by *Habeas Corpus*, a *procedendo* shall be granted: but the declaration itself ought to be returned upon the *Habeas Corpus*, and then the court will see what was the cause, &c. For the special matter and all the proceedings are to be in the return in this case; as well as in an action on a by-law, to take notice thereof. *Carth.* 75, 76. Before a *Habeas Corpus* is returned and filed, it may be amended; but not afterwards. 2 *Lil. Abr.* 2.

A *feme covert* was arrested in *London*, as a *sole-trader*, and discharged, by a judge of *B. R.* on *Habeas Corpus*, bail being put in to appear in *B. R.* The next term, on motion, the court granted a *procedendo*, affidavit of plaintiff's cause of action, &c. being made; for plaintiff could only proceed in *London*. See *Lavie* v. *Phillips*; 3 *Bur.* 1776; wherein the reason of the *procedendo* being granted, is fully discussed and determined.

HABENDUM. See title *Deed*. II. 4.

In a lease or grant to two persons, if the *habendum* be to one for life, and the remainder to the other for life, this alters the general implication of the jointenancy, which would pass by the premisses, if the *habendum* were not. 2 *Rep.* 55. And where things which lie in grant are conveyed, to take effect barely on delivery of the deed of grant, without other ceremony; in such case, if the *habendum* be for a less estate than in the premisses, or be repugnant to it, the *habendum* is void: but when any ceremony is requisite to the perfection of an estate granted, and not a bare delivery only of the deed; and to the estate limited by the *habendum*, nothing is required to perfect it; there, though the *habendum* is of a less estate than the premisses, the *habendum* shall stand good, and qualify the estate granted in the premisses. 2 *Rep.* 23.

An *habendum* may not only qualify what is granted in the premisses; but it may also enlarge what it thus granted, or explain the premisses: though the *habendum* shall never introduce one who is a stranger to the premisses. 1 *Jones* 4: 3 *Leon.* 60. If a bargain and sale be made without expressing to whom, although it were *habendum* to *A. B.* who is a party to the deed, it is not good; because the *habendum* is only to limit an estate, and not to give any thing. *Cro. Eliz.* 585. 903: 2 *Lil* 8: If one thing be granted in the premisses of a deed, *habendum* with another thing, which is not appendant, &c. this other thing shall not pass. *Hob.* 161, 172. None can take by any deed, who is not named in the premisses: but though an estate limited by the *habendum* to a man that is no party, is void by way of estate, it may be good in remainder. *Hob.* 313: *Godb.* 51.

HABENTIA, Riches: In some ancient charters, *habentes homines* is taken for rich men; and we read, *Nec Rex suum pastum requirat, vel* habentes homines *quos nos dicimus* feasting men. *Mon. Angl. Tom.* 1. *p.* 100.

HABERDASHERS. If any persons work *hats* with foreign wool, and not having served an apprenticeship to the trade, &c. they shall forfeit the goods and 5*l.* And no person may dye any *caps* with bark, &c. but only with copperas and gall, or woad and madder. *Stat.* 8 *Eliz. cap.* 7. None shall make *hats* or *felts*, that hath not served seven years in *felt-making*; nor retain any but journeymen who have lawfully served; or have above two apprentices at once, and those not for less than seven years time, &c. on pain of 5*l.* a month: but *hat-makers* may employ their own children in the trade.—And the masters and wardens of *Haberdashers* in *London*, calling to them one of the company of *Cappers*, and another of the *Hat-makers*, and mayors, &c. of towns and corporations, may search all *hatters* and punish them that offend, by fines. *Stat.* 1 *Jac.* 1. *c.* 17. To prevent the exportation of *hats* out of the plantations abroad, which may be seized, and offenders are liable to 500*l.* penalty; and for regulating the trade of *hat-making* there; &c. See *stat.* 5 *Geo.* 2. *c.* 22, and this Dict. title *Navigation Acts*.

HABERE FACIAS POSSESSIONEM, A judicial writ that lies where one hath recovered a term for years in action of *ejectione firmæ*, to put him into *possession*. *F. N. B.* 167. And one may have a new writ, if a former be not well executed. *Mich.* 21 *Car.* 1. *B. R.* A sheriff delivered possession in the morning, by virtue of an *habere facias possessionem*, and some time in the same day, after he was gone, the defendant turned the plaintiff out of possession; it was held, that if he had been turned out immediately, or whilst the sheriff or his officers were there, an attachment might be granted against the defendant; for this had been a disturbance in contempt of the execution; but it being several hours after the plaintiff was in possession, the court doubted, but agreed to grant a new *habere facias*, &c. 1 *Salk.* 321.

If the sheriff deliver possession of more than is contained in the writ of *habere facias possessionem*, an action on the case will lie against him, or an assise for the lands. *Style* 238. The sheriff cannot return upon this writ that another is tenant of the land by right, but must execute the writ, for that will not come in issue between the demandant and him. 6 *Rep.* 52. See this Dict. titles *Ejectment*: *Execution*.

HABERE FACIAS SEISINAM. A writ directed to the sheriff, to give *seisin* of a freehold estate recovered in the King's courts, by *ejectione firmæ*, or other action. *Old Nat. Br.* 154. The sheriff may raise the *posse comitatus* in his assistance, to execute these writs: and where a house is recovered in a real action, or by ejectment, the sheriff may break open the doors to deliver possession and seisin thereof; but he ought to signify the cause of his coming, and request that the doors may be opened. 5 *Rep.* 91. This writ also issues sometimes out of the records of a fine, to give the cognisee seisin of the land whereof the fine is levied. *West. Symb. par.* 2. And there is a writ called *Habere Facias Seisinam, ubi Rex habuit annum, diem & vastum*; for the delivery of lands to the Lord of the fee, after the King hath had the year, day, and waste in the lands of a person convict of felony. *Reg. Orig.* 156. See title *Execution*.

HABERE FACIAS VISUM, A writ that lies in divers cases in real actions, as in *formedon*, &c. where a *view* is required to be taken of the lands in controversy. *Reg. Jud.* 26, 28, &c. *F. N. B.* See title *Jury*.

HABERGEON, From Germ. *Hals*, *Collum*, & *Bergen*, *tegere*.] An helmet which covered the head and shoulders. *Blount*.

HABERJECTS,

HABERJECTS, *Haubergetæ.*] A ſort of cloths of a mixed colour, mentioned in *Magna Charta cap.* 26.

HABILIMENTS OF WAR, Armour, utenſils, or proviſions for the maintaining of war. 3 *Eliz. cap.* 4.

HABLE, Fr.] A ſea-port town; this word is uſed in *Stat.* 27 *H.* 6. *cap.* 3.

HACHIA, A hack, pick, or inſtrument for digging. *Placit.* 2 *Ed.* 3.

HACKNEY COACHES AND CHAIRS. See *Coach.*

HADBOTE, *Sax.*] A recompence or amends for violence offered to perſons in holy orders. *Sax. Dict.*

HADE OF LAND, *Hada terræ.*] Is a ſmall quantity of land, thus expreſſed :—*Surſum reddidit in manus domini duas acras terræ continentes decem ſeliones & duas* Hadas, *Anglicè* ten *ridges*, and two *hades*, &c. *Rot. Cur. Maner. de Orleton, Anno* 16 *Jac.*

HADERUNGA, Reſpect or diſtinction of perſons; from the Sax. *Had, Perſona*, and *Arung*, honoured and admired. *Leg. Ethelred.*

HADGONEL, *Sax.*] Seems to be a tax or mulct.—*Mon. Ang. par.* 1. *fol.* 302.

HÆREDE ABDUCTO, A writ that anciently lay for the Lord, who having by right the wardſhip of his tenant under age, could not come by his body, the ſame being carried away by another perſon. *Old Nat. Br.* 93.

HÆREDE DELIBERANDO ALTERI, QUI HABET CUSTODIAM TERRÆ, A writ directed to the ſheriff to require one that had the body of him who was ward to another, to deliver him to the perſon whoſe ward he was, by reaſon of his land. *Reg. Orig.* 161.

HÆREDE RAPTO, Alſo a writ; ſee *Raviſhment of Guard. Reg. Orig.* 163.

HÆREDIPETA, The next heir to lands.—*Leg. H.* 1. *cap.* 70.

HÆRETICO COMBURENDO, A writ that lay againſt an *Heretick*, who having been convicted of *hereſy* by the biſhop, and abjured it, afterwards fell into the ſame again, or ſome other, and was thereupon delivered over to the ſecular power. *F. N. B.* 69. By this writ, grantable out of Chancery, upon a certificate of ſuch conviction, *Hereticks* were burnt; and ſo were likewiſe witches, ſorcerers, &c. But the writ *de hæretico comburendo* lies not at this day. 12 *Rep.* 93. *Stat.* 29 *Car.* 2. *c.* 9. See title *Hereſy.*

HAFNE, *Daniſh*, A haven or port.] *Hafne Courts* are granted *inter alia*, by letters patent of *Rich.* duke of *Glouc.* admiral of *England.* 14 *Aug. Anno.* 5 *Edw.* 4.

HAGA, Sax. *Manſio.*] A houſe in a city or borough. *Domeſday.* An ancient *anonymous* author, expounds *haga* to be a houſe and ſhop, *domus cum ſhopa*: and in a book which belonged to the *Abby of St. Auſtin* in *Canterbury*, mention is made of *hagan monachis*, &c. See *Co. Lit.* 56.

HAGIA, Sax. *Hæg*, melted into *hay*, whence *haia.*] A hedge *Mon. Angl. Tom.* 2. *p.* 273.

HAIA, An hedge: ſometimes taken for a park, &c. encloſed. *Bract. Lib.* 2. *c.* 40. And *haiement* is uſed for a hedge-fence. *Rot. inq.* 36 *Ed.* 3.

HAIL-SHOT. The *ſtat.* 3 *Ed.* 6. againſt ſhooting of *Hail-Shot*, or more pellets than one, by any perſon under the degree of a Lord, &c. is repealed. *Stat.* 6 & 7 *W.* 3. *c.* 13.

HAIR-POWDER, Not to be mixed with lime, alabaſter, &c. under penalties, by *Stat.* 4 *Geo.* 2. *c.* 14. Vide *Starch-powder.*

HAKE, A ſort of fiſh dried and ſalted; hence the proverb obtains in *Kent*, *As dry as a Hake. Paroch. Antiq.* 575: *Spelm.*

HAKETON, A military coat of defence. *Walſ. in Ed.* 3.

HALF-BLOOD, Is no impediment to *deſcents* of *fee-ſimple* lands of the *crown*, or to *dignities*, or in deſcent of *eſtates tail*: but in other caſes it is an impediment. Adminiſtration is grantable to the *Half Blood* of the deceaſed, as well as to the whole blood; and *Half-Blood* ſhall come in for a ſhare of an inteſtate's perſonal eſtate, equally with the whole blood, they being next of kin, in equal degree. *Style* 74: 1 *Vent.* 307: *Stat.* 22 *Car.* 2. *c.* 10. See titles *Deſcent*: *Executor.*

HALFENDEAL, The moiety, or one half of a thing; as *fardingdeal* is a quarter, or fourth part of an acre of land, &c.

HALF-MARK, *Dimidia Markæ.*] A noble, or ſix ſhillings-and eight-pence in money. If a *writ of right* is brought, and the ſeiſin of the plaintiff, or his anceſtor, be alledged, the ſeiſin is not traverſable by the defendant, but he muſt render the *Half Mark* for the inquiry of the ſeiſin: which is as much as to ſay, that though the defendant ſhall not be admitted to deny, that the plaintiff or his anceſtors were ſeiſed of the land in queſtion, and to prove his denial; yet he may be allowed to tender *half a mark* in money, to have an inquiry made, whether the plaintiff, &c. were ſo ſeiſed, or not. *F. N. B.* 5: *Old Nat. Br.* 25. But in a writ of advowſon brought by the King, the defendant may be permitted to traverſe the ſeiſin, by licence, obtained from the King's ſerjeant; ſo that the defendant ſhall not be obliged to proffer the *Half Mark*, &c. *F. N. B.* 31.

HALF-SEAL, Is what is uſed in the *Chancery*, for ſealing of commiſſions to *delegates*, upon any appeal to the court of delegates, either in eccleſiaſtical or marine cauſes. *Stat.* 8 *Eliz. c.* 5.

HALF-TONGUE. See *Mediætas Linguæ*, as to pleas and trials of *foreigners*, and titles *Jury*: *Trial.*

HALKE, From Sax. *Heall*, i. e. *Angulus.*] An hole; ſeeking in every *Halke*, &c.

HALL, Lat. *Halla*, Sax. *Heall.*] Was anciently taken for a manſion-houſe or habitation, being mentioned as ſuch in *Domeſday*, and other records; and this word is retained in many counties of *England*, eſpecially in the county palatine of *Cheſter*, where almoſt every gentleman of quality's ſeat is called a *Hall.*

HALL, OR COMMON-HALL. There is a *Common-Hall* for electing a mayor, ſheriffs, and other officers of the city of *London*, aſſembled at *Guild-Hall* by the Lord-Mayor. *Ord.* 7 *W.* 3.—See titles *Corporation*: *London.*

HALLAGE, Toll paid for goods or merchandize vended in a *hall*; and particularly applied to a fee or toll due for cloth, brought for ſale to *Blackwell-Hall* in *London*: Lords of fairs or markets, are entitled to this fee. 6 *Rep.* 62.

HALLAMAS, The day of *All Hallows* or *All Saints*, viz. *November* 1. and one of the croſs quarters of the year was computed in ancient writings from *Hallamas* to *Candlemas. Cowel.*

HALLAMSHIRE, A part of the county of *York*, anciently ſo called in which the town of *Sheffield* ſtands. See *ſtat.* 21 *Jac.* 1. *c.* 23.

HALLMOTE or HALLIMOTE, Sax. *Heall*, i. e. Aula, & *Gemote*, Conventus.] That court among the *Saxons*, which we now call a court baron; and the etymology is from the meeting of the tenants of one *hall* or manor. The name is ſtill kept up in ſeveral places in *Herefordſhire*; and in the records of *Hereford*, this court is entered as follows, viz. Hereford Palatium, *ad* Halimot *ibidem tent'* 11 *Die Octob. Anno Regni Regis Hen.* 6, &c. It hath been ſometimes taken for a convention of citizens in their public *hall*, where they held their courts, which was alſo called *Folkmote* and *Halmote*: But the word *Halimote* is rather the lord's court held within the manor, in which the differences between the tenants were determined. See *Leg. Hen.* 1. *cap.* 10.

HALYMOTE, Is properly an *holy* or eccleſiaſtical court; but there is a court in *London*, formerly held on the *Sunday* next before St. *Thomas*'s day, called the *halymote* or *holy court*, *Curia Sanctimonûs*, for regulating the *bakers* of the city, &c. *Blount*. See title *London*.

HALYWERCFOLK, *Holyworkfolk*, or people who enjoyed lands by the ſervice of repairing or defending a church or ſepulchre; for which pious labours they were exempt from all feodal and military ſervices. It did ſignify ſuch of the province of *Durham* in particular, as held their lands to defend the corpſe of St. *Cuthbert*; and who claimed the privilege not to be forced to go out of the biſhoprick, either by the King or Biſhop. *Hiſt. Dunelm. apud Wartoni Ang. Sax. par.* 1. *p.* 749: *Mon. Angl.* 1, 512: *Blount*.

HAM, A *Saxon* word, uſed for a place of dwelling; a village or town: hence the termination of ſome of our towns, as *Nottingham*, *Buckingham*, &c. Alſo a home cloſe, or little narrow meadow is called *ham*. *Blount*.

HAMBLING or HAMELING or DOGS, The ancient term uſed by foreſters for *expeditating*. *Manwood*.

HAMBURGH COMPANY. This, the oldeſt of our Trading Companies and heretofore more uſually called *Merchants Adventurers*, took warning from the repeated complaints made of their monopoly (the laſt of which was in 1661) and facilitated the admiſſion by private regulations made by themſelves. Add to this, it was, like the *Hudſon's Bay Company* without any parliamentary ſanction; and had not been able even during the reigns of *Charles* II. and *James* II. to protect its excluſive privileges againſt the ſeparate adventurers. See *Reeves's Law of Shipping and Navigation*.

HAMESECKEN. Burglary or nocturnal houſe breaking, was by our antient law called *Hameſecken*, as it is in *Scotland* to this day. 4 *Comm.* 223. See tit. *Burglary*.

HAMFARE, Breach of the peace in a houſe. *Brompton in Legibus H.* 1. *c.* 80. See *Homeſoken*.

HAMLET; HEMEL; HAMPSEL, From the Sax. *Ham*, i. e. *Domus*, and *Germ. Let*, Membrum.] A little village, or part of a village or pariſh; of which three words, *hamlet* is now only uſed; though *Kitchen* mentions the other two, *Hamel* and *Hamſel*. By *Spelman* there is a difference between *villam integram*, *villam dimidiam*, and *hamletam*; a *hamlet* being *quæ medietatem friborgi non obtinuit, hoc eſt, ubi* 5 *capitales plegii non deprehenſi ſint*. *Stowe* expounds it to be the ſeat of a freeholder. Several country towns have *hamlets*, as there may be ſeveral *hamlets* in a pirith; and ſome particular places may be out of a town or *hamlet*, though not out of the county. *Weſt.* 3.

HAMSOCA or HAMSOKEN. See *Homeſoken*.

HANAPER OFFICE. One of the offices ſo called, belonging to the Court of Chancery. Writs relating to the buſineſs of the Subject and their returns, were, according to the ſimplicity of ancient times, originally kept in an hamper, *in hanaperio*; and the others, relating to ſuch matters wherein the Crown is immediately, or mediately concerned, were preſerved in a little ſack or bag, *in parvâ bagâ*; and thence hath ariſen the diſtinction, of the *Hanaper Office*, and *petty-bag* office, which both belong to the Common-law Court in Chancery. 3 *Comm.* 49. See title *Chancery*.

HANDBOROW, A ſurety or manual pledge, *i. e.* an inferior undertaker; for *headborow* is the ſuperior or chief. *Spelm.*

HAND IN AND OUT, Is the name of an unlawful *Game* now diſuſed, and prohibited by ſtatute 17 *Ed.* 4. *c.* 2.

HANDFUL, In meaſuring, is four inches by the ſtandard. *Anno* 33 *H.* 8. *c.* 5.

HANDGRITH, From Sax. *Hond*, manus, and *Grith*, *Pax*.] Peace or protection given by the King, with his own hand.—*Leg. Hen.* 1.

HAND-GUN, An engine to deſtroy game. *Stat.* 33 *Hen.* 8. See title *Game*.

HAND-HABEND, A thief caught in the very fact, having the goods ſtolen, in his hand. *Leg. Hen.* 1. *cap.* 59: *Bract. lib.* 3. *tract.* 2. *cap.* 8, 32 & 35: *Fleta lib.* 1. *c.* 38. See *Backberinde*.

HAND-WRITING. See *Similitude*; *Evidence*.

HANDY-WARP, A kind of cloth. *Stat.* 4 & 5 *Ph. & M. c.* 5.

HANGWITE alias HANGWIT, From Sax. *Hangan*, i. e. ſuſpendere, & *wite*, mulcta.] A liberty granted to a perſon, whereby he is quit of a felon or thief hanged without judgment; or eſcaped out of cuſtody. *Raſtal.* We read it interpreted to be quit *de laron pendu ſans ſerjeans le Roy*, i. e. without legal trial: and elſewhere, *mulcta pro latrone præter juris exigentiam ſuſpenſo vel elapſo*. And it may ſignify a liberty, whereby a lord challenges the forfeiture for him who hangs himſelf within the lord's fee. *Domeſday*.

HANIG, A term for cuſtomary labour to be done and performed. *Mon. Ang. tom.* 2. *p.* 264.

HANPER or HANAPER, *Haniperium*.] The *Hanaper* of the *Chancery*; it ſeems to be the ſame as *fiſcus* originally in the *Latin*. 10 *R.* 2. *c.* 1. See *Hanaper*.

HANSE, An old *Gothick* word.] A Society of *Merchants*, for the good uſage and ſafe paſſage of merchandiſe from one kingdom to another. The *Hanſe* or *mercatorum ſocietas*, was and in part yet is endowed with many large privileges by Princes within their territories; and had four principal ſeats or *Staples*, where the *Almain*, or *German* and *Dutch* merchants, being the founders of this ſociety, had an eſpecial houſe: one of which was here in *London*, called the *Steel-Yard*. *Ortelius's Index ad Theatr. verbo Aſiatici*.

HANS TOWNS, Probably from the German *Hanſa*, i. e. *Societas*.

Towards the middle of the thirteenth century, the nations around the *Baltick* were extremely barbarous, and infeſted that ſea with their piracies: this obliged the cities of *Lubeck* and *Hamburgh*, ſoon after they began to open ſome trade with theſe people, to enter into a league of

of mutual defence. They derived such advantages from this union, that other towns acceded to their confederacy, and in a short time *eighty* of the most considerable cities scattered through those vast countries which stretch from the bottom of the *Baltick*, to *Cologne* on the *Rhine*, joined in the famous *Hanseatic league*, which became so formidable, that its alliance was courted, and its enmity dreaded by the greatest monarchs. The members of this powerful association formed the first systematic plan of commerce, known in the middle ages, and conducted it by common laws enacted in their general assemblies. *Robertson's Hist. Emp. Char.* V. 1 *V.* 79, 80. See *Id. fo.* 336.

HANTELODE, An arrest, from the Germ. *Hant*, an hand, and *load*, i e. laid; *manûs immissio*: As arrests are made by laying hold on the debtor, &c.

HAP, Fr. *Happer*, i. e. *Rapere*, to catch.] Is of the same signification with us as in the *French*; as to *hap* the rent, is where partition being made between two parceners, and more land allowed to one than the other, she that has most of the land charges it to the other, and she *haps* the rent, whereon assise is brought, &c. This word is used by *Littleton*, where a person *happeth* the possession of a deed poll. *Lit.* § 8.

HAQUE, A little hand gun, prohibited to be used by *stats.* 33 *H.* 8. *c.* 6: 2 & 3 *Ed.* 6. *cap.* 14. There is the *half haque* or *demy haque*, within those acts. See titles *Arms*: *Game*.

HAQUEBUT, A bigger sort of hand-gun than the *haque*, from the Teuton, *hacke luyse*; it is otherwise called an *harquebus*, vulgarly a *hagbut*. See *Stats.* 2 & 3 *Ed.* 6. *c.* 14: 4 & 5 *P.* & *M. c.* 2. and titles *Arms*: *Game*.

HARATIUM, From the Fr. *Haras.*] A race of horses and mares, kept for breed; in some parts of *England* termed a *stud of mares*. &c. *Spelm. Gloss.*

HARBINGER, An officer of the King's house, &c.

HARBOURS AND HAVENS. Upon the principles of our constitution which places the Executive Power in the hands of the Monarch, the King has the prerogative of appointing *Ports* and *Havens* or such places only, for persons and merchandise to pass into and out of the realm, as he in his wisdom seems proper. By the feodal law all navigable rivers and havens were computed among the *regalia* and were subject to the Sovereign of the State. And in *England* it hath always been holden, that the King is lord of the whole shore, and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm. *F. N. B.* 113: *Dav.* 9, 56. Therefore as early as the reign of King *John*, we find ships seized by the King's officers for putting in at a place that was not a legal port. *Madox. Hist. Exc.* 530. These legal ports were undoubtedly at first assigned by the crown; since to each of them a court of portmote is incident, the jurisdiction of which must flow from the royal authority. 4 *Inst.* 148. The *great ports* of the sea are also referred to, as well known and established by *stat.* 4 *Hen.* 4. *c.* 20, which prohibits the landing elsewhere under pain of confiscation: and the *Stat.* 1 *Eliz. c.* 11. recites that the franchise of lading and discharging had been frequently granted by the crown.

But though the King had a power of granting the franchise of havens and ports, yet he had not the power of resumption or of narrowing and confining their limits when once established; but any person had a right to lade or discharge his merchandize in any part of the haven: whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners. This occasioned the *Stats.* 1 *Eliz. c.* 11: 13 & 14 *Car.* 2. *c.* 11. § 14; which enabled the Crown by commission to ascertain the limits of all Ports, and to assign proper Wharfs and Quays in each port, for the exclusive landing and lading of merchandize. 1 *Comm.* 264. *c.* 7. See further this Dict. tit. *Navigation Acts*.

By the *Stat.* 19 *Geo.* 2. *c.* 22, If any master of a ship shall cast out of any ship, riding in any haven, &c. any ballast, &c. but only on land, where the tide never flows or runs, he may be fined by the justices, not more than 5 *l.* nor less than 40 *s.* As soon as any ship shall be sunk, stranded, or run on shore in any *harbour*, &c. or be brought or drove in, or be there in a ruinous condition, and there be suffered to remain, and the owner shall begin to carry away the rigging; on summons of the owner, or commander, a justice may seize the ship, &c. and by sale thereof raise money to clear the *harbour*.

Many other acts of parliament have been made for repairing and improving particular *harbours* and *havens* of this kingdom; such as *stats.* 23 *Hen.* 8. *cap.* 7: 27 *H.* 8. *c.* 23; relating to the *havens* and ports of *Plymouth*, *Portsmouth*, *Falmouth*, &c. in *Devonshire* and *Cornwall*; and none shall labour in tin works, near rivers of those *havens*, but shall prevent the fall of stones and gravel therein.—Casting and unlading ballast, rubbish, &c. in any *harbour*, *haven*, or road, incurred a penalty of 5 *l.* by *stat.* 34 *Hen.* 8. *cap.* 9.—The *Stat.* 27 *Eliz. cap.* 1, was for repairing *Orford haven* in *Suffolk*; and *Stats.* 13 & 14 *Car.* 2: 4 *Geo.* 1. *c.* 13, &c. for the reparation of *Dover harbour*, &c. And duties are granted by these statutes, towards effecting thereof. *Stat.* 20 *Geo.* 2. *c.* 14, was made for opening *Southwold haven* in *Suffolk*. *Stat.* 20 *Geo.* 2. *c.* 18, was made for improving *Sunderland harbour* in *Durham*. See *Stat.* 27 *Geo.* 2. *c.* 8, for improving and inlarging the harbour of *Leith*.

HARDWIC, Mentioned in *Domesday*, and by *Spelman*. See *Herdwick*.

HARES. See title *Game*.

HARLOTS. If any vintner, alehouse keeper, &c. in *London*, shall permit any *harlots*, or common women to come into their houses to eat, or drink, or otherwise to be conversant or abide there; they shall be liable to imprisonment, and also the women and *harlots*. *Artic. Maldmate* 23. See title *London*.

HARNESS, Fr. *Harnish.*] Signifies all warlike instruments. *Hoved. p.* 725: *Matt. Paris.* The tackle or furniture of a ship, was also called *harnes* or *harnesium*. *Pl. Parl.* 22 *Ed.* 1.

HARO, HARRON, An *outcry* after felons and malefactors; and the original of this *clamor de haro* comes from the *Normans*. *Custum. de Norman.* 1. *p.* 104.

HARPING-IRONS, Are iron instruments for the striking and taking of *Whales*: And those that strike the fish with them are called *Harpiniers* or *Harpooners*. *Merch. Dict.* See titles *Fish*, *Fisheries and Fishing*.

HARRIERS, *Harcti canes.*] Small hounds, for hunting the *hare*: Anciently several persons held lands of the King, by the tenure and service of keeping a pack of *beagles* and *harriers*. *Cart.* 12 *Ed.* I.

HART, A ſtag, or male deer of the foreſt five years old compleat; and if the King or Queen do hunt any ſuch, and he eſcape alive, then he is called an *Hart Royal*: And where by the hunting he is chaſed out of the foreſt, proclamation is uſually made in the adjacent places, that in regard of the diverſion the beaſt hath afforded the King or Queen, none ſhall hurt or hinder him from returning to the foreſt; and then he is called a *Hart Royal proclaimed*. *Manwood's Foreſt Laws, par.* 2. *cap.* 4.

HARVEST WORKMEN, May be licenſed by juſtices of peace to go into other counties to work, *&c.* *Stat.* 13 & 14 *Car.* 2. *c.* 12. See title *Labourers*: *Poor*: *Vagrants*.

HASTA PORCI, A ſhield of brawn.—*Paroch. Antiq.* 450.

HATCHES, Certain dams made of clay and earth, to prevent the water iſſuing from the works and tin wathes in *Cornwall*, from running into the freſh rivers: And the tenants of ſeveral manors there, are bound to do certain days works *ad le hatches*, or *hacches*. *Stat.* 27 *Hen.* 8 *c.* 23. And from a *hatch*, gate, or door, ſome houſes ſituate on the highway, near a common gate, are called *Hatches*.

HATS. See title *Manufacturers*.—By *Stat.* 24 *Geo.* 3. *ſtat.* 2. *c.* 51. certain duties (from 3 *d.* to 2 *s.*) are impoſed on hats ſold by retail, and dealers in hats are to be annually licenſed. See tit. *Stamps*.—The *ſtat.* 27 *Geo.* 3. *c.* 13, regulates the importation and exportation of *hats*, and hare and coney ſkins and goats wool.—See title *Hatters*.

HAUR, From the Fr. *Hair.*] Hatred. *Leg. W.* 1. *c.* 16.

HAUTHONER, *Homo Loricatus.*] A man armed with a coat of mail.—*Charta Galfridi de Dutton, temp. H.* 3.

HAW, A ſmall parcel of land ſo called in *Kent*; as a *Hemphaw* or *Beanhaw*, lying near the houſe, and incloſed for thoſe uſes. *Sax. Dict.* But Sir *Edward Coke*, in an ancient plea concerning *Feverſham* in *Kent*, ſays *Hawes* are houſes. *Co. Lit.* 5. See *Haga*, *Haia*.

HAWGH or HOWGH, A green plot in a valley; a word uſed in the *North* of *England*. *Camd.*

HAWBERK alias HAWBERT, Fr. i. e. *Lorica.*] He who held lands in *France* by finding a coat or ſhirt of mail, and to be ready with it when he ſhall be called, was ſaid to have hauberticum *feudum*, *Fief de* Haubert: and *Hawberk*, with our anceſtors, had the ſame ſignification, and ſo it ſeems to be uſed in the *ſtat.* 13 *Ed.* 1. *cap.* 6.

HAWKS. The ſtealing of an *hawk*, or concealing it, after proclamation made by the ſheriff, is felony with clergy: But this extends only to long-winged *Hawks*, of the kind of *falcons*; and not to *gos hawks* or *ſparrow hawks*. *Stats.* 34 *Ed.* 3. *c.* 22: 37 *Ed.* 3. *c.* 19: 3 *Inſt.* 97. None ſhall kill, or ſcare away, any *hawks* from the coverts where they uſe to breed, on pain of 10 *l.* to be recovered before juſtices of the peace, and divided between the King and proſecutor. *Stat.* 11 *Hen.* 7. *cap.* 17. A *Hawk* taken up, muſt be delivered to the ſheriff, if taken up by a mean perſon to be proclaimed in the towns of the county, *&c.* An action of trover and converſion lies for an *Hawk reclaimed*, and which may be known by her vervels, bells, *&c.* See further title *Game*.

HAWKERS. Thoſe deceitful fellows who went from place to place, buying and ſelling braſs, pewter, and other goods and merchandize, which ought to be uttered in open market, were of old ſo called; and the appellation ſeems to grow from their uncertain wandering, like perſons that with *Hawks* ſeek their game where they can find it. They are mentioned in *Stat.* 33 *Hen.* 8. *cap.* 4.

HAWKERS, PEDLARS and PETTY CHAPMEN, are ſuch perſons as travel from town to town with goods and merchandize, and are under the control of Commiſſioners who are to licence them for that purpoſe under *ſtats.* 8 & 9 *W.* 3. *c.* 25: 29 *Geo.* 3. *c.* 26.

Traders in the linen and woollen manufactures, ſending their goods to markets and fairs, and ſelling them by wholeſale; makers of goods, ſelling thoſe of their own making; and makers and ſellers of *Engliſh* bone-lace, going from houſe to houſe, *&c.* are excepted out of the acts, and not to be taken as *Hawkers*. *Stats.* 3 & 4 *Ann. c.* 4: 4 *Geo.* 1. *c.* 6.—and ſee *ſtat.* 29 *Geo.* 3. *c.* 26. § 20.

Hawkers of news papers, pamphlets, *&c.* are expreſsly excepted in the ſtatutes from the proviſions and regulations applied to other hawkers.—See titles *News-papers*, *Stamps*, *&c.* The *ſtat.* 29 *Geo.* 3. *c.* 26, directs that *Hawkers*, *Pedlars*, *&c.* ſhall pay a duty of 4 *l.* *per* year for a licence for themſelves and 4 *l.* more for every beaſt employed by them.—Before obtaining this licence each of them is to produce a certificate ſigned by a clergyman and two reputable inhabitants in his place of reſidence of his good behaviour. §§ 3, 5, 6, 7.

Selling one parcel of ſilk handkerchiefs, ſhall not make a man a hawker or pedlar. *Burr.* 609.

The ſaid *Stat.* 29 *Geo.* 3. *c.* 26; alſo provides that ſuch hawkers ſhall not ſell their things by auction; that the words *Licenſed Hawker* ſhall be marked on all packs, boxes, waggons, ſhops, and handbills uſed by ſuch hawkers on penalty of 10 *l.* a like penalty is impoſed on unlicenſed hawkers ſo marking their packs, *&c.* §§ 8, 9.—Hawkers ſelling ſmuggled goods ſhall forfeit their licenſe and be incapable of having another granted them. § 10.—The *Stat.* 7 *Geo.* 3. *c.* 43, prohibiting hawkers to carry foreign cambrick or lawn is repealed by *Stat.* 27 *Geo.* 3. *c.* 13. § 23: *c.* 32. § 19. See title *Cambrick*.

Trading without a licence, or refuſing to ſhew it, incurs a penalty of 12 *l.* half to the informer, and half to the poor; or on non-payment to ſuffer as a vagrant. *Stats.* 9 & 10 *W.* 3. *c.* 27. § 3: 3 & 4 *Ann. c.* 4. § 4.—Under *Stat.* 29 *Geo.* 3. *c.* 26. § 11, the penalty is 10 *l.* half to the King and half to the informer.—Hawkers refuſing to produce their licences, or lending or borrowing licences, to forfeit 40 *l.* And they may be detained till they produce their licences. *Stat.* 29 *Geo.* 3. *c.* 26. §§ 13, 14.—Counterfeiting licences 50 *l.* *Stat.* 9 & 10 *W.* 3. *c.* 27. § 5.—100 *l.* *Stat.* 25 *Geo.* 3. *c.* 78. § 5.

Hawkers not to ſell in cities or market towns where they do not reſide, except on fairs or market days. §§ 16, 17. See 2 *Term Rep.* 273.

If *Hawkers* and pedlars, offer any tea, or ſpirituous liquors to ſale, though they have permits, the ſame may be ſeized as forfeited; By *Stat.* 9 *Geo.* 2. *c.* 35.

HAY, *Haya*, Fr. *Haye.*] A hedge or incloſure; alſo a net to take game, See *Haia*.

HAY-BOTE, A liberty to take thorns and other wood, to make and repair hedges, gates, fences, *&c.* either by tenant for life or years: it is alſo ſaid to be wood, for the making of rakes and forks, with which men make *hay*. See *Co. Litt.* 41; and title *Bote*.

HAY

HAY AND STRAW, AND HAY-MARKET. Carts of *Hay*, which ſtand to be ſold in the *Hay-Market*, are to pay 3 *d.* and ſtraw 1 *d. per* load; and ſhall not ſtand loaden with *Hay* after three o'clock in the afternoon, *&c.* on pain of forfeiting 5 *s.* *Hay* ſold in *London*, *&c.* between the firſt of *June* and the laſt of *Auguſt*, being new *Hay* is to weigh 60 pounds a truſs; and old *Hay* the reſt of the year 56 pounds, under the penalty of 1 *s.* 6 *d.* for every truſs offered to ſale, *&c.* See further as to *Hay* and *Straw*, *Stats.* 2 *W.* & *M. ſt.* 2. *c.* 8. §§ 16, 17: 8 & 9 *W.* 3. *c.* 17. § 1: 31 *Geo.* 2. *c.* 40.—*Whitechapel Hay-Market* under *Stat.* 11 *Geo.* 3. *c.* 15, is to be held from 7 in the morning to 1 in the afternoon, from *Lady-day* to *Michaelmas*, and from 8 to 12 during the other half-year.

HAYWARD, From the Fr. *Haye*, *ſepes*, & *Garde*, *Cuſtodia*.] One who keeps a common herd of cattle of a town; and the reaſon of his being called *Hayward* may be, becauſe one part of his office is to ſee that they neither break nor crop the hedges of incloſed grounds, or for that he keeps the graſs from hurt and deſtruction. He is an officer appointed in the *Lord's Court*; And is to look to the fields, and impound cattle that do treſpaſs therein; to inſpect that no pound breaches be made, and if any be, to preſent them at the leet, *&c. Kitch.* 46. There may be a cuſtom in a manor, to have a ſurveyor of the fields or *Hayward*, and for him to diſtrain cattle damage-feaſant. See *Agillarius*.

HAZARD, An unlawful game at dice: and thoſe who play at it are called *Hazaaors*: *Plac. Trin.* 2 *Hen.* 4. *Suſſex* 10. See title *Gaming*.

HEADBOROW, OR HEADBOROUGH, From Sax. *Head*, caput, & *Borge*, fidejuſſor.] Signifies him who is *head* of the *frank-pledge* in *boroughs*; and who had a principal government within his own pledge: as he was called *Headborough*, ſo he was alſo ſtiled *borowhead*, *borſholder*, *third-borough*, *tithingman*, *&c.* according to the uſage and diverſity of ſpeech in ſeveral places. *Lamb.* Theſe *Headboroughs* were the chief of the ten pledges; the other nine being denominated *handborows*, or inferior pledges: *Headborows* are now a kind of *conſtables*. See this Dict. titles *Conſtable*: *Tithing*.

HEADLAND, The upper part of ground left for the turning of the plough; whence the *headway*. *Paroch. Antiq.* 587.

HEAD-PENCE, Was an exaction of a certain ſum heretofore collected by the ſheriff of *Northumberland* of the inhabitants of that county, without any account therefore to be made to the King; which was aboliſhed by *Stat.* 23 *H.* 6. *c.* 7.

HEAD-SILVER, Paid to lords of leets. See *Common Fine*.

HEALFANG OR HALSFANG, From Sax. *Hals*, *Collum*, and *Fang*, *capere*.] That puniſhment, *quâ alicui collum ſtringatur*. *Colliſtrigium*. The Pillory. Sometimes it is taken for a pecuniary mulct, to commute for ſtanding in the *pillory*; payable to the King or Chief Lord. *Leg. H.* 1. *cap.* 11.

HEALTH, *Injuries to*.] Injuries affecting a man's *health*, are whereby any unwholeſome practices of another a man ſuſtains any apparent damage in his vigor or conſtitution. As by ſelling him bad proviſions or wine; 1 *Rol. Abr.* 90; by the exerciſe of a noiſome trade, which infects the air in his neighbourhood; 9 *Rep.* 57: *Hut.* 135; or by the neglect, or unſkilful management of his phyſician, ſurgeon or apothecary. For it hath been ſolemnly reſolved, that *mala praxis* is a great miſdemeanor and offence at Common-law, whether it be for curioſity and experiment, or by neglect; becauſe it breaks the truſt which the party had placed in his phyſician, and tends to his deſtruction. Ld. *Raym.* 214. Theſe are wrongs or injuries unaccompanied by force, for which there is a remedy in damages, by ſpecial action of *treſpaſs on the caſe*. 3 *Comm.* 122.

As to offences againſt the public *health* of the nation, there are various proviſions, as with reſpect to the *plague*. *Stats.* 1 *Jac.* 1. *c.* 31: 26 *Geo.* 2. *c.* 6: 29 *Geo.* 2. *c.* 8. See title *Plague*. As to *unwholeſome proviſions*, 51 *Hen.* 3. *ſtat.* 6: *Ord. pro Piſtor. c.* 7: 12 *Car. c.* 25. See titles *Butchers*: *Bakers*: *Wines*: *Cattle*, *&c.*

HEARTH-MONEY, A tax formerly levied, but now aboliſhed. Vid *Chimney-Money*.

HEBBER-MEN, Fiſhermen, or poachers below *London Bridge*, who fiſh for whitings, ſmelts, *&c.* commonly at *ebbing* water; mentioned in one of the articles of the *Thames* Jury, at the court of Conſervancy of the river *Thames*, printed *anno* 1632. And thoſe perſons are puniſhable by *Stat.* 4 *H.* 7. *c.* 15. See title *London*.

HEBBING-WEARS, Are wears or engines made or laid at *ebbing water*. *Stat.* 23 *Hen.* 8. *c.* 5. See title *Sewers*.

HEBDOMAS, Lat.] A week. See *Week*.

HEBDOMADIUS, The week's man, canon or prebendary in the cathedral church, who hath the care of the choir, and the officers belonging to it, for his own week. *Reg. Epiſc. Hereford. MS.* See *Ebdomadarius*.

HECK, An engine to take fiſh in the river *Ouſe*. *Stat.* 23 *H.* 8. *c.* 18.

HECCAGIUM, Is ſuppoſed to be rent paid to the lord of the fee for liberty to uſe the engines called *Hecks*.

HEDA, A ſmall haven, wharf, or landing place. *Domeſd.* See *Hith*.

HEDAGIUM, Toll or cuſtomary duties paid at the *hith* or wharf, for the landing goods, *&c.* from which exemption was granted by the King to ſome particular perſons and ſocieties. *Cartular. Abbat. de Radings*, *MS. f.* 7.

HEDGE-BOTE, Is neceſſary ſtuff to make *hedges*, which the leſſee for years, *&c.* may of common right take in his ground leaſed. See *Hay-bote*: *Bote*.

HEDGE-BREAKERS. By the *Stat.* 43 *Eliz. cap.* 7. *Hedge-breakers*, *&c.* ſhall pay ſuch damages as a juſtice of peace ſhall think fit; and if not able to pay the damages, ſhall be committed to the conſtable to be whipped. And by *Stat.* 15 *C.* 2. *c.* 2, conſtables, and others, may apprehend perſons ſuſpected of *Hedge-ſtealing*, and carry them before a juſtice; where not giving a good account how they came by wood, *&c.* they are not only to make ſuch recompence as the juſtice of peace ſhall adjudge, but pay a ſum not exceeding 10 *s.* for the uſe of the poor, or be ſent to the houſe of correction for a month; perſons convicted of buying ſtolen *wood*, ſhall forfeit treble value to him from whom taken. See title *Woods*.

HEIR,

HÆRES; AB HÆREDITATE.] Is One *ex juſtis nuptiis procreatus*, who ſucceeds by deſcent to lands, tenements and hereditaments, being an eſtate of inheritance. The eſtate muſt *be Fee*, becauſe nothing paſſeth *jure hæreditatis* but *Fee*; and by the *Common-law* a man cannot be *Heir* to goods

goods and chattels: Tho' the *civilians* call him *hæredem, qui ex teſtamento ſuccedit in univerſum jus teſtatoris.*

Heirs, are included in the word aſſigns in grants, &c. If a woman keeps lands from the *Heir*, on pretence of being big with child by the *Heir*'s anceſtor, her deceaſed huſband, the writ *de ventre inſpiciendo* is to be granted to ſearch her, &c. that the *heir* be not defrauded. *F. N. B.* 227.

Heirs may have divers writs, as writ of *Mortdanceſter*, *Entre ad communem legem*, *In caſu proviſo*, and *conſimili caſu*, *quod permittat*, &c. The *Heir* may bring an ejectment of copyhold lands *before* admittance. 2 *Wilſ.* 14.

I. *The ſeveral Kinds of Heirs; and of relieving them againſt imprudent Contracts.*
II. *Who may be Heirs, what Perſons are excluded from being Heirs; and of the Effect of the Word* Heirs *in Limitations.*
III. 1. *Where the Heir ſhall take Advantage of Conditions, Covenants, &c. entered into to his Anceſtor.*—2. *Where he ſhall be liable to his Anceſtor's Debts and Contracts.*—3. *What ſhall go to the Heir as Fixtures, &c.*—4. *Of Suits by and againſt an Heir, and herein of the Regulations by Statute.*—5. *As to Aſſets in the Hands of an Heir.*

See further as connected with this ſubject, this Dict. titles *Agreements*; *Aſſets*; *Condition*; *Covenant*; *Executor*; *Fraud*; *Limitation*, &c.

I. Some Writers have made a diſtinction of Hæres *ſanguinis*, & *hæreditatis*; a man may be *hæres ſanguinis* to a father or anceſtor, and yet upon diſpleaſure, be defeated of his inheritance: And there is an *ultimus hæres*, being he to whom lands come by *eſcheat*, for want of lawful *heir*, &c. *i. e.* The Lord of whom the lands are held, or the King. *Bract. lib.* 7. *cap.* 17. See title *Eſcheat*: *Tenure*. But the moſt uſual diviſion is, that of *Heir apparent*; *Heir preſumptive*; (as to both which ſee title *Deſcent*. Canon 1;) *Heir general*; *Heir ſpecial*; *Heir by cuſtom*; and *Heir by deviſe*, called *Hæres factus*.

Bonds and bargains with an *Heir apparent*, &c. to have double or treble the money lent, after his father's death, &c. are ſet aſide in equity; but it is by paying what was lent *bona fide*, with intereſt, if the obligor applies for relief; though in caſe the obligee ſues, he ſhall not recover what was really lent; for that would be to aſſiſt fraud. 1 *Vern.* 141, 359. Where *young Heirs* enter into any bond, *Chancery* relieves againſt it, without evidence of actual impoſition; becauſe there is a ſuppoſed diſtreſs, and preſumption of a liableneſs to be impoſed on. *Barnardiſt.* 481. See *Treat. Eq.*

A deviſee under a will defectively executed repreſented the will as duly executed, and for a ſmall ſum gained a releaſe from the Heir; the releaſe was ſet aſide. 1 *P. Wms.* 239.—So where a ſon, who on his father's death was remainder-man in tail, ſold his remainder at an under rate, the Court of *Chancery* ſet aſide the conveyance. *Id.* 310.

The rule upon which Courts of Equity in theſe caſes proceed, is not merely in reſpect of the *age* of the Heir contracting. 3 *P. Wms*, 131. In *Wiſeman* v. *Beake*, Mr. *Wiſeman* was nearly 40 years of age, and a Proctor in the *Commons*: In *Curwyn* v. *Milner* the Heir was about 27 years of age; and in *Gwynne* v. *Heaton* the plaintiff was 23 years old; which tho' not an advanced age, is beyond that which the law recogniſes as the age of diſcretion. But the real object which the rule propoſes is, to reſtrain the anticipation of expectancies, which muſt from its very nature furniſh to deſigning men an opportunity to practiſe upon the inexperience or paſſions of a diſſipated man. And this being the object of the rule, its operation is not confined to Heirs, but extends to all perſons, the preſſure of whoſe wants may be conſidered as obſtructing the exerciſe of that judgment which might otherwiſe regulate their dealings. 2 *Vern.* 346: *Forreſt.* 111: 2 *Atk.* 34. and ſee 2 *Vez.* 281. 516: 1 *Wilſ.* 229; and this Dict. titles *Fraud*: *Agreement*.

It has been ſaid that if the Heir has no maintenance from the father, but is turned out upon unreaſonable diſpleaſure, there perhaps, the bargain, if not exceſſively beyond the proportion of ſuch aſſurances ſhall ſtand; becauſe it is not to ſupply the luxury and prodigality of the Heir, but to keep him from ſtarving. *Treat. Eq. c.* 2. § 12. But in *Gwynne* v. *Heaton*, *Thurlow*, C. was of opinion, that this circumſtance was intitled to no weight whatever: nor does there appear to be any caſe in which ſuch difference has been proceeded upon by the Court of *Chancery*; and there are ſeveral caſes where it has been entirely diſregarded. See 2 *Ch. Ca.* 120: 1 *P. Wms.* 310: 1 *Wils.* 320.

Heir general. The Heir general or Heir at Common-law is he who after his father or anceſtor's death hath a right to, and is introduced into, all his lands, tenements and hereditaments. But he muſt be of the whole blood, not a baſtard, alien, &c.

None but the Heir general, according to the courſe of the Common-law, can be Heir to a warranty, or ſue an appeal of the death of his anceſtor. *Co. Lit.* 14 *a*: *Cro. Jac.* 217, 218.

If a condition be annexed to Borough-Engliſh or Gavelkind lands, and the condition is broken, the Heir at common law ſhall enter; for the condition is a thing of new creation, and collateral to the land: But when the eldeſt ſon enters, the Heir or Heirs by cuſtom, ſhall enjoy the land; for by breach of the condition they are reſtored to their ancient eſtates. *Cro. Eliz.* 204: *Plow.* 28: *Co. Lit.* 11, 12.

Special Heir, Is the iſſue in tail claiming *per formam doni*; and as the ſtatute *de donis* preſerves the eſtate to him, his anceſtor cannot grant or alien, nor make any rightful eſtate of freehold to another, but for term of his own life. *Lit.* § 613.

Heir by cuſtom. A cuſtom in particular places varying the rules of deſcent at Common-law is good; ſuch as the cuſtom of Gavelkind, by which all the ſons ſhall inherit and make but one Heir to their anceſtor; but the general cuſtom of Gavelkind lands extends to ſons only, but a ſpecial cuſtom, that if one brother dies without iſſue, all his brothers may inherit, is good. *Co. Lit.* 140.

Heir by deviſe, or *Hæres factus*, is only a deviſee of lands, being made ſo by the *will* of the teſtator, and has no other right or intereſt than the *will* gives him. 3 *Co.* 42. *a.*

It has been held in Chancery, that ſuch an Heir ſhall have the aid of the perſonal eſtate in diſcharging the debts of the teſtator. 1 *Vern.* 36, 7. But this muſt be underſtood of an *hæres factus* of the whole eſtate, who ſhall have the benefit of the perſonal eſtate, but a deviſee of particular lands ſhall not. *Preced. Chanc.* See title *Executor* V. 6; *Aſſets*.

II. The

II. The Eldest Son, after the death of his father, is at Common-law his *heir*, &c. And if there be grandfather, father, and ſon, and the father die before the grandfather, and after the grandfather die ſeiſed; the land ſhall go to the ſon or daughter of the father, and not to any other children of the grandfather. *Bro.* 303. And this *heir* is called *hæres jure repræſentationis*, becauſe he doth repreſent his father's perſon: but if, in this caſe, the father die without any child; his next eldeſt brother ſhall have the land as *heir*, or, for want of a brother, it deſcends to the ſiſters of the father. *Ibid.* A man having iſſue only a daughter, dies, leaving his wife with child of a ſon, which is afterwards born; here the ſon after his birth is *heir* to the land, but till then the daughter is to have it. 9 *H.* 6. 23: *Perk.* 521. See at large title *Deſcent*.

There are ſome perſons who cannot be heir; as a baſtard born out of lawful wedlock; an alien, born out of the King's allegiance, though in wedlock; a man attainted of treaſon or felony, whoſe blood is corrupted; theſe laſt cannot be *heirs propter delictum*; and an alien cannot be *heir*, *propter defectum ſubjectionis*; nor may one made *denizen* by letters patent; though it is *otherwiſe* of a perſon *naturalized* by act of parliament. *Co. Lit.* 8: 2 *Danv. Abr.* 552. A baſtard by continuance, may be *heir* againſt a ſtranger; and an hermaphrodite may be *heir*, and take according to that ſex which is moſt prevalent; but a monſter, who hath not human ſhape cannot be *heir*, although a perſon deformed may. *Co. Lit.* 7. *Ideots* and *Lunaticks*, *perſons excommunicate*, *attainted* in *præmunire*, *outlaws* in *debt*, &c. may be *heirs*. 2 *Danv.* 553.

The word *heir* is not a good deſcription of a perſon in the life-time of the anceſtor; and an eldeſt ſon ſhall not take by the name of *heir* in the life-time of his father. 2 *Leon.* 70. A man cannot raiſe a fee-ſimple eſtate to his right *heirs*, by the name of *heirs*, as a word of *purchaſe* by conveyance or otherwiſe; but in ſuch caſe the *heir* ſhall be in by deſcent: *Fortior & potentior eſt diſpoſitio legis quàm hominis*. *Hob.* 30: 2 *Lill. Abr.* 11.

By the law of *England*, no perſon can take to himſelf an inheritance in fee-ſimple by *deed*, without the word *heirs*; *but he may by deviſe*: tho' in caſes where the word *heir* is wanting, it has been adjudged that if there were *other words equivalent*, and the intereſt in the thing granted paſſeth by the conſideration only, without any further ceremony in the law, an eſtate in fee may paſs. 2 *Nelſ. Abr.* 928. In a *deviſe* by *will*, or *exchange*, &c. the word *heirs* is *not* neceſſary: but eſtates of inheritance which are otherwiſe conveyed, require it. *Jenk. Cent.* 196. See this Dict. titles *Deed*; *Deviſe*; *Limitation*.

The word *Heir* is *nomen collectivum*, and extends unto all Heirs: and under *heirs*, the *heirs* of *heirs* are comprehended *in infinitum*; if lands are given to a man and his *heirs*, all his *heirs* are ſo totally in him, that he may give his lands to whom he will. *Trin.* 23 *Jac.* 1: *Noy.* 56.

The *Heir* is favoured by the *Common-law*; and the anceſtor could not give away his lands by will from his *heir* at law, without the conſent of the *heir*, till the ſtatute 32 *H.* 8. *c.* 1: 2 *Lill.* 11. Dubious words in a will ſhall be conſtrued for the benefit of the Heir; and not to diſinherit him: and the Heir at law is preferred in *Chancery* in a doubtful caſe. *Noy* 185: *Chanc. Rep.* 7. Where lands were deviſed to the *heirs* of *J. S.* then living; it was held that his eldeſt ſon ſhould have them, though in ſtrictneſs he was not *heir* during his father's life, but *heir apparent*: But this was by reaſon of the words *then living*, which make it a deſcription of the perſon. *Preced. Chanc.* 57.

As a limitation to the Heirs of the body of *A.* then living, ſhall be good as a *deſignatio perſonæ*, notwithſtanding the rule *non eſt hæres viventis*; ſo a limitation to the Heirs of the body of *A.* then begotten ſhall prevail. See 1 *P. Wms.* 229: 1 *Bro. P. C.* 489: 2 *Black. Rep.* 1010.

The caſes in which it has been held that the perſon deſcribed as an Heir ſpecial need not anſwer both parts of the deſcription, by being actually Heir, as well as that ſpecies of Heir denoted by the deſcription, ſeem to have materially broken in upon the doctrine of Lord *Coke* on the ſubject. See 1 *Inſt.* 24 *b.* and which doctrine has been purſued in many caſes excluſive of thoſe on which Lord *Coke* relied: particularly in *Counden* v. *Clerke*, *Hob.* 29: *Southcot* v. *Stowell*, 1 *Freem.* 216: *Lord Oſſulſton's caſe*, 3 *Salk.* 336: and *Dawes* v. *Ferrers*, 2 *P. Wms.* 1: *Starling* v. *Ettrick*. *Pre. Ch.* 54. Mr. *Hargrave* has very ably attempted to vindicate the propriety of Lord *Coke*'s doctrine, obſerving that it may be doubted whether there is a paſſage in all his works more capable of ſtanding the ſevereſt teſt of modern criticiſm; and having examined the circumſtances of the caſes ſuppoſed to have weakened its authority concludes his note, (*p.* 32 *a*,) with remarking that Lord *Cowper*'s judgment in *Newcomen* v. *Barkham*, which was materially ſhaken in its principle by what fell from Lord *Hardwicke*, in decreeing upon the bill of review, is the only direct authority againſt Lord *Coke*.—In a following note however, (*p.* 164 *a*,) Mr. *Hargrave* candidly admits that ſince his writing his former note, a caſe has been publiſhed in which the court of King's Bench, after three arguments, decided againſt applying the above rule to a *Will*; *Wills* v. *Palmer*, 5 *Burr.* 2615. and that in another, which was alſo three times argued, the Court of Exchequer had refuſed to apply the rule to a Marriage-ſettlement. *Evans d. Burtenſhaw* v. *Weſton*, *M.* 1774, or *H.* 1775.—This concurrence of authority, the reſult of ſo much deliberation, for both Courts appear to have weighed the ſubject with the moſt anxious attention, ſeems to have given a weight to the decree in *Newcomen* v. *Barkham*, beyond that to which Ld. *Hardwicke* thought the principle entitled. It is however well worth the Student's while to conſult Mr. *Hargrave*'s obſervations in ſupport of Lord *Coke*'s doctrine, that to take as a purchaſer by deſcription of a ſpecial heir, *every part of the deſcription* muſt unite in the claimant. See alſo *Fearne on Cont. Rem.* 4th edit. *p.* 319. and 2 *Wilſ. p.* 20.

III. 1. Conditions and Covenants-*real*, or ſuch as are annexed to eſtates, ſhall deſcend to the Heir, and he alone ſhall take advantage of them. 43 *Ed.* 3. *c.* 4: 1 *And.* 55.

And this is not only where there are expreſs words, but alſo where there are none; for the law by implication reſerves the condition to the Heir of the feoffor, &c; for being prejudiced by the diſpoſition, it is but reaſonable that he ſhould take the ſame advantage that his anceſtor whom he repreſents might. 1 *Rol. Abr.* 407, 472.

If a man ſeiſed of lands in right of his wife, makes a feoffment in fee upon condition, and dies, and after the condition is broken, the Heir of the huſband ſhall enter; for though no right deſcended to him, yet the title of entry by

by force of the condition which was created upon the feoffment, and reſerved to the feoffor and his Heirs, deſcended. 8 *Co.* 43: *Co. Lit.* 202 *a*: 336 *b*.

The Heir ſhall take advantage of a *nomine pœnæ*; for being incident to the rent, it ſhall deſcend to the Heir, being a ſecurity or penalty to engage the payment of the rent; therefore whoever has a right to the rent, ought in reaſon to have the penalty, which is to oblige the tenant to pay it. *Co. Lit.* 162 *b*.

If a man leaſes for years, and the leſſee covenants with the leſſor, his executors and adminiſtrators, to repair and leave it in good repair at the end of the term, and the leſſor dies, *&c.* his Heir may have an action upon this covenant; for this is a covenant which runs with the land, and ſhall go to the Heir, though he is not named: and it appears that it was intended to continue after the death of the leſſor, inaſmuch as his executors, *&c.* are named. 3 *Lev.* 92: *Skin.* 305.

If *A.* enfeoff *B.* upon condition that if the *Heir* of *A.* pays to *B. &c.* 20*s.* then he and his *Heirs* may re-enter; this is a good condition, of which the *Heir* of *A.* may take advantage, and yet *A.* himſelf never can. *Co. Lit.* 214 *b*.

III. 2. As the Heir-at-law is the proper and only perſon, who can take advantage of conditions, *&c.* annexed to the real eſtate; ſo he ſhall be bound by all ſuch conditions, *&c.* which run with the land, whether ſuch conditions were annexed to the eſtate by the original feoffor, grantor, or immediate anceſtor. 1 *Rol. Abr.* 421.

If a gift be made in tail on condition, that the donee ſhould not diſcontinue, and the donee hath iſſue two daughters, and one of them diſcontinues, the donor ſhall enter and evict them both; becauſe it was the original condition annexed to the whole eſtate, that no part of it ſhould be diſcontinued. *Co. Lit.* 165.

But note, that neither tenant in tail, nor his iſſue can be reſtrained from aliening by *fine* and *recovery*; though they may be reſtrained from aliening by feoffment, or other *tortious act*, which amounts to a *diſcontinuance*.

So where one deviſed lands to *A.* and the Heirs male of his body, provided, that if he does attempt to alien, that then immediately his eſtate ſhall ceaſe, and *B.* ſhall enter, and *A.* makes a feoffment in fee, and thereupon *B.* enters; and it was adjudged againſt *B.* and that the condition was void, becauſe *non conſtat* what ſhall be adjudged an attempt, and how it ſhall be tried. 1 *Vent.* 321: 3 *Keb.* 787, *Piers* and *Winn*.

Alſo where a *condition* is annexed to the eſtate given to the Heir, and which goes in abridgment and reſtraint thereof, the ſame ſhall in ſome caſes be conſtrued a *limitation*; for if it were a *condition*, nobody could take advantage of it but the *Heir*. *Dyer* 316: 10 *Co.* 41: 1 *Vent.* 199. As if a copyholder in *Borough Engliſh* ſurrender to the uſe of his will, and after deviſes to his wife for life, remainder to his eldeſt ſon, paying 40*s.* to each of his brothers and ſiſters within two years after the death of his wife, *&c.* this is a *limitation*, and not a *condition*; for if it ſhould be a *condition*, it would *extinguiſh in the Heir*, and there would be no remedy for the money. *Cro. Eliz.* 204: 3 *Co.* 20 *b*: 2 *Leon* 114. *S. C. Vide* farther as to the doctrine of the *Heir* being bound, *&c. Vaughan.* 271: 2 *Mod.* 26. *S. C*: *Cro. Eliz.* 833. 919: *Moor* 644. *pl.* 891: *Noy* 51.

But wherever the anceſtor makes a conveyance or diſpoſition on condition, which goes in reſtraint and abridgment of the eſtate of the heir, he muſt have notice of it; for having a good title by deſcent, he is not obliged to take notice of ſuch condition at his peril, as others muſt do. 8 *Co. Francia*'s caſe.

If the perſon of the anceſtor be bound in reſpect of his land, which deſcends to the Heir, he ſhall be charged: as, if by a ſubſidy to be aſſeſſed upon every one having 20*s. per annum*, *A.* be charged and die; his Heir ſhall pay it, for it runs with the land. *R. Mo.* 17.

Heir is *nomen collectivum*; and therefore, if a condition be, *that if his heir does not pay ſuch a rent-charge, the eſtate ſhall go to B.* if the *Heir* of the *Heir* does not pay, the condition is broken. *R. Cro. Jac.* 145.

It has been held, that the *Heir* is never chargeable without an expreſs *lien* and aſſets; and even then, no longer than he hath aſſets, for he is not obliged to keep them till he is charged: But if he has aſſets, he ought to plead truly, and confeſs them; otherwiſe judgment ſhall be given againſt him *de terris propriis*, for it is then his debt. *Jones* 88: 3 *Salk.* 179. When a man recovers againſt an *Heir*, by default or verdict, on pleading *riens per deſcent*, a ſpecial judgment *de terris deſcenſis*, may be entered againſt the *Heir*, and the plaintiff, (praying it) ſhall have all the lands by deſcent in execution: though if the judgment be general againſt the *Heir*, without praying ſuch ſpecial judgment he can only have a moiety of the lands by *elegit*. *Plowd.* 439: 2 *Leon.* 16. Here the plaintiff may ſurmiſe, that the *Heir* hath ſuch land by deſcent, and pray to have execution of all his land. *Dyer* 149: *Rol.* 72. The judgment and execution ſhall be general, unleſs the Heir acknowledge the action, and ſhews that he hath ſo much by deſcent; but if he will not ſhew what he hath by deſcent, he loſes the benefit of the law. *Cro. Eliz.* 692.

If the *Heir*, in caſe where the anceſtor hath bound himſelf and his *Heirs*, have never ſo much land come to him by gift in tail, or conveyance of the father, and *not by deſcent*, he is *not* chargeable at all: and ſo it is for any eſtate but what is in *fee ſimple*; as where lands are granted to *J. S.* and his *Heirs* during the life of another, *&c.* the *Heir* ſhall not be charged for this, no more than for the land entailed. 10 *Rep.* 98. See *poſt.* 4. *No lands can be charged but fee ſimple*; therefore, in a ſuit againſt the *Heir*, the judgment is only for the land *deſcended*, and not for other lands, *&c.* but where it is by his own fault, as by a falſe plea, or the like. *Co. Lit.* 102, 376.

A man binds himſelf and his *Heirs* in an obligation, and hath lands and *Heirs* on the part of the father, and the part of the mother; the *Heirs* and lands of both, and not of one alone, muſt be charged in debt: and the plaintiff ſhall have ſeveral actions; and the execution ſhall ſtay, till it may be had againſt both of them. 2 *Rep.* 25: *Hob.* 25. Alſo if one bind himſelf and his *Heirs*, and leave land at *Common-law*, and lands in *gavelkind*; the obligee muſt ſue all the *Heirs*. *Hob.* 25. An *Heir* ſued on a ſpecialty, ſhall have his age; and if one of the *Heirs* be within age, the parol ſhall be ſtayed for all. *Moor cap.* 203.

A collateral *Heir* is chargeable for the debt of his anceſtor: but the declaration muſt be ſpecial, and he is to be charged as collateral *Heir*, not as immediate *Heir*; and if a ſon happens between, who dies, he muſt be ſaid uncle

uncle and *Heir* of the ſon, who was Heir of the debtor, &c. *Cro. Car.* 151. And a child born, though he lives but an hour, has the fee of lands veſted in him as *Heir*. *Hetl.* 134. In a writ a man need not ſhew how he is *Heir*; but he muſt in a declaration, &c. though it is only for form to ſet forth *how* a perſon is *Heir*, becauſe it is not traverſable; and *Heir*, or no *Heir*, is iſſuable. *Moore* 885. If an *Heir* ought to confeſs the debt on action brought againſt him, and the debt be not denied, it muſt be admitted. 1 *Lutw.* 442.

Debt againſt the *Heir*, upon the bond of his anceſtor, is to be brought in the *debet* and *detinet*, becauſe the *Heir* himſelf is bound; and not in the *detinet* only, though that is cured by verdict. *Sid.* 342: 1 *Lev.* 224. An *Heir* is not bound by the bond of the anceſtor, unleſs he is expreſsly bound: and if in a bond a man bind his *Heirs*, but not himſelf, the bond is void. 2 *Saund.* 136: *Cro. Jac.* 570. Alſo a man ſhall never bind his *Heir* to warranty, where he himſelf was not bound: if he make a feoffment in fee, and bind his *Heirs* only to warranty, the feoffment is void, for the *Heir* ſhall be bound to warranty in ſuch caſes only, where the anceſtor was bound, without which it cannot deſcend upon him. *Co. Lit.* 386. And warranties and eſtoppels ſhall deſcend upon the *Heir* general, and not upon any ſpecial *Heir*, &c. So that if a man convey land with warranty againſt him and his *Heirs*, his *Heir* on the mother's part ſhall not be vouched by this, ſo long as there is an *Heir* on the father's part, &c. *Hob.* 24.

A grant of an annuity, muſt be for a man and his *Heirs*, to bind the *Heir*, although there be aſſets; and when he is named, the *Heir* ſhall not be bound except there be aſſets. *Co. Litt.* 144. Where a perſon covenants with another to perform any act, if his *Heir* be not named, he is not bound by it: but in covenants of others, that concern the inheritance, the *Heir* ſhall have the benefit of them, though not named. 5 *Rep.* 8: 1 *Rol. Abr.* 520. An *Heir* may enter for a condition broken, when the condition is annexed to lands, and take advantage of it; becauſe if there had been no condition, the land would have deſcended to him. And an *Heir* may perform a condition, to ſave the land. 2 *Nelſ. Abr.* 929.

The Heir muſt be expreſsly named, otherwiſe he is not chargeable, and the reaſon why the heir is not chargeable in this caſe, as the executor in caſe of a bond entred into by the teſtator, without being named, is this; by the Common-law only the goods and chattels of the debtor, and the annual profits of the land as they aroſe, and not the land itſelf, were liable to execution for debt or damages, becauſe theſe being the ſecurity the creditor depended upon, they were liable in the hands of his repreſentative or executor, as well as in the hands of the debtor himſelf; hence it was, that the executor was bound by the debt of the teſtator, ſo far as he had chattels or aſſets, though he was not named in the contract; but the land was not liable to execution, becauſe it was preſerved from the perſonal contracts and engagements of the tenant, that he might be the better able to anſwer the feudal duties to the lord, which were the life and ſupport of government; therefore the land not being originally liable to the demand in the hands of the obligor, muſt be much leſs liable in the hands of the *Heir*, who was not comprehended in the contract. 2 *Inſt.* 19: *Plow.* 440: *Hob.* 60.

But if *A.* had granted, for him and his *Heirs*, to *B.* and his *Heirs*, ſuch a rent out of his lands; in this caſe, the *Heirs* being comprehended in the contract, are bound to make good the grant, ſo far as they have aſſets by deſcent from the grantor; and this was allowed at Common-law, becauſe the grantee of the rent had the land originally in view for his ſecurity; and by the grant itſelf having it in his power to diſtrain the land for the rent, it was equal to the *Heir*, whether the land anſwer the rent by diſtreſs, or by an execution upon a judgment in a writ of annuity. 1 *Rol. Abr.* 226: *Peſham* 87: *Hob.* 58: *Dyer* 344 *b*: *Co. Lit.* 144 *b*.

If the anceſtor bind himſelf in a ſtatute, recognizance, &c. the *Heir* is liable, not only as tertenant, but alſo as *Heir*, otherwiſe he could not have his age; and cannot oblige a purchaſer, whether for valuable conſideration, or without, to contribute, but one *Heir* may oblige another to contribute; as if a man ſeiſed of two acres, the one deſcendible, according to the courſe of the Common-law, the other in Borough Engliſh, acknowledge a ſtatute, &c. the *Heir* at Common-law ſhall oblige the Borough Engliſh Heir to contribute: ſo one coparcener ſhall oblige the other to contribute; or if the conuzor had lands, ſome deſcendible to the *Heirs* of the father, and ſome deſcendible on the *Heirs* of the mother, the *Heir* on the part of the father ſhall compel the *Heir* on the part of the mother to contribute; *& ſic vice verſa*. 3 *Co.* 12. Sir *William Herbert*'s caſe. See poſt. 4.

III. 3. Not only land, but rent not due at the death of the anceſtor leſſor, ſhall go to the *Heir*; ſo corn ſown by a tenant for years, where his term expires before the corn is ripe; every thing faſtened to the freehold, timber-trees, deeds belonging to the inheritance; deer, conies, pigeons, fiſh, &c. 2 *Nelſ. Abr.* 927. An *Heir* ſhall enforce the adminiſtrator to pay debts with perſonal eſtate, to preſerve the inheritance. *Chan. Rep.* 280, 293. If an executor hath aſſets, he is compellable in equity to redeem a mortgage, for the benefit of the *Heir*; and it is the ſame where the *Heir* is charged in debt. *Hard.* 511. For the perſonal eſtate received the benefit. When the *Heir* is ſued for the debt of his anceſtor, and pays it, he ſhall be reimburſed by the executor of the obligor, who hath perſonal aſſets. 1 *Chanc. Rep.* 74. But in action of debt brought upon a bond againſt an *Heir*, it is no good plea for the *Heir* to ſay, that the executors have aſſets in their hands. *Dyer* 204. For a creditor may ſue either *Heir* or executor, and *Heirs* and executors are both chargeable upon ſpecialties. If an *Heir* hath aſſets, and the executor alſo, it is at the election of the obligee to have action of debt againſt the one, or the other; but he ſhall not charge them doubly, 2 *Plowd.* 433. See title *Executor*. Whether the *Heir* hath land by deſcent ſhall be tried and enquired of, with the value, by a jury, to make the *Heir* anſwerable. 5 *Mod.* 122.

The *Heir* ſhall not have money due on mortgages in fee, if he be not particularly named, but the executor; and if the day be paſt, although the *Heir* be named, the executor ſhall have it. *Co. Lit.* 210: 1 *Ventr.* 348. See titles *Executor*, V. 6: *Mortgage*.

The following is a ſpecification *of what* goods *and* chattels *go to* the Heir.

Goods and chattels annexed to the freehold go to the Heir, and not to the executor, or adminiſtrator: as, the

 glaſs

HEIR III. 4.

glaſs in a window; the doors and locks of an houſe. *Off. Ex'* 86: 21 *H.* 7. 26 *b.* 4 *Co.* 63 *b.* So the pales, poſts, and rails for an incloſure. 12 *H.* 7. 26 *b.* So, furnaces, coppers, *&c.* fixed to the freehold. *R.* 21 *H.* 7. 26 *b*: *R.* 20 *H.* 7. 13 *b.* unleſs they are ſevered in the life-time of the teſtator. *Semb.* 1 *Sal.* 368. *Vide Com. Dig.* tit. *Execution*, (C. 4.) tit. *Waſt*, (D. 2.)—So wainſcot fixed to an houſe. 4 *Co.* 64 *a.* So, pictures, glaſſes, *&c.* fixed inſtead of wainſcot. 2 *Vern.* 508. So, millſtones, *&c.* fixed to a mill. So a term for years to attend the inheritance does not go to the executor, but to the heir. *R* 2 *Ch. Ca.* 156, 160. So deer in a park, conies in a warren, and doves in a dove-houſe, go with the inheritance to the Heir. So, fiſh in a pond, or piſcary. *Co. Lit.* 8. *a*: *R. Owen* 20: 1 *Rol.* 916. *l.* 45, 50. So, apples, and other fruits growing at the death of the anceſtor. *Off. Ex'* 84. So roots, *&c.* within the ſoil. *Ib.* 89. So a coat armour, pennons, tombſtone, and monuments in a church, in honour of the anceſtor. *Co. Lit.* 18 *b.* So charters, deeds, and evidences of lands, with the cheſts in which they are preſerved. See *Com. Dig.* tit. *Biens* (B;) *Charters*: 1 *Inſt.* 18 *b.*—An ancient horn where the tenure is by cornage. 1 *Vern.* 273.

If a nobleman, knight, eſquire, *&c.* be buried in a church, and have his coat of arms, and pennons with his arms, and ſuch other enſigns of honour as belong to his degree, ſet up in the church, or if a grave-ſtone or tomb be laid or made, *&c.* for a monument of him; in this caſe, albeit the freehold of the church be in the parſon, and that theſe be annexed to the freehold, yet cannot the parſon, or any, take them, or deface them, but he is ſubject to the Heir, and his heirs, in the honour and memory of whoſe anceſtor they were ſet up. *Co. Lit.* 18 *b.* And ſee 1 *Rol. Abr.* 625: *Noy.* 104: *Godbolt* 200: *Cro. Jac.* 367: 2 *Bulſt.* 151.

Where money is covenanted to be laid out in a purchaſe of land to be ſettled on *A.* in fee; on *A.*'s dying before the money is laid out, his Heir, and not his executor ſhall have it. 1 *P. Wms.* 483. So where, though by a voluntary contract, money is agreed to be laid out in land, the Court will execute ſuch agreement in favour of the Heir. 2 *P. Wms.* 171. On the ſame principle where one articled to buy land and died; his executor ſhall pay the money, but his Heir ſhall have the lands. *Id.* 632. And in all caſes where it is a meaſuring caſt between an executor and an Heir, the latter ſhall in equity have the preference. *Id.* 176.

A younger brother beyond ſea having contracted to buy a real eſtate of his elder brother, made his will charging his eſtate with great legacies, but his will was attested by only two witneſſes. Afterwards the teſtator died without iſſue, leaving his elder brother his executor and Heir: the Heir may retain out of the aſſets the whole purchaſe money, though intitled to the land again as Heir. 2 *P. Wms.* 291.

III. 4. It is clear, that the *Heir* may bring any real action *droitural*, in right of his anceſtor, but cannot regularly bring any perſonal action, becauſe he has nothing to do with the aſſets, or perſonal contracts of his anceſtor. *Co. Lit.* 164. If an erroneous judgment be given againſt the anceſtor, by which he loſeth the lands, the Heir may bring a writ of error. 1 *Rol. Abr.* 747: *Dyer* 90: *Godb.* 337. And if one hath lands on the part of his mother, and loſeth by erroneous judgment, and dies, the Heir of the part of the mother ſhall have the writ of error. 1 *Leon.* 261: 2 *Sid.* 56. So the younger ſon, when intitled to the land by the cuſtom of Borough Engliſh, ſhall bring the writ of error, and not the Heir at Common-law, for this remedy deſcends with the land. *Owen* 68: 1 *Leon.* 261: 4 *Leon.* 5. and ſee *Bridgm.* 71. So if there be an erroneous judgment againſt tenant in tail female, the iſſue female, and not the ſon, ſhall bring a writ of error. *Dyer* 90: 1 *Leon.* 261: 1 *Rol. Abr.* 747. See further *Dyer* 89: *Cro. Eliz.* 469: 3 *Lev.* 36; and title *Error*. I. 1.

If *J. S.* binds himſelf and his Heirs, in a bond, and thereupon Judgment is obtained againſt *J. S.* and *J. S.* makes his will, and his Heir at law executor, and dies, leaving lands which deſcended to his Heir, yet he ſhall not have a writ of error as Heir, for he is not privy to the judgment; and when an extent is made upon him, it is as tertenant; but after the lands are taken in execution, he may have a writ of error. Becauſe he is prejudiced by the judgment, and by the reverſal will receive benefit. *Sty.* 38, 9.

The Heir at law may, in right of his anceſtor, maintain an action of debt for rent reſerved on a leaſe, made by his anceſtor, (accrued after the death of the anceſtor) for the rent is part of the lands, and incident to the reverſion; but for arrears of rent incurred in the life-time of the anceſtor, neither the Heir, nor the executor, could by the Common-law maintain an action; for as to the Heir, they were conſidered as part of the perſonal eſtate, and as to the executor, he could not repreſent his teſtator as to any contracts relating to the freehold and inheritance. 11 *H.* 6. 15: 19 *H.* 6. 41: *Co. Lit* 162 *a.* But now, by *ſtat.* 32 *H.* 8. *cap.* 37, an executor may maintain an action of debt for ſuch arrears; for which ſee tit. *Debt*.

Where the anceſtor binds himſelf, and his heirs, in an obligation, the obligee may ſue the Heir, or executor, or the adminiſtrator of the executor, at his election, and may have execution of the land deſcended to the Heir; for the Common-law having allowed the action of debt againſt the Heir, he could have no benefit by the action, unleſs he were permitted to have execution of the lands which deſcended to the Heir. *Plowd.* 441: 3 *Co.* 12 *a*: *Cro. Jac.* 450: 1 *And.* 7.

But the body of the *Heir* is protected, for it would be moſt unreaſonable to ſubject the *Heir* to the payment of his anceſtor's debts, any farther than to the value of the aſſets deſcended. *Dyer* 81 *pl.* 62; 207. *pl.* 15: *Moor pl.* 203: *Co. Lit.* 103, 290.

By the common law, if the *heir* before an action brought againſt him had aliened the aſſets, the obligee was without any remedy; but if he only aliened, pending the writ, the lands, which he had by deſcent at the time of the original purchaſed, had been liable. *Co. Lit.* 102.

In conſequence of this doctrine, that the lien ſhall have relation to the time of the original purchaſed, it hath been adjudged, that if there had been two creditors to *J. S.* whoſe Heir is bound, *viz. A.* and *B.* and *A.* files an original in *C. B.* and hath judgment thereon. *Trin. Term*, 2 *Jac.* 2, by default, and thereupon a *general elegit* iſſues againſt all the lands of the Heir, and a moiety thereof

thereof is delivered to *A.*—*B.* on a bill filed in *B. R.* 1 & 2 *Jac.* 2. has a *ſpecial judgment* againſt the aſſets confeſſed by the Heir, *Trin Term*, 3 *Jac.* 2; though *B.*'s judgment be ſubſequent to *A.*'s, yet it appearing that his bill or original was filed before *A.*'s, the judgment ſhall have relation thereto; therefore he muſt be firſt ſatisfied. *Carth.* 245.

So it ſeems in the above caſe, that though *A*'s judgment had been on an original actually filed before *B.*'s, that *B.* muſt have been preferred, becauſe his judgment was general *againſt the heir*, and the execution a *general* and *common execution* by *elegit*, and *not* againſt the *aſſets only* by way of extent; therefore ſuch a *general judgment* will not operate by way of relation to the original, but binds only, as in common caſes, from the time of the judgment given. *Carth.* 246. *Per Cur'*.

But now, in relief of creditors againſt the alienation of lands deſcended, *&c.* it is enacted by *ſtat.* 3 & 4 *W. & M. c.* 14; "That in all caſes, where any Heir at law ſhall be liable to pay the debt of his anceſtor, in regard of any lands, tenements or hereditaments deſcending to him; and ſhall ſell, alien, or make over the ſame, before any action brought or proceſs ſued out againſt him; that ſuch Heir at law ſhall be anſwerable for ſuch debt or debts, in an action or actions of debt to the value of the ſaid land ſo by him ſold, aliened, or made over; in which caſes all creditors ſhall be preferred, as in actions againſt executors and adminiſtrators; and ſuch execution ſhall be taken out upon any judgment or judgments ſo obtained againſt ſuch Heir to the value of the ſaid land, as if the ſame were his own proper debt or debts; ſaving that the lands, tenements and hereditaments *bona fide* aliened before the action brought, ſhall not be liable to ſuch execution."

But it is by the act provided, "That where any action of debt upon any ſpecialty is brought againſt any heir, he may plead *riens per diſcent* at the time of the original writ brought, or the bill filed againſt him. And the plaintiff in ſuch action may reply, that he had lands, tenements or hereditaments from his anceſtor *before the original writ brought*, or *the bill filed*: and if, upon iſſue joined thereupon, it be found for the plaintiff, the jury ſhall inquire of the value of the lands, tenements or hereditaments ſo deſcended, and thereupon judgment ſhall be given, and execution ſhall be awarded as aforeſaid: but if judgment be given againſt ſuch *heir* by confeſſion of the action without confeſſing the aſſets deſcended, or upon demurrer, or *nihil dicit*, it ſhall be for the debt and damages, without any writ to inquire of the lands, tenements or hereditaments ſo deſcended."

Before this act, if the anceſtor had deviſed away the lands, a creditor by ſpecialty had no remedy either againſt the Heir, or deviſee. *Abr. Eq.* 149.—To provide againſt which miſchief, it is by the ſame ſtatute enacted, "That all wills and teſtaments, limitations, diſpoſitions, or appointments, of or concerning any manors, meſſuages, lands, tenements, or hereditaments, or of any rent, profit, term, or charge out of the ſame, whereof any perſon or perſons at the time of his, her, or their deceaſe ſhall be ſeiſed in fee-ſimple, poſſeſſion, reverſion, or remainder, or have power to diſpoſe of the ſame by his, her, or their laſt wills or teſtaments, ſhall be deemed and taken (only as againſt ſuch creditor or creditors as aforeſaid, his, her, and their *heirs*, ſucceſſors, executors, adminiſtrators and aſſigns, and every of them,) to be fraudulent, and clearly, abſolutely, and utterly void, fruſtrate, and of none effect; (any pretence, colour, feigned or preſumed conſideration, or any other matter or thing to the contrary notwithſtanding.)"

And that ſuch creditors may be enabled to recover their debts, it is further enacted, "That, in the caſes before mentioned, every ſuch creditor may maintain an action of debt upon ſuch bonds and ſpecialties, againſt the *heirs* at law of ſuch obligors, and ſuch deviſees *jointly*, by virtue of this act; and ſuch deviſees ſhall be liable and chargeable for a falſe plea, in the ſame manner as any *heir* ſhould have been for falſe plea, or for not confeſſing the lands or tenements to him deſcended."

It is, however, by this act further provided, "That where there is any limitation or appointment, deviſe or diſpoſition of any lands, *&c.* for the raiſing or payment of any real or juſt debt, or any portion or ſum of money, for any child, other than the Heir at law, according to or in purſuance of any *marriage contract*, or *agreement* in *writing bona fide* made, before ſuch marriage, the ſame ſhall be in full force, and the lands, *&c.* ſhall be holden and enjoyed by ſuch perſons, and their Heirs, executors, adminiſtrators and aſſigns, for whom the ſaid limitation *&c.* was made, and by their truſtees and their Heirs, executors, adminiſtrators and aſſigns, for ſuch eſtate or intereſt, as ſhall be ſo limited, *&c.* until ſuch debt or debts, portion or portions ſhall be raiſed, paid and ſatisfied."

And it is further enacted, "That all and every deviſee and deviſees, made liable by that act, ſhall be liable and chargeable in the ſame manner as the Heir at law, by force of the act, notwithſtanding the lands, tenements, and hereditaments to him or them deviſed, ſhall be aliened before the action brought."

In the conſtruction of this ſtatute it hath been holden, that though a man is prevented thereby from defeating his creditors by will, that yet any ſettlement or diſpoſition he ſhall make in his life-time of his lands, whether voluntary or not, will be good againſt bond creditors; for that was not provided againſt by the ſtatute, which only took care to ſecure ſuch creditors from any impoſition, which might be ſuppoſed in a man's laſt ſickneſs; but if he gave away his eſtate in his life-time, this prevented the deſcent of ſo much to the Heir, conſequently took away their remedy againſt him, who was only liable in reſpect of the lands deſcended; and as a bond is no lien whatſoever on lands in the hands of the obligor, much leſs can it be ſo, when they are given away to a ſtranger. *Eq. Ab.* 149. See title *Fraud*, II.

As to the manner of *pleading* and *replying* under this ſtatute; See *Carth.* 35: 5 *Mod.* 122.

It ſeems that neither before, nor ſince, this ſtatute, the *executor* or *adminiſtrator* of the *heir* are liable; for the *perſon* of the *heir* is not chargeable, but with reſpect to the land; and if, before the ſtatute, the *heir* had aliened before action brought, he ſhould not be charged for the profits he received; which is evident from the plea of *riens per diſcent* the day of the writ purchaſed; much leſs could his executor, nor can he yet, unleſs ſome ſtatute make him ſo: for an executor is but in nature of a truſtee for the perſonalty, and not at all privy to the inheritance. *Trin.* 32 *Car.* 2. in *C. B.* 3 *New Abr.* 28.

If there be judgment in debt againſt two, and one dies, a *ſcire facias* lies againſt the other alone, reciting

the death, and he cannot plead that the *heir* of him who is dead has aſſets by deſcent, and demand judgment if he ought to be charged alone: for, at *common law*, the charge upon a judgment, being *perſonal*, ſurvived, and the ſtatute of *Weſtm.* 2, that gives the *elegit*, does not take away the remedy of the plaintiff at *common law*, therefore the party may take out his execution which way he pleaſes; for the words of the ſtatute are *ſit in electione*: but if he ſhould, after the allowance of the writ, and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by ſuggeſtion, or elſe by *audita querela* 1 *Lev.* 30: *Raym.* 26: 1 *Keb.* 92.

As to a *ſequeſtration*, and to ſhew that a *decree* ſhall have the ſame authority to bind the perſonal aſſets, as a judgment at law, and therefore ſhall go *pari paſſu* to be paid off and diſcharged. *Vide* 1 *Vern.* 143: 3 *Lev.* 355: 2 *Vern.* 37, 88-9. and this Dict. title *Executor*, V. 6.

III. 5. Where the anceſtor binds himſelf and his Heirs, all his lands of freehold, and which deſcend in *fee ſimple*, are aſſets by deſcent, and ſhall be liable, as far as they extend, to anſwer the anceſtor's obligations. See *Bro.* tit. *Aſſets*: *Fit.* tit. *Aſſets*: 1 *Rol. Abr.* 269. tit. *Aſſets*. A reverſion after a leaſe for years made by the anceſtor is preſent aſſets, ſo that the Heir cannot plead *riens per diſcent* in delay of execution of the rent and reverſion, though the plaintiff cannot have benefit of the reverſion till the leaſe be determined. 1 *Salk.* 354-5: 7 *Mod.* 42: 2 *Mod.* 50, 51. *Hern's Plead.* 320.

So a *reverſion expectant* upon the determination of an *eſtate* for *life* is *quaſi aſſets*, and ought to be pleaded ſpecially by the Heir, and the plaintiff in ſuch caſe may take judgment of it *cum acciderit*. *Carth.* 129. But a *reverſion in fee* expectant upon *an eſtate tail* is *not* aſſets, becauſe it lies in the will of the tenant in tail to dock and bar it at his pleaſure. 6 *Co.* 58: 1 *Rol. Abr.* 269.

If *A.* hath iſſue *B.* and *C.* and conveys lands to the uſe of himſelf for life, the remainder to *B.* in tail male, the remainder to his own right Heirs, and *A.* dies, and the reverſion deſcends to his ſon, who dies without iſſue, ſo that the tail is ſpent, and *C.* enters, theſe lands ſhall be aſſets to anſwer the debt of his father. *Carth.* 127: 3 *Lev.* 286: 3 *Mod.* 223. *S. C.*

The lands (as hath been obſerved) muſt deſcend to the Heir; and therefore it was formerly held, that if he took by *purchaſe*, as if the teſtator deviſed them to him, paying ſo much, or if he deviſed lands to one of the two, and his Heirs at law jointly, that thoſe lands were not aſſets; but if he deviſed one part to *A.* another to *B.* and another to his Heir at law, this third part was aſſets. *Cro. Eliz.* 431: 2 *Mod.* 286.

By the ſtatute of frauds and perjuries, (29 *Car.* 2. *c.* 3.) it is enacted, That if land come to the Heir by reaſon of a ſpecial occupancy, they ſhall be chargeable in his hands as aſſets by deſcent, as in caſes of lands in fee-ſimple; and in caſe there be no ſpecial occupant thereof, 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. Alſo by the ſaid ſtatute, §§ 10, 11. where lands are ſettled in truſt, and deſcend in fee to the Heir of *ceſtuy que truſt*; the ſame ſhall be aſſets in the ſame manner as lands in poſſeſſion, but he ſhall not by reaſon of any plea or other matter be chargeable to pay the condemnation out of his own eſtate.—See 2 *Vern.* 248. and this Dict. tit. *Fraud.*

An equity of redemption of an inheritance is aſſets, for the Heir having a right in equity, that ought in equity to ſatisfy a bond debt. 4 *Chanc. Caſ.* 148. Tenant in tail ſuffers a recovery to let in a mortgage of 500 years, then limits the land to the old uſes, and makes his will, and deviſes all his lands for the payment of his debts; the redemption was limited to him, his Heirs and aſſigns; and the court thought that the equity of redemption of this mortgage, ſhould be aſſets to ſatisfy creditors, or a ſubſequent grantee of an annuity. *Precd. Chanc.* 39. A *right* without any eſtate in poſſeſſion, reverſion or remainder, is not aſſets till it be recovered and reduced into poſſeſſion. 6 *Co.* 58.

For more learning on this ſubject, ſee 14 *Vin. Abr.* and 2 *New Abr.* title *Heir*; and this Dict. tit. *Aſſets.*

HEIRESS, The *female heir* to to a man, having an eſtate of inheritance in lands; and where there are ſeveral joint *heirs*, they are called *Co-heirs* or *Co-heireſſes*. As to ſtealing an *heireſs*, and marrying her againſt her will; See *Forcible Marriage.*

HEIR-LOOME, From the Sax. *Heir*, i. e. *Hæres*, & *Loome*, Membrum.] Comprehends divers implements of houſhold, ſuch as the firſt beſt bed and other things, which by the cuſtom of ſome countries have belonged to a houſe for certain deſcents, and are never inventoried after the deceaſe of the owner as chattels, nor do they go to the executor, but accrue to the *Heir* with the houſe itſelf by *cuſtom*, and not by the Common-law: theſe are *not deviſable by teſtament*; for the law preſers the *cuſtom* before a *deviſe*, which takes not effect till after the death of the teſtator, and then they are veſted in the *Heir* by the *cuſtom*. *Co. Lit.* 18, 185. But ſale in a man's life-time might make it otherwiſe. The ancient jewels of the *Crown* are *Heir-looms*, and ſhall deſcend to the next ſucceſſor; and are not deviſable by will. 1 *Inſt.* 185. And *Heir-looms* in general are ſaid to extend to all large houſhold implements not eaſily moved. See *Spelman.*

It is ſaid, that the word by time hath obtained a more general ſignification than at firſt it did bear, comprehending all implements of houſhold, as tables, preſſes, cupboards, bedſteads, wainſcot, and ſuch like: which, by the cuſtom of ſome countries, have belonged to a houſe during certain deſcents, as before-mentioned.

Per Holt Ch. J. *goods in groſs* cannot be an Heir-loom, but they muſt be things fixed to the freehold, as old benches, tables, &c. 12 *Mod.* 519, 520. Alſo on this ſubject, *vide* 12 *Co.* 104, 105. *Corven's* caſe. and *ante* title *Heir.* III. 3.

HEGIRA, The Mahometan *Æra*, or computation of time; beginning from the flight of *Mahomet* from *Mecca*, 16 *July*, *anno* 622. As the years of the *Hegira* conſiſt of only 354 days, they are reduced to the *Julian* calendar by multiplying the year of the *Hegira* by 354, dividing the product by 365, ſubtracting the intercalary days, or as many times as there are four years in the quotient, and adding 622 to the remainder.

HELSING, A braſs coin among the *Saxons*, equivalent to our halfpenny.

HELM, Thatch or ſtraw. *Cowell.* Sometimes called *Halm.*—*Helm*, is alſo a *Saxon* word, ſignifying a *covering* for the *head* in *war*. Alſo, that part of a *coat* of *arms*, which bears the *creſt*.—The *ſteerage*, or *rudder* in a ſhip, or other veſſel.

HELOWE-WALL,

HELOWE-WALL, the *hell-wall* or end wall, that covers and defends the reſt of the building. From Saxon *helan*, to cover or heal; whence a thatcher, ſlater or tiler, who covers the roof of a houſe, is in the Weſtern parts called a *hellier*.—*Paroch. Antiq. p.* 573: See *Kennet's Gloſſary*.

HEMP AND FLAX. By *ſtat.* 33 *H.* 8. *c.* 17, None may water *hemp* or *flax* in any river, running water, ſtream, brook, or common pond, where beaſts are uſed to be watered, but only in their ſeveral ponds, *&c.* for that purpoſe, on pain of 20*s.* By *ſtat.* 15 *Car.* 2. *c.* 15, Any perſons may in any place or corporate town privileged, or unprivileged, ſet up manufactures of Hemp or Flax; and perſons coming from abroad, uſing the trade of *Hemp* or *flax* dreſſing, and of making thread, weaving cloth made of *Hemp* or *Flax*, or making tapeſtry hangings, twine or nets for fiſhery, cordage, *&c.* after three years, ſhall have the privileges of natural-born ſubjects.

As to the importation and exportation of hemp and flax from *Ireland*, *&c.* See *Stats.* 7 & 8 *W.* 3. *c.* 39: 1 *Ann. ſtat.* 2. *c.* 8: 16 *Geo.* 2. *c.* 26. § 6. & 19 *Geo.* 3. *c.* 37. the laſt giving a bounty, and the others allowing importation duty-free.—And ſee *Stat.* 26 *Geo.* 3. *c.* 53. § 12. and this Dict. title *Navigation-Acts*.

By *Stat.* 26 *Geo.* 3. *c.* 43, (and ſee *Stat.* 27 *Geo.* 3. *c.* 13. § 65,) bounties are granted for 7 years of 3 *d. per* ſtone for hemp, and 4 *d.* for flax *raiſed in England*.

The Tithe of hemp and flax is by *Stat.* 11 & 12 *W.* 3. *c.* 16, aſcertained at 5*s.* an acre. For penalties on workmen imbezzling it; See *Stats.* 1 *Ann. ſt.* 2. *c.* 18. § 1. Againſt frauds in manufactures of hemp, flax, *&c.* *Stat.* 22 *Geo.* 2. *c.* 27.

HENCHMAN, *Qui equo innititur bellicoſo*, from the German *hengſt*, a war-horſe.] With us it ſignifies one who runs on foot, attending upon a perſon of honour or worſhip. See the ancient *Stats.* 3 *Ed.* 4. *c.* 5: 24 *Hen.* 8. *c.* 14. It is written *henxman*. *Stat.* 6 *Hen.* 8. *c.* 1.

HENEDPENNY. A cuſtomary payment of money inſtead of hens at *Chriſtmas*: from the Saxons *hen*, *gallina* and *penning*, *denarius*. *Monaſt.* 2 *tom.* 327, 827. *Du Freſne* thinks it may be *henpenny*, *gallinagium*, or a compoſition for eggs. But poſſibly it is miſprinted *benedpenny* for *beved-peny*, or *head-peny*. *Cowell, edit.* 1727.

HENEWARD, A duty to the King in *Cambridgeſhire*. *Domeſday*.

HENGHEN, Saxon *hongen*.] A priſon, gaol, or houſe of correction. *LL. Hen.* 1. *c.* 65.

HENGWITE, See *Hangwite*.

HEORDFESTE, The ſame with *husfaſtne* or *husfeſtane*, i. e. the Maſter of a family: From the Saxon *hearthfæſt*, i. e. fixed to the houſe or hearth: *Leges Canuti, cap.* 40. See *Hurdereferſt*.

HEORDPENNY, *Olim* Romeſcot & *poſtea* Peterpence from the Saxon *hearth*, *focus*, and *pening*, *denarius*. See *Peterpence* and *Romeſcot*.—*Leges Edgari Regis, cap.* 5. *apud Bromptonum*.

HEPTARCHY, The Kingdom of *England* was formerly, under the *Saxons*, divided into an Heptarchy, conſiſting of *ſeven* independent kingdoms, peopled and governed by different clans and colonies; Theſe were all reduced into one kingdom by *Egbert* King of the Weſt *Saxons* in the year 827 or 828.—*Egbert* is therefore ſtiled the firſt King of *England*. See 4 *Comm. c.* 33.

HERALD, HERALT, or HEROLD, Ital. *heraldo*, Fr. *herault*, quaſi *herus* altus.] An officer at arms. *Verſtegan* thinks it may be derived from two *Dutch* words, *viz.* Here, *exercitus et* Healt, *pugil magnanimus*; as if he ſhould be called the *Champion of the Army*: and the *Romans* called *Heralds*, *feciales*. *Polydore, lib.* 19, deſcribes them thus: *Habent inſuper apparitores miniſtros, quos* Heraldos *dicunt, quorum præfectus* Armorum Rex *vocitatur*; *hii belli et pacis* Nuncii; *Ducibus, Comitibuſque a Rege factis inſignia aptant, ac eorum funera curant*. The function of theſe officers, as now exerciſed with us, is to denounce war, proclaim peace, and to be employed by the King in martial meſſages: they are examiners and judges of gentlemens *coat of arms*, and conſervators of *genealogies*; and they marſhal the ſolemnities at the coronations, and funerals of princes, and other great men.

The three chief *Heralds*, are called *Kings at Arms*; of which *Garter* is the principal, inſtituted by King *Henry* V. whoſe office is to attend the *Knights of the Garter* at their ſolemnities, and to marſhal the funerals of the nobility: and King *Edward* IV. granted the office of *King of Heralds* to one *Garter*, *cum feudis et proficuis ab antiquo*, *&c.* The next is *Clarencieux* or *Clarentius*, ordained by *Edward* IV. who attaining the dukedom of *Clarence* by the death of *George* his brother, (whom he beheaded for aſpiring to the crown,) made the *Herald* who belonged to that dukedom a King at arms, and called him *Clarencieux*; his proper office is to marſhal and diſpoſe the funerals of all the leſſer nobility, knights and eſquires, thro' the realm, on the *South* ſide of the *Trent*. The third is *Norroy*, quaſi *North Roy*, whoſe office and buſineſs is the ſame on the *North* ſide of *Trent*, as *Clarentius* on the South, which is intimated by his name, ſignifying the *Northern King*, or *King at Arms* of the *North* parts. Theſe three officers are diſtinguiſhed as follows, *viz.* Garter *Rex Armorum Anglicorum*; *indefinitè*; Clarencieux, *Rex Armorum partium Auſtralium*: Norroy, *Rex Armorum partium Borealium*.

Beſides the *Kings at Arms*, there are ſix *inferior Heralds*, according to their original, as they were created to attend Dukes and great Lords, in martial expeditions, i. e. *York*, *Lancaſter*, *Cheſter*, *Windſor*, *Richmond* and *Somerſet*; the four former inſtituted by King *Edward* III. and the two latter by *Edward* IV. and *Henry* VIII. To theſe, upon the coming of King *George* to the crown, on account of his *Hanoverian* dominions, a new *Herald* was made, called *Hanover Herald*; and another ſtiled *Glouceſter*, King at Arms. *Anno* 11 *Geo.* 1. And laſtly, to the ſuperior and inferior *Heralds*, are added four others, called *Marſhals* or *Purſuivants at Arms*, who commonly ſucceed in the places of ſuch *Heralds* as die, or are preferred; and they are *Blue-mantle*, *Rouge-croſs*, *Rouge-dragon*, and *Portcullis*: all equipped with proper enſigns, badges and diſtinctions.

The ancient *Heralds* have been made a corporation or college under the *Earl Marſhall* of *England*, with certain privileges by the Kings of this realm: *Conceſſerunt*, *&c.* Heraldi Armorum, *et omnes alii* Heraldi, *proſecutores ſive* Purſuivandi *armorum, qui pro tempore fuerint, imperpetuum, ſint unum corpus corporatum, in re, facto, et nomine*; *habeantque ſucceſſionem perpetuam, nec non quodam ſigillum commune*, *&c.* *Dat. &c.* *Spelm. Gloſſ. Herald's Court of Honour*. See titles *Honor-Courts*: COURT *of Chivalry*.

For the ceremony of making the King of Arms, ſee *Dethick's* caſe. *Ley's Reports* 248.

HERBAGE,

HERBAGE, *Herbagium.*] The green pasture and fruit of the earth, provided by nature for the bite or food of cattle: it is also used for a liberty that a person hath to feed his cattle in the ground of another person; or in the forest, &c. *Cromp. Jurisd.* 197.

He that hath Herbage of a forest by patent may have trespass for the grass, but not for trees or the fruit of them; and he may take beasts damage-feasant, and have *quare clausum fregit*, and by such grant may inclose the forest. Yet grantee of Herbage may inclose, and may have action of trespass *quare clausum fregit*. But though he that hath Herbage may inclose, yet he that hath reasonable Herbage cannot. *Dy.* 285. and see 2 *Ro Rep.* 356.

Grantee of Herbage of a park cannot dispark it *Godb.* 419. A lease was made of a manor with all gardens, orchards, yards, &c. and with all the profits of a wood, excepting to lessor forty acres, to take at his pleasure; *per Dyer*, The wood is not comprized within the lease, but the lessee shall only have the profits, as pannage, herbage, &c. 4 *Leon.* 8. See titles *Trespass*: *Lease*, &c.

HERBAGIUM ANTERIUS, The first crop of grass or hay in opposition to after-math and second cutting.—*Paroch. Antiq. pag.* 459.

HERBERY or HERBURY, An Inn. *Cowell.*

HERBENGER or HARBINGER, from the French *herberger*, that is, *hospitio accipere.*] An officer in the King's house, who goes before and allots the noblemen, and those of the household their lodgings. *Kitchin, fol.* 176. It is also used for an innkeeper.

HERBERGAGIUM, Lodgings to receive guests in the way of hospitality. *Cowell.*

HERBERGATUS, Spent in an inn. *Cowell.*

HERBIGARE, To harbour, to entertain, from *heribergum*, *heriberga*, Saxon *here berg*, a house of entertainment.—*Somner's Antiq. p.* 248. Hence our *herbinger* or *harbinger*, who provides harbour or house-room, &c.

HERCE, HERCIA, an harrow. *Fleta, lib.* 2. *c.* 77.—It signifies also a candlestick set up in churches, made in the form of an harrow, in which many candles were placed at the head of a *cenotaph.*

HERCIARE, from the French *hercer*, to harrow. See 4 *Inst. fol.* 270.

HERDEWICH, or HERDEWIC, *Herdewycha.*] A grange or place for cattle and husbandry. *Mon. Angl.* 3. part.

HERDWERCH, HEORDWERCH. Herdsman's work, or customary labours done by the shepherds, herdsmen, and other inferior tenants at the will of their lord. *Cowell, edit.* 1727: *Regist. Eccles. Christi Cant. MS.*

HEREBANNUM, Sax. *Here, exercitus,* & Ban, *edictum, multa.*] A mulct, for not going armed into the field, when called forth. *Spelm.* Under the feudal policy, every *free* man, was under an obligation to serve the State. If, upon being summoned into the field, any freeman refused to obey, a full *herebannum*, i. e. a fine of sixty crowns, was to be exacted from him, according to the law of the Franks. This fine was levied with such rigor, that if any person was insolvent, he was reduced to servitude, and continued in that state until such time as his labour should amount to the value of the *herebannum.* The Emperor *Lotharius* rendered the penalty more severe, by confiscating the goods of the person refusing, and banishing him. *Robertson's Char.* V. 1 *V.* 216, 217.

HEREBOTE, From the Sax. *Here*, and *Bode* a messenger.] The King's edict commanding his subjects into the field; from the Saxon *here, exercitus*, and *bode* a messenger. *Cowell.*

HEREDITAMENTS, *Hæreditamenta.*] All such immoveable things, whether corporeal or incorporeal, which a man may have to him and his heirs by way of inheritance; and which, if they are not otherwise devised, descend to him that is next heir, and fall not to the executor as chattels do. See *stat.* 32 *Hen.* 8 *cap.* 2. It is a word of very great extent, comprehending whatever may be inherited or come to the *Heir*; be it real, personal or mixed, and though it is not holden, or lieth not in tenure. *Co. Lit.* 6 16. And by the grant of *hereditaments* in conveyances, manors, houses, and lands of all sorts, rent, services, advowsons, &c pass. *Ibid. Hæreditamentum est omne quod jure hereditario ad heredem transit.*

Hereditaments are of two kinds, *corporeal* and *incorporeal.* Corporeal consist of such as affect the senses; such as may be seen and handled by the body: Incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal Hereditaments consist wholly of substantial and permanent objects, all which may be comprehended under the general denomination of land only. For *land* says *Coke*, comprehendeth in its legal signification any ground, soil, or earth whatsoever, as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. 1 *Inst.* 4. It legally includes also all castles, houses, and other buildings; for they consist, saith he, of two things; *land* which is the foundation; and the *structure* thereupon: so that if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land which may seem a kind of solecism; but such is the language of the law: and therefore one cannot bring an action to recover possession of a pool, or other piece of water, by the name of *water* only; either by calculating its capacity, as for so many cubical yards; or, by superficial measure, for twenty acres of water, or by general description, as for a pond, a water course, or a rivulet: but he must bring his action for the land that lies at the bottom, and must call it twenty acres of *land covered with water. Brownl.* 142. For water is a moveable wandering thing, and must of necessity continue common by the law of nature: so that there can only be a temporary, transient, usufructuary property therein: wherefore, if a body of water runs out of *A.*'s pond into *B.*'s. *A.* has no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this there may be a certain substantial property; of which the law will take notice, and not of the other.

Land hath also in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cælum*, is the maxim of the law; upwards, therefore, no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the center of the earth belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word *land* includes not only the face of the earth, but every thing under it or over it. And therefore if a man grants all his lands, he grants thereby all

all his mines of metal and other foſſils, his woods, his waters, and his houſes, as well as his fields and meadows. Not but the particular names of the things are equally ſufficient to paſs them, except in the inſtance of water; by a grant of which nothing paſſes but a right of fiſhing. *Co. Lit.* 4. But the capital diſtinction is this; that by the name of a caſtle, meſſuages, toft, croft, or the like, nothing elſe will paſs, except what falls with the utmoſt propriety under the term made uſe of; but by the name of Land, which is *nomen generaliſſimum*, every thing terreſtial will paſs. 1 *Inſt.* 4, 5, 6. By the name of a Caſtle, one or more manors may be conveyed; and *è converſo* by the name of a manor, a caſtle may paſs. 1 *Inſt.* 5: 2 *Inſt.* 31. See 2 *Comm.* 17, 19.

An *Incorporeal Hereditament* is a right iſſuing out of a thing corporate (whether real or perſonal) or concerning, or annexed to, or exerciſable within the ſame. *Co. Lit.* 19, 20. It is not the thing corporate itſelf, but ſomething collateral thereto; as a rent iſſuing out of lands, *&c.* or an office belonging to jewels, &c. Or, according to logicians, Corporeal Hereditaments are the ſubſtance which may be always ſeen, always handled; Incorporeal Hereditaments are but a ſort of accidents, which inhere in, and are ſupported by that ſubſtance; and may belong or not belong to it, without any viſible alteration therein. Their exiſtence is merely in idea, and abſtract contemplation, though their effects and profits, which are totally diſtinct, may be frequently objects of our bodily ſenſes. 2 *Comm.* 20. Theſe Incorporeal Hereditaments are ſtated in the Commentaries to be principally of *ten ſorts*; *Advowſons*; *Tithes*; *Commons*; *Ways*; *Offices*; *Dignities*; *Franchiſes*; *Corodies*, or *Penſions*; *Annuities*, and *Rents*. As to all which ſee thoſe ſeveral titles in this Dict.

HEREDITARY RIGHT TO THE CROWN, See title *King*.

HEREDITARY REVENUE OF THE KING, ſee title *King*.

HEREFARE, Saxon.] *Profectio militaris et expeditio* — See *Subſidia*. A military expedition, a going to warfare.

HERIFORD. For incloſing of commons in *Herefordſhire*, ſee *ſtat.* 4 *Jac.* 1. *c.* 11.

HEREGELD, Saxon.] *Pecunia ſeu tributum alendo exercitui collatum.*] A tribute or tax levied for the maintenance of an army. See *Subſidy*.

HERELLUS, A ſort of little fiſh, perhaps minows, or rather gudgeons. *Cowell, edit.* 1727.

HEREMITORIUM, A ſolitary place of retirement for *hermits*—*Mon. Ang. Tom.* 3. *p.* 18

HERENACH, An archdeacon. *Cowell, edit.* 1727.

HEREMONES, OR HERETEAMS, One who follows an army of rebels. *Lamb. Leges Inæ, cap.* 15. *In exercitu prædatorum, &c.* from *here*, *exercitus*, and *team*, *ſequela*.

HERESLITA, OR HERESSA, OR HERESLIZ, A hired ſoldier, that departs without licence; derived from the Saxon *here*, *exercitus*, and *ſliten*, to depart, according to *Co.* 4 *Inſt. f.* 128.

HERESY, *Hæreſis.*] Among Proteſtants, is ſaid to be a falſe opinion repugnant to ſome point of doctrine clearly revealed in ſcripture, and either abſolutely eſſential to the Chriſtian faith, or at leaſt of moſt high importance. 1 *Hawk. P. C. c.* 2. § 1.

Anciently, under the general name of Hereſy there have been comprehended three ſorts of crimes; 1. *Apoſtacy*, when a Chriſtian apoſtatizes to Paganiſm. 2. *Witchcraft*, 3. *Formal Hereſy*, which ſeems to be an apoſtacy from the eſtabliſhed religion; for which, and the ſeveral ways of determining, puniſhing, and the difference between the Civil and Imperial laws, Popiſh canons, and the laws of *England* concerning hereſy, ſee a large account in 1 *Hal. Hiſt. P. C.* 383—410.

It ſeems difficult preciſely to determine what error ſhall amount to Hereſy, and what not; but the ſtatute 1 *Eliz. cap.* 1. which erected the High Commiſſion court, having reſtrained it to ſuch as are either determined by ſcripture, or by one of the four firſt general councils, or by ſome other council, by expreſs words of ſcripture, or by parliament, with the aſſent of the convocation; theſe rules are at preſent generally thought the beſt directions concerning this matter. 2 *Hawk. P. C. c.* 2. § 2.

By the Common-law, one convicted of Hereſy, and refuſing to abjure it, or falling into it again after he abjured it, might be burnt, by force of the writ *de hæretico comburendo*, which iſſued out of Chancery upon a certificate of ſuch conviction; but he forfeited neither lands nor goods, becauſe the proceedings againſt him were only *pro ſalute animæ*. *F. N. B.* 269: 3 *Inſt.* 43: *Doctor and Student, lib.* 2. *cap.* 29: 1 *Hawk. P. C. c.* 2. § 10.

This writ *de Hæretico comburendo* is thought by ſome to be as ancient as the Comman-law itſelf. However it appears from thence that the conviction of Hereſy by the Common-law was not in any petty eccleſiaſtical court, but before the Archbiſhop himſelf in a Provincial Synod; and that the delinquent was delivered over to the King to do as he ſhould pleaſe with him: ſo that the Crown had a controul over the Spiritual Power, and might pardon the convict by iſſuing no proceſs againſt him; the writ *de hæretico comburendo* being not a writ of courſe, but iſſuing only by the ſpecial direction of the King in council. *F. N. B.* 269: 1 *Hal. P. C.* 395.

But in the Reign of *Henry* IV, when the eyes of the chriſtian world began to be open, and the ſeeds of the proteſtant religion (though under the opprobious name of Lollardy) took root in this kingdom; the Clergy taking advantage, from the King's dubious title, to demand an increaſe of their own power obtained an act of parliament, (*ſtat.* 2 *H.* 4. *c.* 15,) which ſharpened the edge of perſecution to its utmoſt keenneſs. For by that ſtatute the Dioceſan alone, without the intervention of a Synod, might convict of heretical tenets; and unleſs the convict abjured his opinions, or if after abjuration he relapſed, the ſheriff was bound *ex officio*, if required by the biſhop, to commit the unhappy victim to the flames without waiting for the conſent of the Crown. By *Stat.* 2 *H.* 5. *c.* 7, Lollardy was alſo made a temporal offence, and indictable in the King's courts; which did not thereby gain an excluſive, but only a concurrent juriſdiction, with the biſhop's conſiſtory.

Afterwards when the final reformation of religion began to advance, the power of the eccleſiaſtics was ſomewhat moderated; for though what Hereſy is, was not then preciſely defined, yet we are told in ſome points what it is *not*. The *Stat.* 25 *H.* 8. *c.* 14, Declaring, that offences againſt the ſee of Rome are not Hereſy; and the Ordinary being thereby reſtrained from proceeding in any caſe upon mere ſuſpicion; that is, unleſs the party be accuſed

cuſed by two credible witneſſes, or an indictment for Hereſy be firſt previouſly found in the King's courts of Common-law. And yet the ſpirit of perſecution was not then abated, but only diverted into a lay channel. For in ſix years afterwards by *Stat.* 31 *Hen.* 8. *c.* 14, the bloody law of the *Six Articles* was made; which eſtabliſhed the ſix moſt conteſted points of popery; tranſubſtantiation, communion in one kind, the celibacy of the clergy, monaſtic vows, the ſacrifice of the maſs, and auricular confeſſion; which points were "determined and reſolved by the moſt godly ſtudy, pain, and travail of his majeſty: for which his moſt humble and obedient Subjects, the Lords *Spiritual* and temporal and the Commons, in parliament aſſembled, did not only render and give unto his highneſs their moſt high and hearty thanks," but did alſo enact and declare all oppugners of the firſt to be Hereticks, and to be burnt with fire; and of the five laſt to be felons, and to ſuffer death. The ſame ſtatute eſtabliſhed a new and mixed juriſdiction of Clergy and Laity for the trial and conviction of Hereticks; the reigning prince being then equally intent on deſtroying the ſupremacy of the Biſhop of Rome, and eſtabliſhing all other Romiſh corruptions of the chriſtian religion.

It would be unneceſſary to perplex this detail with the various repeals and revivals of the ſanguinary laws in the two ſucceeding reigns; we may therefore proceed directly to the reign of Queen *Elizabeth*; when the Reformation was finally eſtabliſhed. By *ſtat.* 1 *Eliz. c.* 1, all former ſtatutes relating to Hereſy are repealed, which leaves the juriſdiction of Hereſy as it ſtood at Common-law; *viz.* as to the infliction of common cenſures, in the Eccleſiaſtical Courts; and in caſe of burning the Heretic in the Provincial Synod only. 5 *Rep.* 23: 12 *Rep.* 56, 92. Sir *Matthew Hale* indeed is of a different opinion, and holds that ſuch power reſides in the Dioceſan alſo, tho' he agrees that in either caſe the writ *de hæretico comburendo* was not demandable of common right, but grantable or otherwiſe merely at the King's diſcretion. 1 *Hal. P. C.* 405. But the principal point now gained was, that by this ſtatute a boundary is for the firſt time ſet to what ſhall be accounted Hereſy; nothing for the future being ſo to be determined, but only ſuch tenets, which have been heretofore ſo declared 1. By the words of the canonical ſcriptures. 2. By the firſt four General Councils or ſuch others as have only uſed the words of the Holy Scriptures; or, 3. which ſhall be hereafter ſo declared by the parliament, with the aſſent of the Clergy in Convocation. Thus was Hereſy reduced to a greater certainty than before; though it might not have been the worſe to have defined it in terms ſtill more preciſe and particular; as a man continued ſtill liable to be burnt for what perhaps he did not underſtand to be Hereſy, till the eccleſiaſtical judge ſo interpreted the words of the canonical ſcriptures.

For the writ *de Hæretico comburendo* remained ſtill in force, and there are inſtances of its being put in execution upon two Anabaptiſts in the ſeventeenth of *Elizabeth*, and two Arians in the ninth of *James* I. But it was totally aboliſhed, and Hereſy again ſubjected only to eccleſiaſtical correction *pro ſalute animæ* by virtue of *Stat.* 29 *Car.* 2. *c.* 9; for in one and the ſame reign our lands were delivered from the ſlavery of military tenures; our bodies from arbitrary impriſonment by the *Habeas Corpus act*; and our minds from the tyranny of ſuperſtitious bigotry, by demoliſhing this laſt badge of perſecution in the *Engliſh* law. 4 *Comm.* 46—9.

The following determinations will further explain the hiſtory and progreſs of proceedings in Hereſy; and thoſe relative to the temporal courts ſeem to be yet undiſputed law, as far as they are now applicable.

By the Common-law with us, the Convocation of the clergy or Provincial Synod, might and frequently did proceed to the ſentencing of Hereticks, and, when convicted left them to the ſecular power, whereupon the writ of *hæretico comburendo* might iſſue. *Bro.* tit. *Hereſy*: 2 *Rol. Abr.* 226.

It is alſo agreed, that every Biſhop may convict perſons of *Hereſy* within his own dioceſe, and proceed by church cenſures againſt thoſe who ſhall be convicted; but it is ſaid, that no ſpiritual judge, who is not a biſhop, hath this power; and it hath been queſtioned, whether a conviction before the Ordinary were a ſufficient foundation whereon to ground the writ *de hæretico comburendo*, as it is agreed that a conviction before the Convocation was. *F. N. B.* 269: 12 *Co.* 56, 57: 3 *Inſt.* 40: *Gibſ. Codex* 401: 1 *Hawk. P. C. c.* 2. § 4: *State Trials, Vol.* 2. 275.

It ſeems agreed, that regularly the Temporal Courts have no conuſance of *Hereſy*, either to determine what it is, or to puniſh the Heretick as ſuch, but only as a diſturber of the public peace; that therefore, if a man be proceeded againſt as an Heretick in the ſpiritual court, *pro ſalute animæ*, and think himſelf aggrieved, his proper remedy is to bring his appeal to a higher eccleſiaſtical court, and not to move for a prohibition, from a temporal one. 27 *H.* 8. 14 *b*: 5 *Co.* 58: *Hob.* 236.

Yet a Temporal Judge may incidentally take knowledge whether a tenet be heretical or not; as where one was committed by force of *ſtat.* 2 *H.* 4. *c.* 15, for ſaying, that he was not bound by the law of God to pay tithes to the curate; another for ſaying, that tho' he was excommunicated before men, yet he was not ſo before God; the temporal courts on an *habeas corpus* in the firſt caſe, and in an action of falſe impriſonment in the other, adjudged neither of the points to be *Hereſy* within that ſtatute, for the King's courts will examine all things which are ordained by ſtatute. 3 *Inſt.* 42: 1 *Rol. Rep.* 110: 2 *Bulſt.* 300.

In *quare impedit* if the biſhop plead that he refuſed the clerk for Hereſy, it ſeems that he muſt ſet forth the particular point, that it may appear to be heretical to the court wherein the action is brought. 5 *Co.* 58: 1 *And.* 191: 3 *Leon.* 199: 3 *Lev.* 314. See title *Quare Impedit.*

HERETABLE JURISDICTIONS, in *Scotland.* The feodal grievance of theſe juriſdictions is removed by *Stat.* 20 *Geo.* 2. *c.* 43. Vide *Dalrymple of Feuds*, 292. And ſee the *Stat.* 20 *Geo.* 2. *c.* 50, which aboliſhed the tenure of *Ward holding* equivalent to the ancient tenure of knight-ſervice in *England.*

HERETICK, *Hæreticus.* One that adheres to and is convicted of hereſy. See title *Hereſy.*

HERETICO COMBURENDO. See *Hereſy.*

HERETOCHE, From Sax. *Here, exercitus*, and *tegen, ducere.*] The general of an army; a leader or commander of military forces. *LL. Ed. Conf. c.* 35. *Ducange* ſays the *Heretochii* were the barons of the realm.—*Leg. H.* 1: *Du Freſne.* See title *Peer.*

HERETOCHIAS, A leader or commander of military forces. See at large the name and office in the laws of *Edward the Confeſſor, cap.* 35. *De Heretochiis.*

HERETUM,

HERETUM, A court or yard; perhaps an orchard. *Hiſt. Dunelm.*

HERGRIPA, Pulling by the hair; from the Sax. *hær*, *capillus*, and *grypan*, *capere*: *Leg. H.* 1. *cap.* 94.

HERIGALDS, A ſort of garment. *Cowell.*

HERIOT:

HERIOTUM, Sax. *heregeat*; *bellicæ apparatus*, from *here*, *exercitus*, an army, and *geat*, *fuſus*, *effuſus*.] Signified originally a tribute given to the lord of a manor for his better preparation for war. By the laws of *Canutus*, at the death of the great men of this realm, ſo many horſes and arms were to be paid as they were in their reſpective life-times obliged to keep for the King's ſervice. *Spelm.* Sir *Edw. Coke* makes *Heriot*, or *heregat*, (from *herus* lord) the lord's beaſt: And it is now taken for the beſt beaſt, whether it be horſe, ox, or cow, that the tenant dies poſſeſſed of, due and payable to the lord of the manor: and in ſome manors, the beſt goods, piece of plate, *&c. Kitch.* 133.

There is this difference between *Heriot* and *Relief*; *Heriot* has been generally a *perſonal*, and *Relief* always a *predial* ſervice.

It appears not only from *Spelman*'s conjectures, but likewiſe from the laws themſelves of King *Canutus*, that the *Danes* were the firſt inventors of Heriots, and that it was a political inſtitution of theirs, whereby the *Daniſh* tenants were to hold by military ſervice, and their arms and horſes, at their deaths, to revert to the Public; by that means putting the whole ſtrength and defence of the kingdom into their hands; committing only the affairs of agriculture, and the improvement of the nation to the *Engliſh*, though they thereby enjoyed greater freedom and immunities in their tenures than the *Daniſh* tenants. *Spelm.* 287.

As to the ſeveral kinds of Heriots, ſome are due by *cuſtom*, ſome by *tenure*, and ſome by *reſervation* on deeds executed within time of memory; thoſe due by *cuſtom*, are the moſt frequent, and aroſe by the contract or agreement of the lord and tenant, in conſideration of ſome benefit or advantage accruing to the tenant; and for which an Heriot, as the beſt beaſt, beſt piece of houſhold furniture, *&c.* became due, and belonged to the lord, either on the death or alienation of the tenant, and which the lord may ſeize, either within the manor or without, at his election, *Dyer* 199 *b*: *Bro.* title *Heriot* 2, 3.

Heriots are therefore now to be conſidered as uſually divided into two ſorts; *Heriot-ſervice* and *Heriot-cuſtom*. The former, being ſuch as are due upon a ſpecial reſervation in a grant or leaſe of lands, therefore amount to little more than a mere rent. 2 *Saund.* 166. The latter ariſe upon no ſpecial reſervation whatſoever, but depend merely upon immemorial uſage and cuſtom. *Co. Cop.* § 24. The latter, of which we are here principally to ſpeak, are defined to be "a cuſtomary tribute of goods and chattels, payable to the Lord of the fee, on the deceaſe of the owner of the land." 2 *Comm. c.* 28.

Upon the plan of the *Daniſh* eſtabliſhment, already noticed, did *William* the Conqueror faſhion his law of reliefs, when he aſcertained the preciſe relief to be taken of every tenant in chivalry; and, contrary to the feodal cuſtom and the uſage of his own duchy of *Normandy*, required arms and implements of war to be paid inſtead of money. *LL. Guil. Conq. c.* 22, 23, 24. See this Dict. titles *Relief*: *Tenure* II. 5.

The *Daniſh* compulſive Heriots, being thus tranſmuted into reliefs, underwent the ſame ſeveral viciſſitudes as the feodal tenures, and in ſocage eſtates do frequently remain to this day in the ſhape of a *Double Rent* payable at the death of the tenant: the Heriots which now continue among us, and preſerve that name, ſeeming rather to be of Saxon parentage, and at firſt to have been merely diſcretionary. *Lambard, Peramb. of Kent.* 492.

Theſe are now for the moſt part confined to Copyhold Tenures and are due by cuſtom only, which is the life of all eſtates by copy, and perhaps are the only inſtance where cuſtom has favoured the Lord. For this payment was originally a voluntary donation or gratuitous legacy of the tenant; perhaps in acknowledgement of his having been raiſed a degree above villeinage, when all his goods and chattels were quite at the mercy of the Lord: and cuſtom which has on the one hand confirmed the tenant's intereſt in excluſion of the Lord's will, has on the other hand eſtabliſhed this diſcretional piece of gratitude into a permanent duty. An Heriot may alſo appertain to free land, that is held by ſervice and ſuit of court; in which caſe it is moſt commonly a copyhold enfranchiſed, whereupon the Heriot is ſtill due by cuſtom. *Bracton* ſpeaks of Heriots as frequently due on the death of both ſpecies of tenants, which he obſerves, *magis fit de gratiâ quam de jure*; in which *Fleta* and *Britton* agree: thereby plainly intimating the original of this cuſtom to have been merely voluntary, as a legacy from the tenant, though now the immemorial uſage has eſtabliſhed it as of right in the Lord. *Bract. l.* 2. *c.* 36. § 9: *Fleta l.* 3. *c.* 18: *Britton*, *c.* 69.

This Heriot is, as has been ſaid, ſometimes the beſt live beaſt, or *averium*, which the tenant dies poſſeſſed of, which is particularly denominated the villein's relief, in the 29th law of King *William* the Conqueror; ſometimes the beſt inanimate good, under which a jewel or piece of plate may be included: but it is always a *perſonal* chattel, which immediately on the death of the tenant who was the owner of it, being aſcertained by the option of the Lord, becomes veſted in him as his property; and is no charge upon the lands, but merely on the goods and chattels. *Hob.* 60. The tenant muſt be the owner of it, elſe it cannot be due; and therefore on the death of a feme-covert no Heriot can be taken; for ſhe can have no ownerſhip in things perſonal. *Keilw.* 84: 4 *Leon.* 239. In ſome places there is a cuſtomary compoſition in money, as 10*s.* or 20*s.* in lieu of a Heriot, by which the lord and tenant are both bound, if it be an indiſputable antient cuſtom; but a new compoſition of this ſort, will not bind the repreſentatives of either party; for that amounts to the creation of a new cuſtom, which is now impoſſible. *Co. Cop.* § 31: See 2 *Comm.* 422—4. *c.* 28.

The following extracts will further elucidate this ſubject.—*Heriot-ſervice* is payable on the death of *Tenant in fee-ſimple*; and *Heriot-cuſtom* upon the death of *Tenant for life*: *Co. Lit.* 185.

If an Heriot is reſerved upon a leaſe, it is Heriot-ſervice, and incident to the reverſion. *Lutw.* 1366, 7. For a Heriot goes with the reverſion, as well as rent; and the grantee of the reverſion ſhall have it. 2 *Saund.* 166.

Although an Heriot reſerved upon a leaſe is called an Heriot-ſervice; yet it is not like the caſe where a man holds land by the *ſervice of paying an Heriot*, &c. becauſe where a Heriot is reſerved on leaſe, the proper remedy is either a *diſtreſs*, or *action of covenant* grounded on the contract, for *the leſſor cannot ſeize*, as the lord of a manor may do, the beaſt of his tenant who holds of him by Heriot-ſervice. *Keilw.* 82, 84. See *Poſt.*

There may be a covenant in leaſes for lives, &c. to render the beſt beaſt, or ſo much money for an *Heriot*, at the election of the leſſor; in which caſe the leſſor muſt give notice which he will accept, before action may be brought for it, or a diſtreſs taken. &c. 2 *Lill. Abr.* 19.

For *Heriot-ſervice*, the lord may *diſtrain* any beaſt belonging to the tenant *on the land*: Alſo it has been held, that the lord may diſtrain any man's beaſts which are upon the land, and retain them until an Heriot is ſatisfied. *Co. Litt.* 185: *Litt. Rep.* 33: *Cro. Car.* 260. And if the tenant deviſeth away all his goods, &c. yet the lord ſhall have his Heriot on the death of the tenant. *Stat.* 13 *Eliz. cap.* 5.

When a Heriot is to be paid by a certain life-holder of his own goods, an aſſignee is not liable to pay the *Heriot*; his goods not being the goods of ſuch life. *Cro. Car.* 313: 2 *Nelſ.* 932. If the lord purchaſe part of the tenancy, Heriot-ſervice is extinguiſhed; but it is not ſo of Heriot-cuſtom. 8 *Rep.* 105.

It hath been ſolemnly adjudged, that for an *Heriot-ſervice*, or for a *Heriot* reſerved by way of *tenure*, the lord may either ſeize or diſtrain; for when the tenant agrees that the lord ſhall on his death have the beſt beaſt, &c. the lord hath his election which beaſt he will take, and by ſeizing thereof reduces that to his poſſeſſion, wherein he had a property at the death of the tenant, without the concurring act of any other perſon; and it is not like the caſe where the leſſor reſerves 20 *s.* or a robe; for there the leſſee has his election which he will pay, and being to do the firſt act the lord cannot ſeize, but muſt diſtrain. *Plow.* 96. adjudged. *Cro. Eliz.* 589.

So it hath been ruled, that for a *Heriot-cuſtom* or *ſervice* the lord may *ſeize* as well *in* the manor as *out*; but if he *diſtrain*, it muſt be *in* the manor. See 1 *Salk.* 356: 1 *Show.* 81. *S. P*: 3 *Mod.* 231. But it is now ſtated as poſitive law, that for *Heriot-cuſtom*, which *Coke* ſays, *Co. Cop.* § 25, lies only in *prender*, and not in *render*, the lord may ſeize the identical thing itſelf, but cannot diſtrain any other chattel for it. *Cro. Eliz.* 590: *Cro. Car.* 260: 3 *Comm.* 15. *c.* 1. And this is confirmed by the following authorities.

For *Heriot-cuſtom*, the lord is to *ſeize*, not diſtrain; and he may ſeize the beſt beaſt, &c. though out of the manor, or in the King's highway, becauſe he claims it as *his proper goods*, by the death of the tenant, which he may *ſeize* in *any place* where he finds it. *Kitch.* 267: 2 *Inſt.* 132: 2 *Nelſ. Abr.* 931: *Plowd.* 96: *Keilw.* 82, 4: 1 *Salk.* 356: *Bro. tit. Heriot*, 2, 3.

And it is ſaid, that this liberty muſt be underſtood to be annexed to ancient tenures, on which the lords had many privileges, and not to be extended to thoſe which are created within time of memory, upon particular reſervations. See 1 *Show.* 81: 3 *Mod.* 231.—Alſo ſee further 14 *Vin. Abr.* and 3 *New. Abr.* tit. *Heriot.*

HERISCHILD, Military ſervice, or knight's fee: from the Sax. *Here*, an army, and *ſcyld*, *ſcutum*. *Cowell.*

HERISCINDIUM, A diviſion of houſhold goods; *non toties fieri placet* hereſcindia *mecum*, *i. e.* I am not pleaſed ſo often to divide my goods. *Blount.*

HERISLIT, Laying down of arms: from the Sax. *here*, *exercitus*, and *ſlitan*, *ſciſſura*. *Blount.* See *Spelm.*

HERISTALL, A caſtle; from the Sax. *here*, an army, and *ſtall*, *ſtatio*. *Blount*; *Spelm.*

HERMAPHRODITE, *Hermaphroditus.*] A perſon that is both man and woman. *Lit. Dict.* And as *Hermaphrodites* partake of both ſexes; they may give or grant lands, or inherit as heirs to any, and ſhall take according to the prevailing ſex. *Co. Lit.* 2, 7. See titles *Heir*; *Deſcent*; *Grant*, &c.

HERMER, Among the *Saxons* was a great lord; from the Sax. *here*, i. e. *major*, and *mære*, *dominus.*

HERMINUS, *mus ponticus.*] A mouſe, of whoſe ſkins we have *Ermine*. See *Furr.*

HERMITAGE, *Hermitagium.*] The habitation of a hermit, a ſolitary place. *Mon. Angl.* 2 *par. fol.* 339 *b.*

HERMITORIUM, The chapel or place of prayer, belonging to an *hermitage*. *Cowell.*

HERNESCUS. A heron. *Cowell.*

HERNESSUM, Tackle or furniture of a ſhip. *Pl. Parl.* 22 *Ed.* 1. It is alſo called *hernaſium*, from the Teuton. *harnas*, Engliſh *harneſs*, and ſignified any ſort of furniture of a houſe, implements of trade, or rigging of a ſhip, *Cowell.*

HEROUDES, Heralds. *Knighton, p.* 2571.

HERRINGS. It is unlawful to buy or ſell *Herrings* at ſea, before the fiſhermen come into the haven, and the cable of the ſhip be drawn to the land. *Stat.* 31 *Ed.* 3. *ſtat.* 2. No *herrings* ſhall be ſold in any veſſel, but where the barrel contains 32 gallons, and half barrel and firkin accordingly; and they muſt be well packed, of one time's packing and ſalting, and be as good in the middle as at the ends, on pain of forfeiting 3 *s.* 4 *d.* a barrel, &c. by *Stat.* 22 *Ed.* 4. *cap.* 2. The veſſels for *Herrings* are to be marked with the quantity, and place where packed; and packers are to be appointed and ſworn in all fiſhing ports, &c. under the penalty of 100 *l. Stat.* 15 *Car.* 2. *cap.* 16.—See titles *Fiſh*; *Navigation Acts.*

HERRING SILVER. Seems to be a compoſition in money, for the cuſtom of paying ſuch a number of *herrings*, for the proviſion of a religious houſe. *Plac. Trin. T.* 18. *E* 1.

HESIA, An eaſement.—*Chart. Antiq.*

HESTA OR HESTHA, A corruption of the Latin *hecta.*] A little loaf of bread. *Domeſday*: *Cowell, edit.* 1727. See *Ruſca.*

HESTCORN. Perhaps vowed or devoted corn. See *Mon. Ang. tom.* 2. *p.* 367.

HESTA. A capon or young cockerill. *Domeſday.*

HEUVELBORTH, from the Sax. *healf*, i.e. *dimidium*, & borgh, *debitor vel fidejuſſor.*] A ſurety for debt, *quia qui fidejubet, debitorem ſe quodammodo conſtituit. Du Freſne.*

HEXAM OR HEXHAM; AND HEXAMSHIRE, Anciently *Haguſtald*; was a county of itſelf, and likewiſe a biſhoprick, endowed with great privileges: but by the *Stat.* 14 *Eliz. c.* 13, it is enacted, that the franchiſe of *Hexham* and *Hexhamſhire*, ſhall be within and accounted part of the county of *Northumberland*, ſaving to the bailiffs return of writs, &c. 4 *Inſt.* 22.

HEYBOTE,

HEYBOTE, See *Haybote.*

HEYLOED, Seems to ſignify a cuſtomary load or burden laid upon the inferior tenants for mending or repairing the *heys* or hedges. *Cowell.*

HEYMECTUS, A net for catching conies; a *hay-net. Placit. temp. Ed.* 3. *Cowell.*

HIBERNAGIUM, See *Ibernagium.*

HIDAGE, *hidagium.*] An extraordinary tax formerly payable to the King for every *hide* of land. *Bract. lib.* 2. *cap.* 6. This taxation was levied, not only in money, but proviſion of armour, &c. And when the *Danes* landed at *Sandwich*, in the year 994, King *Ethelred* taxed all his lands by *hides*, ſo that every 310 hides found one ſhip furniſhed; and every 8 hides found one jack and one ſaddle, to arm for the defence of the Kingdom, &c. Sometimes the word *hidage* was uſed for the being quit of that tax; which was alſo called *hidegild*, and interpreted from the *Saxon*, a price or ranſom paid to ſave one's ſkin or hide from beating. *Sax. Dict.* See title *Taxes.*

HIDEGILD. Vide *Hidgild.*

HIDES, See *Leather* and *Skins.*

HIDE AND GAIN, Did anciently ſignify arable land. *Coke Lit.* 85 *b.* For of old, to *gain* the land was as much as to till it. See *Gainage.*

HIDELANDS, Sax. *Hydelandes.*] *Terræ ad hydam ſeu tectum pertinentes.*

HIDE OF LAND, Sax. *hyde-lands*, from *hyden*, *tegere.*] A ploughland (See *Plow-land.*) In an old manuſcript it it ſaid to be 120 acres. *Bede* calls it *Familiam*, and ſays it is as much as will maintain a family, others call it *Manſum*, *Manentem*, *Caſatam*, *Carucatam*, *Sullingham*, &c. *Crompton*, in his *Juriſdict. fo.* 222, ſays, a *Hide of land* contains one hundred acres, and eight hides make a knight's fee. *Henry Hunting. Hiſt. lib.* 6. *fol.* 206. *b.* But Sir *Edward Coke* holds, that a knight's fee, a *Hide* or plough-land, a yard-land, or an oxgang of land, do not contain any certain number of acres. *Co. Lit. fol.* 69. The diſtribution of *England* by *Hides of land* is very ancient; for there is mention of them in the laws of King *Ina*, *cap.* 14. *Spelm.* And ſee *Camd. Brit.*

HIDEL, A place of protection or ſanctuary. See *Stat.* 1 *Hen.* 7. *c.* 6.: *Cowel, edit.* 1727.

HIDGILD, HIDEGILD, *in LL. Canuti R.* Sometimes written *Hinegild* and *Hudegeld.* From the Sax. *Hide*, *i. e.* the ſkin; and *geld*, *pretium.*] The price by which a villein or ſervant redeemed his ſkin from being whipped in ſuch treſpaſſes as anciently incurred that corporal puniſhment. *Cowell.*—See *Fleta. lib.* 1. *c.* 47. § 20.

HIERLOOM, See *Heirloome.*

HIGH TREASON, See *Treaſon.*

HIGHWAY:

VIA REGIA.] A publick paſſage for the King's people; for which reaſon it is called the *King's Highway.*

Under this title are comprehended Bridges repaired by the pariſh or townſhip. As to County Bridges, See this Dict. title *Bridges.*

The law relating to *Turnpike-roads* as well as that concerning *Highways*, being in a great meaſure, regulated by ſtatutes, the proviſions of which are in ſome degree implicated with, and frequently refer to each other, the whole is here digeſted and abridged according to the following diviſions.

I. *Of the various Sorts of Highways, &c.*
II. *Of the Right to, the claiming, and changing and enlarging of Highways.*
III. *Of Repairs, at Common-Law.*
IV. *Of Nuſances, at Common Law, in Highways.*
V. *Of proceedings relative to repairing Highways, Nuſances in them, &c.*
VI. *Regulation of* { (A) HIGHWAYS / (B) TURNPIKE-ROADS } *by Statute.*

I. It ſeems, that anciently there were but four Highways in *England*, which were free and common to all the King's ſubjects, and through which they might paſs without any toll, unleſs there was a particular conſideration for it; all others, which we have at this day, are ſuppoſed to have been made through the grounds of private perſons, on writs of *ad quod damnum*, &c. which being an injury to the owner of the ſoil, it is ſaid that they may preſcribe for toll without any ſpecial conſideration. 3 *New Abr.* 54: 1 *Mod.* 231: 2 *Mod.* 143.

There are (ſays Lord *Coke*) three kinds of ways: 1. A foot-way, called in Latin *iter.* 2. A pack and prime way, which is both a horſe and foot-way, called in Latin *actus.* 3. A cart-way, called in Latin *via* or *aditus*, which contains the other two, and alſo a cart way; and is called *via regia*, if it be common to all men; and *communis ſtrata*, if it belong only to ſome town or private perſon. *Co. Lit.* 56 *a.*

But, notwithſtanding theſe diſtinctions, it ſeems, that any of the ſaid ways which is common to all the King's ſubjects, whether it lead directly to a market-town or only from town to town, may properly be called a Highway; that any ſuch cart-way may be called the King's Highway; that a river common to all men may alſo be called a Highway; and that nuſances in any of the ſaid ways are puniſhable by indictment: otherwiſe they would not be puniſhed at all: for they are not actionable unleſs they cauſe a *ſpecial damage* to ſome *particular perſon*; becauſe, if ſuch action would lie, a multiplicity of ſuits would enſue. See 2 *Term Rep.* —. But it ſeems, that a way to a pariſh church, or to the common fields of a town, or to a village, which terminate there, may be called a private way, becauſe it belongs, not to all the King's ſubjects, but only to the particular inhabitants of ſuch pariſh, houſe or village, each of which, as it ſeems, may have an action for a nuſance therein. *Palm.* 389: *Cro. Eliz.* 63. 664: 1 *Vent.* 189, 208: 3 *Keb.* 28: *Co. Lit.* 56: 6 *Mod.* 255: 1 *Hawk. P. C. c.* 76. § 1.

A ſtreet built upon a perſon's own ground is a dedication of the Highway ſo far only as the publick has occaſion for it, *viz.* for a right of paſſage, not as to the abſolute poſſeſſion of the ſoil. *Stra.* 1004.

If paſſengers have uſed time out of mind, when the roads are bad, to go by outlets on the land adjoining to a Highway in an open field, ſuch outlets are parcel of the Highway; and therefore if they are ſown with corn, and the tract founderous, the King's ſubjects may go upon the corn. 1 *Rol. Abr.* 390: *Cro. Car.* 366. *S. C.*: 1 *Hawk. P. C. c.* 76. § 2. But it is not a good juſtification in *treſpaſs* that the defendant has a ſpecific right of way over the plaintiff's land, and that he had gone upon the adjoining land, becauſe the way was impaſſable by being overflowed by a river. *Taylor* v. *Whitehead Doug.* 745-9.

Though every Highway is ſaid to be the King's, yet this muſt be underſtood ſo as that in every Highway the King and his Subjects may paſs and repaſs at their pleaſure. But the freehold, and all the profits, as trees, &c. belong to the lord of the ſoil, or to the owner of the lands on both ſides of the way. Alſo the lord or owner of the ſoil ſhall have an action of treſpaſs for digging the ground. But the lord of a rape, within which there are ten hundreds, may preſcribe to have all the trees growing within an Highway within this rape, though the manor or ſoil adjoining belongs to another: for uſage to take the trees is a good mark of ownerſhip. 1 *Rol. Abr.* 392: 1 *Brownl.* 42: *Keilw.* 141.

II. A Man may have a way either by preſcription or grant, by reſervation, by implication, or by owelty of partition, and ſhall not in a *cur' claudend'* be obliged to ſhew which way he claims it; but it will be ſufficient for him to alledge *debet & ſolet*, &c. but in a bar or replication, he muſt ſhew his title preciſely. 1 *Vent.* 274: 2 *Lev.* 148: 3 *Keb.* 528, 531. But he who preſcribes for a way, muſt ſhew in certain whether it is a foot, horſe, or cart way. *Yel.* 163.

But it ſeems, that if a man hath a way for carriages from *D.* to *Blackacre* over my cloſe, and after he purchaſes land adjoining to *Blackacre*, he cannot uſe the ſaid way with carriages to the land adjoining, for then it may be very prejudicial to my cloſe; but it ſeems, if I will help myſelf, I muſt ſhew the ſpecial matter, and that he uſed it for the land adjoining. 1 *Rol. Abr.* 391.

A way muſt not be claimed as appendant or appurtenant to a houſe, becauſe it is only an eaſement, and no intereſt. *Yelv.* 159. But it may be *quaſi* appendant thereto, and as ſuch paſs by grant thereof. *Cro. Jac.* 190.

A man may preſcribe for a way from his houſe through a certain cloſe, &c. to church, though he himſelf has lands next adjoining to his ſaid houſe, through which of neceſſity he muſt firſt paſs; for the general preſcription ſhall be applied only to the lands of others. *Palm.* 387, 388: 2 *Rol. Rep.* 397.

An ancient Highway cannot be changed without an inquiſition found on a writ of *ad quod damnum*, that ſuch change will be no prejudice to the Public; and it is ſaid, that if one change a Highway without ſuch authority, he may ſtop the new way whenever he pleaſes; neither can the King's ſubjects, in an action brought againſt them for going over ſuch new way, juſtify generally as in a common Highway, but *ought to ſhew ſpecially, by way of excuſe, how the old way was obſtructed, and a new one ſet out*; neither are the inhabitants bound to keep watch in ſuch new way, or repair it, or to make amends for a robbery committed in it. *Cro. Car.* 266: *Vaugh.* 341: *Yelv.* 141: 1 *Burr.* 465: 1 *Hawk. P. C. c.* 76. § 3.

But it hath been holden, that if a water, which hath been an ancient Highway, by degrees changes its courſe, and goes over different ground from that whereon it uſed to run, yet the Highway continues in the new channel in the ſame manner as in the old. 22 *Aſſ.* 93: 1 *Rol. Abr.* 390.

An owner of land, over which there is an open road may incloſe it by his own authority, but he is bound to leave ſufficient ſpace and room for the road, and he is obliged to repair it till he throws up the incloſure. But if *he* alter or change the road by the legal courſe of a writ of *ad quod damnum*, he is not obliged to repair the new road, unleſs the jury impoſe ſuch a condition on him: for otherwiſe it ſtands juſt as it did before, even though it was at firſt open and ſhould be directed by the jury to be incloſed. And a private act of parliament for incloſing lands which veſts a power in commiſſioners to ſet out new roads by their award, is equally ſtrong as to theſe conſequences as a writ of *ad quod damnum*. See 1 *Burr.* 456.

As to the regulation by ſtatute, See *poſt.* VI. (A) 9.

III. Of *Common right*, the general charge of repairing Highways lies on the occupiers of lands in the pariſh wherein they lie; but it is ſaid that the tenants of the lands adjoining are bound to ſcour their ditches. 1 *Rol. Abr.* 39: *March* 26: 1 *Vent.* 90. 183: 8 *Hen.* 7. 5.

If a pariſh is part in one county, and part in another, and the Highways, in one county are out of repair, the whole pariſh ſhall contribute to the repair; but there may be an agreement between the inhabitants, that the one ſhall repair one part, and the other the other; and ſuch agreement is good between themſelves, and for breach, the one may have an action upon the caſe againſt the other; but in indictment they ſhall take no advantage of theſe agreements, for as to the King they are equally liable. 1 *Mod.* 112: 1 *Vent.* 256: 3 *Keb.* 301.

A Highway lying within a pariſh, the whole pariſh is of common right bound to repair it; except it appears that it ought to be repaired by ſome particular perſon either *ratione tenuræ*, or by preſcription. 1 *Vent.* 183. *Style* 163.

If a pariſh lie in two diſtinct counties, an indictment may be brought againſt that part of the pariſh in which the ruinous road lies. 4 *Burr.* 2511. But it muſt appear upon the face of the indictment by what right the charge is laid upon the particular diviſion of any pariſh, which is in one county only. 5 *Burr.* 2700, 2: As that they have repaired time out of mind. *Andr.* 276: *Hardw.* 259; and ſee 2 *Term Rep.* 513.

But though the pariſh be obliged of common right to repair the Highways in it, yet it is certain, that particular perſons may be bound to repair the Highway, by reaſon of incloſure or preſcription; as where the owner of lands not incloſed, next adjoining to the Highway, incloſes his lands on both ſides of it; in which caſe he is bound to make a perfect good way, and ſhall not be excuſed by making it good as it was before the incloſure, if it were then any way defective, becauſe by the incloſure he takes from the people the liberty of going over the lands adjoining to the common track. 1 *Rol. Abr.* 390: *Cro. Car.* 366: 1 *Sid.* 464.

Alſo it is ſaid, that if one incloſe land on one ſide, which hath anciently been incloſed on the other ſide, he ought to repair all the way; but that if there be no ſuch ancient incloſure on the other ſide, he ought to repair but half the way. 1 *Sid.* 464.

Therefore, if there be an old hedge time out of mind belonging to *A.* on the one ſide of the way, and *B.* having land lying on the other ſide, makes a new hedge, there *B.* ſhall be charged with the whole repair. 1 *Sid.* 464: 2 *Keb.* 665: 2 *Saund.* 157. But if *A.* makes a hedge on the one ſide of the way, and *B.* on the other, they ſhall be chargeable by moieties. 1 *Sid.* 464: 2 *Keb.* 665;

665. But it seems clear, that wherever a person makes himself liable to repair a Highway by reason of inclosure, that by throwing of it open again, he thereby frees himself from the burthen of any future reparation. 2 *Saund.* 160; See *ante* II.

In a writ of *ad quod dammum*, and inquisition found thereupon, after the person hath once made the road; (and *N. B.* it is not necessary the whole new road should go through his own soil;) the parishioners ought to keep it in repair: because being discharged from repairing the old road, no new burthen is laid upon them; their labour is only transferred from one place to another. But if the new road lies in another parish, the person who sued out the writ, and his heirs ought to keep it in repair, because the inhabitants of the other parish gaining no benefit from the old road being taken away, it would be imposing a new charge upon them for which they enjoyed no compensation. 3 *Atk.* 772.

Particular persons may be bound to repair a Highway, by prescription, or in respect of inclosure of the land wherein the road lies; and it is said, that a corporation aggregate may be charged by a general prescription, that it ought and hath used to do it, without shewing any consideration in respect whereof they had used to do it, because such a corporation never dies, neither is it any plea, that they have done it out of charity; but it is said, that such a general prescription is not sufficient to charge a private person, because no man is bound to do a thing which his ancestors have done, unless it be for some special reason; as having lands descended to him holden by such service, &c. but it seems, that an indictment charging a tenant of lands in fee with having used of right to repair such a way *ratione tenuræ terræ suæ*, without adding that his ancestors, or those whose estate he hath, have so done, is sufficient, for it is implied. 27 *Ass.* 8: 27 *Ed.* 4. 38: *Bro. Prescription* 49, 70: *Keilw.* 52 *a*: *Latch.* 206: 1 *Hawk. P. C. c.* 76. § 5—8.

And it seems certain in all those cases, whether a private person be bound to repair a Highway by inclosure or prescription, that the parish cannot take advantage of it on the general issue, but *must plead it specially*; that therefore, if to an indictment against the parish, for not repairing a Highway, they plead Not-guilty, this shall be intended only that the ways *are in repair*, but does not go to the *right* of reparation. 1 *Mod.* 112: 3 *Keb.* 301: 1 *Vent.* 256.

At Common law it is said, that all the county ought to make good the reparations of a Highway, where no particular persons are bound to do it; by reason the whole county have their ease and passage by the said way. *Co. Rep.* 13. By the ancient Common-law, villages are to repair their Highways, and may be punished for their decay; and if any do injure or straighten the Highway, he is punishable in the King's Bench, or before justices of the peace in the Court-Leet, &c. 27 *Ass.* 63: *Cromp. Jurisd.* 76. See *post* V.

As to *Private ways*.—If one grants a way, and afterwards digs trenches in it to my hindrance, I may fill them up again. But if a way which a man has, becomes not passable, or becomes very bad, by the owner of the land tearing it up with his carts, so that the same be filled with water, yet he who has the way cannot dig the ground to let out the water, for he has no interest in the soil. *Godb.* 52, 3. But in such case he may bring his action against the owner of the land for spoiling the way, or *perhaps* he may go out of the way, upon the land of the wrong-doer, as near to the bad way as he can. But where a private way is spoiled by those who have a right to pass thereon, and not through the default of the owner of the land, it seems that they who have the use and benefit of the way, ought to repair it, and not the owner of the soil, unless he is bound thereto by custom or special agreement. 2 *Burr.* 382.

In an action on the case for not repairing a private road leading through the defendant's close, it is sufficient to allege that the defendant *as occupier* of the close is bound to repair. 3 *Term Rep.* 766.

For further matter as to repairs of Highways, See *post* VI. (A). 2, 3, 6.

IV. It is clearly agreed to be a Nusance to dig a ditch, or make a hedge a-cross the Highway, or to erect a new gate, or to lay logs of timber in it, or generally to do any other act which will render it less commodious. *Kitchin.* 34: 1 *Hawk. P. C. c.* 76. § 48. Also it is a Nusance for an heir, (and for which he may be indicted,) to continue an incroachment, or other nusance to a Highway begun by his ancestor, because such continuance thereof amounts, in the judgment of law, to a new nusance. 1 *Hawk. P. C. c.* 76. § 61. Also it is agreed, that it is no excuse for him who lays logs in the Highway, that he laid them only here and there so that the people might have a passage through them by windings and turnings. 2 *Rol. Abr.* 137: 1 *Hawk. P. C. c.* 76. § 49.

It is a nusance to suffer the Highway to be incommoded by reason of the foulness, &c. of the adjoining ditches, or by boughs of trees hanging over it, &c. And it is said, that the owner of land next adjoining to the Highway, ought of common right to scour his ditches; but that the owner of land next adjoining to such land, is not bound by the Common-law so to do without a special prescription; also it is said, that the owner of trees hanging over an Highway, to the annoyance of travellers, is bound by the Common-law to lop them; and it is clear that any other person may lop them, so far as to avoid the nusance. 8 *H.* 7. 5 *a*: *Kitch.* 34: *Dalt. cap.* 26: 1 *Hawk. P. C. c.* 76. § 52.

But it is no nusance for an inhabitant of a town to unlade billets, &c. in the street before his house, by reason of the necessity of the case, unless he suffer them to continue there an unreasonable time. 2 *Rol. Abr.* 137, 265.

Any one may justify pulling down, or otherwise destroying a common nusance, as a new gate or house erected in a Highway; and it hath been holden, that there is no need, in pleading such justification to shew that as little damage was done as might be. 2 *Rol. Abr.* 144: *Cro. Car.* 184: 1 *Jon.* 221: 2 *Salk.* 458.

Though all nusances are punishable by indictment with fine and imprisonment, it is said, that one convicted of a nusance to the Highway, may be commanded by the judgment to remove it at his own costs, &c. 2 *Rol. Abr.* 84: 1 *Hawk. P. C. c.* 75. § 14. See 2 *Stra.* 686.

A gate erected in a Highway is a common nusance, because it interrupts the people in that free and open passage, which they before enjoyed and were lawfully intitled to; but where such a gate has continued *time out of mind*, it shall be intended that it was set up at first by consent, on a composition with the owner of the land on the

the laying out the road, in which caſe the people had never any right to a freer paſſage than what they ſtill enjoy. 1 *Hawk. P. C. c.* 75. § 9. If one has a *private way* without a gate, and a gate is hung up, an action on the caſe lies, for the party hath not his way as he had before. *Litt. Rep.* 267.

See further as to nuſances in Highways poſt V: and of their puniſhment by ſtatute, poſt VI. (A) 4.

V. *As to the general doctrine with reſpect to* Indictments, *&c. upon this ſubject*, Mr. Serjeant Hawkins *has laid down the following rules:*

Firſt, That it is ſafe in every ſuch indictment to ſhew both the *place from which*, and alſo the *place to which*, the way ſuppoſed to be out of repair doth *lead*; yet exceptions, for want of ſuch certainty, have ſometimes been diſallowed: (See 4 *Burr.* 2091: *Lucas* 383.) However it ſeems certain, That there is no neceſſity to ſhew that a Highway leads to a market town, becauſe every Highway leads from town to town. 1 *Hawk. P. C. c.* 76. § 86.

An indictment againſt the pariſh of *B.* for not repairing a road leading *from A. to B.* is excluſive of *B.* and therefore bad: and it is not aided by a ſubſequent allegation that a *certain part of the ſame Highway, ſituate in B.* is in decay, *&c.* 3 *Term Rep.* 513.—See 1 *H. Black. Rep.* 351; that in *pleading* a publick Highway it is not neceſſary to ſtate any *termini*. So in an indictment for a nuſance in a Highway, it is not neceſſary to mention the *termini*. *Stra.* 44.

2dly, That it is neceſſary in every ſuch indictment expreſsly to ſhew *in what place* the nuſance complained of was done; for which cauſe an indictment for ſtopping a way at *D.* leading from *D.* to *C.* is not good; for it is impoſſible that a way leading from *D.* ſhould be in *D.* and no other place is alledged. 1 *Hawk. P. C. c.* 76. § 87.

So alſo in a preſentment the Highway muſt be alleged to lie in the pariſh, otherwiſe the pariſh is not bound to repair. *Cowp.* 111; *Stra.* 181.—But if there be two vills in a pariſh, it is not neceſſary, in an indictment for a nuſance, to ſhew in which vill the nuſance lies. *Say.* 119.

3dly, That every ſuch indictment ought alſo certainly to ſhew *to what part* of the Highway the nuſance *did extend*, as by ſhewing how many feet in length, and how many feet in breadth it contained; or otherwiſe the defendant will neither know of the certainty of the charge, againſt which he is to make his defence, neither will the court be able from the record to judge of the greatneſs of the offence, in order to aſſeſs a fine anſwerable thereunto; and upon this ground it hath been adjudged, that an indictment for ſtopping a certain part of the King's Highway at *K.* is bad, for the incertainty thereof. Alſo it hath been reſolved, that the place wherein ſuch a nuſance is alleged, is not ſufficiently aſcertained in ſuch an indictment, by ſhewing that it contained ſo many feet in length, and ſo many in breadth, *by eſtimation*. 1 *Hawk. P. C. c.* 76. § 88.

An indictment for a nuſance in laying ſoil in a Highway is not bad for want of the length and breadth of the nuſance being ſet out. *Say.* 98.—Nor for a nuſance in digging two grips or ditches in a common footway. *Say.* 197.—Nor for a nuſance, that a certain Highway and bridge are in a ruinous condition. *Say.* 301.

4thly, That every ſuch indictment muſt ſhew, that *the way* wherein a nuſance is alledged, is *a common Highway*; for which cauſe it hath been reſolved, That an indictment for a nuſance to a horſeway, without adding that it was a Highway, is bad; and upon the ſame ground it ſeemeth alſo, That an indictment for a nuſance to a common footway to the church of *D.* for all the pariſhioners of *D.* is not good; yet it ſeems, that if thoſe laſt words, *viz. for all the pariſhioners of D.* had been omitted, ſuch an indictment might be maintained. See 1 *Hawk. P. C. c.* 76. § 89.

5thly, That it is not ſafe in an indictment againſt a common perſon for not repairing a Highway, which he ought to have done in reſpect of the *tenure* of certain lands, barely to ſay that he was bound to repair it *ratione tenuræ terræ*, without adding *ſuæ*. Alſo it is ſaid, that in an indictment againſt a biſhop, *&c.* for not repairing a Highway, in reſpect to certain lands, it ought to be ſhewn in what capacity he ought to repair it, becauſe otherwiſe it cannot be known in what capacity the proceſs is to be awarded againſt him. 1 *Hawk. P. C. c.* 76. § 90.

If a man be charged to repair *ratione tenuræ*, he may throw it upon the pariſh by the general iſſue. *Stra.* 184.—And it hath been held upon conſideration that *ratione tenuræ* is ſufficient without *ſuæ*. *Stra.* 187. *Hawkins* poſitively ſtates that the defendant ought not to plead *quod non debuit reparare* without ſhewing who ought. 1 *Hawk. P. C. c.* 76. § 94; cites 1 *Sid.* 140: *Carth.* 213: 11 *Mod.* 273: 12 *Mod.* 13.

6thly, That in every ſuch indictment the *fact* alledged againſt the defendant muſt be expreſſed in ſuch *proper terms*, that it may clearly appear to the court to have been a nuſance; and for this cauſe it hath been reſolved, That a preſentment for diverting a Highway is not good, becauſe a Highway cannot be diverted, but muſt always continue in the ſame place where it was, howſoever it be obſtructed, and a new way made in another place. See 1 *Hawk. P. C. c.* 76. § 91.

It hath been reſolved, That an indictment againſt a man for ſtopping a Highway in his own land, is good, without laying the offence done *vi et armis*. Alſo it is ſaid, That a preſentment that a Highway in ſuch a place is decayed by the default of the inhabitants of ſuch a town, is good, without naming any perſon in certainty. But it hath been adjudged, than an indictment againſt particular perſons muſt ſpecially charge them every one; for which cauſe it hath been reſolved, that an indictment againſt ſeveral for not repairing their ſtreets, that they, *& eorum uterque*, did not repair them, is not good. See 1 *Hawk. P. C. c.* 76. § 92.

Upon an indictment for not repairing a Highway, if the defendant produce a certificate before trial, that the way is repaired, he ſhall be admitted to a fine: but after verdict, the certificate is too late, for then he muſt have a *conſtat* to the ſheriff, who ought to return that the way is repaired, becauſe the verdict, which is a record, muſt be anſwered by a record. *Raym.* 215. And where the defendants, indicted for not repairing a common foot-way, confeſſed the indictment, and ſubmitted to a fine; it was held, that the matter was not ended by their being fined; but that writs of *diſtringas* ſhall be awarded *in infinitum* till the court of *B. R.* is certified that the way is repaired, as it was when it was at beſt; but the defendants are not bound to put it in better repair than it has been time out

of

of mind. 1 *Salk.* 358: 6 *Mod.* 163. If a defendant hath made a Highway as good as it is capable of being made, it was said, in an extraordinary case, this shall not discharge him, on an information against him; though it may be a mitigation of his fine. 3 *Salk.* 183. Also it is no excuse for the inhabitants of a parish indicted at Common-law, for not repairing the Highways, that they have done the work required by statute; for the statutes are made in aid of the Common-law: and when the statute work is not sufficient, rates and assessments are to be made. *Dalt. c.* 26.

It is said, that if the right or title to repair such ways come in question, upon suggestion and affidavit made thereof, a *certiorari* may be had to remove the indictment into *B. R.*

A person may be indicted for not repairing a house standing upon a Highway which is ruinous, and like to fall down, to the danger of travellers, whatever be his tenure, which in such case is not material. 1 *Salk.* 357.

If there be a common foot-way through a close by prescription, and the owner of the close ploughs up the way, and sows it, and lays thorns at the side of it, passengers may go over another foot-way in the same close, without being trespassers. *Yelv.* 142. And if a *Highway* is not sufficient, any passenger may break down the inclosure of it, and go over the land, and justify it till a sufficient way is made. 3 *Salk.* 182.

Erecting a gate cross a *Highway*, though not locked, but opening and shutting at pleasure, is esteemed a nusance; for it is not so free and easy a passage, as if there had been no gate: and the usual way of redressing nusances of this kind, is by indictment; but every person may remove the nusance, by cutting or throwing it down, if there be occasion so to do; and it hath been held, that though there are many gates across *Highways*, they must be *anciently* set up, and it shall be intended by licence from the King upon the writ of *ad quod damnum*. *Cro. Car.* 184. See *ante* IV.

VI. (A) *Of* Highways.

1. *The Statute duty.*
2. *Assessment of Rates and other funds for the Repair of Highways.*
3. *Of the Appointment of the Surveyor, and his duty.*
4. *Of Nusances by Statute.*
5. *The Number of Horses in Carriages.*
6. *Of presenting Highways.*
7. *Of levying Assessments, Penalties and Forfeitures; and other general provisions to enforce the Execution of the Act.*
8. *Of Defendants in Actions on the Statutes, &c.*
9. *Of Changing and Enlarging Highways.*

1. By *stat.* 13 *Geo.* 3. *c.* 78. § 34, which repeals and consolidates the provisions of all former statutes on this subject, Occupiers of 50 *l.* a year keeping a team of three horses shall send the same and *two* men to do statute-duty for six days in every year.—And so for another six days in every year for every further 50 *l.* a year.—So also every person who shall occupy 50 *l.* in any other parish than where he resides.—Every person occupying 50 *l.* a year, but not keeping a team, shall send a team; a person not keeping a team, but occupying under 50 *l.* a year either where he does or does not reside, to pay the surveyor in lieu of duty for every 20 *s.* a year 1 *d.* for every day's duty.—A person keeping a team and not occupying 30 *l.* a year shall only send *one* man with the team.

Lands suffered to lie fresh, neither occupied or let, are liable to the performance of the duty; to be satisfied by their *Owners*. *Palm.* 389.

The livings of the clergy are liable as other estates. *Watf.* 40: 2 *Inst.* 784.

Whoever shall keep a cart and horse, and not a team, shall send the same, and one labourer, or pay the composition at the option of the surveyor.—Persons above 18 and under 60 not occupying 4 *l.* a year, not being apprentices or menial servants, if they have not otherwise performed or commuted shall, by themselves or deputy, perform the six days' duty.—A person keeping a coach or carriage and no team, and not occupying 50 *l.* a year shall pay 1 *s.* a day for each horse or the composition before mentioned at the option of the surveyor.—If the carriages required are not necessary, the owners shall send 3 men or pay 4 *s.* 6 *d.*—The labourers shall furnish *themselves* with proper instruments for the statute-labour; and shall with the teams, *&c.* work 8 hours a day.—If persons do not send a sufficient labourer besides the driver, or if the labourers disobey the surveyor, he may discharge them and recover the forfeiture against the master, as he might in case none had been sent at all. § 35.

A stand-cart and one horse to be reckoned half a team; a cart and two horses as two-thirds.—And if the duty require it, the surveyor may order it to be performed with a waggon. § 36.

The surveyor shall give four days' notice to the occupiers, *&c.* of the statute-duty required, and the days when. (See *Ld. Raym.* 858.) Persons making default in sending the team and men, to forfeit 10 *s.*—in sending cart, horse and man 3 *s.*—in sending cart, horse and two men 5 *s.*—in sending a labourer 1 *s.* 6 *d.*—The forfeitures to be applied to the Highways; the surveyor to be impartial. § 37.

The statute duty may be compounded for, as the Justices shall direct, at the rate of 4 *s.* 6 *d.* for a team; 2 *s.* for a cart and horse; 3 *s.* for a cart and 2 horses; and 4 *d.* for a day's personal labour, § 38.

Justices of cities, corporations, *&c.* are to execute this act within their jurisdictions. § 54.

If a necessity should arise in any particular place, the Justices may supersede the liberty of compounding, and order the statute-duty to be performed in kind; and lots shall be drawn which of the inhabitants shall so perform it. § 39.

The Justices may mitigate the composition, where part of the land occupied lies in another parish. § 40.

Sect. 41, Settles the manner in which the surveyors shall give notice of the time and place for compounding, and how such compositions shall be paid.

Where a draught or plough is kept and no carriage, 1 *s.* shall be paid for every horse or pair of oxen. § 42.

The Inhabitants may appoint 3 separate months in the year for seed-time, hay, and corn-harvest in which no Statute-duty shall be performed. §. 43.

The *Stat.* 13 *Geo.* 3. *c.* 84. § 58, empowers the Justices in special sessions in certain cases to apply the funds of *Turnpike roads* in aid of the statute-duty on Highways.

By *Stat.* 30 *Geo.* 2. *c.* 25. §. 23, Persons serving in the militia are exempted from statute-duty during their service.

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The performance of this ſtatute-duty is no anſwer to an indictment for not repairing. *Dalt. c.* 26.

The inhabitants of a pariſh into which a road is turned by Turnpike-truſtees are not bound to do ſtatute work thereon. 1 *Black.* 603.

2. The Seſſions may order a rate not exceeding 6 *d.* in the pound to defray the expences of procuring materials, *&c.* for the repairs. *Stat.* 13 *Geo.* 3. *c.* 78. § 30.

If the funds are exhauſted, and they and the labour appointed by the act, are inſufficient to keep the Highways in ſufficient repair, the Seſſions may cauſe an equal aſſeſſment for that purpoſe; provided the ſaid rate of 6 *d.* and this aſſeſſment do not exceed 9 *d. per* pound. §§ 45, 46.

Feoffees or truſtees of lands granted for the repair of Highways ſhall let them to the beſt advantage, and the Seſſions may enquire into the management thereof. § 52.

3. Of the *Appointment* of the *Surveyor*. By the ſaid *Stat.* 13 *Geo.* 3. *c.* 78. § 1, The officers and Pariſhioners ſhall aſſemble yearly on 22*d* of *September* at 11 in the morning, when the majority ſhall make a liſt of ten pariſhioners each poſſeſſing a real eſtate of 10 *l.* a year or renting 30 *l.* or worth 100 *l.* perſonally.—If a ſufficient number of this deſcription cannot be found, the deficiency ſhall be ſupplied by the moſt able inhabitants.—Within three days after, the conſtable ſhall ſend a copy of the liſt to the Juſtice of the diviſion, and the original liſt to the ſpecial Seſſions after *Michaelmas* ſeſſion; and give notice to the perſons named, to appear at the Seſſion and accept the office of ſurveyor (if appointed) or ſhew cauſe to the contrary.—The Juſtices, at ſuch ſpecial Seſſions ſhall appoint one, two or more ſurveyors from the ſaid liſt, preferring ſuch as are qualified; which ſhall be notified to the perſons choſen who ſhall be ſurveyors for the next year.—If any named in the liſt refuſe to ſerve, they ſhall forfeit 5 *l.*—And the Juſtices may appoint inhabitants of the county living within three miles of the pariſh; who on refuſal ſhall forfeit 50 *s.*—A ſurveyor ſerving one year ſhall be exempt for the three following.—If no liſt is returned, or the perſon appointed refuſes to ſerve; two Juſtices at ſpecial Seſſion may appoint a ſurveyor with a ſalary to be paid from the forfeitures, but not to exceed ⅓ of the 6 *d.* rate—The Juſtices may order the collector to return an account of the ſaid aſſeſſment.—Officers neglecting their duty to forfeit 40 *s.*

It ſeems that the preſence of the pariſh officers is not abſolutely eſſential to the legality of the meeting, provided it is in other reſpects fair and regular. 4 *Burr.* 2454.—More Surveyors than one are comprehended under, and underſtood by the word *ſurveyor* in this act. See *Sect.* 5, of the act.—If the liſt has been improperly procured, the Juſtices may reject it. 4 *Burr.* 2454.

Where a ſurveyor with a ſalary is appointed, the juſtices ſhall alſo appoint an aſſiſtant, who ſhall forfeit 50 *s.* on refuſal to ſerve; and another be appointed, liable alſo to 50 *s.* for refuſing; and they may then appoint one with a ſalary.—An aſſiſtant ſerving one year ſhall not be appointed again for three years, without his own conſent. 13 *Geo.* 3. *c.* 78. § 2.

The Surveyor ſhall give ſecurity by bond, if required. § 3.

By § 5, It is provided that two parts in three of the pariſhioners aſſembled may recommend a Surveyor with a ſalary to the Juſtices.—And if the Surveyor dies or becomes incapable during the interval of the Seſſions, two Juſtices may appoint a perſon to officiate until the Seſſion.

The ſalaries of Surveyors in cities, *&c.* muſt be approved by two thirds of the pariſhioners. § 54.

As to the *Surveyor's duty*.—By § 4. of the ſame act, the aſſiſtant ſhall obey the Surveyor, and account to him for money received, under forfeiture of double the amount.—And for any neglect he ſhall forfeit, not more than 5 *l.* nor leſs than 40 *s.* at the diſcretion of the Juſtices.—The Surveyor is to draw on the aſſiſtant for ſums of 40 *s.* or upwards.

Surveyors ſhall view the Highways, and give notice to remove obſtructions or encroachments by hedges, *&c.* and if not remedied within twenty days the Surveyor may do it at the charge of the party offending, who ſhall alſo forfeit 1 *d. per* foot. § 12. and See *poſt.* 4.

The Surveyor ſhall upon oath inform two Juſtices of all Highways, bridges, *&c.* repairable by tenure which are out of repair.—And if they are not repaired on notice to the perſons chargeable they ſhall be preſented at the Seſſions. § 23. See. 1 *Black.* 602; and *poſt.* 6.

Juſtices at ſpecial Seſſions may order which of the Highways ſhall be firſt repaired. § 25.

Sect. 26, directs how, where, and in what manner the ſurveyor ſhall erect direction poſts in croſs roads, *&c.*

Sects. 27 & 28, State where and in what manner the Surveyor may get materials for the repairs; and § 29, how materials ſhall be obtained where there are not ſufficient within the pariſh.—As to this latter, See 1 *Burr.* 382.—The Surveyor enabled to contract. § 50.

The Surveyor is to fence off all pits and holes made in digging materials, on forfeiture of 10 *s.* and on neglect after notice from 40 *s.* to 10 *l.* § 31.—Materials dug for the uſe of a different pariſh than that in which they lie, ſhall be removed only between the 1ſt of *April* and 1ſt of *November* or in a hard froſt. § 32.

The penalty for damaging bridges, mills, *&c.* between 20 *s.* and 5 *l.* at the diſcretion of the Juſtices. § 33.

Sect. 48, Directs in what manner the Surveyor or his executors, *&c.* ſhall keep his accounts; which are to be examined at a veſtry, afterwards by a Juſtice, and further if neceſſary at a ſpecial Seſſions.—See 2 *Burr.* 746.

Surveyors neglecting their duty ſhall forfeit between 10 *s.* and 5 *l.* at the diſcretion of the Juſtices. § 51.

If the Surveyor receives money due to the turnpike roads he ſhall pay it to the treaſurer, and how it is to be applied. § 44.

4. By the ſaid *Stat.* 13 *Geo.* 3. *c.* 78. § 7, The Surveyor ſhall give ten days' notice to the landholders next adjoining the road to cut and prune their hedges; and upon default the Juſtices may order the ſame to be done; and if ſuch order is not complied with, in ten days, the Surveyor ſhall cut and prune at the expence of the owner of the land, who ſhall pay over and above 2 *s.* for every 24 feet of hedge, and 2 *s.* for every tree; and ſee § 12 of this act mentioned under the laſt head.

The landholder ſhall make proper ditches and drains, and keep them properly ſcowered and in repair on pain of 10 *s.* § 8.—And where the old ditches are not ſufficient, the Surveyor ſhall order new ones to be made. § 14.

No *ſmall tree* or buſh whereby a man may lurk, ſhall ſtand within 200 feet of a Highway.—See *ſtat. Wincheſter* (13 *Ed.* 1. *ſt.* 2.) *c.* 5; which was repealed by 7 *Geo.* 3. *c.* 42; but revived by 8 *Geo.* 3. *c.* 5. § 3.

Sect.

Sect. 13, of the said act, 13 *Geo.* 3. *c.* 78, directs the season in which hedges shall be pruned and trees felled.

No tree, bush or shrub shall grow within 15 feet from the centre of any Highway, unless for ornament, &c. § 6.

Whoever shall lay any stone, timber, &c. in a Highway for five days so as to obstruct or injure the same, shall forfeit 10*s.* § 9.—And if not removed within five days after notice by the surveyor, it shall be sold. § 10.—Obstructions by carriages, unless for a reasonable time to unload, forfeit 10*s.* § 11.

Penalty for incroaching upon Highways 40*s.* and the incroachment may be taken down by the surveyor. § 64.

No ale-houses suffered on bridges where tolls are kept, on penalty of 5*l.* § 63.

Penalty for damaging banks, causeways, *mile-stones*, &c. from 10*s.* to 5*l.* or commitment to the house of correction. § 53. [The same provisions are made as to turnpike roads by 13 *Geo.* 3. *c.* 84.]

5. The number of horses in the several carts and waggons with wheels of various breadths is settled by § 56, of the said *Stat.* 13 *Geo.* 3. *c.* 78; and the time of prosecution for penalties is so limited by § 57, as to render it necessary for an informer to be pretty diligent.

Justices at sessions may licence an additional number, and stop proceedings for the forfeiture. §§ 58, 59. See 4 *Burr.* 2260.

The owner's name, &c. to be painted on all carriages on forfeiture of from 20*s.* to 5*l.* § 59.

Penalty for negligent or impertinent behaviour of drivers not more than 20*s.* if owners of carriages, or 10*s.* if not; who may be apprehended *with or without warrant* by a person seeing the offence committed. § 60.

This statute does not restrain the Subject, who receives any injury by a driver, &c. of any carriage, from suing the owner thereof at Common-law, or from punishing the driver for wilful offence, by indictment, as the nature of the case may require. But then the party prosecuting must waive the benefit of proceeding, under this statute, in the summary way thereby prescribed. *J. M.*

The forms to be observed in proceedings are settled in the schedule annexed to the act.—Abstracts of the act are to be given to the surveyor. §§ 70, 71.

6. Under the said *Stat.* 13 *Geo.* 3. *c.* 78. § 24, (and see § 81,) Justices of assise upon view, and justices of peace upon view, or on information on oath by the surveyor, may present at the assises, great sessions of *Wales*, or quarter sessions, any Highway, causeway or bridge out of repair, within the jurisdiction and county where they lie.—And no such presentment nor any indictment shall be removed by *certiorari* [on the part of the defendant (*a*)] until traverse and judgment.—But if the right to repair is in question, the defendant *may* remove the proceedings.—And every such presentment shall have equal force as if it had been found by a jury.—Saving the right of traverse as to the fact of non-repair, as well as to the right of repairing.—The justices may order the prosecution to be at the expence of the limit, and on conviction may fine the offender.

(*a*) On the part of the *prosecution* a presentment may be removed before traverse and judgment; for the restriction was to prevent delay by *defendants*. *Cowp.* 78. And if the Quarter Sessions exceed their authority; as to order a surveyor to make out his account before a special sessions, such proceedings may be removed by a *certiorari* and quashed; for their power in such case is not original but appellate. *Leache's Hawkins* i. *c.* 76. § 80, and the authorities there cited: and see 2 *Stra.* 1209.

The Justices are compellable by *mandamus* to receive a general traverse. *Burr.* 1532: 1 *Black.* 468.

[Since compiling the above abstract, the *Stat.* 34 *Geo.* 3. *c.* 74, was passed repealing §§ 34, 35 & 39 of the *Stat.* 13 *Geo.* 3. *c.* 78; and re-enacting them in all particulars, except as relates to *poor and indigent persons*; whom two Justices, in special or petty sessions, may as they see fit, on their application, excuse and exempt from performing any personal labour, and from paying any composition in lieu thereof.]

7. Assessments may be levied by distress, and the surveyor shall be a competent witness. *Stat.* 13 *Geo.* 3. *c.* 78. §§ 68, 69.

Forfeitures, &c. to be levied by distress. §§ 73, 74.

Convictions shall be made on confession, the oath of one witness, or view of the justice.—Inhabitants competent witnesses. § 77.

The prosecutor may proceed for a forfeiture above 40*s.* either as directed by the act, or by action of *debt*, in a court of record, and recovering shall have double costs. § 75.

It may not be improper to observe, that there are very good opinions, against the general method of declaring in debt, directed by the act, and that a declaration, thus framed could not be supported, on demurrer; for, the act creating a variety of offences, where the forfeiture is a pecuniary one, the defendant cannot be prepared to defend the charge, not knowing what may be given in evidence on the trial, *i. e.* what kind of offence may then be alledged against him, but such declaration being directed by an act of parliament, it is a very doubtful point. *J. M.*

Ten days notice before action commenced and none to be brought after a month [See *post* § 82,] has expired. § 76.

No distress *unlawful*, or the party to be deemed a trespasser for want of form. § 79.

The court may award costs to either party, according to the circumstances. § 65.

A defendant indicted for not repairing *ratione tenuræ* shall on submission pay costs. 1 *Black.* 602.

All forfeitures shall be paid into the hands of such persons as the court inflicting them shall direct for the benefit of the Highways; on penalty, for the misapplication, of double the sum received.—And if any forfeiture is levied upon a particular inhabitant for the default, or on account of the parish, the sessions may cause a rate to be levied within one month by the surveyor for reimbursing him. § 47.

The court will also grant a *mandamus* for a rate to reimburse a particular *district* for a fine paid on the conviction of another district in the same parish, both bound to repair; but such mandamus must be special. *Doug.* 422: *Stra.* 211.

The parishioners may agree to bear the charges of any prosecution or defence. § 66.—But public notice shall be given of every meeting of the parish. § 67.

Forfeiture for opposing the execution of the act, and on officers neglecting to execute warrants; from 40*s.* to 10*l.* or imprisonment till paid. § 72.

Juſtices are empowered to adminiſter oaths for the purpoſes of the act. § 78.—And on giving fit notice they may hold a ſpecial ſeſſions. § 62.

8. Perſons aggrieved may appeal to the Quarter ſeſſions, giving notice thereof within 6 days after the cauſe aroſe, and entering into a recogniſance with one ſurety within 4 days after notice; and on notice of ſuch appeal all proceedings to be returned to the ſeſſions on pain of 5 *l.*—The ſeſſions ſhall hear the appeal in a ſummary way, and decide *finally*, and award coſts as the deciſion ſhall be. *Stat.* 13 *Geo.* 3. *c.* 78. § 81.

Limitation of actions 3 months, and treble coſts to defendant. § 82.

9. By the ſaid *Stat.* 13 *Geo.* 3. *c.* 78. § 15, Every publick cartway ſhall be 20 feet wide, and every horſe-way 8 feet wide.

Two juſtices, upon view, may order Highways to be widened or diverted; ſo as not to exceed 30 feet in breadth, and ſo as not to pull down any building, or incroach on any garden, court, or yard.—The ſurveyor ſhall make ſatisfaction to the owners for the ground which ſhall be neceſſary for ſuch purpoſes.—If the owners refuſe to treat, or cannot be found, or will not accept the ſatisfaction offered by the ſurveyor, the ſeſſions upon certificate ſhall impannel a jury who ſhall aſſeſs the value, not exceeding 40 years, purchaſe; and upon tender thereof, or leaving the ſame with the clerk of the peace, the ground ſhall be for ever diveſted and become a publick Highway.—But all ſubterranean property of value which can be acquired without injuring the ſurface of the Highway is ſaved to the owners of the land.—And all timber and wood thereon ſhall be felled within a month, and laid upon the adjoining land for the benefit of the owner; and the ſeſſions may order a rate, not exceeding 6*d.* in the pound yearly, to pay for ſuch purchaſe. § 16.

The old Highway to be ſold, in which a preference is to be given to the occupiers of the adjoining lands; and if it lead to any land, houſe or place, the ſale ſhall be ſubject to ſuch right of paſſage.—And upon tender or payment of the money, the land ſhall veſt in the purchaſer, ſaving the right of all ſubterranean property to thoſe who would otherwiſe have been entitled. § 17.

If the jury ſhall aſſeſs a greater ſum than what the ſurveyor offered, the coſts ſhall be paid from the ſurveyor's fund; if a leſs ſum, by the owners of the land. § 18.

Two juſtices may divert any Highway, not in the ſituation before deſcribed, if the owners of the land through which the new road is to paſs will conſent; and may purchaſe, ſtop up and ſell, as in roads to be widened or diverted.—Perſons aggrieved by any ſuch proceedings, or by any writ of *ad quod damnum* for this purpoſe may appeal to the next ſeſſions [See *Leache's Hawkins* i. *c.* 76. § 31. in the notes.]—No old way ſhall be ſtopped up before the new way is compleated.—New Highways which have been acquieſced in for 12 months ſhall become incontrovertible. § 19. See *Doug.* 749: 2 *Show.* 28: *Lev.* 1234: *W. Jon.* 296: *Ld. Raym.* 725: 3 *Comm.* 36.

No common land lying between the fences of any old Highway ſhall be incloſed.—And land between the fences not being common, exceeding 30 and not extending to 50 feet in breadth ſhall not be ſtopped till ſatisfaction is made to the owners for all the land exceeding 30 feet.—And if the old road ſhall have paſt through common land, or if the ſpace between the fences, the land not being common, ſhall exceed 50 feet in breadth, the reſpective owners of ſuch land ſhall hold and enjoy the old Highway, making ſatisfaction for the ſame. § 20.

Where a footway is diverted through a different part of the ſame lands, no ſatisfaction ſhall be made, except the new road ſhall be longer, or that part of the land of greater value.—If the footway ſhall not go through the ſame perſon's lands, ſatisfaction ſhall be made to the owner of the new land by the award of two perſons and an umpire. § 21.

Two juſtices, upon view, may ſtop up and ſell, or may divert all Highways which are uſeleſs and burdenſome to the pariſh. § 22.—But this is not a general power; but tied up to a particular caſe; and is given only where there is a new road to be ſet out. *Page* v. *Howard, Cald. Ca.* 228.

It often happening that a Highway is in two pariſhes (See ante III,) and even frequently that the boundaries of pariſhes paſs through the middle of Highways, the *Stat.* 34 *Geo.* 3. *c.* 64, provides, that on complaint or application by a ſurveyor, two juſtices may determine what parts of Highways lying in two pariſhes ſhall be repaired by each; for which purpoſe they may order boundary ſtones to be erected, and annex a plan of the Highway and the diviſion of it to their order, which plan is to be filed by the Clerk of the peace; the coſts of ſuch order to be paid by both pariſhes.

(B) *Of Turnpike roads.*—

The Turnpike Roads of *England* are placed under the management and direction of certain truſtees, who are uſually appointed by the reſpective acts of parliament occaſionally paſſed for the making and repairing particular roads. But the powers of theſe acts being confined to ſeparate and diſtinct objects, it was thought expedient to paſs ſome general laws which ſhould apply in common to all truſtees and turnpike roads in general throughout the kingdom.—*Leach's Hawk. P. C.* i. *c.* 76. *App.*

The laſt general turnpike act, and that now in force, is the *Stat.* 13 *Geo.* 3. *c.* 84. and this act by 21 *Geo.* 3. *c.* 20. is extended to all acts of parliament made ſince it, or to be made hereafter for the purpoſe of regulating particular turnpikes.

In analyzing and abbreviating this act therefore we ſhall follow nearly the plan of the laſt ingenious editor of *Hawkins*, referring to his book for fuller information. Conſidering

1. *The Truſtees; their Qualification, Power and Duty.*
2. *Weighing Engines.*
3. *Carriages; and their Tolls.*
4. *Exemptions from Toll.*
5. *Statute Duty and Repairs.*
6. *Nuiſances.*
7. *Subſcribers and Mortgagees.*
8. *Officers, their Duty and Reſponſibility.*
9. *Of adopting the Powers of the Highway Act, and enforcing this Act.*
10. *Of deſtroying Turnpike-Gates, &c.*

1. A *Truſtee* muſt poſſeſs *realty* of 40 *l.* a year, or 800 *l.* perſonalty, or be heir apparent to *realty* of 80 *l.* a year.—And take an oath of ſuch qualification before

two

two Juſtices; on penalty of 50*l.* and in an action it is incumbent on the truſtee to prove his qualification, *Stat.* 13 *Geo.* 3. *c.* 84. § 44.

No Publican ſhall be a Truſtee, or act under them as *Collector* of tolls, *&c.* but he may *farm* the tolls, if he employs a perſon to collect them. § 46.

Acting as a Truſtee is evidence of being one. § 64.

Where the firſt or any other day of meeting has elapſed, any 5 Truſtees may appoint a meeting of the whole body, on giving 20 days notice. § 49. [explained and amended by *Stat.* 18 *Geo.* 3. *c.* 63. § 1.]

No meeting ſhall be adjourned longer than 3 months; and all buſineſs is to be done between 10 *A. M.* & 2 *P. M.* § 50.

If Truſtees exceed their power in erecting gates, the juſtices may order them to be removed. § 51.

Truſtees may adminiſter oaths neceſſary under the act. § 84.

Seven Truſtees may farm out the tolls by auction upon one month's notice, deſcribing the particular tolls to be let, and ſpecifying their produce the preceding year. § 31.—The ſame ſection directs the method in which the bidding at ſuch auction ſhall be conducted, and that farmers of the tolls ſhall not take more than the regular rates on penalty of 5*l.* on them, or 40*s.* on the gate-keepers. § 31.

Seven Truſtees on a month's notice may reduce or advance the tolls as they ſee convenient; but if the toll is mortgaged, they muſt have the conſent of four fifths of the creditors. § 29.

Five Truſtees may direct proſecution for nuiſances at the expence of the truſt; provided they can prove the fact by one witneſs. § 47.

Two Truſtees may ſupply the vacancy of toll-keeper, till a general meeting. § 54.

The Truſtees may agree for proportion of repairs with thoſe who are bound to repair by reaſon of tenure, incloſure, *&c.* § 62.

They ſhall hang up at the toll-gates tables of the rates of toll and of the different weights and number of horſes allowed to carriages, § 66.

They ſhall erect mile-ſtones, direction poſts, flood-poſts, *&c.* § 41. [And ſee *Highways.* VI. (A) 4.]

2. Five truſtees may order Weighing-engines to be erected at ſuch gates, within their juriſdiction, as they ſee proper. *Stat.* 13 *Geo.* 3. *c.* 84. § 1. [See 1 *Burr.* 377.]

No ſide gate to be erected, unleſs on order of *nine* truſtees (being a majority preſent) on 21 days notice; and no toll to be paid for paſſing only 100 yards through the ſame, unleſs over ſome expenſive bridge. § 34.

The different burthens which carriages are allowed are ſettled at large by § 1. and the additional toll to be paid for extra weight, is determined by *Stat.* 14 *Geo.* 3. *c.* 82. § 2.—And by § 3. of the ſaid act 13 *Geo.* 3. *c.* 84, carriages employed in huſbandry or in carrying manure are exempted from being weighed.

Any truſtee, officer or creditor may cauſe carriages not paſſed above 300 yards through any gate to return and be weighed on tendering the driver 1*s.* which ſhall be refunded if the weight is found exceſſive. § 3.

If the toll-keeper neglects to weigh *ſuſpected* carriages, or to receive the additional toll, he ſhall forfeit 5 *l.* § 2.

The truſtees ſhall make places within 300 yards of every gate, for carriages to turn.—A liſt of the truſtees and officers, ſhall be hung in the houſe of every gate where there is a Weighing-engine.—A driver refuſing to return ſhall forfeit 40*s.* and any peace officer may drive the carriage back to be weighed. § 4.

The quarter ſeſſions upon complaint may order Weighing-engines to be erected, § 7. and where two roads meet the truſtees may erect one Weighing-engine for both. § 8.

No compoſition to be made for tolls, unleſs the carriages have fellies 6 inches broad. § 9.

The penalty for endeavouring to evade the tolls by unloading goods, *&c.* before the carriage arrives at the Weighing-engine 5*l.*—and the driver may be committed to the houſe of correction for a month. § 10.—Penalty on endeavouring to avoid the Weighing-engine; on the owner of a carriage from 20*s.* to 5*l.*—the driver from 10*s.* to 50*s.* § 11.

Toll-gates ought not to be erected in the middle of great towns, ſo as to obſtruct the neceſſary intercourſe. 1 *Burr.* 377.

3. Sect. 13, of the *Stat.* 13 *Geo.* 3. *c.* 84, explains at large the number of horſes allowed to carriages according to the breadth of their fellies, and the penalties on tranſgreſſion 5 *l.* on owners, and 20*s.* on drivers.

Two oxen equal to one horſe. § 67.

Carriages to have names and deſcriptions. § 68. [Vide *Burr.* 2258.]

Carriages going on 16 inch rollers may be drawn with any number of horſes. § 14. [and by *Stat.* 14 *Geo.* 3. *c.* 82. § 5. ſhall only pay half-tolls.]

On proſecution for penalties, information to be made of the offence within 3 days, and action commenced within one month. § 15.

Penalty for taking off horſes and altering the diſtance of the wheels to avoid the toll. 5 *l.* § 17.

Penalty on perſons paſſing through gates without paying tolls, or aſſaulting collectors, reſcuing cattle, *&c.* between 40*s.* and 10*l.* § 75.

Truſtees may allow a ſufficient number of horſes up hills, riſing more than 4 inches in a yard. And one juſtice may ſtop proſecution for penalties in drawing with a greater number of horſes than allowed; if it appear neceſſary from deep ſnows, *&c.* § 18. [See Highway act. § 59.]

No carriages with leſs than 9 inch fellies, ſhall be drawn by horſes in pairs, except ſuch as having 6 inch fellies, ſhall be permitted by 7 truſtees, and except carriages drawn by 2 horſes only. § 20.

Juſtices in *Wales* may licence an increaſed number of horſes. § 59.

Any perſon may apprehend the driver of a carriage not marked, or drawn by too many horſes, *&c.* § 21.

Extraordinary high tolls for particular roads may be reduced by 5 truſtees. § 22.

4. As to certain exemptions from toll,—See under the head immediately preceding, as to carriages moving on rollers; and under Div. 3. as to carriages employed in huſbandry; and as to the former ſee alſo § 26 of the act.

No exemption from tolls ſhall be taken by carriages carrying any *particular* kind of goods, unleſs they have 6 inch fellies (except by carriages employed in huſbandry.) *Stat.* 13 *Geo.* 3. *c.* 84. § 24.

And no exemption ſhall be taken by carriages with 6 inch fellies, unleſs the tire of ſuch fellies lie flat, or do not deviate more than one inch from a flat ſurface. § 25.

No chaiſe-marine, coach, landau, berlin, chaiſe, chair, calaſh, or hearſe, nor any royal artillery or ammunition carriage; nor any cart drawn by one horſe or two oxen; nor any carriage of 9 inch ſellies, carrying one block of ſtone and piece of timber, &c.—ſhall be ſubject to the tolls of this act. § 27.

No toll ſhall be taken for carriages working on the repair of highways or turnpike roads. § 60.

No toll ſhall be taken for any horſes of ſoldiers or officers on their march or on duty, nor for any baggage-waggons; nor ſhall ſuch carriages be weighed at any engine. 18 *Geo.* 3. *c.* 63.

The mail-coaches are exempted from toll by *Stat.* 25 *Geo.* 3. *c.* 57.

Perſons taking fraudulent advantage of any exemptions, ſhall forfeit between 40 *s.* and 5 *l.* 13 *G.* 3. *c.* 84. § 28.

5. The Surveyors ſhall ſee that the duty required by the ſeveral particular Turnpike acts is done, and that the compoſitions ariſing therefrom are applied to the repair of the reſpective roads; on penalty of 40 *s.*—And when two truſt-roads lie in the ſame pariſh, and the duty ſhall exceed three days, the juſtices ſhall apportion the duty between each road. *Stat.* 13 *Geo.* 3. *c.* 84. § 32.

No Surveyor ſhall gather ſtones without the conſent of the owners of the land, or licence from a juſtice, after the owner ſhall have been ſummoned and refuſe to appear. § 61.

Satisfaction ſhall be made for materials, § 71, in the ſame manner as directed by the Highway act, § 29. And by § 36, materials may be contracted for (but no ſurveyor ſhall have any ſhare therein, under forfeiture of 10 *l.* and being incapacitated). See Highway act § 50.

The inhabitants or perſons who were liable to repair any old road, ſhall continue liable to repair any new road which may be made in lieu of the old one.—And if the parties cannot agree in what proportion they are liable to repair it, it ſhall be ſettled by two juſtices: for which proportion, a groſs or annual ſum may be fixed to be paid, with the conſent of the parties at a Veſtry for that purpoſe. § 63.

But this does not extend to the repair of walls or fences on the ſides of ſuch new roads, only to the ſurface of the roads. 2 *Term Rep.* 232.

Where Turnpike roads are indicted, the Court may proportion the fine and coſts between the inhabitants and the Truſtees; but ſo as not to endanger the ſecurity of the creditors. § 33.

6. If the Overſeer of any Turnpike road ſhall ſuffer any nuiſance, (ſuch as heaps of ſtones, rubbiſh, &c.) to remain for 4 days, within 10 feet on either ſide the middle of ſuch road, he ſhall forfeit 40 *s.* *Stat.* 13 *Geo.* 3. *c.* 84. § 37.

As to nuiſances by encroachments of other perſons within 30 feet of the road, &c. a penalty of 40 *s.* is impoſed, in the ſame manner as by § 64, of the Highway act. § 38.

7. Subſcribers who ſhall ſign any writing to advance money, ſhall be bound by their ſubſcription, and on 21 days default, the Treaſurer may ſue for the ſame. *Stat.* 13 *Geo.* 3. *c.* 84. § 35.

Mortgagees of tolls, having poſſeſſion of them, ſhall account, on oath, for all the monies which ſhall ſo come to their hands, after 14 days notice from 5 Truſtees, or forfeit 10 *l.* § 52.

Penalty for a mortgagee holding over after his money is paid—Double the money received, and treble coſts. § 53.

8. If a diſcharged gate-keeper refuſes to deliver up the toll-houſe, &c. within four days after notice of a new appointment, any juſtice may order him to be removed, and put the new toll-keeper in poſſeſſion. *Stat.* 13 *Geo.* 3. *c.* 84. § 54.

Gate-keepers and toll-gatherers on notice from 5 Truſtees, ſhall account for money received by them, on penalty of 5 *l.* § 55.

No perſon reſiding in a toll-houſe, ſhall be removable as a pauper, unleſs chargeable; nor ſhall he thereby gain a ſettlement, or be aſſeſſed to any publick or parochial levy. § 56.

Gate-keepers permitting horſes or carriages not allowed by the act, to paſs the gates ſhall forfeit 40 *s.* § 57.

All officers, their executors and adminiſtrators, ſhall within 10 days, after notice by 5 truſtees, deliver up all books, &c. on penalty of 20 *l.* § 45.

Treaſurers and Surveyors ſhall give bond for the diſcharge of their duty. § 65. [which bond by *Stat.* 23 *Geo.* 3. *c.* 18, § 15, muſt be on ſtamps.]

Officers of pariſhes and of the truſt neglecting to put the act into execution, ſhall forfeit 10 *l.* § 73.

Juſtices may act notwithſtanding they are creditors. § 74.

9. When the powers for providing materials, enlarging and turning Turnpike roads, &c. and calling forth the ſtatute duty, are ineffectual, and when more ample powers are given by the Highway act; the Surveyor of the Turnpike roads, with the approbation of the Truſtees, may execute and enforce theſe powers, for the benefit of the Turnpike roads, under the reſtrictions in the Highway act. *Stat.* 13 *Geo.* 3. *c.* 84. § 70.

The Highway and Turnpike acts are ſimilar in the following particulars, *viz.* § 72 of the Turnpike act anſwers to § 70 of the Highway act—§ 74 to 77 & 78.—§ 7, to 73 —§ 77 to 74.—§ 78 & 79 to 75 & 76 [except the former, giving *full*, the latter *double* coſts.] § 80 to 79 —§ 81 to 80.—§ 82 & 83 to 81.—§ 85 to 82. For all which ſections of the Highway act, ſee before VI. (A).

10. By *St.* 1 *Geo.* 2. *ſt.* 2. *c.* 19, To deſtroy any publick Turnpike gate, or the rails or fences thereto belonging, ſubjects the offender to hard labour for 3 months, and to be publickly whipped.

By *Stat.* 5 *Geo.* 2. *c.* 33, On conviction at the aſſiſes, the offender may be tranſported for 7 years—and on a ſecond offence, or on demoliſhing any Turnpike houſe, he ſhall be guilty of felony and tranſported for 7 years.

In both theſe caſes the proſecution muſt be within 6 months, and on the convict's returning from tranſportation he ſhall ſuffer death.

By *Stat.* 8 *Geo.* 2. *c.* 20, Perſons guilty of the above offences, or deſtroying any chain, &c. placed to prevent perſons from paſſing without paying toll, or reſcuing any offender, ſhall ſuffer death without benefit of clergy.

The two laſt mentioned acts are made perpetual by *ſtat.* 27 *Geo.* 2. *c.* 16.

By *ſtat.* 13 *Geo.* 3. *c.* 84, if any perſon ſhall commit any of the offences aforeſaid, or ſhall deſtroy any crane or machine for weighing carriages, &c. he ſhall be tranſported for ſeven years, or committed to priſon not exceeding three years at the diſcretion of the Court.

By the laſt mentioned act it is provided, that unleſs the offender is convicted within twelve months, the hundred ſhall make ſatisfaction for the damages.

HIGHWAYMEN. A reward of 40*l.* is given for the apprehending and taking of a *Highwayman*; to be paid within a month after conviction, by the sheriff of the county, &c. *Stat.* 4 & 5 *W.* & *M. c.* 8. See titles *Robbery*; *Rewards*.

HIGLER, A name frequently mentioned in our statutes, for a person who carries from door to door, and sells by retail, small articles of provisions, &c. they are laid under various restraints by the statute laws. See titles *Game*; *Holidays*; *Hawkers*.

HIIS TESTIBUS, Words anciently added in deeds, after *In cujus rei testimonium*; which *witnesses* were first called, then the deed read, and their names entered down: but this clause of *hiis testibus* in the deeds of Subjects has been disused since the reign of King *Hen.* 8. *Co. Lit.* 6. See title *Deed*.

HINDENI HOMINES, From the Sax. *Hindene*, i. e. *Societas.*] A society of men: and in the time of the *Saxons*, all men were ranked into three *classes*, and valued, as to satisfaction for injuries, &c. according to the class they were in; the *highest* class were valued at twelve hundred shillings, and were called *Twelfhindmen*: the *middle* class valued at six hundred shillings, and caller *Sexhindmen*: and the *lowest*, at ten pounds, or two hundred shillings, called *Twyhindmen*: their wives were termed *Hindas*. *Brompt. Leg. Alfred. cap.* 12, 30, 31.

HINE, *Sax.*] Rather perhaps *Hind*. A servant, or one of the family; but is properly a term for a servant in husbandry, and he that oversees the rest is called the *Master-hine*. *Stat.* 12 *R.* 2. *c.* 4.

HINEFARE, Sax. *Hine*, a servant, and *fare*, a going or passage.] Signifies the loss or departure of a servant from his master. *Domesday*.

HINEGELD, See *Hidgild*.

HIRCISCUNDA, The division of an inheritance among *heirs*. *Sax.*

HIRD, *Domestica vel intrinseca familia*. *Inter. Pla. Trin.* 12 *Edw.* 2: *Ebor.* 48. *MS.*

HIREMAN, A Subject; from the Sax. *Hiran*, i. e. *Obedire*, to obey; or it may be one who serves in the King's hall, to guard him; from *hird*, *aula*, and *man*, *homo*. *Du Fresne*: *Cowell*.

HIRING. A contract by which a qualified property may be transferred to the *hirer*. Hiring is always for a price, stipend, or recompence. By this contract the possession and a transient property is transferred for a particular time or use, on condition and agreement to restore the goods, &c. so hired, as soon as the time is expired or use performed; together with the price or stipend, either expressly agreed on by the parties, or left to be implied by law according to the value of the service. 2 *Comm.* 454. See title *Bailment*; *Poor*, (*Settlement of.*)

HIRST OR HURST, A little wood. *Domesday*.

HITH, See *Hythe*.

HLAFORDSOCNA, The Lord's protection; from the Sax. *Hlaford*, *dominus*, and *socn*, *libertas*. *Nec dominus homini libero* hlafordsocnam *prohibeat. Leg. Adelstan, cap.* 5.

HLASOCNER, The benefit of the law; from the Sax. *lega*, *lex*, and *socn*, *libertas*.

HLOTH, An unlawful company, from seven to thirty-five. *Qui de* hloth *fuerit accusatus, abneget per centum viginti hidas, vel sit emendet*; that is, he who is accused for being at an unlawful rout, let him purge himself *tot sacramentalibus quot is qui* 120 *hidas æstimatur*; or, let him clear himself by a mulct, which is called *hlothbote*. *Cowell*.

HLOTHBOTE, A mulct set on him who is in a riot. From the Sax. *hloth*, *turma*, and *bote*, *compensatio*. See the preceding article.

HOST-MEN, An ancient gild, or fraternity at *Newcastle-upon-Tyne*, who dealt in sea-coal; they are mentioned *Stat.* 21 *Jac.* 1. *cap.* 3. See title *Coals*.

HOBLERS OR HOBILERS, *Hobellarii.*] Were light horse-men; or certain tenants bound by their tenure to maintain a little light horse, for giving notice of any invasion made by enemies, or such like peril towards the sea side; of which mention is made in *Stats.* 18 *Ed.* 3. *c.* 7: 25 *Ed.* 3. *st.* 5. *c.* 8 See *Camd. Britan.* They were to be *Ad omnem motum agiles*, &c. And we read, *Duravit vocabulum usque ad ætatem H.* 8. *Gentzdarmes* and *Hobelours*. *Spelm. Pryn's Animad. on* 4 *Inst. f.* 307: *Hobeleris*, *Rot. Parl.* 21 *Ed.* 3. Sometimes the word signifies those who used bows and arrows, See *Thorn Anno* 1364. *Cowel*.

HOCCUS SALTIS, Seems to be a *hoke*, hole or lesser pit of salt. See *Domesday*, (*Worcestershire.*)

HOCKETTOR, or HOCQUETEUR, An old *French* word for a knight of the post, a decayed man, a basket carrier. 3 *Par. Inst. f.* 175: *Stat. Ragman.*—*Cowel*.

HOCK-TUESDAY MONEY, Was a duty given to the landlord, that his tenants and bond-men might solemnize that *day* on which the *English* mastered the *Danes*, being the second *Tuesday* after *Easter* week. *Cowell*. See *Hokeday*.

HOGA, HOGIUM, HOCH, A mountain or hill, from the Germ. *Hoogh*, *altus*; or from the Sax. *Hou*—*Du Cange*.

HOGASTER, *Hogastrum.*] A little hog; it also signifies a young sheep. *Fleta lib.* 2. *c.* 79. *See Hoggacius*.

HOGENHINE, Sax.] See *Third-Night-Awn-hind*.

HOGGACIUS, HOGGASTER, A sheep of the second year. *Regula computi domûs de Farendon*: *MS. Cartular. Abbat. Glaston. MS.* And indeed in many, especially the Northern parts of *England*, sheep after they lose the name of lambs, are called *hogs*; as in *Kent*, *tags*. *Cowell*.

HOGSHEAD, A vessel of wine, or oil, &c. containing in measure 63 gallons; *i. e.* half a pipe, and the fourth part of a ton. See *stat.* 1 *R.* 3. *c.* 13.

HOGGUS, HOGIETUS, A *hog* or swine, beyond the growth of a pig. *Chart. Antiq.*

HOGS, The keeping of hogs in any city or market town is indictable as a public nuisance. *Salk.* 460. Indeed it seems the keeping hogs in any neighbourhood (if they stink much, so as to be troublesome) is indictable. See title *Nuisance*: *London*, and the *stat.* 2 *W.* & *M. st.* 2. *c.* 8. § 20.—See as to hogs and hogs flesh, tit. *Cattle*.

HOKEDAY, Called otherwise *Hock Tuesday*, *dies Martis*, *quam quindenam* Paschæ *vocant.*] Was a day so remarkable in ancient times, that rents were reserved payable thereon: and in the accounts of *Magdalene College* in *Oxford*, there is a yearly allowance *pro mulieribus* hockantibus, in some manors of theirs in *Hamtshire*, where the men *hock* the women on *Monday*, & *contra* on *Tuesday*; the meaning of it is, that on that day the women in merriment stop the way with ropes, and pull passengers to them, desiring something to be laid out in pious uses. See *Hock-Tuesday-Money*.

HOLDES,

HOLDES, Bailiffs of a town or city, from the Sax. *hold, i. e. ſummus præpoſitus.* Others are of opinion that it ſignifies a general; for *hold* in *Saxon* doth alſo ſignify *ſummus imperator. Leges Alured. de Weregildis.*

HOLDING OVER A TERM, *&c.* Lands were deviſed to *A.* till 800 *l.* raiſed. Reſolved, that if the Heir at law, or he in reverſion or remainder, in caſe of leaſe or limitation for life, enters upon *A.* or on him to whom the lands are devited or limited, and expels him, it is in the election of him ſo expelled, either to bring his action and recover the meſne profits which ſhall be accounted parcel of the ſum, or he may re-enter and hold over till he ſhall levy the entire ſum, not accounting the time of his expulſion. But otherwiſe, if the expulſion was by a ſtranger. 4 *Rep.* 82: See titles, *Term*: *Limitation*: *Eſtate.*

The expreſſion hath alſo another ſenſe, *i. e.* Where a term is expired, and premiſſes are held by the tenant or perſon in poſſeſſion, afterwards, againſt the will of the landlord, or perſon claiming the eſtate and poſſeſſion. By *Stat.* 4 *Geo.* 2. *c.* 28, In caſe any tenant for years, *&c.* or other perſon claiming under or by colluſion with ſuch tenant, ſhall *wilfully hold over* after the determination of ſuch term, and *demand made in writing* for recovering poſſeſſion of the premiſſes, he ſhall pay, for the time he continues, at the rate of double the yearly value. See titles *Ejectment*: *Diſtreſs*; *Rent.*

HOLM, Sax. *hulmus, inſula amnica.*] An iſle or fenny ground, according to *Bede*; or a river iſland. And where any place is called by that name, or this ſyllable is joined with any other in the names of places, it ſignifies a place ſurrounded with water; as the *Flatholmes* and *Stepholmes* in the *Severn* near *Briſtol*: but if the ſituation of the place is not near the water; it may then ſignify a hilly place; *Holm* in *Saxon* being alſo a hill or cliff,

——— *Cum duobus* Holmis *in campis de* Wedone.—*Mon. Angl. Tom.* 2. *p.* 262.

HOLT, *Sax.*] A wood: wherefore the names of towns beginning or ending with *holt*, as *Buckholt*, *&c.* denote that formerly there was great plenty of wood at thoſe places.

HOLY-DAYS AND FASTING-DAYS. See *Stat. Weſtm.* 1; 3 *Ed.* 1. *c.* 51, as to holding aſſiſes in Lent, and this Dict. title *Juſtices of Aſſize.*—*Stats.* 2 & 3 *Ed.* 6. *c.* 19: 5 *Eliz. c.* 5, as to eating fiſh on Fiſh days; now obſolete—and *Stat.* 5 & 6 *E.* 6. *c.* 3, appointing thoſe now called *Red Letter Days.*

Fairs and markets not to be kept on *Sundays* and principal feſtivals, except four *Sundays* in Autumn, 27 *H.* 6. *c.* 5. Shoe-makers in *London* not to ſell or ſit on their goods on *Sundays*, *&c.* 4 *Ed.* 4. *c.* 7: 1 *Jac.* 1. *c.* 22. §. 29. (obſolete)—Penalty for not reſorting to church on *Sundays* and holy days, 1 *Eliz. c.* 2. *ſ.* 14. See title *Nonconformiſts.* The 5th of *November* to be kept as a day of thankſgiving, 3 *Jac.* 1. *c.* 1.—The 29th of *May* to be an anniverſary thankſgiving, 12 *Car.* 2. *c.* 14.—The 30th of *Jan.* to be kept as an anniverſary day of humiliation, 12 *Car.* 2. *c.* 30. § 1.—The 2d of *September* to be annually kept as a faſt in *London*, 19 *Car.* 2. *c.* 3. *ſ.* 28. See this Dict. title *Sunday.*

HOLYHEAD, Rock ſalt may be uſed in its ſalt-works. 6 *Ann. c.* 12. *ſect.* 2. See title *Navigation Acts.*

HOMAGE, *Homagium.*] Is a *French* word derived from *homo*, becauſe, when the tenant does his ſervice to the Lord, he ſays, *I become your man. Co. Lit.* 64.

The *Stat.* 12 *C.* 2. *c.* 24, which was made to free the Subject from the burthen of Knight's ſervice, and the oppreſſive conſequences of tenures *in capite*, amongſt other proviſions, wholly diſcharges all tenures from the incident of Homage; not becauſe Homage itſelf was any grievance, but becauſe, though not wholly, yet it was more properly an incident to Knight's ſervice, which that ſtatute aboliſhed. But, while Homage continued, it was far from being a mere ceremony; for the performance of it, where due, materially concerned both lord and tenant in point of intereſt and advantage. See 1 *Inſt.* 67 *b.* in *n.* at length, as alſo 65 *a*: 67 *a*: 68 *a*: in the notes, and this Dict. title *Tenures.*

Notwithſtanding the law on this ſubject is thus become obſolete, the curious reader may not be diſpleaſed with the following ſhort extracts relative thereto.

In the original grants of lands and tenements by way of *fee*, the Lord did not only oblige his tenants to certain ſervices; but alſo took a ſubmiſſion with promiſe and oath, to be true to him as their lord and benefactor; and this ſubmiſſion, which is the moſt honourable, being from a freehold tenant, is called *Homage. Stat.* 17 *E.* 2. *ſt.* 2. The Lord of the fee for which *Homage* is due, takes *Homage* of every tenant, as he comes to the land or fee: but women perform not *Homage* but by their huſbands, as *Homage* eſpecially relates to ſervice in war; and a corporation cannot do *Homage*, which is perſonal, and they cannot appear but by attorney: alſo a biſhop or religious man, may not do Homage, only fealty; but the archbiſhop of *Canterbury* does *Homage* on his knees to our Kings at their coronation; and it is ſaid the biſhop of the *Iſle of Man* did *Homage* to the Earl of *Derby*; though *Fulbec* reconciles this, when he ſays that a religious man may do *Homage*, but may not ſay to his Lord, *Ego devenio homo veſter*, I become your man, becauſe he has profeſſed himſelf to be *God's man*, but he may ſay, *I do unto you Homage, and to you ſhall be faithful and loyal. Britton, cap.* 68.

Homage, ſay the ancient authors, is either, by ligeance; by reaſon of tenure: or Homage anceſtrel.

Homage by *ligeance* is inherent and inſeparable to every Subject, See titles *Allegiance*; *Oaths.*—*Homage* by *tenure* is a ſervice made by tenants to their Lords according to their eſtate; and *Homage anceſtrel*, is where a man and his anceſtors have time out of mind held their land of the lord by *Homage*; and ſuch ſervice draws to it warranty from the Lord, and acquittal of all other ſervices to other Lords, *&c. Brac. lib.* 3: *F. N. B.* 269: *Lit. Sect.* 85. But, according to Sir *Edw. Coke*, there muſt be a double preſcription for *Homage anceſtrel*, both in the blood of the Lord and of the tenant; ſo that the ſame tenant, and his anceſtors, whoſe heir he is, is to hold the ſame land of the ſame Lord and his anceſtors, whoſe heir the Lord is, time out of memory, by *Homage*, *&c.* and therefore there was but little land holden by *Homage anceſtrel. Co. Lit.* 100 *b.* Though in the manor of *Whitney* in *Herefordſhire*, there was one *Weſt* who held lands by this tenure. *Dict.*

Homage tenure is incident to a freehold, and none ſhall do or receive *Homage*, but ſuch as have eſtates in fee-ſimple, or fee tail, in their own right or right of another. *Kitch.* 131. Seiſin of *Homage* is ſeiſin of fealty, and inferior ſervices, *&c.* And the Lord only ſhall take *Homage*, and not the ſteward, whoſe power extends but to fealty. 4 *Rep.* 8.

When a tenant made his *Homage* to the Lord, he was to be ungirt, and his head uncovered, and his Lord was to ſit, and he ſhould kneel, and hold his hands together

together between his Lord's hands, and say; *I become your man from this day forward, for life, for member, and for worldly honour, and unto you shall be true and faithful, and bear you faith for the lands that I hold of you, saving the faith that I owe to our Sovereign Lord the King*: And the Lord so sitting should kiss the tenant, &c. 17 *Ed.* 3: *Lit.* § 85. See 2 *Comm.* 53. *c.* 4.

When Sovereign Princes did Homage to each other for lands held under their respective sovereignties, a distinction was always made between *simple* Homage, which was only an acknowledgment of tenure (7 *Rep.* 7;) and liege homage, which included fealty, and the services consequent upon it.—Thus when *Edward* III. in 1329 did Homage to *Phillip* VI. of *France*, for his ducal dominions on that Continent, it was warmly disputed of what species the Homage was to be, whether *liege* or *simple* homage. 1 *Comm.* 367. *c.* 10.

HOMAGE JURY, A Jury in a *Court-Baron*, consisting of tenants that do *Homage* to the Lord of the fee; and these by the *Feudists* are called *pares curiæ*: they enquire and make presentment of defaults and deaths of tenants, admittances, and surrenders, in the Lord's court, &c. *Kitch.* See title *Court Baron.*

HOMAGER, One that does or is bound to do *Homage* to another.

HOMAGIO RESPECTUANDO, Was a writ to the escheator, commanding him to deliver seisin of lands to the heir of the King's tenant, notwithstanding his *Homage* not done. *F. N. B.* 269. And the heir at full age was to do *Homage to the King*, or agree with him for respiting the same. *New Nat. Br.* 563.

HOMAGIUM REDDERE, To renounce *Homage*, when the vassal made a solemn declaration of disowning and defying his lord. For which, there was a set form and method prescribed by the feudal laws. *Bracton, lib.* 2. *cap.* 35. *sect.* 35. This is the meaning of a passage in *Richardus Hostoldnesis de Bello Standard, p.* 321. And of *Mat. Paris. sub anno* 1188. *Cowel. edit.* 1727.

HOMESOKEN, HOMSOKEN, OR HAMSOKEN, AND HAMSOCA, From the Sax. *ham*, i. e. *domus, habitatio*; and *socne, libertas, immunitas.*] The privilege or freedom which every man hath in his house; and he who invades that freedom is properly said *facere Homesoken.* This we take to be what we now call *burglary*, a crime of a very heinous nature, because it is not only a breach of the King's peace, but a breach of that liberty which a man hath in his house, which should be his castle, and therefore ought not to be invaded. See *Bracton, lib.* 3. *tract.* 2. *c.* 23: *Du Cange*: *Ll. Canuti. cap.* 39: *Rastal.*

It is also taken for an impunity to those who commit this crime. *W. Thorn, p.* 2030.

HOMESTALL. A mansion-house. See *Frumstol.*

HOMICIDE;

HOMICIDIUM.] The killing of any Human Creature: This is of three kinds; *justifiable, excusable*, and *felonious.* The first has no share of guilt at all, the second very little; but the third is the highest crime against the law of nature that a man is capable of committing. 4 *Comm. c.* 14; from whence the plan of this title, and much of the subsequent matter is extracted.

Offences against the life of a man come under the general name of Homicide, which in our law signifies the killing of a man, by a man. 1 *Hawk. P. C. c.* 26. § 2: *Bracton, lib.* 3. *c.* 4.

I. *Of Justifiable Homicide.*
1. *By unavoidable Necessity, under command of the Law.*
2. *By permission of Law; For advancement of Publick Justice.*
3. ——————— *For prevention of Crimes, in themselves Capital.*

II. *Of Excusable Homicide,*
Per infortunium; or Misadventure Se Defendendo.
1. *Wherein these are distinct.*
2. *Wherein they agree.*

III. *Of Felonious Homicide.*
1. *Self Murder; or Felo de se.*
2. *Manslaughter* } Which two should be carefully
3. *Murder* } compared with each other.
4. *Petit Treason.*

I. 1. JUSTIFIABLE HOMICIDE may be owing to some unavoidable *necessity*, without any will, intention, or desire, and without any inadvertence or negligence in the party killing, and therefore without any shadow of blame; it is either of a publick or private nature.

That of a *publick* nature is such as is occasioned by the due execution or advancement of publick justice. That of a *private* nature is such as happens in the just defence of a man's person, house or goods. 1 *Hawk. P. C. c.* 28. § 3.—The first of these may happen by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who has forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable: therefore wantonly to kill the greatest of malefactors, a felon, or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder. 1 *Hal. P. C.* 497: *Bract. fol.* 120.

There must be no malice coloured under pretence of necessity, for wherever a person who kills another, acts in truth upon malice, and takes occasion from the appearance of necessity to execute his revenge, he is guilty of murder. 1 *Hawk. P. C. c.* 28. § 2: 2 *Rol. Rep.* 120, 121; *Kelynge* 28: *Bract. lib.* 3. *cap.* 4.

Farther, if judgment of death be given by a judge not authorised by lawful commission, and execution is done accordingly, the judge is guilty of murder. 1 *Hawk. P. C. c.* 28: § 4: 1 *Hal. P. C.* 497. And upon this account Sir *Matthew Hale* himself, though he accepted the place of a Judge of the Common Pleas under *Cromwell's* government, (since it is necessary to decide the disputes of civil property in the worst of times,) yet declined to sit on the crown side at the Assises, and try prisoners; having very strong objections to the legality of the Usurper's commission; a distinction perhaps rather too refined, since the punishment of crimes is at least as necessary to Society, as maintaining the boundaries of property.

The judgment, by virtue whereof any person is put to death, must be given by one who has jurisdiction in the cause; for otherwise *both Judge and officer* may be guilty

guilty of felony. 1 *Hawk. P. C. c.* 28: *Dalt. cap.* 98: 10 *Co.* 76: 22 *Ed.* 4. 33 *a*: *H. P. C.* 35.—And therefore if the Court of Common Pleas give a judgment on an appeal of death, or Juſtices of Peace on an indictment for treaſon, and award execution, which is executed, both the judge who gives, and the officers who execute, the ſentence are guilty of felony; becauſe the courts having no more juriſdiction over theſe crimes than mere private perſons, their proceedings thereon are merely void, and without foundation.—But if the Juſtices of Peace, on an indictment for treſpaſs, arraign a man of felony, and condemn him, and he be executed, the juſtices only are guilty of felony, and not the officers who execute their ſentence: for the Juſtices had a juriſdiction over the offence, and their proceedings were irregular and erroneous only, but not void. 1 *Hawk. P. C. c.* 28. §§ 5, 6, and the authorities there cited.—Alſo ſuch judgment, when legal, muſt be executed by the proper officer, or his appointed deputy; for no one elſe is required by law to do it, which requiſition it is, that juſtifies the Homicide. If another perſon does it of his own head, it is held to be murder: even though it be the judge himſelf. 1 *Hal. P. C.* 501: 1 *Hawk. P. C. c.* 28: *Dalt. Juſ. c.* 150. It was formerly held, that any one might as lawfully kill a perſon attainted of treaſon or felony, as a wolf or other wild beaſt; and anciently a perſon condemned in appeal of death, was delivered to the relations of the deceaſed, in order to be executed by them. 1 *Inſt.* 128 *b*: 2 *Aſſ. pl.* 3: *S. P. C.* 13 *a*: 11 *H.* 4. 12 *a*: *Plowd. Com.* 306 *b*: 3 *Inſt.* 131. But at this day, it ſeems agreed, if the judge, who gives the ſentence of death, and *à fortiori* if any private perſon execute the ſame, or if the proper officer himſelf do it without lawful command, they are guilty of felony. 27 *Aſſ.* 41: *Bro. Appeal* 69: 1 *Hawk. P. C. c.* 28. § 8, 9. This Judgment muſt alſo be executed, *ſervato juris ordine*; it muſt purſue the ſentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice verſa*, it is murder: for he is merely miniſterial, and therefore only juſtified when he acts under the authority and compulſion of the law; but if a ſheriff changes one kind of death to another, he then acts by his own authority, which extends not to the commiſſion of Homicide; and beſides, this licence might occaſion a very groſs abuſe of his power. *Finch L.* 31: 3 *Inſt.* 52: 1 *Hal. P. C.* 501. The King indeed may remit part of a ſentence; as in the caſe of treaſon, all but the beheading: but this is no change, no introduction of a new puniſhment, and in the caſe of felony, where the judgment is *to be hanged*, the King (it hath been ſaid) cannot legally order, even a peer, to be beheaded. 3 *Inſt.* 52, 212: See *Foſt.* 267; where it is ſaid that if the officer varieth from the judgment, *of his own head*, and without warrant or the colour of authority, he is guilty of felony at leaſt, if not of murder; but not if he is authoriſed by cuſtom or warrant from the crown. For although the King cannot by his prerogative vary the execution, ſo as to aggravate the puniſhment beyond the intention of the law; yet it doth not follow, that he who may remit part of the judgment, or wholly pardon the offender, cannot mitigate his puniſhment with regard to the pain or infamy of it. But this doctrine is more fully conſidered in another place. See titles *Pardon*: *Execution* (*Criminal*): *Judgment* (*Criminal*).

2. Homicides, committed for the advancement of public *juſtice*, are;—Where an *officer*, in the execution of his office, either in a civil or criminal caſe, kills a perſon that *aſſaults* and reſiſts him. 1 *Hal. P. C.* 494: 1 *Hawk. P. C.*—If an *Officer*, or any private perſon, attempts to take a man charged with felony, and is *reſiſted*; and in the endeavour to take him, kills him. 1 *Hal. P. C.* 494.—In caſe of a *riot*, or rebellious aſſembly, the officers endeavouring to diſperſe the mob are juſtifiable in killing them, both at Common-law, and by the Riot-act, *Stat.* 1 *Geo.* 1. *c.* 5: 1 *Hal. P. C.* 495: 1 *Hawk. P. C.* 161. And in caſe a ſtranger interpoſes to part the combatants in an affray, giving notice to them of that intention, and they aſſault him; if in the ſtruggle he ſhould chance to kill, this would be juſtifiable Homicide; for it is every man's duty to interpoſe for the preſervation of the publick peace, and for the prevention of miſchief. *Foſt.* 272.—Where the *priſoners* in a gaol, or going to gaol, *aſſault the gaoler* or officer, and he in his defence kills any of them, it is juſtifiable, for the ſake of preventing an eſcape. 1 *Hal. P. C.* 496.—If *treſpaſſers* in foreſts, parks, chaſes, or warrens, will not ſurrender themſelves to the keepers, they may be ſlain, by virtue of the *Stat.* 21 *E.* 1. *ſt.* 2. *de malefactoribus in pareis*; and 3 & 4 *W.* & *M. c.* 10. —If a perſon having actually committed felony will not ſuffer himſelf to be arreſted, but ſtand on his own defence, or fly, ſo that he cannot poſſibly be apprehended alive by thoſe who purſue, whether private perſons or public officers, with or without a warrant from a magiſtrate, he may be lawfully ſlain by them. So if even an *innocent* perſon be *indicted* of a felony, where no felony was committed, yet if he will not ſuffer himſelf to be arreſted by an officer who has a warrant, he may be lawfully killed, for there is a charge againſt him on record, to which he is bound at his peril to anſwer. 1 *Hawk. P. C. c.* 28. §§ 11, 12: 22 *Aſſ.* 55: *Bro. Cor.* 87, 89: *S. P. C.* 13: 3 *Inſt.* 221: *Dalt. cap.* 98: *H. P. C.* 36: *Crom.* 30.—Where a ſheriff, &c. attempting to make a lawful arreſt in a *civil* action, or to retake one who has been arreſted and made his eſcape, is reſiſted by the party, and unavoidably kills him in the affray. 1 *Hawk. P. C. c.* 28. § 17: 1 *Rol. Rep.* 189: *H. P. C.* 37: 3 *Inſt.* 56: *Crom.* 24 *a*: *Dalt. cap.* 98. And in ſuch caſe the officer is not bound to give back, but may ſtand his ground and attack the party, 1 *Hawk. P. C. c.* 28. § 18: *H. P. C.* 31. But no private perſon of his own authority can arreſt a man for a *civil* matter, as he may for felony, &c. 1 *Hawk. c.* 28. § 19: *Crom.* 30 *b*. Neither can the ſheriff himſelf lawfully kill thoſe who *barely fly from* the execution of any civil proceſs. 1 *Hawk. c.* 28. § 20: *H. P. C.* 37.

And in all theſe caſes, there muſt be an apparent neceſſity on the officer's ſide, *viz.* that the party could not be arreſted or apprehended, the riot could not be ſuppreſſed, the priſoners could not be kept in hold, the deer-ſtealers could not but eſcape, unleſs ſuch Homicide were committed: otherwiſe without ſuch abſolute neceſſity, it is not juſtifiable.

Laſtly, If the champions in a trial by battle, killed either of them the other, ſuch Homicide was juſtifiable, and was imputed to the juſt judgment of God, who was thereby preſumed to have decided in favour of the truth. 1 *Hawk. P. C.* 71. See title *Battel*.

3. Such

3. Such Homicide as is committed for the *prevention* of any forcible and atrocious *crime*, is juſtifiable by the law of nature; and alſo by the law of *England*, as it ſtood ſo early as the time of *Bracton*, and as it is ſince expreſsly declared by *Stat.* 24 *Hen* 8. *c.* 5. See *Bract. fol.* 155. If any perſon attempts a robbery or murder of another, or attempts to break open a houſe *in the night time*, (which extends alſo to an attempt to burn it,) and ſhall be killed in ſuch attempt, the ſlayer ſhall be acquitted and diſcharged. 1 *Hal. P. C.* 488. And not only the maſter of a houſe, but a lodger or a ſojourner who kills an aſſailant intending to commit murder or robbery, is within the protection of the law. *Cro. Car.* 544. This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking open of any houſe *in the day time*, unleſs it carries with it an attempt of robbery alſo. 4 *Comm. c.* 14.

Juſtifiable Homicide of a *private* nature, in the juſt defence of a man's perſon, houſe or goods, may happen either by the killing of a *wrong-doer*, or an *innocent* perſon. And firſt, the killing of a wrong-doer in the making of ſuch defence, may be juſtified in many caſes; as where a man kills one who aſſaults him in the highway to rob or murder him; or the owner of a houſe, or any of his ſervants, or lodgers, *&c.* kill one who attempts to burn it, or to commit therein murder, robbery, or other felony; or a woman kills one who attempts to raviſh her; or a ſervant coming ſuddingly and finding his maſter robbed and ſlain, falls upon the murderer immediately and kills him; for he does it in the height of his ſurpriſe, and under juſt apprehenſions of the like attempt upon himſelf; but in other circumſtances, he could not have juſtified the killing of ſuch an one, but ought to have apprehended him, *&c.* 1 *Hawk. P. C. c.* 28. § 21: 24 *H.* 8. *cap.* 5: *Dalt. cap.* 98.

Neither ſhall a man in any caſe juſtify the killing another by a pretence of neceſſity, unleſs he were himſelf wholly without fault in bringing that neceſſity upon himſelf; for if a man, *in defence of an injury done by himſelf*, kill any perſon whatſoever, he is guilty of manſlaughter at leaſt; as where divers rioters wrongfully with-hold a houſe by force, and kill thoſe who attack it from without, and endeavour to burn it. 1 *Hawk. P. C. c.* 28. § 22: *Crom.* 27 *b*: *H. P. C.* 56.

Neither can a man juſtify the killing another in defence of his houſe or goods, or even of his perſon, from *a bare private treſpaſs*; and therefore he that kills another, who, claiming a title to his houſe, attempts to enter it by force and ſhoots at it, or that breaks open his windows in order to arreſt him, or that perſiſts in breaking his hedges after he is forbidden, is guilty of man-ſlaughter; and he, who in his own defence kills another that aſſaults him in his houſe in the day-time, and plainly appears to intend to beat him only, is guilty of Homicide *ſe defendendo*, for which he forfeits his goods, but is pardoned of courſe; yet it ſeems, that a private perſon, and, *à fortiori*, an officer of juſtice, who happens unavoidably to kill another endeavouring to defend himſelf from, or ſuppreſs dangerous rioters, may juſtify the fact, inaſmuch as he only does his duty in aid of public juſtice. 1 *Hawk. P. C. c.* 28. § 23: *H. P. C.* 40. 57: *Cro. Car.* 538: *Dalt. cap.* 98.

According to the opinion of Mr. Serjeant *Hawkins*, A perſon who without provocation is aſſaulted by another in any place whatſoever, in ſuch a manner as plainly ſhews an intent to murder him, as by diſcharging a piſtol, or puſhing at him with a drawn ſword, *&c.* may juſtify killing ſuch an aſſailant, as much as if he had attempted to rob him. 1 *Hawk. P. C. c.* 28. § 24 *&c*: *N. Bendl* 47: 1 *And.* 41: *Crom.* 27 *b.* 28 *b*: *Dalt. cap.* 98: *S. P. C.* 15 *a*: 3 *Inſt.* 57: *Bacon* 33. For other caſes, vide *Cro. Car.* 338: *March* 5.

The Roman Law alſo juſtifies *Homicide*, when committed in defence of the chaſtity either of one's ſelf or relations: The *Engliſh* Law alſo juſtifies a woman killing one who attempts to raviſh her; *Rac. Elem.* 34: 1 *Hawk. P. C. c.* 38. § 21; and ſo too, 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, 6. And there ſeems no doubt but the forcibly attempting a crime of a ſtill more deteſtible 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. c.* 14.

In theſe inſtances of *juſtifiable* Homicide, it may be obſerved, that the Slayer is in no kind of fault whatſoever, not even in the minuteſt degree; and is therefore to be totally acquitted and diſcharged, with commendation rather than blame. 1 *Hawk. P. C. c.* 28. § 3.

But that is not quite the caſe in *excuſable Homicide*, the very name whereof imports ſome fault, ſome error, or omiſſion; ſo trivial however, that the law excuſes it from the guilt of felony, though in ſtrictneſs it judges it deſerving of ſome little degree of puniſhment. See the next Diviſion.

II. 1. HOMICIDE *per infortunium*; or MISADVENTURE, is where a man doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a ſtander-by; or where a perſon *qualified to keep a gun*, is ſhooting at a mark, and undeſignedly kills a man: for the act is lawful, and the effect is merely accidental. 1 *Hawk. P. C. c.* 29. So where a perſon is moderately correcting his child, a maſter his apprentice or ſcholar, or an officer puniſhing a criminal, (as by whipping,) and happens to occaſion his death, it is only miſadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the inſtrument, or the quantity of puniſhment, and death enſues, it is *Manſlaughter* at leaſt; and in ſome caſes (according to the circumſtances) murder; for the act of immoderate correction is unlawful. 1 *Hal. P. C.* 473, 4.—Where an officer of the impreſs ſervice in the navy, fires at a boat in order to bring her to, and kills a man, it is impoſſible that the offender ſhould be made guilty of more than manſlaughter, eſpecially if he fires in the manner uſual upon ſuch occaſions. *Cowp.* 832. *per Ld. Mansfield.*

A tilt or a tournament, the martial diverſion of our anceſtors, was however an unlawful act; and ſo are boxing and ſword-playing, the ſucceeding amuſements of their poſterity: and therefore if a knight in the former caſe, or a gladiator in the latter, be killed, ſuch

killing is felony of manſlaughter. But, if the King command, or permit ſuch diverſion, it is ſaid only to be miſadventure; for then the act is lawful. 1 *Hal. P. C.* 473: 1 *Hawk. P. C. c.* 29. § 8. Likewiſe to whip another's horſe whereby he runs over a child and kills him, is held to be accidental death in the rider, for he has done nothing unlawful: but it is manſlaughter in the perſon who whipped him; for the act was a treſpaſs, and at beſt a piece of idleneſs of inevitably dangerous conſequence. 1 *Hawk. P. C. c.* 29. § 3.

Where one lawfully uſing an innocent diverſion, as ſhooting at butts, or at a bird, *&c.* by the glancing of an arrow, or ſuch like accident, kills another, this is only Homicide by miſ-adventure. *Keilw.* 108: *Bro. Cor.* 148; See *Kelynge* 41.—So where a perſon happens to kill another in playing a match of foot-ball, wreſtling, or ſuch like ſports which are attended with no apparent danger of life, and intended only for the trial, exerciſe and improvement of the ſtrength, courage and activity of the parties. *Keilw.* 108, 136: *Crom.* 29 *a*: 11 *H.* 7. 23 *a*: 1 *Hawk. P. C. c.* 29. §§ 6, 7, 8.

In general, if death enſues in conſequence of an idle, dangerous, and unlawful ſport, the ſlayer is guilty of manſlaughter, and not miſadventure only, for theſe are unlawful acts. 1 *Hawk. P. C. c.* 29. § 9: 1 *Hal. P. C.* 472: *Foſt.* 261. Thus, if a man kills another by ſhooting at a deer, *&c.* in a third perſon's park, in the doing whereof he is a treſpaſſer; or by ſhooting of a gun, or throwing ſtones in a city or highway, or other place where men uſually reſort, by throwing ſtones at another wantonly in play, which is a dangerous ſport, and has not the leaſt appearance of any good intent; or by doing any other ſuch idle action as cannot but indanger the bodily hurt of ſome one or other; or by tilting or playing at hand-ſword without the King's command; or by parrying with naked ſwords, covered with buttons at the points, or with ſwords in the ſcabbards, or ſuch like raſh ſports, which cannot be uſed without the manifeſt hazard of life, he is guilty of manſlaughter. 1 *Hawk. P. C.* 29. § 9: *H. P. C.* 31, 32, 58: *Hob.* 134. But ſee poſt III.

Where the defendant came to town in a chaiſe, and before he got out of it, fired his piſtols, which by accident killed a woman, *King*, Ch. J. ruled it to be manſlaughter. *Str.* 481.

Homicide, in *ſelf-defence*, or *Se-defendendo*, upon a ſudden affray, is alſo excuſable, rather than juſtifiable, by the *Engliſh* law. This ſpecies of ſelf-defence muſt be diſtinguiſhed from that already mentioned, *ante* I. 3, as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuſe, but of juſtification. But the ſelf-defence, which we are now ſpeaking of, 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 the 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 the *Stat.* 24 *Hen.* 8. *c.* 5, and our ancient books (*Staun. P. C.* 16,) that it is properly applied to ſuch killing as happens in ſelf-defence, upon a ſudden rencounter. 3 *Inſt.* 55, 7: *Foſt.* 275, 6. This right of natural defence does not imply a right of attacking: for, inſtead of attacking one another for injuries paſt or impending, men need only have recourſe to the proper tribunals of juſtice: they cannot therefore legally exerciſe this right of preventive defence, except in ſudden and violent caſes, when certain and immediate ſuffering would be the conſequence of waiting for the aſſiſtance of the law. Wherefore to excuſe Homicide, by the plea of ſelf-defence, it muſt appear that the ſlayer had no other poſſible (or, at leaſt, probable) means of eſcaping from his aſſailant.

It is frequently difficult to diſtinguiſh this ſpecies of Homicide (upon *chance-medley*, in ſelf-defence,) from that of man-ſlaughter, in the proper legal ſenſe of the word. 3 *Inſt.* 55. But the true criterion between them ſeems to be this: when both parties are actually combating at the time when the mortal ſtroke is given, the ſlayer is then guilty of man-ſlaughter: but if the ſlayer hath not begun to fight, or (having begun) endeavours to decline any farther ſtruggle, and afterwards being cloſely preſſed by his antagoniſt, kills him to avoid his own deſtruction, this is Homicide excuſable by ſelf-defence. *Foſt.* 277. For which reaſon the law requires, that the perſon who kills another in his own defence, ſhould have retreated as far as he conveniently or ſafely can, to avoid the violence of the aſſault, before he turns upon his aſſailant; and that not fictitiouſly, or in order to watch his opportunity, but from a real tenderneſs of ſhedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-ſubjects, the law countenances no ſuch point of honour: becauſe the King and his Courts are the *vindices injuriarum*, and will give to the party wronged all the ſatisfaction he deſerves. 1 *Hal. P. C.* 481, 3. The party aſſaulted muſt therefore flee as far as he conveniently can, either by reaſon of ſome wall, ditch, or other impediment, or as far as the fierceneſs of the aſſault will permit him, for it may be ſo fierce as not to allow him to yield a ſtep, without manifeſt danger of his life, or enormous bodily harm; and then, in his defence, he may kill his aſſailant inſtantly. 1 *Hal. P. C.* 483. And as the *manner* of the defence, ſo is alſo the time to be conſidered: for if the perſon aſſaulted does not fall upon the aggreſſor till the affray is over, or when he is running away, this is revenge and not defence. Neither under the colour of ſelf-defence, will the law permit a man to ſcreen himſelf from the guilt of deliberate murder: for if two perſons *A.* and *B*, agree to fight a duel, and *A*, gives the firſt onſet, and *B*, retreats as far as he ſafely can, and then kills *A*, this is murder; becauſe of the previous malice and concerted deſign. 1 *Hal. P. C.* 479. But if *A.* upon a ſudden quarrel aſſaults *B*, firſt, and upon *B.*'s returning the aſſault, *A*, really and *bonâ fide* flees, and being driven to the wall, turns again upon *B*, and kills him; this may be *ſe defendendo*, according to ſome of our writers. 1 *Hal. P. C.* 482: Though others have thought this opinion too favourable; inaſmuch as the neceſſity, to which he is at laſt reduced, originally aroſe from his own fault. 1 *Hawk. P. C. c.* 29. § 17.

And it is now agreed, that if a man ſtrike another upon *malice prepenſe*, and then fly to the wall, and there kill him in his own defence, he is guilty of murder. 1 *Hawk. P. C. c.* 29. § 17: *S. P. C.* 15 *a*: *Crom.* 28 *a*: *Dalt. cap.* 98: *Kelynge* 58: *H. P. C.* 42. See poſt. III. 3.

Under this excuſe, of ſelf-defence, the principal civil and natural Relations are comprehended; therefore maſter and ſervant, parent and child, huſband and wife, killing an aſſailant in the neceſſary defence of each other reſpectively, are excuſed; the act of the Relation aſſiſting being conſtrued the ſame as the act of the party himſelf. 1 *Hal. P. C.* 484.

Homicide *ſe defendendo*, or by ſelf-defence, ſays *Hawkins*, ſeems to be, where one who has no other poſſible means of preſerving his life from one who combats with him on a ſudden quarrel, or of defending his perſon from one who attempts to beat him, (eſpecially if ſuch attempts be made upon him in his own houſe) kills the perſon by whom he is reduced to ſuch an inevitable neceſſity. 1 *Hawk. P. C. c.* 22. § 13, *&c*: *H. P. C.* 40: *S. P. C.* 15.

And not only he who on an aſſault retreats to a wall, or ſome ſuch ſtreight, beyond which he can go no further before he kills the other, is adjudged by the law to act upon unavoidable neceſſity: but alſo he who being aſſaulted in ſuch a manner, and in ſuch a place, that he cannot go back without manifeſtly indangering his life, kills the other without retreating at all. 1 *Hawk. P. C. c.* 29. § 14: *Bro. Coro.* 125: 43 *Aſſ.* 31: 3 *Inſt.* 56: *H. P. C.* 41.

And notwithſtanding a perſon, who retreats from an aſſault to the wall, give the other divers wounds in his retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of Homicide *ſe defendendo* only. 1 *Hawk. P. C. c.* 29. § 15: *H. P. C.* 41: *Crom.* 28: *S. P. C.* 15 *a.*

And an officer who kills one that reſiſts him in the execution of his office, and even a private perſon that kills one who felonioufly aſſaults him in the highway, may juſtify the fact without ever giving back at all. 1 *Hawk. P. C. c.* 29. § 16: *H. P. C.* 41: 3 *Inſt.* 56: *Crom.* 28 *a.*

There is one ſpecies of Homicide *ſe defendendo*, where the party ſlain is equally innocent as he who occaſions his death: and yet this Homicide is alſo excuſable from the great univerſal principle of ſelf-preſervation, which prompts every man to ſave his own life preferable to that of another, where one of them muſt inevitably periſh. As, among others, in that caſe mentioned by Lord *Bacon*, where two perſons being ſhipwrecked, and getting on the ſame plank, but finding it not able to ſave them both, one of them thruſts the other from it, whereby he is drowned. He who thus preſerves his own life at the expence of another man's, is excuſable, through unavoidable neceſſity, and the principle of ſelf-defence; ſince their both remaining on the ſame weak plank is a mutual, though innocent, attempt upon, and endangering of each other's life. See *Bac. Elem. c.* 5: 4 *Comm. c.* 14.

2. The circumſtances wherein theſe two ſpecies of Homicide, by miſadventure and ſelf-defence, agree, are in the *blame* and *puniſhment*. For the law ſets ſo high a value upon the life of a man, that it always intends ſome miſbehaviour in the perſon who takes it away, unleſs by the command or expreſs permiſſion of the law. In the caſe of miſadventure, it preſumes negligence, or at leaſt a want of ſufficient caution in him who was ſo unfortunate as to commit it; who is therefore not altogether faultleſs. And as to the neceſſity which excuſes a man who kills another *ſe defendendo*, Lord *Bacon* entitles it *neceſſitas culpabilis*, and thereby diſtinguiſhes it from the former neceſſity of killing a thief or a malefactor. *Bac. Elem. c.* 5. For the law intends that the quarrel or aſſault aroſe from ſome unknown wrong, or ſome provocation, either in word or deed: and ſince, in quarrels, both parties may be, and uſually are, in ſome fault, and it ſcarcely can be tried who was originally in the wrong, the law will not hold the ſurvivor entirely guiltleſs. But it is clear, in the other caſe, that where I kill a thief that breaks into my houſe, the original fault can never be upon my ſide. The law beſides may have a farther view, to make the crime of Homicide more odious, and to caution men how they venture to kill another upon their own private judgment, by ordaining that he who ſlays his neighbour, without an expreſs warrant from the law ſo to do, ſhall in no caſe be abſolutely free from guilt.

The Penalty inflicted by our laws in theſe caſes is ſaid, by Sir *Edward Coke* to have been antiently no leſs than death; 2 *Inſt* 248, 315;-which however is with reaſon denied by later and more accurate writers. 1 *Hal. P. C.* 425: 1 *Hawk. P. C. c.* 29. § 20: *Foſt.* 282. *&c.* It ſeems rather to have conſiſted in a forfeiture, ſome ſay of all the goods and chattels, others of only part of them, by way of fine or *weregild*: which was probably diſpoſed of, *in pios uſus*, according to the humane ſuperſtition of the times, for the benefit of *his* ſoul, who was thus ſuddenly ſent to his account, 'with all his imperfections on his head.' *Foſt.* 287. But that reaſon having long ceaſed, and the penalty (eſpecially of a total forfeiture) growing more ſevere than was intended, in proportion as perſonal property has become more conſiderable, the delinquent has now, and has had as early as our records will reach, a pardon, and a writ of reſtitution of his goods as a matter of courſe and right, only paying for ſuing out the ſame. *Foſt.* 283: 2 *Hawk. P. C. c.* 37. § 2. And indeed to prevent this expence, in caſes where the death has notoriouſly happened by miſadventure or in ſelf defence, the Judges will uſually permit, (if not direct) a general verdict of acquittal. *Foſt.* 288.

It ſeems clear that neither of theſe Homicides, by *miſadventure* or *ſe defendendo*, are felonious, becauſe they are not accompanied with a felonious intent, which is neceſſary in every felony. 1 *Hawk. P. C. c.* 29. § 19: 3 *Inſt.* 56: 2 *Inſt.* 149.

And from hence it ſeems plainly to follow, that they were never puniſhable with loſs of life: And the ſame alſo farther appears from the writ *De odio & atiâ*, by virtue whereof, if any perſon committed for killing another, were found guilty of either of theſe Homicides, and no other crime, he might be bailed; and indeed it ſeems to be againſt natural juſtice to condemn a man to death, for what is owing rather to his misfortune than his fault. 1 *Hawk. P. C. c.* 29. § 20.

It is true indeed, that ſome of our beſt authors have argued from the ſtatute of *Marlbridge, ch.* 26, which enacts, that *murdrum de cætero non adjudicetur, ubi infortunium tantummodo adjudicatum eſt*, *&c.* that, before this ſtatute, homicides by miſadventure, or *ſe defendendo*, were adjudged murder, and conſequently puniſhed by death. 1 *Hawk. P. C. c.* 29. § 21: 2 *Inſt.* 56: *S. P. C.* 16.

But to this it may be anſwered, that murder in thoſe days ſignified only the private killing of a man, by one who was neither ſeen nor heard by any witneſs; for which the offender, if found, was to be tried by ordeal,

and if he could not be found, the town in which the fact was done, was to be amerced ſixty-ſix marks, unleſs it could be proved that the perſon killed was an *Engliſhman*: otherwiſe it was preſumed he was a *Dane* or *Norman*, who in thoſe days were often privately made away with by the *Engliſh*. And it being a doubt whether Homicide by miſadventure, &c. were to be eſteemed murder in this ſenſe, it ſeems to have been the chief intent of the makers of this ſtatute to ſettle this queſtion. 1 *Hawk. P. C. c.* 29. § 22: *Bract.* 134 *b*; 135 *a*: *Kelynge* 121.

However it is certain, that notwithſtanding neither of theſe offences be felonies, yet a perſon guilty of them is not bailable by *Juſtices of peace*, but muſt be committed till the next coming of the Juſtices of eyre or gaol-delivery. 1 *Hawk. P. C. c.* 29. § 23: *H. P. C.* 98, 99: 2 *Inſt.* 315: *Dalt. cap.* 98. But ſuch offender may be brought up by *habeas corpus*, before any of the twelve judges, and bailed.

Indeed, anciently a perſon committed for the death of a man, might ſue out the writ *de odio & atiâ*, which by *Magna Charta c.* 16, is grantable without fee; and if thereon, by an inqueſt taken by the ſheriff, he were found to have done the fact by miſadventure, or *ſe defendendo*, he might be mainpriſed by twelve men, upon the writ *de ponendo in ballium*. But ſuch writs and enquiries were taken away by the ſtatute of *Glouceſter*, *c.* 9. and *St.* 28 *Ed.* 3. *c.* 9, and though perhaps they were again revived by *St.* 42 *Ed.* 3. *c.* 1, which makes all ſtatutes contrary to *Magna Charta* void, yet at this day they ſeem to be obſolete, and, indeed, uſeleſs; inaſmuch as the party may probably be ſooner delivered in the uſual courſe, by the coming of the Juſtices of gaol-delivery. 1 *Hawk. P. C. c.* 29. § 24: *S. P. C.* 77 *g*: 2 *Inſt.* 43, 315: 9 *Co.* 56: *Co. Bail and Mainprize*, *c.* 10.

It is alſo agreed, that no one can excuſe the killing another, by ſetting forth in a ſpecial plea, that he did it by miſadventure, or *ſe defendendo*, but that he muſt plead 'Not guilty', and give the ſpecial matter in evidence. And that wherever a perſon is found guilty of ſuch Homicide, either by a ſpecial indictment for the ſame, or by a verdict ſetting forth the circumſtances of the caſe on a general indictment of murder or Homicide, he ſhall be diſcharged out of priſon upon bail, and forfeit his goods: But, that upon removing the record by *certiorari* into Chancery, he ſhall have his pardon of courſe, without ſtaying for any warrant from the King to that purpoſe. 1 *Hawk. P. C. c.* 29. § 25: 4 *H.* 7. 2 *a*: *Keilw.* 53 *a*; 108 *b*: 2 *Inſt.* 316: *S. P. C.* 15 *b*; 16 *b*: *Dalt. cap.* 96, 98: *F. N. B.* 246. *C. H.*

III. Felonious Homicide, is an act of a very different nature from the former, being the killing of a human creature, of any age or ſex, without juſtification or excuſe. This may be done either by killing one's ſelf or another perſon.

1. Self-Murder, is ranked among the higheſt crimes, being a peculiar ſpecies of felony; a felony committed on one's ſelf. The party muſt be of years of diſcretion, and in his ſenſes, elſe it is no crime. But this excuſe ought not be ſtrained to that length, to which our Coroners' Juries are too apt to carry it, *viz.* that the very act of ſuicide is an evidence of inſanity; as if every man, who acts contrary to reaſon, had no reaſon at all: for the ſame argument would prove every other criminal *non compos*, as well as the ſelf-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of diſcerning right from wrong, and therefore if a real lunatic kills himſelf in a lucid interval, he is *felo de ſe* as much as another man. 1 *Hal. P. C.* 412.

As to the puniſhment which human laws inflict on this crime; they can only act upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial in the highway, with a ſtake driven through his body; on the latter, by the forfeiture of all his goods and chattels to the King.

In this, as well as all other felonies, the offender muſt be of the age of diſcretion, and *compos mentis*; and therefore, an infant killing himſelf under the age of diſcretion, or a lunatick during his lunacy, cannot be a *felo de ſe*. 1 *Hawk. P. C. c.* 27. § 1: *Crom.* 30 *a*, *b*; 31 *a*: *H. P. C.* 28: *Dalt. cap.* 92: 3 *Inſt.* 54.

Our laws have always had ſuch an abhorrence of this crime, that not only he who kills himſelf with a deliberate and direct purpoſe of ſo doing, but alſo in ſome caſes he who maliciouſly attempts to kill another, and in purſuance of ſuch an attempt unwillingly kills himſelf, ſhall be adjudged in the eye of the law a *felo de ſe*; for whereever death is cauſed by any act done with a murderous intent, it makes the offender a murderer; 1 *Hawk. P. C. c.* 27. § 4: *Dalt. cap.* 92, 144: 44 *E.* 3. 44: 44 *Aſſ.* 55: *Bro. Cor.* 12, 14: *S. P. C.* 16: *H. P. C.* 28, 29: *Pult.* 119 *b*: *Crom.* 28.

He who kills another upon his deſire or command, is in the judgment of the law as much a murderer, as if he had done it merely of his own head; and the perſon killed is not looked upon as a *felo de ſe*, inaſmuch as his aſſent was merely void, being againſt the law of God and man. 1 *Hawk. P. C. c.* 27. § 6: *Keilw.* 136: *Moor* 754.

Further as to what a *Felo de ſe* ſhall forfeit, it ſeems clear, that he ſhall forfeit all chattels real or perſonal which he hath in his own right; and alſo all chattels real whereof he is poſſeſſed either jointly with his wife, or in her right; and alſo all bonds and other perſonal things in action, belonging ſolely to himſelf; and alſo all perſonal things in action, and, as ſome ſay, entire chattels in poſſeſſion to which he was intitled jointly with another, on any account, except that of merchandize. But it is ſaid, that he ſhall forfeit a moiety only of ſuch joint chattels as may be ſevered, and nothing at all of what he was poſſeſſed of as executor or adminiſtrator. 1 *Hawk. P. C. c.* 27. §. 7. However the blood of a *felo de ſe* is not corrupted, nor his lands of inheritance forfeited, nor his wife barred of her dower. 1 *Hawk. P. C. c.* 27. § 8: *Plowd. Com.* 261 *b*: 262 *a*: 1 *Hal. P. C.* 413.

Not any part of the perſonal eſtate is veſted in the King, before the ſelf-murder is found by ſome inquiſition; and conſequently the forfeiture thereof, is ſaved by a pardon of the offence before ſuch finding. 5 *Co.* 110 *b*: 3 *Inſt.* 54: 1 *Saund.* 362: 1 *Sid.* 150, 162. But if there be no ſuch pardon, the whole is forfeited immediately after ſuch inquiſition, from the time ſuch mortal wound was given, and all intermediate alienations are avoided. *Plowd. Com.* 260: *H. P. C.* 29: 5 *Co.* 110. And ſuch inquiſitions ought to be by the Coroner *ſuper viſum corporis*, if the body can be found; and an inquiſition ſo taken, as ſome ſay, cannot be traverſed. *H. P. C.* 29: 3 *Inſt.* 55. See 1 *Hawk. P. C. c.* 27. § 9, 10, 11.

But if the body cannot be found, ſo that the coroner, who has authority only *ſuper viſum corporis*, cannot proceed, the inquiry may be by Juſtices of peace; (who by their commiſſion have a general power to inquire of all felonies;) or in the King's Bench, if the felony were committed in the county where that court ſits; and ſuch inquiſitions are traverſable by the executor, &c. 1 *Hawk. P. C. c.* 27. § 12: 3 *Inſt.* 55: *H. P. C.* 29: 2 *Lev.* 141.

Alſo all inquiſitions of this offence being in the nature of indictments, ought particularly and certainly to ſet forth the circumſtances of the fact; and in the concluſion add, that the party in ſuch manner murdered himſelf. 1 *Hawk. P. C. c.* 27. § 13: 3 *Lev.* 140: 3 *Mod.* 100: 2 *Lev.* 152. Yet if it be full in ſubſtance, the coroner may be ſerved with a rule to amend a defect in form. 1 *Sid.* 225, 259: 3 *Mod.* 101: 1 *Keb.* 907: 1 *Hawk. P. C. c.* 27. § 15.

By the rubrick in the Common Prayer, before the burial office, (confirmed by ſtat. 13 & 14 *Car.* 2. *c.* 4,) perſons who have laid violent hands upon themſelves, ſhall not have that office uſed at their interment.—See further on this ſubject this Dict. tit. *Felo de ſe.*

The other ſpecies of criminal Homicide is that of killing another man. But in this there are alſo degrees of guilt, which divide the offence into *Manſlaughter*, and *Murder*. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles; and principally conſiſts in this, that *Man-ſlaughter* (when voluntary) ariſes from the ſudden heat of the paſſions; *Murder* from the wickedneſs of the heart.

2. MANSLAUGHTER is therefore thus defined; *The unlawful killing of another, without malice, either expreſs or implied*: which may be either *voluntarily*, upon a *ſudden heat*; or *involuntarily*, but in the commiſſion of ſome *unlawful act*. 1 *Hal. P. C.* 466. And hence it follows, that in Manſlaughter there can be no acceſſories before the fact; becauſe it muſt be done without premeditation.

As to the firſt, or *voluntary* branch: if upon a ſudden quarrel two perſons fight, and one of them kills the other, this is Manſlaughter: and ſo it is, if they, upon ſuch an occaſion go out and fight in a field; for this is one continued act of paſſion, and the law pays that regard to human frailty, as not to put a haſty and deliberate act upon the ſame footing with regard to guilt. 1 *Hawk. P. C. c.* 31. §§ 29, 30. So alſo if a man be greatly provoked, as by pulling his noſe, or other great indignity, and immediately kills the aggreſſor, though this is not excuſable *ſe defendendo*, ſince there is no abſolute neceſſity for doing it, to preſerve himſelf; yet neither is it murder, for there is no previous malice; but it is Manſlaughter. *Kelyng.* 135. But in this, and in every other caſe of Homicide, upon provocation, if there be a ſufficient cooling-time for paſſion to ſubſide and reaſon to interpoſe, and the perſon ſo provoked afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder. *Foſt.* 296. So if a man takes another in the act of adultery with his wife, and kills him directly upon the ſpot; this is not abſolutely ranked in the claſs of juſtifiable Homicide, as in caſe of a forcible rape, but it is Manſlaughter. 1 *Hal. P. C.* 486. It is however the loweſt degree of it, and therefore in ſuch a caſe, the court directed the burning in the hand to be gently inflicted, becauſe there could not be a greater provocation. *Raym.* 212. Manſlaughter therefore on ſudden provocation differs from Excuſable Homicide *ſe defendendo* in this: that in one caſe there is an apparent neceſſity, for ſelf-preſervation, to kill the aggreſſor; in the other no neceſſity at all, being only a ſudden act of revenge. 4 *Comm. c.* 14.

The ſecond branch, or *involuntary* Manſlaughter differs alſo from Homicide excuſable by miſadventure, in this; that miſadventure always happens in conſequence of a lawful act, but this ſpecies of manſlaughter in conſequence of an unlawful one. As if two perſons play at ſword and buckler, unleſs by the King's command, and one of them kills the other, this is manſlaughter, becauſe the original act was unlawful; but it is not murder, for the one had no intent to do the other any perſonal miſchief. 3 *Inſt.* 56. So where a perſon does an act, lawful in itſelf, but in an unlawful manner, and without due caution and circumſpection: as when a workman flings down a ſtone or piece of timber into the ſtreet, and kills a man; this may be either miſadventure, manſlaughter, or murder, according to the circumſtance under which the original act was done; if it were in a country village where few paſſengers are, and he calls out to all people to have a care, it is miſadventure only; but if it were in *London*, or other populous town, where people are continually paſſing, it is manſlaughter, though he gives loud warning; and murder, if he knows of their paſſing, and gives no warning at all, for then it is malice againſt all mankind. *Kel.* 43: 3 *Inſt.* And, in general when an involuntary killing happens in conſequence of an unlawful act, it will be either murder or manſlaughter according to the nature of the act which occaſioned it. If it be in proſecution of a felonious intent, or in it's conſequences naturally tended to bloodſhed, it will be murder; but if no more was intended than a mere civil treſpaſs, it will only amount to manſlaughter. 4 *Comm. c.* 14. See *poſt.* 3. more at large.

Our ſtatute law has ſeverely animadverted on one ſpecies of criminal negligence, whereby the death of a man is occaſioned. For by *Stat.* 10 *Geo.* 2. *c.* 31, if any Waterman between *Graveſend* and *Windſor* receives into his boat or barge a greater number of perſons than the act allows, and any paſſenger ſhall then be drowned, ſuch waterman is guilty (not of manſlaughter, but) of felony, and ſhall be tranſported as a felon.

Next as to the *Puniſhment* of this degree of Homicide: the crime of manſlaughter amounts to felony, but within the benefit of clergy; and the offender ſhall be burnt in the hand, and forfeit all his goods and chattels.

But there is one ſpecies of manſlaughter, which is puniſhed as murder, the benefit of clergy being taken away from it by ſtatute; namely, the offence of mortally *ſtabbing* another, though done upon ſudden provocation. For by *ſtat.* 1 *Jac.* 1. *c.* 8, when one thruſts or ſtabs another, who has not then a weapon drawn, or who hath not then firſt ſtricken the party ſtabbing, ſo that he dies thereof within ſix months after, the offender ſhall not have the benefit of clergy, *though he did it not of malice aforethought*. This ſtatute was made on account of the frequent quarrels, and ſtabbing with ſhort daggers, between the *Scotch* and the *Engliſh*, at the acceſſion of *James* the Firſt; and, being therefore of a temporary nature, ought perhaps to have expired with the miſchief which

which it meant to remedy. 1 *Lord Raym.* 140. It was however continued indefinitely by *St.* 3 *Car.* 1. *c.* 4: and by *ſtat.* 16 (or 17) *C.* 1. *c.* 4, till ſome other act ſhall be made touching the continuance or diſcontinuance thereof.—It ſeems that in point of ſolid and ſubſtantial juſtice, it cannot be ſaid that the mode of killing, whether by ſtabbing, ſtrangling, or ſhooting, can either extenuate or enhance the guilt; unleſs where, as in the caſe of poiſoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath conſtrued the ſtatute ſo favourably in behalf of the Subject, and ſo ſtrictly when againſt him, that the offence of ſtabbing now ſtands almoſt upon the ſame footing, as it did at the Common-law. *Foſt.* 299, 300. Thus, (not to repeat the caſes before mentioned, of ſtabbing an adultereſs, *&c.* which are barely manſlaughter, as at Common-law) in the conſtruction of the ſtatute it hath been doubted, whether if the deceaſed had ſtruck at all before the mortal blow given, this does not take it out of the ſtatute, though in the preceding quarrel the ſtabber had given the firſt blow; and it ſeems to be the better opinion, that this is not within the ſtatute. *Foſt.* 301: 1 *Hawk. P. C. c.* 30. § 6. Alſo it hath been reſolved, that the killing a man by throwing a hammer or other blunt weapon is not within the ſtatute; and whether a ſhot with a piſtol be ſo or not, is doubted. 1 *Hal. P. C.* 470. And if the party ſlain had a cudgel in his hand, or had thrown a pot or a bottle, or diſcharged a piſtol at the party ſtabbing, this is a ſufficient having a weapon drawn on his ſide within the words of the ſtatute. 1 *Hawk. P. C. c.* 30. § 8.

It is generally holden, that this ſtatute is but declarative of the Common-law, and in the conſtruction thereof, the following points have been alſo reſolved. 1 *Bulſt.* 87: *Kelyng* 55.

That he who actually gives the ſtroke, and not any of thoſe who may be ſaid to do it by conſtruction of law, as being preſent, and aiding and abetting the fact, are within the ſtatute; from whence it follows, That if it cannot be proved by whom the ſtroke was given, none can be found guilty within the ſtatute. 1 *Hawk. P. C. c.* 30. § 7: *H. P. C.* 58: *Aleyn* 44.

That there is no need to lay the concluſion of the indictment *contra formam ſtatuti*, becauſe the ſtatute makes no new offence, but only takes away the privilege of clergy from an old one, and leaves it to the judgment of the Common-law; from whence it follows, that a perſon indicted on the ſtatute, may be found guilty of manſlaughter generally. Alſo from the ſame ground it hath been reſolved, That if an indictment lay, and a verdict alſo find, a fact to be *contra formam ſtatuti*, which cannot poſſibly be ſo, as that *A.* and *B.* aided and abetted *C. contra formam ſtatuti*, yet neither ſuch indictment nor verdict are void; but *A.* and *B.* ſhall be dealt with in the ſame manner as they ſhould have been, if theſe words *contra formam ſtatuti* had been wholly omitted, becauſe the ſubſtance of the indictment being found, they may be rejected as ſenſeleſs and ſurpluſage: And, *à fortiori*, therefore it is certain, that they ſhall do no hurt to an indictment or verdict containing a fact which may be within the ſtatute. 1 *Hawk. P. C. c.* 30. § 9: *H. P. C.* 58, 266: *Allen* 47: *Cro. Jac.* 283.

That, as theſe words, *contra formam ſtatuti*, do not vitiate an indictment which would be good without them; ſo alſo, they will not ſupply a defect in a vitious one, which does not ſpecially purſue the ſtatute. 1 *Hawk. P. C. c* 30. § 10: *H. P. C.* 58.

A priſoner whoſe caſe may be brought within this ſtatute, is commonly arraigned upon two indictments, one at Common-law for murder, and the other upon the ſtatute. *Foſt.* 299.—But the ſame circumſtances which at Common-law will ſerve to juſtify, excuſe or alleviate a charge of murder, have always had their due weight in proſecutions, grounded on this ſtatute. *Foſt.* 298.—As where a huſband ſtabs an adulterer whom he ſeizes in the act. 1 *Vent.* 158: *Raym.* 212.—Or where a man is aſſaulted by thieves in his houſe, the thieves having no weapon drawn, nor having ſtruck him; and he ſtabs one of them. *Stra.* 469. Or where an officer entering violently into the chamber of a gentleman to arreſt him, but without announcing the purpoſe for which he came, is ſtabbed by the gentleman with his ſword. *Kel.* 136: 1 *Hale* 470: *Sty.* 467.—Or where upon an outcry of thieves a perſon who had innocently hidden himſelf in a cloſet, was miſtaken for the thief and ſtabbed in the dark. See 1 *Hale* 42, 474: *Cro. Car.* 538: *W. Jon.* 429: *Kely.* 136; and many other inſtances of this kind which were held not to be within the ſtatute. 1 *Hawk. P. C. c.* 30. *in n.*

3. The term of MURDER (as a crime) was antiently applied only to the *ſecret* killing of another; *Dial. de Scacch. l.* 1. *c.* 10; which the word *moerda* ſignifies in the Teutonic language; and it was defined, "*homicidium quod, nullo vidente, nullo ſciente, clam perpetratur*: *Glanv. lib.* 14. *c.* 3: for which the vill wherein it was committed, or (if that were too poor) the whole hundred, was liable to a heavy amercement; which amercement itſelf was alſo denominated *murdrum. Bract. l.* 3. *tr.* 2. *c.* 15. § 7: *Stat. Marl. c.* 26: *Foſt.* 281. The word *murdre* in our old *ſtatutes* alſo ſignified any kind of concealment or ſtifling: So in the ſtat. of *Exeter*, 14 *E.* 1. "*je riens ne celerai ne ſuffrerai etre celé ne murdré.*" which is thus tranſlated in *Fleta, l.* 1. *c.* 18. § 4. "*Nullum veritatem celabo, nec celari permittam, nec murdrari.*" And the words "*pur murdre le droit*" in the articles of that ſtatute, are rendered in *Fleta, ibid.* § 8 "*pro jure alicujus murdriendo.*" The word *murdrum*, (by ſome derived from the Sax. *Morth*, whence, (as it is ſaid) comes the barbarous *Latin Mordrum*, & *Murdrum*, in *French Meurtre*; though the word *Murdrare*, evidently comes from the *Latin Morti dare*), was a word in uſe long before the reign of King *Canutus*, which ſome would have to ſignify a violent death; and ſometimes the *Saxons* expreſſed it by *morthlad* & *morth weorc*, a deadly work: But the Sax. *morth* relates generally to *mors*.

The uſage of fining the vill or the hundred was common among the antient *Goths*, in *Sweden* and *Denmark*, who ſuppoſed the neighbourhood, unleſs they produced the murderer to have perpetrated, or at leaſt connived at, the murder: and, according to *Bracton*, it was introduced into this kingdom by King *Canute* to prevent his countrymen the *Danes* from being privily murdered by the *Engliſh*; and was afterwards continued by *William* the Conqueror, for the like ſecurity of his own *Normans. Bract. l.* 3. *tr.* 2. *c.* 15: 1 *Hal. P. C.* 447. And therefore if, upon inquiſition had, it appeared that the perſon ſlain was an *Engliſh man*, (the preſentment whereof was denominated *Engleſcherie*) the county ſeems to have been excuſed from this burthen. *Bract. ubi ſupra.* See this Dict. tit. *Englecery.*

Englecery. But, this difference being totally aboliſhed by *Stat.* 14 *E.* 3. *c.* 4, we muſt define murder in quite another manner; without regarding whether the party ſlain was killed openly or ſecretly, or whether he was of *Engliſh* or foreign extraction. See *Staunf. P. C. l.* 1. *c.* 10, as alſo 1 *Hawk. P. C. c.* 31; where it is ſaid that in the ancient times above alluded to, the open killing of a man through anger or malice was not called *murder*; but *voluntary Homicide*. *Bract.* 121 *a*; 134 *b*; 135 *a*: *Kel.* 121.

The law concerning *Engleſcherie* having been aboliſhed by *Stat.* 14 *Ed.* 3. *c.* 4, the killing of an *Engliſhman* or foreigner through malice prepenſe, whether committed openly or ſecretly, was by degrees called *murder*; and *Stat.* 13 *Rich.* 2. *c.* 1, which reſtrains the King's pardon in certain caſes, does in the preamble, under the general name of *murder*, include all ſuch *Homicide* as ſhall not be pardoned without ſpecial words; and, in the body of the act, expreſſes the ſame by *murder*, or killing by *await*, *aſſault*, or *malice prepenſed*. And doubtleſs the makers of *ſtat.* 23 *H.* 8. *cap.* 1, which excluded all *wilful murder* of *malice prepenſe* from the benefit of clergy, intended to include open, as well as private *Homicide*, within the word *murder*. 1 *Hawk. P. C. c.* 31. § 2: *S. P. C.* 18 *b*; 19 *a*.

By *Murder*, therefore, ſays *Hawkins* at this day we underſtand, the wilful killing of any Subject whomſoever, through *malice forethought*, whether the perſon ſlain be an *Engliſhman* or foreigner. 1 *Hawk. P. C. c.* 31. § 3.

Murder is thus defined, or rather deſcribed, by Sir *Edward Coke*; "When a perſon of ſound memory and diſcretion, unlawfully killeth any reaſonable creature in being, and under the King's peace, with malice aforethought, either expreſs or implied." 3 *Inſt.* 47. The beſt way of examining the nature of this crime will be by conſidering the ſeveral branches of this definition.

Firſt, murder muſt be committed by a *perſon of ſound memory and diſcretion*: for lunaticks or infants, as was formerly obſerved, are incapable of committing any crime; unleſs in ſuch caſes where they ſhew a conſciouſneſs of doing wrong, and of courſe a diſcretion, or diſcernment, between good and evil.

One under the age of diſcretion, or *non compos mentis*, cannot be guilty of *murder*; though if it appears by circumſtances, that the infant did hide the body, *&c. it is felony*. *H. P. C.* 43: 3 *Inſt.* 46, 54.

If an infant under twelve years old, hath an extraordinary wit, that *it may be preſumed he knows what he does*, and he kill another, it may be felony and *murder*; otherwiſe it ſhall not. 3 *H.* 7. 13: *Plowd.* 191.

See the caſe of *William York*, at *Bury*, Summer aſſiſes in 1748. *Foſter's Rep.* 70. and this Dict. tit. *Infant* I.

Next, murder happens when a perſon of ſuch ſound diſcretion *unlawfully killeth*. The unlawfulneſs ariſes from the killing without warrant or excuſe: and there muſt alſo be an actual killing to conſtitute murder; for a bare aſſault, with intent to kill, is only a great miſdemeanor, though formerly it was held to be murder. See 1 *Hal. P. C.* 425.

A perſon *indicted* for *intending to murder* the Maſter of the Rolls, *Term Mich.* 16 *Car.* 2; and for offering a ſum of money to another perſon to do it, ſaying at the ſame time, that "*if he would not perpetrate the crime, he would do it himſelf*;" upon his conviction, the court declared that this was a heinous offence, and not only indictable, but fineable; and the offender was fined *one thouſand marks*, committed to priſon for three months, and ordered to find ſureties for his good behaviour during life. 1 *Lev.* 146.

The killing may be by poiſoning, ſtriking, ſtarving, drowning, and a thouſand other forms of death, by which human nature may be overcome. And if a perſon be indicted for one ſpecies of killing, as by *poiſoning*, he cannot be convicted by evidence of a totally different ſpecies of death, as by *ſhooting* with a piſtol, or *ſtarving*. But where they only differ in circumſtances, as if a *wound* be alledged to be given by a ſword, and it proves to have ariſen from a ſtaff, an ax, or a hatchet, this difference is immaterial. 3 *Inſt.* 319: 2 *Hal. P. C.* 185. Of all ſpecies of deaths, the moſt deteſtable is that of poiſon; becauſe it can of all others be the leaſt prevented either by manhood or forethought. 3 *Inſt.* 48. And therefore by the *ſtat.* 22 *Hen.* 8. *c.* 9, it was made treaſon, and a more grievous and lingering kind of death was inflicted on it than the Common-law allowed; namely, boiling to death: but this act did not live long, being repealed by *Stat.* 1 *Ed.* 6. *c.* 12; which declares that all wilful killing by poiſoning of any perſon ſhall be adjudged wilful murder, of malice prepenſed.

There was alſo, by the antient Common-law, one ſpecies of killing held to be murder which may be dubious at this day, as there hath not been an inſtance wherein it has been held to be murder, for many ages paſt; namely by bearing *falſe witneſs* againſt another, with an expreſs, premeditated deſign to take away his life, ſo as the innocent perſon be condemned and executed. *Mirror c.* 1. § 9, 19: *Brit. c.* 52: *Bracton l.* 3. *c.* 4. There is no doubt but this is equally murder *in foro conſcientiæ* as killing with a ſword; though the modern law (to avoid the danger of deterring witneſſes from giving evidence upon capital proſecutions, if it muſt be at the perils of their own lives,) has not yet puniſhed it as ſuch. See 3 *Inſt.* 48: *Foſt.* 131. and this Dict. tit. *Perjury*.

A gaoler knowing a priſoner to be infected with an epidemic diſtemper, confines another priſoner againſt his will, in the ſame room with him, by which he catches the infection, of which the gaoler had notice, and the priſoner dies; this is a felonious killing. *Stra.* 856: 9 *St. Tr.* 146. So to confine a priſoner in a low, damp, unwholeſome room, not allowing him the common conveniences, which the decencies of nature require, by which the habits of his conſtitution are ſo affected as to produce a diſtemper of which he dies; this is alſo a felonious Homicide. *Stra.* 884: *Ld. Raym.* 1578.—For although the law inveſts gaolers with all neceſſary powers, for the intereſt of the common-wealth, they are not to behave with the leaſt degree of wanton cruelty to their priſoners, O. B. 1784, *p.* 1177.—And thoſe were deliberate acts of cruelty, and enormous violations of the truſt the law repoſeth in it's miniſters of juſtice. *Foſt.* 322.

In ſome caſes a man ſhall be ſaid, in the judgment of the law, to kill one who is in truth actually killed by another, or by himſelf; as where one by dureſs of impriſonment compels a man to accuſe an innocent perſon, who, on his evidence, is condemned and executed; or where one incites a madman to kill himſelf or another: or where one lays poiſon with an intent to kill one man, which is afterwards accidentally taken by another who dies thereof. 1 *Hawk. P. C. c.* 31. § 7: *S. P. C.* 36: 3 *Inſt.* 91: *Dalt. cap.* 93: *Plowd. Com.* 474.

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If a man however does such an act, of which the probable consequence may be, and eventually is death, such killing may be murder although no stroke be struck by himself, and tho' no killing may be primarily intended; as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died. 1 *Hawk. P. C. c.* 31. § 5; of the harlot, who laid her child under leaves in an orchard, where a kite struck it and killed it. 1 *Hal. P. C.* 432; and of the parish officers, who shifted a child from parish to parish, till it died for want of care and sustenance. *Palm.* 545. So also, in general any one who, assuming to take care of another, refuses them necessary subsistence, or by any other severity, though not of a nature to produce immediate death, as by putting the party in such a situation as may possibly be dangerous to life or health, if death actually and clearly ensues in consequence of it, it is murder.—And this mode of killing is of the most aggravated kind, because a long time must unavoidably intervene before the death can happen, and also many opportunities of deliberation, and reflection, O. B. 1784 p. 455: *R. v. S. Self*, O. B. 1784: *Feb. Sessi.* 1776.

If a man hath a beast that is used to do mischief; and he, knowing it, *suffers* it to go abroad, and it kills a man, even this is manslaughter in the owner: but if he had purposely *turned it loose*, though barely to frighten people and make what is called sport, it is as much murder, as if he had incited a bear or dog to worry them. See 1 *Hal. P. C.* 431.

Hawkins says, that he who wilfully neglects to prevent a mischief, which he may and ought to provide against, is, *as some have said*, in judgment of the law, the actual cause of the damage which ensues; and therefore if a man have an ox or horse, which he knows to be mischievous, by being used to gore or strike at those who came near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to some opinions, the owner may be indicted, as having himself killed him; and this is agreable to the Mosaical law. However, it is agreed by all, such a person is guilty of a very gross misdemeanor. 1 *Hawk. P. C. c.* 31. § 1: *Fitz. Corone* 311: *S. P. C.* 17 *a*: *Crom.* 24 *b*: *Dalt. cap.* 93: *Pult.* 122 *b*: *H. P. C.* 53: *Exodus, c.* 2. *v.* 29.

If a physician or surgeon gives his patient a potion or plaister to cure him, which contrary to expectation kills him, this is neither murder, nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action, for neglect or ignorance. *Mirror c.* 4. § 16. But it hath been holden, that if he is not a *regular* physician or surgeon, who administers the medicine, or performs the operation, it is manslaughter at the least. *Britt. c.* 5: 4 *Inst.* 251. Yet Sir *Matthew Hale* very justly questions the law of this determination. 1 *Hal. P. C.* 430.

In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first. 1 *Hawk. P. C. c.* 31. § 9.

But if a person hurt by another, die thereof within a *year and a day*, it is no excuse for the other, that he might have recovered, if he had not neglected to take care of himself. 1 *Hawk. P. C. c.* 31. § 10: 3 *Inst.* 53: *Kelynge* 26: 1 *Keb.* 17.

If one dies within a year and a day, through disorderly living, it shall be no excuse, *the wound will be judged the principal cause of his death*; but if one wounded die after that time, the law will presume he died a natural death. 3 *Inst.* 53: *H. P. C.* 55: *Kel.* 26. If a man receive a wound that is not mortal; but either for want of help, or by neglect, it turns to a fever, *&c.* which causes the party's death, it is *murder*: so it is, where a man has some disease, which possibly would terminate his life in half a year, and another wounds him, that it hastens his end, *&c.* But if, by ill applications of the party, or those about him, of unwholesome medicines, the wounded person dies; if this plainly appears, it is not *murder*: by *Hale*; *Hist. P. C.* 428.

As to the place where such killing is within the conusance of the law; it seems that the killing of one who is both wounded and dies out of the realm, or wounded out of the realm and dies here, cannot be determined at Common-law, because it cannot be tried by a jury of the neighbourhood where the fact was done. But it is agreed, that the death of one who is both wounded and dies beyond sea, and it is said by some, that the death of him who dies here of a wound given there, may be heard and determined before the Constable and Marshal, according to the Civil law, if the King please to appoint a Constable. And it seemeth also to be clear, that such a fact being examined by the privy council, may by force of *St.* 33 *H.* 8. *cap.* 23, be tried (in relation to the principal offenders, but not as to the accessaries) before commissioners appointed by the King, in any county of *England*. 1 *Hawk. P. C. c.* 31. § 11: 3 *Inst.* 48: 2 *Inst.* 51: *Co. Lit.* 75: *S. P. C.* 65 *a*: *Bro. Appeal* 153: *Cro. Car.* 247: 1 *And.* 195. A commission was issued, against Captain *Rocke* for killing Mr. *Ferguson*, at the cape of *Good Hope*.

A murder at sea was anciently cognisable only by the Civil law; but now by force of *Stats.* 27 *H.* 8. *c.* 4: 28 *H.* 8. *c.* 15, it may be tried and determined before the King's Commissioners in any county of *England*, according to the course of the Common-law; yet the death of one who is at land, of a wound received at sea, is neither determinable at Common-law, nor by force of either of these statutes: but it seems, that it may be tried by the Constable and Marshal, or before the commissioners appointed in pursuance of the aforesaid statute of 33 *H.* 8. *c.* 23: 1 *Hawk. P. C. c.* 31. § 12: 3 *Inst.* 48, 49: 1 *Leon.* 270: *H. P. C.* 54: 3 *Inst.* 48.

The Commissioners to be appointed under *Stats.* 27 & 28 *H.* 8, are the Admiral, or his deputy, and three or four more (among whom two Common law judges are constantly appointed, who in effect try all prisoners); the indictment being first found by a Grand Jury of 12 men, and afterwards tried by another jury. This is now the only method of trying marine felonies in the Court of Admiralty. The Judge of the Admiralty still presiding therein, just as the Lord Mayor presides at the Sessions in *London*. 4 *Comm.* 269. See this Dict. tit. *Admiralty*.

And it is said by some, that the death of one who died in one county, of a wound given in another, is not indictable at all at Common-law, because the offence was not complete in either county, and the jury could enquire only of what happened in their own county. But it hath been holden by others, That if the corpse were carried into the county where the stroke was given, the whole might be enquired of by a jury of the same county. And it is agreed, that an appeal might be brought in either county, and

and the fact tried by a jury returned jointly from each. And at this day, by force of *St.* 2 & 3 *Ed* 6. *c.* 24, the whole is triable by a jury of the county wherein the death ſhall happen, on an indictment found, or appeal brought, in the ſame county. 1 *Hawk. P. C. c.* 31. § 13: 3 *Inſt.* 48, 49: *Bro. Coro.* 140, 141, 143: *Indictm.* 3: *S. P. C.* 90. *c*: 6 *H.* 7. 10 *a*: *Finch Law* 411: *S. P. C.* 182: *Bro. Appeal* 3. 80. 83. 85. 149.

Alſo by force of *St.* 26 *H.* 8. *cap.* 6, a murder in *Wales* may be enquired of in an adjoining *Engliſh* county, but appeals muſt ſtill be brought in the proper county. 1 *Hawk. P. C. Cro. Car.* 247: 1 *Jon.* 255: 1 *Lev.* 118: *Latch* 12. 118: *Wilſ.* 320.

By *Stat.* 2 *Geo.* 2. *cap.* 21, it is enacted that where any perſon ſhall be feloniouſly ſtricken or poiſoned upon the ſea, or at any place out of *England*, and ſhall die of the ſame in *England*; or where any perſon ſhall be feloniouſly ſtricken or poiſoned within *England*, and ſhall die of ſuch ſtroke or poiſoning upon the ſea, or out of *England*, an indictment thereof found by jurors of the county in *England*, in which ſuch *death*, *ſtroke* or *poiſoning* ſhall happen, whether it be found before any coroner upon view of ſuch dead body, or before juſtices of peace, or other juſtices who ſhall have authority to inquire of murders, ſhall be as effectual, as well againſt the principals as the acceſſories, as if ſuch ſtroke or poiſoning and death, and the offence of ſuch acceſſories, had happened in the ſame county; and every ſuch offender ſhall have the like defences (except challenges for the hundred) as if ſuch ſtroke or poiſoning and death, and the like offence of ſuch acceſſories, had happened in the ſame county where ſuch indictment ſhall be found. See title *Indictment* II.

Farther; the perſon killed muſt be "*a reaſonable creature in being, and under the King's peace*," at the time of the killing; therefore to kill an alien, a Jew, or an outlaw, who, are all under the King's peace and protection, is as much murder as to kill the moſt regular born *Engliſhman*, except he be an alien enemy in time of war. 3 *Inſt.* 50: 1 *Hal. P. C.* 433. To kill a child in it's mother's womb, is now no murder, but a great miſprifion: but if the child be born alive, and dieth by reaſon of the potion or bruiſes it received in the womb, it ſeems by the better opinion to be murder in ſuch as adminiſtered or gave them. 3 *Inſt.* 50: 1 *Hawk. P. C. c.* 31. § 16. But ſee 1 *Hal. P. C.* 433.

It ſeems alſo agreed, that where one counſels a woman to kill her child when it ſhall be born, who afterwards kills it in purſuance of ſuch advice, he is an acceſſary to the murder. 1 *Hawk. P. C. c.* 31. § 17: *Dyer* 186: 3 *Inſt.* 51.

But, as there is one caſe where it is difficult to prove the child's being born alive, namely, in the caſe of the murder of baſtard children by the unnatural mother, it is enacted by *ſtat.* 21 *Jac.* 1. *c.* 27, "that if a woman be delivered of a child, which if born alive, ſhould by law be a baſtard; and endeavours privately to conceal it's death, by burying the child or the like; the mother ſo offending ſhall ſuffer death as in the caſe of murder, unleſs ſhe can prove by one witneſs at leaſt that the child was actually born dead." See title *Baſtard.* II. 2.

Laſtly, the killing muſt be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now diſtinguiſhes murder from other killing, and this malice prepenſe, *malicia præcogitata*, is not ſo properly ſpite or malevolence to the deceaſed in particular, as any *evil deſign* in general: the dictate of a wicked, depraved and malignant heart. *Foſt.* 256: *un diſpoſition à faire un male choſe.* 2 *Rol. Rep.* 461. and it may be either *expreſs*, or *implied* in law. Expreſs is, when one with a ſedate, deliberate mind, and formed deſign, doth kill another; which formed deſign is evidenced by external circumſtances, diſcovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted ſchemes to do him ſome bodily harm. 1 *Hal. P. C.* 451. This takes in the caſe of deliberate *duelling*, where both parties meet avowedly, with an intent to murder; thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their own lives and thoſe of their fellow creatures; without any warrant or authority from any power, either divine or human, but in direct contradiction to the laws both of God and man; and therefore the law has juſtly fixed the crime and puniſhment of murder, on them, and on their ſeconds alſo. 1 *Hawk. P. C. c.* 31. § 21. & *ſeq.*

As to the firſt inſtance of this kind, it ſeems agreed, that wherever two perſons in cold blood meet and fight, on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himſelf by alledging that he was firſt ſtruck by the deceaſed; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent to vindicate his reputation, or that he meant not to kill, but only to diſarm his adverſary: For ſince he deliberately engaged in an act in defiance of the laws, he muſt at his peril abide the conſequences thereof. 1 *Hawk. P. C. c.* 31. § 21: 1 *Bulſt.* 86, 7: 2 *Bulſt.* 147: *Crom.* 22 *b*: 1 *Rol. Rep.* 360: 3 *Bulſt.* 171: *H. P. C.* 48.

From hence it clearly follows, that if two perſons quarrel over night, and appoint to fight the next day, or quarrel in the morning, and agree to fight in the afternoon, or ſuch a conſiderable time after, by which, in common intendment, it muſt be preſumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder. 1 *Hawk. P. C. c.* 31. § 22: 3 *Inſt.* 51: *H. P. C.* 48: *Kelynge* 56: 1 *Lev.* 180.

And wherever it appears, from the whole circumſtances of the caſe, that he who kills another on a ſudden quarrel was maſter of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other diſcourſe, and talk calmly thereon: or perhaps if he has ſo much conſideration as to ſay, that the place wherein the quarrel happens, is not convenient for fighting; or that if he ſhould fight at preſent, he ſhould have the diſadvantage by reaſon of the height of his ſhoes, &c. 1 *Hawk. P. C. c.* 31. § 23: *Kelynge* 56: 1 *Sid.* 177: 1 *Lev.* 180.

If *A.* on a quarrel with *B.* tells him that he will not ſtrike him, but that he will give *B.* a pot of ale to ſtrike him, and thereupon *B.* ſtrike, and *A.* kills him, he is guilty of murder; for he ſhall not elude the juſtice of the law by ſuch pretence to cover his malice. 1 *Hawk. P. C. c.* 31. § 24: *H. P. C.* 48.

In like manner, if *B.* challenge *A.* and *A.* refuſe to meet him; but in order to evade the law, tells *B.* that he ſhall go the next day to ſuch a town about his buſineſs, and accordingly *B.* meet him the next day in the road to the ſame town, and aſſault him, whereupon they

fight, and *A.* kills *B.* he is, in the opinion of *Hawkins*, guilty of murder, unleſs it appear by the whole circumſtances that he gave *B.* ſuch information accidentally, and not with a deſign to give him an opportunity of fighting. 1 *Hawk. P. C. c.* 31. § 25: *Crom.* 22 *b*: *H. P. C.* 48.

And at this day it ſeems to be ſettled, That if a man aſſaults another with *malice prepenſe*, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder in reſpect of his firſt intent. *Hawk. P. C. c.* 31. § 26: *Crom.* 22 *b*: *Dalt. cap.* 93: *H. P. C.* 47: *Kelynge* 58. *Mawgridge*'s caſe.

And it hath been adjudged, that even upon a ſudden quarrel, if a man be ſo far provoked by any bare words or geſtures of another, as to make a puſh at him with a ſword, or to ſtrike at him with any other ſuch weapon as manifeſtly indangers his life, before the other's ſword is drawn, and thereupon a fight enſue, and he who made ſuch aſſault kill the other, he is guilty of murder; becauſe that by aſſaulting the other in ſuch an outrageous manner, without giving him an opportunity to defend himſelf, he ſhewed that he intended not to fight with him, but to kill him, which violent revenge is no more excuſed by ſuch a ſlight provocation, than if there had been none at all. 1 *Hawk. P. C. c.* 31. § 27: *Crom.* 23 *a. b*: *Dalt. cap.* 93: *Kelynge* 61. *Mawgridge*'s caſe.

But it is ſaid, that if he who draws upon another in a ſudden quarrel, make no paſs at him till his ſword is drawn, and then fight with him, he is guilty of manſlaughter only; becauſe that by neglecting the opportunity of killing the other, he was on his guard, and in a condition to defend himſelf, with like hazard to both, he ſhewed that his intent was not ſo much to *kill*, as to *combat* with the other; in compliance with thoſe common notions of honour, which prevailing over reaſon, during the time that a man is under the tranſports of a ſudden paſſion, ſo far mitigate his offence in fighting, that it ſhall not be adjudged to be of *malice prepenſe*. *Hawk. P. C. c.* 31. § 28: *Kelynge* 55, 61, 131: 2 *Rol. Rep.* 461.

And if two happen to fall out upon a ſudden, and preſently agree to fight, and each of them fetch a weapon, and go into the field, and there one kills the other, he is guilty of manſlaughter only, becauſe he did it in the heat of blood, 1 *Hawk. P. C. c.* 31. § 29: *H. P. C.* 48: 3 *Inſt.* 51.

And ſuch an indulgence is ſhewn to the frailties of human nature, that where two perſons, who have formerly fought on malice, are afterwards to all appearance reconciled, and fight again on a freſh quarrel, it ſhall not be preſumed that they were moved by the old grudge, unleſs it appear by the whole circumſtances of the fact. 1 *Hawk. P. C. c.* 31. § 30: *Crom.* 23 *a*: *Dalt. cap.* 93: *H. P. C.* 49: 1 *Rol. Rep.* 360.

But the law ſo far abhors all duelling in cold blood, that not only the principal who actually kills the other, but alſo his ſeconds are guilty of murder, whether they fought or not; and ſome have gone ſo far as to hold, that the ſeconds of the perſons killed are alſo equally guilty, in reſpect of that countenance which they give to their principals in the execution of their purpoſe, by accompanying them therein, and being ready to bear a part with them: but perhaps the contrary opinion is the more plauſible; for it ſeems too ſevere a conſtruction to make a man by ſuch reaſoning the murderer of his friend, to whom he was ſo far from intending any miſchief, that he was ready to hazard his own life in his quarrel. 1 *Hawk. P. C. c.* 31. § 32: *H. P. C.* 51: *Dalt. cap.* 93.

Any formed deſign of doing miſchief may be called malice; and therefore not only ſuch killing as proceeds from premeditated hatred or revenge againſt the perſon killed, but alſo in many other caſes, ſuch as is accompanied with thoſe circumſtances that ſhew the heart to be perverſely wicked, is adjudged to be of malice *prepenſe* or *aforethought*, and conſequently murder. 1 *Hawk. P. C. c.* 31. § 18: *Kelynge* 127: *Stran.* 766.

If a man happen to kill another in the execution of a malicious and deliberate purpoſe to do him a perſonal hurt, by wounding or beating him; or in the wilful commiſſion of any unlawful act, which neceſſarily tends to raiſe tumults and quarrels, and conſequently cannot but be attended with the danger of perſonal hurt to ſome one or other; he ſhall be adjudged guilty of murder. 1 *Hawk. P. C. c.* 29. § 10: *H. P. C.* 52, 57: *Kelynge* 117.

A fortiori, He ſhall come under the ſame conſtruction, who, in the purſuance of a deliberate intention to commit a felony, chances to kill a man, as by ſhooting at tame fowl with an intent to ſteal them, *&c.* for ſuch perſons are by no means favoured, and they muſt at their peril take care of the conſequence of their actions; and it is a general rule, that wherever a man intending to commit one felony, happens to commit another, he is as much guilty as if he had intended the felony which he actually commits. 1 *Hawk. P. C. c.* 29. § 11: 3 *Inſt.* 56: *Kelynge* 117: *H. P. C.* 52.

If any one ſhoot at any wild fowl upon a tree, and the arrow killeth any reaſonable creature afar off, without any evil intent in him, this is miſadventure; for it was not unlawful to ſhoot at the wild fowl: But if he had ſhot at a cock or hen, or any tame fowl of another man's, and the arrow by miſchance had killed a man; if his intention was to ſteal the poultry (which muſt be collected from circumſtances) it will be murder by reaſon of that felonious intent: but if it was done wantonly, and without that intention, it will be barely manſlaughter. *Foſt.* 258, 9.

The rule before laid down ſuppoſeth, that the act from which death enſued, was *malum in ſe*. For if it was barely *malum prohibitum*, as ſhooting at game by a perſon not qualified by ſtatute-law to keep or uſe a gun for that purpoſe; the caſe of a perſon offending, will fall under the ſame rule as that of a qualified man. For the ſtatutes prohibiting the deſtruction of the game under certain penalties, will not, in a queſtion of this kind, enhance the accident beyond its intrinſick moment. *Foſt.* 259.

If upon a ſudden provocation one beats another in a cruel and unuſual manner, ſo that he dies, though he did not intend his death, yet he is guilty of murder by expreſs malice; that is, by an expreſs *evil deſign*, the genuine ſenſe of *malitia*. As when a park-keeper tied a boy, that was ſtealing wood, to a horſe's tail, and dragged him along the park; when a maſter corrected his ſervant with an iron bar, and a ſchoolmaſter ſtamped on his ſcholar's belly; ſo that each of the ſufferers died; theſe were juſtly held to be murders, becauſe the correction being exceſſive, and ſuch

as could not proceed but from a bad heart, it was equivalent to a deliberate act of ſlaughter. 1 *Hal. P. C.* 454, 473, 474. Neither ſhall He be guilty of a leſs crime, who kills another in conſequence of ſuch a wilful act, as ſhews him to be an enemy to all mankind in general; as going deliberately, and with an intent to do miſchief, upon a horſe uſed to ſtrike, or coolly diſcharging a gun among a multitude of people. *Ld. Raym.* 143: 1 *Hawk. P. C. c.* 29. § 12.

And it is no excuſe that he intended no harm to any one in particular, or that he meant to do it only for ſport, or to frighten the people, *&c.* *H. P. C.* 32, 44: 3 *Inſt.* 57: *Dalt. cap.* 93, 97: 11 *H.* 7. 23 *a*: *Bro. Coro.* 229.

So if a man reſolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is univerſal malice. And, if two or more come together to do an unlawful act againſt the King's peace, of which the probable conſequence might be bloodſhed, as to beat a man, to commit a riot, or to rob a park: and one of them kill a man, it is murder in them all, becauſe of the unlawful act, the *malitia præcogitata*, or evil intended before-hand. 1 *Hawk. P. C. c.* 31. § 46.

Murder occaſioned through an expreſs purpoſe to do ſome perſonal injury to him who is ſlain, is properly ſaid to be of expreſs malice: Such as happens in the execution of an unlawful action, principally intended for ſome other purpoſe, and *not expreſſed in its nature to do a perſonal injury* to him in particular that is killed, is moſt properly malice implied. *Kel.* 129, 130.

In many caſes where no malice is expreſſed, the law will imply it: as, where a man wilfully poiſons another, in ſuch a deliberate act the law preſumes malice, though no particular enmity can be proved. 1 *Hal. P. C.* 455. And if a man kills another ſuddenly, without any, or without a conſiderable provocation, the law implies malice; for no perſon, unleſs of an abandoned heart, would be guilty of ſuch an act, upon a ſlight or no apparent cauſe. No affront, by words or geſture only, is a ſufficient provocation, ſo as to excuſe or extenuate ſuch acts of violence as manifeſtly endanger the life of another. 1 *Hawk. P. C. c.* 31. § 33: 1 *Hal. P. C.* 455, 6. But if the perſon ſo provoked had unfortunately killed the other, by beating him in ſuch a manner as ſhewed only an intent to chaſtiſe and not to kill him, the law ſo far conſiders the provocation of contumelious behaviour as to judge it only manſlaughter, and not murder. *Foſt.* 291. In like manner if one kills an officer of juſtice, either civil or criminal, in the execution of his duty, or any of his aſſiſtants endeavouring to conſerve the peace, or any private perſon endeavouring to ſuppreſs an affray; or apprehends a felon, knowing his authority, or the intention with which he interpoſes; the law will imply malice; and the killer ſhall be guilty of murder. 1 *Hal. P. C.* 457: *Foſt.* 308, *&c.* And if one intends to do another felony, and undeſignedly kill a man, this is alſo murder. 1 *Hal. P. C.* 465. Thus if one ſhoots at *A.* and miſſes *him*, but kills *B.* this is murder; becauſe of the previous felonious intent, which the law transfers from one to the other. The ſame is the caſe where one lays poiſon for *A*; and *B*, againſt whom the priſoner had no malicious intent, takes it, and it kills him; this is likewiſe murder. 1 *Hal. P. C.* 466. So alſo if one gives a woman with child a medicine to procure abortion, and it operates ſo violently as to kill the woman, this is murder in the perſon who gave it. 1 *Hal. P. C.* 429.

As to ſuch murder as happens in killing another *without any provocation*, or but upon a ſlight one; it is to be obſerved, that wherever it appears that a man killed another, it ſhall be intended *primâ facie* that he did it maliciouſly, unleſs he can make out the contrary, by ſhewing that he did it on a ſudden provocation, *&c.* 1 *Hawk. P. C. c.* 31. § 32: *Kelynge* 27.

Alſo it ſeems to be agreed, that no breach of a man's word or promiſe, no treſpaſs either to lands or goods, no affront by bare words or geſtures, however falſe or malicious it may be, and aggravated with the moſt provoking circumſtances, will excuſe Him from being guilty of murder, who is ſo far tranſported thereby, as immediately to attack the perſon who offends him, in ſuch a manner as manifeſtly endangers his life, without giving him time to put himſelf upon his guard, if he kills him in purſuance of ſuch aſſault, whether the perſon ſlain did at all fight in his defence or not: for ſo baſe and cruel a revenge cannot have too ſevere a conſtruction. 1 *Hawk. P. C. c.* 31. § 33: *Kelynge* 131, 135: 2 *Rol. Rep.* 460, 461: *Dalt. cap.* 93: *Cro. Eliz.* 779: *Noy* 171: 1 *Sid.* 277: 1 *Levinz* 180: *Hob.* 121. *con*: 1 *Jon.* 432 *a.*

But if a perſon ſo provoked had beaten the other only in ſuch a manner, that it might plainly appear that he meant not to kill, but only chaſtiſe him; or if he had reſtrained himſelf till the other had put himſelf on his guard, and then in fighting with him had killed him, he had been guilty of manſlaughter only. 1 *Hawk. P. C. c.* 31. § 34: *Kelynge* 55, 61, 131.

And of the like offence ſhall he be adjudged guilty, who ſeeing two perſons fighting together on a private quarrel, whether ſudden or malicious, takes part with one of them, and kills the other. 1 *Hawk. P. C. c.* 31. § 35: *Kelynge* 61, 136: *Cro. Jac.* 296: 12 *Co.* 87.

If two having *malice* fight, and the ſervant of one of them, not knowing of the malice, killeth the other, this is murder in the maſter, and manſlaughter in the ſervant: Though if there be a conſpiracy to kill a man, but *no malice* againſt his ſervant; if the ſervant be ſlain, the malice againſt the maſter ſhall be conſtrued to extend to his ſervant: and the killing the ſervant is murder. *Dyer* 128.

He cannot be thought guilty of a greater crime, than manſlaughter, who finding a man in bed with his wife, or being actually ſtruck by him, or pulled by the noſe, or fillipped upon the forehead, immediately kills him; or who happens to kill another in a contention for the wall; or in the defence of his perſon from an unlawful arreſt; or in the defence of his houſe from thoſe who, claiming a title to it, attempt forcibly to enter it, and *to that purpoſe ſhoot at it*, *&c.* or in the defence of his poſſeſſion of a room in a public houſe, from thoſe who attempt to turn him out of it, and thereupon draw their ſwords upon him; in which caſe the killing the aſſailant hath been holden by ſome to be juſtifiable; but it is certain, that it can amount to no more than manſlaughter. 1 *Hawk. P. C. c.* 31. § 36: *H. P. C.* 57: 3 *Inſt.* 57: *Kelynge* 51, 137: *Crom.* 27 *a.*

Nor was he judged criminal in a higher degree, who ſeeing his ſon's noſe bloody, and being told by him, that he had been beaten by ſuch a boy, ran three quarters of a mile, and having found the boy, beat him *with a ſmall*

cudgel, whereof he afterwards died. 1 *Hawk. P. C. c.* 31. § 48: *Cro. Jac.* 296: 12 *Co.* 87.

Nor was he thought more criminal, who duped and encouraged by a concourſe of people, threw a pick-pocket into a pond adjoining to the road, in order to avenge the theft, by ducking him, but without any apparent intention to take away his life, and the pick-pocket was drowned; for although this mode of puniſhment is highly unjuſtifiable and illegal, yet the law reſpects the infirmities and imbecilities of human nature, where certain provocations are given: O. B. 85, N°. 751.—So alſo where three *Scotch* ſoldiers were drinking together in a public houſe, one of them ſtruck ſome ſtrangers that were drinking in another box, with a ſmall rattan; they having uſed ſeveral opprobrious epithets, reviling the character of the *Scotch* nation: an altercation enſued, and one of the ſtrangers laid hold of the ſoldier who had ſtricken, and threw him againſt a ſettle.—The altercation increaſed, and when the ſoldiers had paid the reckoning the ſtrangers again ſhoved him from the room into the paſſage; upon this, the ſoldier exclaimed, that "he did not mind killing an *Engliſh man*, more than eating a meſs of crowdy;" the ſtranger, aſſiſted by another perſon, then violently puſhed the ſoldier out of the houſe, whereupon the ſoldier inſtantly turned round, drew his ſword, and ſtabbed the ſtranger to the heart. This was adjudged *Manſlaughter*. 5 *Burr.* 2799.—But in every caſe of Homicide, upon provocation, how great ſoever it be, if there is ſufficient time for paſſion to ſubſide, and for reaſon to interpoſe, ſuch Homicide will be murder. *Foſt.* 278, 296: 1 *Hale* 486: 1 *Vent.* 158: *Raym.* 212: *Leach's Hawk. P. C.* i. *c.* 31. § 37. in *n.*

When one executes his revenge, upon a ſudden provocation, in ſuch a cruel manner, *with a dangerous weapon*, as ſhews a malicious intention to do miſchief; and death enſues, it is expreſs malice and murder from the nature of the fact. *Kel.* 55, 61, 65, 130. A man chided his ſervant, and upon ſome croſs anſwer given, he having a hot iron in his hand ran it into the ſervant's belly, of which he died, this was adjudged murder. *Kel.* 64.

If a perſon is treſpaſſing upon another, by breaking his hedges, *&c.* and the owner upon ſight thereof take up a hedge-ſtake, and give him a ſtroke on the head, whereof he dies, this is murder, becauſe *it is a violent act beyond the proportion of the provocation. H. P. C.* And where a boy was upon a tree in a park cutting of wood, and the keeper bids him come down, which he did; and then the keeper ſtruck him ſeveral blows with a cudgel, and afterwards *with a rope tied him to his horſe's tail*, and the horſe ran away with him and killed him; this was held to be murder out of malice, the boy having come down at the keeper's command. *Cro. Car.* 139: *H. P. C.*

As to ſuch murder as happens *in killing one whom the perſon killing intended to hurt* in a leſs degree; it is to be obſerved, that wherever a perſon in cool blood by way of revenge, unlawfully and deliberately beats another in ſuch a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone ſo far. 1 *Hawk. P. C. c.* 31. § 38: *Kelyn.* 119. *Mawgridge's* caſe: *H. P. C.* 49, 50, 51, 52.

Alſo it ſeems, that he who upon a ſudden provocation executeth his revenge in ſuch a cruel manner, as ſhews a cool and deliberate intent to do miſchief, is guilty of murder, if death enſue; as where the keeper of a park finding a boy ſtealing wood, tied him to a horſe's tail and beat him, whereupon the horſe ran away with him and killed him. 1 *Hawk. P. C. c.* 31. § 39: *Cro. Car.* 131: 1 *Jon.* 198: *Palm.* 545: *H. P. C.* 49.

As to the caſes where ſuch killing ſhall be adjudged murder, which happen in *the execution of an unlawful action*, principally intended for ſome other purpoſe, and not to do a perſonal injury to him in particular who happens to be ſlain, they are as follow. And *firſt*, Such killing as happens in the execution of an *unlawful* action, whereof the principal intention was to commit another felony; it ſeems agreed, that wherever a man happens to kill another in the execution of a deliberate purpoſe to commit any *felony*, he is guilty of murder; as where a perſon ſhooting at tame fowl, with an intent to ſteal them, accidentally kills a man; or where one ſets upon a man to rob him, and kills him in making reſiſtance; or where a perſon ſhooting at, or fighting with one man with a deſign to murder him, miſſes him, and kills another. 1 *Hawk. P. C. c.* 31. § 40, 41: *Kelynge* 117: *H. P. C.* 46, 50: *Dalt. cap.* 93: *Moore* 87.

And not only in ſuch caſes, where the very act of a perſon having ſuch a felonious intent, is the immediate cauſe of a third perſon's death, but alſo where it any way occaſionally cauſes ſuch a misfortune, it makes him guilty of murder; and ſuch was the caſe of the huſband, who gave a poiſoned apple to his wife, who eat not enough of it to kill her, but innocently, and againſt the huſband's will and perſuaſion, gave part of it to a child who died thereof; ſuch alſo was the caſe of the wife who mixed *ratſbane* in a potion ſent by an apothecary to her huſband, which did not kill him, but afterwards killed the apothecary, who to vindicate his reputation taſted it himſelf, having firſt ſtirred it about. Neither is it material in this caſe, that the ſtirring of the potion might make the operation of the poiſon more forcible than otherwiſe it would have been; for inaſmuch as ſuch a murderous intention, which of itſelf perhaps in ſtrictneſs might juſtly be made puniſhable with death, proves now in the event the cauſe of the King's loſing a Subject, it ſhall be as ſeverely puniſhed as if it had had the intended effect, the miſſing whereof is not owing to any want of malice, but of power. 1 *Hawk. P. C. c.* 31. § 42: *Plow. Com.* 474: 9 *Co.* 91.

But if one happened to be poiſoned by *ratſbane* laid in order to deſtroy vermine, the perſon by whom he is ſo killed, is guilty of Homicide *per infortunium* only, becauſe his intentions were wholly innocent. 1 *Hawk. P. C. c.* 31. § 43.

Alſo if a third perſon accidentally happen to be killed by one engaged in a combat with another upon a ſudden quarrel, it ſeems that he who kills him is guilty of manſlaughter only; but it hath been adjudged, that if a juſtice of peace, conſtable or watchman, or even a private perſon be killed in the endeavouring to part thoſe whom he ſees fighting, the perſon by whom he is killed, is guilty of murder; and that he cannot excuſe himſelf by alledging that what he did was in a ſudden affray in the heat of blood, and through the violence of paſſion; for he who carries his reſentment ſo high as not only to execute his revenge againſt thoſe who have affronted him, but even againſt ſuch as have no otherwiſe offended him but by doing their duty, and endeavouring to reſtrain him from breaking through his, ſhews ſuch an obſtinate contempt

contempt of the law, that he is no more to be favoured than if he had acted in cool blood. 1 *Hawk P. C. c.* 31. § 44: *H. P. C.* 45, 50: 3 *Inst.* 52: *Dalt. cap.* 93: *Savil* 67: *Kelynge* 66: 22 *Ass.* 71: 4 *Co.* 40 *b*: 9 *Co.* 68: *Crom.* 25 *a. b.*

Yet it hath been resolved, that if the third person slain in such a sudden affray, do not give notice for what purpose he comes, by commanding the parties in the King's name to keep the peace, or otherwise manifestly shewing his intention to be not to take part in the quarrel, but to appease it, he who kills him is guilty of manslaughter only, for he might suspect that he came to side with his adversary. 1 *Hawk. P. C. c.* 31. § 45: *Kelynge* 66. If the officer be within his proper district, and known, or but generally acknowledged to have the office he assumeth, the law will presume that the party killed had due notice of his intent, especially if it be in the day time. *Fost.* 135, 311.

As to such killing as happens in the execution of an *unlawful* action, where the principal design is to commit a *bare breach of the peace*, not intended against the person of him who happens to be slain; it seems clear that where divers persons resolve generally to resist all opposers in the commission of any such breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays; as by committing a violent disseisin with great numbers of people, hunting in a park, *&c.* and in so doing happen to kill a man, they are all guilty of murder; for they must at their peril abide the event of their actions, who wilfully engage in such bold disturbances of the public peace, in open opposition to, and defiance of, the justice of the nation. 1 *Hawk. P. C. c.* 31. § 46: *Savil* 67: *Moore* 86: *Palm.* 35: *Crom.* 24 *b.* 25 *a*: *H. P. C.* 47: 5 *Mod.* 285: *Dyer* 128. *pl.* 60: *S. P. C.* 17 *b.*

The fact however must appear to have been committed strictly in prosecution of the purpose for which the party was assembled. *Prin. P. L.* 234:—Therefore if divers persons be engaged in an unlawful act, and one of them with malice prepense against *one* of his companions, finding an opportunity, kills him, the rest are not concerned in the guilt of that act. *Kely.* 112: because it hath no connection with the crime in contemplation. *Prin. P. L.* 235.—So where two men were beating another man in the street, a stranger made some observations upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife. Both the men were indicted as principals in the murder, yet although both were doing an unlawful act in beating the man, as the death of the stranger did not ensue upon that act, and it appearing that only one of them intended any injury to the person killed, the judges were of opinion that he could not be guilty either as principal or accessary: and upon the case of *R.* v. *Thompson*, *Kely.* 66, 7, he was acquitted. 8 *Mod.* 164: 12 *Mod.* 629: Yet see 12 *Mod.* 256:—*Leach's Hawk. P. C.* i. *c.* 31. § 46, in *n.*

Where divers rioters, having forcible possession of a house, afterwards killed the person whom they had ejected, as he was endeavouring in the night forcibly to regain the possession, and *to fire the house*, they were adjudged guilty of manslaughter only, notwithstanding they did the fact in maintenance of a deliberate injury; perhaps for this reason, *because the person slain was so much in fault himself.* 1 *Hawk. P. C. c.* 31. § 47: *Crom.* 28 *b*: *H. P. C.* 56.

But if in such, or any other quarrel, whether it were sudden or premeditated, a justice of peace, constable or watchman, or even a private person, be slain in endeavouring to keep the peace, and suppress the affray, he who kills him is guilty of murder; for notwithstanding it was not his primary intention to commit a felony, yet inasmuch as he persists in a less offence with so much obstinacy as to go on in it to the hazard of the lives of those who no otherwise offend him, but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he seems to be in this respect equally criminal, as if his intention had been to commit a felony. 1 *Hawk. P. C. c.* 31. § 48: *H. P. C.* 45: *Dalt. cap.* 93: 3 *Inst.* 52: *Kelyn.* 66: 22 *Ass.* 71: 4 *Co.* 40 *b*: 9 *Co.* 68: *Crom.* 25. See *supra.*

If one attack another to rob him, and by the resistance of the party kills him, this is *murder.* 3 *Inst.* 52: *Dalt.* 344. A person stands by and encourages or commands another to *murder* a man; or if he come with others on purpose to kill him, and stand by while the other persons commit the fact: It will be *murder* in them all. *Plowd.* 98: 11 *Rep.* 5. And if two or more persons come together to do an unlawful act, as to beat a man, rob a park, *&c.* and one of them kills a person, this is *murder* in all present, aiding or assisting, or that were ready to aid and assist: All will be said to intend the *murder.* 3 *Inst.* 56: *Dalt.* 347: *H. P. C.* 31. And such persons will be judged to be present who are in the same house, though in another room, or in the same park, although half a mile off, *&c. H. P. C.* 47: *Kel.* 87, 116, 127. See tit. *Accessary.*

Several persons having conspired to enter the King's park, and to hunt and carry away deer, *with design of killing any one that should oppose them*; though the keeper's servant began the assault, and required them first to stand, whereupon they fled, and one of the keeper's men discharged a piece at them, and they continued their flight until he laid violent hands upon one of the offenders, and then, and not before, they killed one of the keeper's servants, this was held to be *murder*; as they were doing an unlawful act, the law implies malice, and they ought not to have fled, but to have surrendered themselves. *Roll. Rep.* 20.

As to such killing, as happens in the execution of an *unlawful* action, the principal motive whereof was *to assist a third person*; it seems clear, that if a master maliciously intending to kill another take his servants with him, without acquainting them with his purpose, and meet his adversary and fight with him, and the servants seeing their master engaged take part with him, and kill the other, they are guilty of manslaughter only, but the master of murder. *Pl. Com.* 100, 101 *a*: *Crom.* 23: *Dalt. cap.* 93: *H. P. C.* 51, 52: 1 *Hawk. P. C. c.* 31. § 49—Though if the master have malice, and he tells his servants of it, and that his intention is to kill the party, and they go with the master, if they kill another, it is murder both in master and servant. *Dy.* 26: 9 *Rep.* 66: *Plowd.* 100.

And therefore it follows *à fortiori*, that if a man's servant or friend, or even a stranger, coming suddenly, see him fighting with another and side with him, and kill the other; or seeing his sword broken lend him another, wherewith he kills the other, he is guilty of manslaughter only. 1 *Hawk. P. C. c.* 31. § 50: *Crom.* 26 *b*: *H. P. C.* 57: *Dalt. cap.* 94: 1 *Rol. Rep.* 407, 408: 3 *Bulst.* 206: *H. P. C.* 52.

Yet

Yet in this very caſe, if the perſon killed were a bailiff, or other officer of juſtice, reſiſted by the maſter, &c. in due execution of his duty, ſuch friend or ſervant, &c. are guilty of murder, whether they knew the perſon ſlain were an officer or not. *Kelynge* 67, 86, 87. But perhaps it may be objected, that in this laſt caſe there ſeems to be no more malice than in the former; and ſuch third perſon being wholly ignorant that the party killed was an officer, ſeems to be no more in fault than if he had been a private perſon. To this it may be anſwered, that all fighting is highly unlawful, and that he who on a ſudden ſeeing perſons engaged in it, is ſo far from endeavouring to part them, as every good Subject ought, that he takes part with one ſide, and fights in the quarrel, without knowing the cauſe of it, ſhews a high contempt of the laws, and a readineſs to break through them on a ſmall occaſion, and muſt at his peril take heed what he does; and conſequently might perhaps in ſtrict juſtice be adjudged in the foregoing caſes to act with *malice*, which *doth not always ſignify a particular ill-will againſt the perſon killed*, as appears by many of the above-mentioned caſes; and tho' ſuch perſons be favoured in reſpect of the ſuddenneſs of the occaſion where both the quarrel and the perſons are private, yet he muſt not expect ſuch indulgence, where the fight, in which he ſo raſhly engages, was begun in oppoſition to the juſtice of the nation, and a perſon happens to be killed thereby who engaged in maintenance thereof, and on that account is under its more particular care; and it may be juſtly challenged, that his oppoſers be made examples to deter others from joining in ſuch unwarrantable quarrels. 1 *Sid.* 160: *Noy* 50: *Plow. Com.* 100.—See 1 *Hawk. P. C. c.* 31. § 51-53.

But if a man ſeeing another arreſted, and reſtrained from his liberty, under colour of a 'preſs-warrant or civil proceſs, &c. by thoſe who in truth have no ſuch authority, happen to kill ſuch treſpaſſers' in reſcuing the perſon oppreſſed, he ſhall be adjudged guilty of manſlaughter only, notwithſtanding the injured perſon ſubmitted to them, and endeavoured not to reſcue himſelf; and the perſon who reſcued him, did not know that he was illegally arreſted; for ſince in the event it appears, that the perſons ſlain were treſpaſſers, covering their violence with a ſhew of juſtice, he who kills them is indulged by the law, which in theſe caſes judges by *the event*, which thoſe who engage in ſuch unlawful actions muſt abide at their peril. *Kelynge* 66, 137: *Crom.* 27 *a*, *Dent's* caſe: 1 *Hawk. P. C. c.* 31. § 54.—But the principles upon which this caſe was determined, are very elegantly and warmly controverted by Mr. Juſtice *Foſter*, *p.* 315—318.

There were two men in an inner chamber, quarrelling, and together by the ears; a brother of one of them ſtanding at the door, that could not get in, cried to his brother to make him ſure, and preſently after he gave the other a mortal wound; this was held *manſlaughter* in him that ſtood at the door. *Shep. Abr.* 493.

As to ſuch killing as happens in the execution of an *unlawful* action, whereof *the direct deſign was to eſcape from an arreſt*, it ſeems to be agreed that whoever kills a ſheriff, or any of his officers, in the lawful execution of civil proceſs, as on arreſting a perſon upon a *capias*, &c. is guilty of murder. 1 *Hawk. P. C. c.* 31. § 55: *Dalt. cap.* 93: *H. P. C.* 45: *Crom.* 24 *a*.

Neither is it any excuſe to ſuch a perſon, that the proceſs was erroneous, (for it is not void by being ſo,) or that the arreſt was in the night, or that the officer did not tell him for what cauſe he arreſted him, and out of what court, (which is not neceſſary when prevented by the party's reſiſtance): or that the officer did not ſhew his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a ſpecial one. 9 *Co.* 66, 68: *Cro. Jac.* 280, 486: 6 *Co.* 68 *b*: 69 *a*: 1 *Hawk. P. C. c.* 31. § 56.

Yet the killing of an officer in ſome caſes will be manſlaughter only; as, where the warrant by which he acts gives him no authority to arreſt the party; as where a bailiff arreſts *J. S.* a baronet, who never was knighted; by force of a warrant to arreſt *J. S.* knight. 1 *Hawk. P. C. c.* 31. §. 57: *Cro. Car.* 372: 1 *Jon.* 346: 12 *Co.* 49. So where a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door or window to arreſt a man; or perhaps if he arreſt one on a *Sunday* ſince *ſtat.* 29 *Car.* 2. *cap.* 7. by which all ſuch arreſts are made unlawful. *H. P. C.* 46: 1 *Hawk. P. C. c.* 31. § 58.

If a bailiff is killed in executing a lawful warrant, &c. it is *murder*: Nor is it any excuſe to the perſon, that the proceſs was erroneous; or that the arreſt was in the night; that the officer did not tell him for what cauſe he arreſted him; or that he did not ſhew his warrant, &c. being a bailiff commonly known. 9 *Rep.* 68, 69: *Cro. Jac.* 280, 486. But if a bailiff who is not executing his office is killed, it is not *murder*; for he ought to be duly executing his office, by ſerving the proceſs of the law, wherein he is aſſiſted *cum poteſtate Regis & Legis*. *Cro. Car.* 537: 2 *Lill. Abr.* 212. Therefore where the warrant by which he acts gives him no authority to arreſt the party; as where a bailiff arreſts a wrong perſon, or *J. S.* a baronet, by force of a warrant to arreſt *J. S.* knight; or if a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door, or window, to arreſt a man; or perhaps if he arreſt one on a *Sunday*; ſince the *ſtat.* 29 *Car.* 2. *c.* 7, by which all ſuch arreſts are made unlawful, and he is ſlain; malice ſhall not be implied to make it *murder*, but it ſhall be manſlaughter only. *H. P. C.* 46: *Cro. Car.* 372: 12 *Rep.* 49: 1 *Hawk. c.* 31. § 58. If bailiffs come to a houſe to arreſt a perſon, and the houſe being locked they attempt to break in, whereupon the ſon of the perſon intended to be arreſted, ſhoots and kills one of them, it is not *murder*. *Jones* 429: See *Foſter's Rep.* 135, 138. 270, 308, 312, 318, 321.

A perſon was arreſted, and another not knowing the cauſe of the ſtruggle, but ſeeing ſwords drawn, and to prevent miſchief, came and defended the party arreſted, and in the ſcuffle the bailiff was killed; it was reſolved to be no *murder* in the perſon doing it, but that all that were preſent and aſſiſting, *knowing of the arreſt*, were principal *murderers*. *Kel.* 86. Though it has been held in ſuch a caſe, that the perſon offending is guilty of *murder*, whether he knew that the perſon ſlain were an officer or not; for *all fighting is unlawful*, and he who, ſeeing perſons engaged in it, takes part with one ſide, and fights in the quarrel *without knowing the cauſe of it*, eſpecially where the fight is begun in oppoſition to the juſtice of the nation, ſhews a readineſs to break through the laws on a ſmall occaſion, and muſt at his peril take heed what he doth. 1 *Sid.* 160: *Noy* 50. See *ante*.

As to ſuch killing as happens in the execution of an *unlawful action*, whereof *the principal purpoſe was to uſurp an illegal*

illegal authority; it seems clear, that if persons take upon them to put others to death, either by virtue of a new commission wholly unknown to our laws, or by virtue of an unknown jurisdiction, which clearly extends not to cases of this nature; as if the court of Common Pleas cause a man to be executed for treason or felony; or the Court Martial, in time of peace, put a man to death by the martial law, both the judges and officers are guilty of murder. 1 *Hawk. P. C. c.* 31. § 59: *H. P. C.* 46.

But where persons act by virtue of a commission, which, if it were strictly regular, would undoubtedly give them full authority, but which happens to be defective only in some point of *form*; it seems that they are no way criminal. 1 *Hawk. P. C. c.* 31. § 60.

As to such killing as happens in the execution of an *unlawful* action, where *no mischief was intended at all*, it is said, that if a person happen to occasion the death of another, in doing any idle wanton action, which cannot but be attended with the manifest danger of some other; as by riding with a horse known to be used to kick among a multitude of people, by which he means no more than to divert himself by putting them in a fright, he is guilty of murder. 1 *Hawk.* 87.

It has been already mentioned to have been anciently holden, that if a person not duly authorized to be a physician or surgeon, undertake a cure, and the patient die under his hand, he is guilty of felony; but in as much as the books wherein this opinion is holden were written before the statute of 23 *H.* 8. *c.* 1, which first excluded such felonious killing, as may be called *wilful murder or malice prepense*, from the benefit of clergy, it may be well questioned, whether such killing shall be said to be of malice prepense, within the intent of that statute; however, it is certainly highly rash and presumptuous for unskilful persons to undertake matters of this nature; and indeed the law cannot be well too severe in this case, in order to deter ignorant people from endeavouring to get a livelihood by such practice, which cannot be followed without the manifest hazard of the lives of those who have to do with them: but surely the charitable endeavours of those gentlemen who study to qualify themselves to give advice of this kind, in order to assist their poor neighbours, can by no means deserve so severe a construction from their happening to fall into some mistakes in their prescriptions, from which the most learned and experienced cannot always be secure. 1 *Hawk. P. C. c.* 31 § 62: *S. P. C.* 16 *b*: *Pult.* 32 *b*: *Crom.* 27: 43 *Ed.* 3. 33 *b*: *Fitz. Coron.* 163. See *Dalt. cap.* 93.

It were endless to go through all the cases of Homicide which have been adjudged either expressly or impliedly, malicious: the above therefore may suffice as a pretty ample specimen: and we may make it for a general rule that all Homicide is malicious and of course amounts to murder, unless where, 1. *justified* by the command or permission of the law; 2. *excused* on the account of accident or self-preservation; or 3. *alleviated* into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. For all Homicide is presumed to be malicious, until the contrary appeareth upon evidence. *Foft.* 255.

The *punishment* of murder, and that of manslaughter were formerly one and the same; both having the benefit of clergy: so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. 1 *Hal. P. C.* 450. But by several statutes the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors. See *Stats.* 23 *Hen.* 8. *c.* 12: 1 *Ed.* 6. *c.* 12: 4 & 5 *P.* & *M. c.* 4. And tit. *Clergy, Benefit of.*

The Principal in murder is therefore now ousted of clergy in all cases, and the Accessary *before* is also ousted of clergy in all cases, but the Accessary *after* is in no case ousted of clergy. 2 *Hale's H.* 344.

In atrocious cases, it was frequently usual for the court to direct the murderer, after execution to be hung upon a gibbet in chains near the place where the fact was committed: but this was no part of the legal judgment; and the like is still sometimes practised in the case of notorious thieves. But now in *England*, it is enacted by *stat.* 25 *Geo.* 2. *c.* 37, that the Judge before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it; and shall in passing sentence direct him to be executed on the next day but one (unless the same shall be *Sunday*, and then on the *Monday* following) and that his body be delivered to the surgeons to be dissected and anatomized; and that the Judge may direct his body to be afterwards hung in chains, but in no wise to be buried without dissection. See *Foft.* 107. And during the short but awful interval between sentence and execution the prisoner shall be kept alone, and sustained only with bread and water. But a power is allowed to the Judge upon good and sufficient cause to respite the execution and relax the other restraints of the act. See tit. *Execution of Criminals.*

At a meeting of the Judges to consider of this act there was some doubt whether *hanging in chains* might ever be made *part of the sentence*; but on debate it was agreed by nine judges, that in all cases within the act, the *judgment* for *dissecting and anatomizing only* should be *part of the sentence*, and if it should be thought adviseable, the judge might *afterwards* direct the *hanging in chains* by *special order* to the sheriff, pursuant to the power given by the act. *Foft.* 107.

4. By the Roman law *Parricide*, or the murder of one's parents or children, was punished in a much severer manner than any other kind of Homicide. But the *English* laws treat it no otherwise than as simple murder, unless the child was also the servant of his parent; probably under the idea of the impossibility of committing so enormous a crime.

But though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder denominates it a new offence, no less than a species of treason, called *parva proditio*, or *Petit Treason*: which is however nothing else but an aggravated degree of murder; although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason. And thus, in the antient *Gothic* constitution, we find the breach both of natural and civil relations ranked in the same class with crimes against the State and Sovereign.

PETIT

PETIT TREASON, according to the *ſtat.* 25 *E.* 3. *c.* 2, may happen three ways: by a ſervant killing his maſter, a wife her huſband, or an eccleſiaſtical perſon (either ſecular or regular,) his ſuperior, to whom he owes faith and obedience. A ſervant who kills his maſter whom he has left upon a grudge conceived againſt him during his ſervice, is guilty of petit treaſon, for the traiterous intention was hatched while the relation ſubſiſted between them, and this is only an execution of that intention. 1 *Hawk. P. C.* 89: 1 *Hal. P. C.* 380. So if a wife be divorced *à menſa et thoro*, ſtill the *vinculum matrimonii* ſubſiſts; and if ſhe kills ſuch divorced huſband, ſhe is a traitreſs. 1 *Hal. P. C.* 381.

A wife divorced *cauſâ adulterii vel ſævitiæ*, is ſtill within this law, becauſe the bond of matrimony is not thereby diſſolved, and ſhe may again lawfully cohabit with her huſband. But a divorce *cauſâ conſanguinitatis vel pre-contractûs*, entirely diſſolves the nuptial tie, and annihilates the very character of wife.—Therefore a wife *de facto* only, and not *de jure* cannot commit this crime, for ſhe has no lawful lord to whom ſhe owes ſubjection and obedience.—Neither can a huſband be guilty of this crime by killing his wife *de jure*, for there is no reciprocity of obedience and ſubjection.—*Leach's Hawk. P. C.* i. *c.* 32. § 7.

A clergyman is underſtood to owe canonical obedience to the biſhop who ordained him, to him in whoſe dioceſe he is beneficed, and alſo to the metropolitan of ſuch ſuffragan or dioceſan biſhop; and therefore to kill any of theſe is petit treaſon. 1 *Hal. P. C.* 381. As to the reſt, whatever has been ſaid, or remains to be obſerved, with reſpect to wilful murder, is alſo applicable to the crime of petit treaſon, which is no other than murder in it's moſt odious degree: except that the trial ſhall be as in caſes of high treaſon, before the improvements therein made by the ſtatutes of *William* 3. *Foſt.* 337. But a perſon indicted of petit treaſon may be acquitted thereof, and found guilty of manſlaughter or murder. *Foſt.* 106: 1 *Hal. P. C.* 378: 2 *Hal. P. C.* 184; and in ſuch caſe it ſhould ſeem that *two* witneſſes are not neceſſary, as in caſe of petit treaſon they are. Which crime is alſo diſtinguiſhed from murder in it's puniſhment. 4 *Comm. c.* 14.

An appeal of death will lie, and *autrefoits acquit* or *attaint* in murder is a good bar, in petit treaſon; and *è converſo.* 2 *Hale* 246, 253: 3 *Inſt.* 213. It is included in a pardon under the name of murder. 1 *Hal.* 378. And the offender may be *indicted* either for petit treaſon, murder or manſlaughter, and tried and found guilty on ſuch indictment, of either of thoſe crimes reſpectively, according as the caſe may appear upon the evidence. 1 *Hal.* 378: *Foſter* 326.—But if the proſecutor be appriſed of the real caſe, he ought to adapt the bill to the truth of the fact. *Foſt.* 104, 326. For though the offences are to moſt purpoſes conſidered as ſubſtantially the ſame, yet there is, as we have ſeen, ſome difference with regard to the judgment; and alſo a very material one with regard to the trial. *Foſt.* 327.—On the trial the priſoner is entitled to a peremptory challenge of *thirty five*. *Foſt.* 327.—Two witneſſes, it is alſo poſitively ſtated, by *Foſter*, are required both on the indictment and at the trial. *Foſt.* 337: See *ſtat.* 1 *Ed.* 6. *c.* 12: And the *ſtat.* 5 & 6 *Ed.* 6. *c.* 11, by general words extending to all treaſons, requireth that the witneſſes, *if living*, ſhall be examined in perſon upon the trial in open court. Depoſitions therefore taken before the coroner, or informations taken by a juſtice of the peace, are not evidence whereon to ground a conviction of petty treaſon, if the party be living, though unable to travel, or kept out of the way by the priſoner, or his procurement. *Foſt.* 337. cites *ſtat.* 1 & 2 *P. & M. c.* 13: 1 *Hale* 305: 2 *Hale* 284.

The puniſhment of petit treaſon, in a man, is to be drawn and hanged, and in a woman was formerly to be drawn and burned, but which latter ſentence is now changed to hanging by *ſtat.* 30 *Geo.* 3. *c.* 48. See title *Judgment in criminal caſes.* Perſons guilty of petit treaſon were firſt debarred the benefit of clergy by *ſtat.* 12 *H.* 7. *c.* 7, which has been ſince extended to their aiders, abettors, and counſellors, by *ſtat.* 23 *Hen.* 8. *c.* 1: 4 & 5 *P. & M. c.* 4. See title *Clergy Benefit of.*

HOMINATIO. *Domeſday*, tit. *Northampton Sockmanni de Riſden.*—The muſtering of men; alſo the doing of homage. *Cowell edit.* 1727.

HOMINE CAPTO IN WITHERNAMIUM. A writ to take him that hath taken any bondman or woman, and led him or her out of the country, ſo that he or ſhe cannot be *replevied* according to law. *Reg. Orig. fol.* 79. See this Dict. tit. *Withernam.*

HOMINE ELIGENDO AD CUSTODIENDAM PECIAM SIGILLI PRO MERCATORIBUS EDITI. A writ directed to a corporation, for the choice of a new perſon to keep one part of the ſeal appointed for *Statutes merchant*, when a former is dead, according to the ſtatute of *Acton-Burnel. Reg. Orig.* 178.

HOMINE REPLEGIANDO. A writ to bail a man out of priſon: *F. N. B. fol.* 6: *Reg. Orig. fol.* 77.

This writ lies where a perſon is in priſon, (not by ſpecial commandment of the King, or his Judges, or for any crime or cauſe irrepleviſable,) directed to the ſheriff to cauſe him to be *replevied*: in the ſame manner that chattels taken in diſtreſs may be replevied; and if the perſon be conveyed out of the ſheriff's juriſdiction, he may return, that the defendant hath *eſſoined* the plaintiff's body, ſo that he cannot deliver him; then the plaintiff ſhall have a *capias in withernam* to take the defendant's body, and keep him without bail or mainprize till he produces the party. 3 *Comm.* 129. *c.* 8. And if the ſheriff return *non eſt inventus* in that writ againſt the body, the plaintiff ſhall have a *capias* againſt the defendant's goods, &c.. *F. N. B.* 66: *New Nat. Br.* 151, 152.

Where one takes away ſecretly, or keeps in his cuſtody another man againſt his will, upon oath made thereof, and a petition to the Lord Chancellor, he will grant a writ of *replegiari facias*, with an *alias* and *pluries*, upon which the ſheriff returns an *elongatus*, and thereupon iſſues out a *capias in withernam*: and when the party is taken, the ſheriff cannot take bail for him; but the court where the writ is returnable may, if they think fit, grant a *habeas corpus* to the ſheriff to bring him into court and bail him. 2 *Lill.* 23.

In a *Homine replegiando* it hath been adjudged, that it doth not differ from a common *replevin*, on which the ſheriff muſt return a *deliberari feci*, or an excuſe why he doth not: that where he cannot make deliverance, if he return an *elongatus*, the defendant is not concluded by that return

return to plead *non cepit*: and after the return of an *elongatus*, and a *capias in withernam*, if the defendant pleads this plea, he ſhall be bailed, for the *withernam* is no execution: and after a defendant is bailed upon the *capias in withernam*, there may be a new *withernam* againſt him. And it was held, that in a *homine replegiando* after an *elongatus* returned, if the defendant comes in *gratis*, and calls for a declaration, and pleads *non cepit*, he ſhall not be obliged to give bail, but if he come in upon the return of the *capias*, he muſt give bail, and ſhall not be admitted to it till he call for a declaration, and plead *non cepit*. 2 *Salk.* 381.

The ſheriff returned an *elongavit* in a *homine replegiando*, and then a *capias in withernam* went forth; afterwards the defendant, having entered an appearance, moved for a *ſuperſedeas* to the *withernam*, and offered to plead *non cepit*; which was oppoſed, unleſs he would give bail to deliver the perſon, in caſe the iſſue was found againſt him: though it was ruled, that if any property had been pleaded in the party then the defendant ought to give bail to deliver him; but he ſays he hath not the perſon, and therefore *non cepit* is a proper plea, and he ſhall put in bail to appear *de die in diem*. In this caſe the defendant ſhall not be compelled to *gage deliverance*; and a *ſuperſedeas* was granted to the *withernam*. See 4 *Mod.* 183.

A *homine replegiando* cannot be brought either by the wife herſelf, or by her *prochein amy* againſt her huſband; and the nature and proceedings in the writ ſhew it to be ſo. *Ch. Prec.* 492.

This writ is now ſeldom uſed to deliver a perſon out of cuſtody, being ſuperſeded by the more beneficial effects of the writ of *Habeas Corpus*. See that title.

HOMINES; A term applied to a ſort of *feudatory* tenants, who claimed a privilege of having their cauſes and perſons tried only in the court of their lord: and when *Gerard de Canvil*, *Anno* 5 *R.* 1, was charged with treaſon and other miſdemeanors, he pleaded that he was *Homo comitis Johannis*, *&c.* and would ſtand to the law and juſtice of his court. *Paroch. Antiq.* 152.

HOMIPLAGIUM; Is uſed in the laws of *Hen.* 1. *cap.* 80, for the maiming a man. *Si quis in domo vel curia Regis fecerit homicidium vel* homiplagium.

HOMO. This *Latin* word includes both man and woman, in a large or general underſtanding. 2 *Inſt.* 45.

HOMSTALE. A home-ſtall, or manſion-houſe. As in a charter granted about the 5 *Ed.* I. *Cowell.*

HOND-HABEND, See *Hand-habend.* It alſo ſignifies the right which the lord hath of determining the offence in his court.

HONEY. All veſſels of honey are to be marked with the name of the owner, and be of a certain content, under penalties; and if any *honey* ſold, be corrupted with any deceitful mixture, the ſeller ſhall forfeit the *honey*, &c. *Stat.* 23 *Eliz. c.* 8.

HONOUR, Is, beſides the general ſignification, uſed eſpecially for the more noble ſort of *Seigniories*, on which other inferior Lordſhips or Manors depend, by performance of ſome cuſtoms or ſervices to thoſe who are lords of them; (though anciently *honor* and *baronia* ſignified the ſame thing.) See *Spelman*, in v. *Honor.* The manner of creating theſe *Honours* by act of parliament, may in part be collected out of the ſtatute of 33 *Hen.* 8. *cc.* 37, 38.

In the early times of our legal conſtitution, the King's greater barons, who had a large extent of territory held under the crown, granted out frequently ſmaller manors to inferior perſons to be holden of themſelves; which do now therefore continue to be holden under a ſuperior lord, who is called in ſuch caſes the lord paramount over all theſe manors: and his ſeignory is frequently termed an *Honour*, not a manor; eſpecially if it hath belonged to an ancient feodal baron, or hath at any time been in the hands of the crown. 2 *Comm.* 91. *c.* 6. See title *Tenure.*

An Honour ought to conſiſt of lands, liberties, and franchiſes. 1 *Bulſt.* 197: 2 *Rol.* 72. *l.* 48. And it is the moſt noble ſeigniory. *Co. Lit.* 108 *a.* One or more manors may be parcel of an Honour. 2 *Rol.* 72. *l.* 45. So a foreſt may be appendant to it. 2 *Rol.* 73. *l.* 3.

An *Honour* originally ſhall be created by the King. *Co. Lit.* 108 *a.* Every *Honour* muſt be holden of the King. *R.* 1 *Bul.* 195. And if it be aſſigned, or granted over to another, it ſhall not be holden of a Subject. For it may be granted by the King to a Subject. A man may claim an *Honour* by grant, or by preſcription. But the King at this day cannot make an *Honour* by grant, without an act of parliament. *R.* 1 *Bul.* 195, 196: *Co. Lit.* 108 *a.* See *Cowell* title *Honour.*

The following is a liſt of *Honours* within the realm, *viz. Ampthill*, (by *Stat.* 33 *H.* 8. *c.* 37.) *Aquila*, (formerly *Pevenſey*) *Arundel*, (See *poſt*) *Abergavenny*, *Boloine*, *Berkhamſtead*, *Beaulieu*, *Barnard's Caſtle*, *Bullingbroke*, *Barſtable*, *Bonenia*, *Brecknock*, *Brember*, *Bedford*, *Clare*, *Crevecure*, *Clun*, *Chriſtchurch*, *Cockermouth*, *Cormayls*, *Candicut*, *Cariſbrook*, *Clifford Caſtle*, *Cheſter*, *Carmarthen*, and *Cardigan*, *Donnington Caſtle*, (by *ſtat.* 37 *H.* 8. *c.* 18,)—*Dudley*, and *Dover Caſtle*, *Eye*, and *Egremond.*

The *Honour* of *Eaſt* and *Weſt Greenwich*, *Glamorgan*, *Gloceſter*, *Grentmeſnil*, *Gower*, *Grafton*, (by *ſtat.* 33 *H.* 8. *c.* 38,)—*Haganet*, *Hampton Court*, (by *ſtat.* 31 *H.* 8. *c.* 5,)—*Huntindon*, (in *Herefordſhire*) *Hevenyngham*, *Hawenden-Caſtle*, *Hertford*, and *Halton*, *Lancaſter*, *Lincoln*, *Leiceſter*, *Lovetot*, *Hinckley*, *Kingſton upon Hull*, (by *ſtat.* 37 *H.* 8. *c.* 18.)—*Kington*, and *Folkingham.*

The *Honour* of *Montgomery*, *Mowbray*, *Middleham*, and *Maidſtone*, *Nottingham*, *Newelbn* or *Newelme*, *Oakhampton*, *St. Oſith*, (by *ſtat.* 37 *H.* 8. *c.* 18,)—*Oxford.*

The *Honour* of *Plimpton*, *Peverel*, *Pickering*, *Raleigh*, *Richard's Caſtle*, *Skipton*, *Stafford*, *Strigul*, *Tickhil*, *Tremanton*, *Totneſs*, *Theony*, *Tamworth.*

The *Honour* of *Wigmore*, *Wallingford*, *Weſtminſter* (by *ſtat.* 37 *H.* 8. *c.* 18,)—*Windſor*, *Wormgay*, *Whirwelton*, (in *Yorkſhire*) *Werk*, *Whitchurch*, and *Warwick*, *Webley*, and *Tutbury.*

The King granted to a Subject a great manor, called *an Honour*, and paſſed it by the name of *an Honour*, and well. *Jenk.* 277. *pl.* 99.

It is illegal to purchaſe *honour* (as a dukedom) for money. *Vern.* 5. See title *Peers.*

At this day the Earl of *Arundel* only hath his Earldom by preſcription, the beginning of which is not within the memory of any one; ſo that his Earldom is the moſt ancient in the realm. 1 *Bulſt.* 196.—See title *Peers.*

HONOUR-COURTS, Are courts held within the *honours*, or manors laſt noticed, mentioned in the *ſtat.* 33 *Hen.* 8. *cap.* 37. There is alſo a *Court of Honour* of the *Earl Marſhal of England*, &c. which determines diſputes concerning precedency and points of *Honour.* 2 *Hawk. P. C.* This court of *Honour*, which is alſo exerciſed to do juſtice to *Heralds*, is a court by preſcription, and has a priſon belonging to it, called the *White Lyon* in *Southwark.* 2 *Nelſ.* 935. See title *Court of Chivalry.*

HONOURARY (or HONORARY) FEUDS, Are titles of nobility, descendible to the eldest son in exclusion of all the rest. See title *Tenures*.

HONOURARY SERVICES, Are those that are incident to the tenure of *Grand Sergeanty*, and commonly annexed to some *honour*. *Stat.* 12 *Car.* 2. 29.

HONTFONGENETHEF. *Cum omnibus aliis libertatibus tantummodo* hontfongenethef *mihi retento.—Charta Wil. Comitis Mateſialſci. In Mon. Angl.* 1 *par. fo.* 724.

This should have been written *hondfangenethef*, and signifies a *thief*, taken with *hondhabend*, *i. e.* having the thing stolen in his hand. *Cowell.*—See *Backberind.*

HOPCON, Signifies a valley, in *Domesday Book*; so do *hope*, *hawgh* and *howgh*. *Cowell. edit.* 1727.

HOPS AND HOP-BINDS. Penalty on importing or using corrupt hops, *stat.* 1 *Jac.* 1. *c.* 18.—No bitter to be used in brewing but hops, *Stat.* 9 *Ann. c.* 12. § 24.—No hops to be imported into *Ireland* from other parts but *Great Britain*, *Stat.* 5 *G.* 2. *c.* 9.—Landing foreign hops before duty paid, hops to be burnt, and ship forfeited, *Stat.* 7 *Geo.* 2. *c.* 19.—Penalty on sophisticating hops, 7 *Geo.* 2. *c.* 19. *sect.* 2.—Cutting hop-binds, 10 *Geo.* 2. *c.* 32. *sect.* 4.—By *Stat.* 6 *Geo.* 2. *c.* 37. *sect.* 6, Unlawfully and maliciously cutting hop-binds is made felony without benefit of clergy.—The duty upon hops is a branch of the Excise and regulated by many *statutes* made for the purpose.

HORA AURORÆ, The morning bell, or what we now call the *four o'clock bell*, was anciently called *Hora Auroræ*; as our eight o'clock bell, or the bell in the evening, was called *Ignitegium* or *Coverfeu. Cowell.*

HORDERA, from the Sax. *Hord*, *Thesaurus.*] A treasurer: and hence we have the word *Hord* or *Hoard*, as used for treasuring or laying up a thing. *Leg. Adelstan. cap.* 2.

HORDERIUM, A hoard, a treasury, or repository. *L. Canuti, c.* 104.

HORDEUM PALMALE. Beer-barley, which in *Norfolk* is called sprat-barley, and battledore-barley; and in the marches of *Wales cymridge*, it being broader in the ear, and more like a *band* than the common barley, which in old deeds is called *Hordeum quadragesimale. Cowell.*

HORNE-BEAME POLLENGERS. Trees so called, that have been usually lopped, and are about twenty years growth, and therefore not tithable. *Plowden, fol.* 407: *Soby's* case.

HORNEGELD, from the *Saxon* word *horn*, *cornu*, and *geld*, *solutio.*] A tax within a forest, to be paid for horned beasts. *Cromp. Jurisd.* 197. And to be free thereof is a privilege granted by the King unto such as he thinketh good. *Cowell, edit.* 1727.

HORN WITH HORN, OR HORN UNDER HORN. The promiscuous feeding of bulls and cows, or all *horned* beasts, that are allowed to run together upon the same common. *Spelman.* To which may be added, that the commoning of cattle *horn with horn*, was properly when the inhabitants of several parishes let their common herds run upon the same open spacious common, that lay within the bounds of several parishes, and therefore, that there might be no dispute upon the right of tithes, the bishop ordains, that the cows should pay all profit to the minister of the parish where the owner lived, *&c. Cowell.*

HORNAGIUM. *Horngeld*; See that title.

HORNERS. No stranger was to buy any *English* horns gathered or growing in *London*, or within twenty-four miles thereof, by the *Stat.* 4 *Ed.* 4. *c.* 8. And none may sell *English horns* unwrought to any stranger, or send them beyond sea, on pain of forfeiting double value: the wardens of *Horners* in *London* may search all wares, *&c. stat.* 7 *Jac.* 1. *cap.* 14. See title *London.*

HORS DE SON FEE, Fr. *i. e.* out of his fee.] An exception to avoid an action brought for rent or services, *&c.* issuing out of land, by him that pretends to be the lord; for if the defendant can prove that the land is *without the compass* of his *fee*, the action falls. *Broke.* In an *avowry*, a stranger may plead generally *hors de son fee*; and so may tenant for years: and such stranger to the *avowry*, being made a party, is at liberty to plead any matter in abatement of it. 9 *Rep.* 30: 2 *Mod.* 104. A tenant in fee-simple ought either to disclaim, or plead *Hors de son fee.* 1 *Danv. Abr.* 655: *Vide* 9 *Rep*; *Bucknal's case*, 22 *Hen.* 6. 2, 3: *Keilw.* 73, 14: *Aff. pl.* 13: *Co. Lit.* 1 *b*: 2 *Mod.* 103, 104; & 14 *Vin. Abr. tit. Hors de son fee.* See title *Pleading.*

HORSE-BREAD, Inn-keepers shall not make horse-bread. *Statutes.* 13 *Ric.* 2. *stat.* 1. *c.* 8: 4 *Hen.* 4. *c.* 25. Permitted to bake horse-bread, *Stat.* 32 *Hen.* 8. *c.* 41.

HORSES.

Were not to be conveyed out of the realm, without the King's licence, *&c.* on pain of forfeiture, by an ancient statute, 11 *H.* 7. *c.* 13. Persons having lands of inheritance in parks, *&c.* were ordered to keep two mares apt to bear foals thirteen hands high, for the increase of the breed of *horses*, on pain of 40*s.* for every month they are wanting; and not suffer them to be leaped by stoned *horses* under fourteen hands, on a certain penalty by *stat.* 27 *Hen.* 8. *c.* 6. And for the preservation of a strong breed of *Horses*, stone-horses above two years old are directed to be fifteen hands high, or they shall not be put into forests or commons, where mares are kept, upon pain of forfeiture; and scabbed or infected *Horses* shall not be put into common fields, under the penalty of 10*s.* leviable by the Lord of the leet. *Stat.* 32 *H.* 8. *c.* 13; still in force.

Stealing of any horse, gelding, or mare, is felony without benefit of clergy; but accessaries to this offence are not excluded clergy. *stat.* 1 *Ed.* 6. *c.* 12: 2 & 3 *Ed.* 6. *c.* 33. The first made stealing horses geldings or mares felony; a doubt was entertained whether this extended to the stealing *one* horse, *&c.* on which the latter act was passed. And if any *Horse* that is stolen be not sold according to the statute 2 & 3 *P. & M. c.* 7; the owner may take the *Horse* again wherever he finds him, or have action of *detinue*, *&c.* To prevent *Horses* being stolen and sold in private places, this *stat.* 2 & 3 *P. & M. c.* 7, provides, that owners of fairs and markets shall appoint toll-takers or book-keepers, who are to enter the names of buyers and sellers of *Horses*, *&c.* And to alter the property, the *Horses* must be rid or stand in the open fair one hour; and all the parties to the contract must be present with the *Horse.*—And by *stat.* 31 *Eliz. cap.* 12, sellers of *Horses* are to procure vouchers of the sale to them; and the names of the buyer, seller and voucher, and price of the *Horse* are to be entered in the toll taker's book, and a note thereof delivered to the buyer; and if any person shall

ſhall ſell a *Horſe* without being known to the book-keeper, or bringing a voucher; or if any one ſhall vouch without knowing the ſeller: or the book-keeper ſhall make an entry without knowing either, in either of theſe caſes the ſale is void, and a forfeiture is incurred of 5 *l.* and the ſaid ſtatute provides that a *Horſe* ſtolen, though ſold according to the direction of the act, may be redeemed and taken by the owner within ſix months, repaying the buyer what he ſhall ſwear he gave for the ſame.

By *ſtat.* 22 & 23 *Car.* 2. *c.* 7, Any perſon maliciouſly killing or deſtroying any horſes in the night ſhall be guilty of felony, puniſhable by tranſportation for ſeven years.—Maliciouſly hurting or wounding horſes in the night, to forfeit treble damages to the owner.

Duties are impoſed by *ſtats.* 24 *Geo.* 3. *ſt.* 2. *c.* 31: 25 *Geo.* 3. *c.* 47: 29 *Geo.* 3. *c.* 49, or perſons keeping Horſes to ride or draw in a carriage.—Theſe are now 10 *s.* for one horſe;—5 *s.* additional (*i. e.* in the whole 15 *s.*) for a ſecond horſe;—7 *s.* 6 *d.* additional (*i. e.* 17 *s.* 6 *d.*) each for a third, fourth and fifth horſe; and where ſix or more are kept 20 *s.* for each except the firſt.—The *ſtat.* 26 *Geo.* 3. *c.* 79, excepts Horſes *bona fide* uſed in huſbandry, trade, and on particular occaſions only; ſuch as going to church, or market, or election for a member of parliament, &c. The ſaid *ſtat.* 24 *Geo.* 3. *c.* 31, allows horſe dealers to be exempted from the tax on taking out an annual licenſe paying 10 *l.* in *London*, &c. and 5 *l.* elſewhere.—As to *poſt horſes* and the duty on them, See title *Poſt.*—As to Horſes in Hackney Coaches. See title *Coach.*

Horſe-ſtealing having got to a great pitch, and many of thoſe uſeful animals having been ſtolen, merely for the purpoſe of ſelling them as dogs meat, and for their hides, the following ſtatute was made to put a ſtop to this iniquitous traffick.

By *Stat.* 26 *Geo.* 3. *c.* 71, No perſon ſhall keep any place for ſlaughtering any horſe or other cattle, not killed, for butcher's meat, without taking out a licence at the general quarter ſeſſions, to be granted upon a certificate of the miniſter and churchwardens that the perſon applying is proper to be truſted with the carrying on ſuch buſineſs. § 1.

Such licence to be ſigned by the Juſtices at ſeſſions, and a copy entered in a book to be kept for that purpoſe by the clerk of the peace, and all perſons ſo licenſed ſhall cauſe to be painted over their gates, their name and the words "licenſed for ſlaughtering Horſes purſuant to an act paſſed in the 26th year of his Majeſty King *George* III." § 2.

Every occupier of ſuch licenſed ſlaughter-houſe ſhall, ſix hours previous to the ſlaughtering any live horſe, or to the flaying any horſe brought dead to the ſlaughtering houſe, give notice in writing to the after-mentioned inſpector, who is to take an exact account of the height, age, colour and particular marks of every horſe, &c. and keep the ſame in a book. [ſee *ſect.* 5.] And no ſuch Horſe ſhall be ſlaughtered or flay'd but between 8 in the morning and 4 in the evening, from *October* to *March*, both incluſive, and between 6 in the morning and 8 in the evening from *April* to *September* both incluſive. § 3.

Every perſon ſo licenſed ſhall at the time any horſe, &c. ſhall be brought, make an entry in a book of the name and abode, and profeſſion of the owner, and alſo of the perſon who ſhall bring the ſame to be ſlaughtered or flayed and the reaſon why the ſame is ſo brought; which book ſhall, at all times be open for the examination of the inſpector, and produced before any juſtice, when required. § 4.

The pariſhioners in veſtry ſhall annually or oftner appoint one or more perſons to be inſpectors of ſuch ſlaughtering houſe: And in caſe ſuch inſpector ſhall upon examination of any Horſe, &c. intended to be ſlaughtered believe that ſuch Horſe, &c. is free from diſeaſe, and in a ſound and ſerviceable ſtate, or that the ſame has been ſtolen, he ſhall prohibit the ſlaughtering ſuch Horſe, &c. for not exceeding 8 days; and in the mean time ſhall cauſe an advertiſement to be inſerted in ſome public newſpaper twice or oftner (unleſs the owner of ſuch Horſe ſhall ſooner claim the ſame) at the expence of the occupier of ſuch ſlaughtering houſe; who on refuſal to pay the ſame, ſhall forfeit double the amount, to be raiſed by diſtreſs. § 5.

Every inſpector may at all times in the day or night, but if in the night, then in the preſence of a conſtable, enter into and inſpect any place kept for ſlaughtering horſes by licenſed perſons, and take an account of the Horſes, &c. there. § 6.

In caſe any perſon offering to ſale or bringing any Horſe, &c. to be ſlaughtered or flayed ſhall refuſe to give an account of himſelf, or of the means the ſame came into his poſſeſſion, or if there be reaſon to ſuſpect that ſuch Horſe, &c. is ſtolen; ſuch perſon ſhall be carried before a juſtice of peace, who ſhall commit him for not more than 6 days to be further examined, and if ſuch juſtice ſhall be ſatisfied that ſuch Horſe, &c. is ſtolen, the perſon bringing the ſame is to be committed to gaol to be dealt with according to law. § 7.

Any perſon keeping ſuch ſlaughtering houſe tranſgreſſing the rules before laid down by the act, ſhall be guilty of *felony* and puniſhed by fine and impriſonment, and ſuch corporal puniſhment by whipping, or ſhall be tranſported for not more than 7 years, as the court ſhall direct. § 8.

Any ſuch perſon deſtroying or defacing with lime, or burying the hide or ſkin of any horſe, &c. or being guilty of any offence againſt this act for which no puniſhment or penalty is provided ſhall be adjudged guilty of a miſdemeanor, and puniſhed by fine and impriſonment and ſuch corporal puniſhment by whipping, as the court ſhall direct. § 9.

Making falſe entries ſubjects the party to a forfeiture not exceeding 20 *l.* nor leſs than 10 *l.* to be levied by diſtreſs; half to the informer and half to the poor; and in caſe the offender ſhall not have effects to the amount of the penalty, he may be committed to hard labour in the houſe of correction for not more than 3 months, nor leſs than one. § 10.

The book of the inſpector ſhall be produced at every general quarter ſeſſions. § 12.

If any perſon ſhall occaſionally lend any barn or place for ſlaughtering any horſe, &c. without taking out ſuch licence he ſhall forfeit not more than 20 *l.* nor leſs than 10 *l.* half to the informer and half to the poor; or be committed to gaol for not more than 3 months nor leſs than 1, unleſs the penalty is ſooner paid. § 13.

This act does not extend to curriers, &c. nor to farriers, nor perſons killing Horſes, &c. to feed their own dogs. § 14.

If any currier, tanner, &c. ſhall under colour of their trades, knowingly kill any ſound horſe, or boil the fleſh thereof to ſell, ſuch tradeſman becomes an offender under the act, and ſhall forfeit not more than 20 *l.* nor leſs than 10 *l.* § 15.

[The forms of the ſeveral convictions are ſpecified in the act.]

HORSES HIRED, Action of treſpaſs on the caſe lies for abuſing a *horſe* hired, by immoderate riding, &c. And a difference has been made in our law between *hiring* a *horſe*, and *borrowing* one to go a journey: for in the *firſt* caſe the party may ſet his *ſervant*, &c. upon the horſe, but not in the *ſecond*. 1 *Mod.* 210. See title *Bailment*.

HORSES FOR THE KING'S SERVICE. None ſhall take the *Horſe* of any perſon to ſerve the King without the owner's conſent, or ſufficient warrant, on pain of impriſonment, &c. *ſtat.* 20 *R.* 2. *c.* 5.

HORSE-RACES, For ſmall ſums, having encouraged idleneſs, and impoveriſhed the meaner ſort of people; it is enacted, that no perſon ſhall run any *horſe* at a *race*, unleſs it be his own, nor enter more than one *horſe* for the ſame plate, upon pain of forfeiting the *horſes*; and no plate, is to be run for under 50 *l.* on the penalty of 500 *l.* Alſo every *horſe race* muſt be begun and ended in the ſame day, &c. *Stat.* 13 *Geo.* 2. *cap.* 19.

Horſes at *races* to be entered by the owners, 13 *Geo.* 2. *c.* 19. *Horſe*-racing with *horſes* carrying ſmall weights, prohibited. *Ib. Horſes* may run for the value of 50 *l.* with any weight and at any place, 18 *Geo.* 2. *c.* 34. *ſect.* 11.

A plaintiff ſhall not be allowed to recover a wager on ſuch an horſe-race, as is illegal within the ſtatute. 4 *Term Rep.* 1. A match for 25 *l.* a ſide is a match for 50 *l.* See this Dict. tit. *Gaming*.

The *ſtat.* 24 *Geo.* 3. *c.* 31, impoſes an annnual duty of 2 guineas on *Race-Horſes*.

HORSTILERS, Fr. *Hoſteliers.*] Is uſed for Innkeepers: and in ſome old books the word *hoſtlers* is taken in the ſame ſenſe. *ſtat.* 31 *Ed.* 3. *c.* 2. The executors of *Horſtelers* are not chargeable, for their faults. 1 *Keb.* 682.

HOSPES GENERALIS, A great chamberlain.—*Volumus, quantum ad* hoſpitia *pertinet, omnes indifferenter noſtro* hoſpiti generali *obediant*, &c. *Du Cange*.

HOSPITALLERS, *Hoſpitalarii.*] Were the knights of a religious order, ſo called becauſe they built an *hoſpital* at *Jeruſalem*, wherein pilgrims were received. To theſe Pope *Clement* transferred the Templars, which order, by a council held at *Vienne* in *France*, he ſuppreſſed for their many and great offences. The inſtitution of their order was firſt allowed by Pope *Gelaſius* the Second *anno* 1118; and confirmed in this kingdom by Parliament, and had many privileges granted them, as immunities from payment of tithes, &c. Their privileges were reſerved to them by *Magna Charta cap.* 37; and the right of the King's Subjects vindicated from the uſurpation of their juriſdiction, by the ſtatute of *Weſtm.* 2. *cap.* 43. Their chief abode is now in *Malta*, an iſland given them by the Emperor *Charles* V. after they were driven from *Rhodes* by *Solyman* the Magnificent, Emperor of the *Turks*; and for that they are now called *Knights of Malta*. All the lands and goods of theſe knights here in *England* were given to the King, by 32 *Hen.* 8. *c.* 34: See *Mon. Angl.* 2 *par. fol.* 489: *Tho. Walſingh. in Hiſt. E.* II: *Stowe's Ann. ib.* See title *Knights Templars*.

HOSPITALS

Are either *Aggregate*, in which the maſter or warden and his brethren have the eſtate of inheritance; or *Sole*, in which the maſter, &c. only has the eſtate in him, and the brethren, or ſiſters, having college, and common ſeal in them, muſt conſent, or the maſter alone has the eſtate not having college, or common ſeal. So Hoſpitals are *eligible*, *donative*, or *preſentative*. 1 *Inſt.* 342. *a.*

The Maſter of the Hoſpital, who has college, and common ſeal, may have a writ of right; for the right, and inheritance is in him. If he has no college, or common ſeal, he may have a *juris utrum*. *Co. Lit.* 341 *b*: 342 *a*.

Any perſon ſeiſed of an eſtate in fee-ſimple may by deed inrolled in *Chancery* erect and found an *Hoſpital* for the ſuſtenance and relief of the poor, to continue for ever; and place ſuch heads, &c. therein as he ſhall think fit: and ſuch *Hoſpital* ſhall be incorporated, and ſubject to ſuch viſitors, &c. as the Founder ſhall nominate; alſo ſuch corporations have power to take and purchaſe lands not exceeding 200 *l. per annum*, ſo as the ſame be not holden of the King, &c. and to make leaſes for twenty-one years, reſerving the accuſtomed yearly rent: but no *Hoſpital* is to be erected unleſs upon the foundation it be endowed with lands or hereditaments of the clear yearly value of 10 *l. per annum*. *Stat.* 39 *Eliz. cap.* 5; made perpetual by *Stat.* 21 *Jac.* 1. § 1.

It has been adjudged upon this ſtatute, that if lands given to an *Hoſpital* be at the time of the foundation or endowment of the yearly value of 200 *l.* or under, and afterwards they become of greater value by good huſbandry, accidents, &c. they ſhall continue good to be enjoyed by the *Hoſpital*, although they be above the yearly value of 200 *l.* And goods and chattels (real or perſonal) may be taken of what value ſoever. 2 *Inſt.* 722. And if one give his land then worth 10 *l.* a year to maintain poor, &c. and the land after comes to be worth 100 *l.* a year, it muſt all of it be employed to increaſe their maintenance, and none of it may be converted to private uſe. 8 *Rep.* 130.

If a deviſe be to the poor people maintained in the *Hoſpital* of St. *Lawrence* in *Reading*, &c. (where the mayor and burgeſſes capable to take in mortmain, do govern the *Hoſpital*) albeit the poor, not being a corporation, are not capable by that name to take; yet the deviſe is good; and commiſſioners appointed to enquire into lands given to *Hoſpitals*, &c. may order him that hath the land to aſſure it to the mayor and burgeſſes for the maintenance of the *Hoſpital*. *Stat.* 43 *Eliz. c.* 4. See titles *Charitable Uſes*, *Mortmain*.

A gift muſt be to the poor, and not to the aged or impotent of ſuch a pariſh, without expreſſing their poverty; for poverty is the principal circumſtance to bring the gift within the *ſtat.* 43 *Eliz. c.* 4. Although at Common-law a corporation may be of an *Hoſpital*, that is *in poteſtate* of certain perſons to be governors of the *Hoſpital* and not of the perſons placed therein: the ſafeſt way upon the *ſtat.* 39 *Eliz. c.* 5, is firſt to prepare the *Hoſpital*, and to place the poor therein, and to incorporate the perſons therein placed; and after the incorporation, to convey the lands, tenements, &c. to the ſaid corporation, by bargain and ſale, or otherwiſe, between the Founder of the one part, and the maſter and brethren, &c. of the other part, in conſideration of 5 *s.* in hand paid by the maſter of the ſaid *Hoſpital*, &c. 2 *Inſt.* 724, 725. And the Founder

Founder cannot erect an *Hospital* for years, lives, or any other limited time, but it must be for ever, according to the *Stat.* 39 *Eliz. c.* 5. See 10 *Rep.* 17, 34.

The *Stat.* 43 *Eliz. c.* 4, under which *Commissions* may be awarded to certain persons to enquire of lands or goods given to *Hospitals*; and the *Lord Chancellor* is empowered to issue commissions to commissioners for enquiring by a jury, of all grants, abuses, breaches of trust, &c. of lands given to charitable uses, does not extend to lands given to any college or hall in the Universities, &c. nor to any *hospital* over which special governors are appointed by the Founders; and it shall not be prejudicial to the jurisdiction of the bishop or ordinary, as to his power of inquiry into and reforming abuses of *Hospitals*, by virtue of the *Stat.* 2 *Hen.* 5. *st.* 1. *c.* 1. &c. See this Dict. tit. *Charitable Uses.*

These commissioners may order houses to be repaired, by those who receive the rents; see that the lands be let at the utmost rent; and on any tenant's committing waste, by cutting down and sale of timber, they may decree satisfaction, and that the lease shall be void. *Hil.* 11 *Car.* Where money is kept back, and not paid, or paid where it should not, they have power to order the payment of it to the right use: and if money is detained in the hands of executors, &c. any great length of time, they may decree the money to be paid, with damages for detaining it. *Duke Read.* 123. See 4 *Rep.* 104.

The *Hospital* of *St. Cross* near *Winchester*, and several other large *hospitals*, were anciently founded by *particular statutes*, or acts of parliament. And King *Charles* I. granted to the Mayor and commonalty of *London* the keeping of *Bethlem Hospital*, and the manors and lands belonging to it. Also there is now an *Hospital* in *London* for *Foundling Children*, under the care of governors and guardians, who may purchase lands or tenements to the value of 4000 *l.* a year: and they are to receive as many such *children*, as they think fit, which may be brought to the *Hospital* and shall there be bred up and employed, or placed apprentice to any trade, or the sea service, the males till the age of twenty-four, and the females till twenty-one. They may likewise be let out or hired, &c. See *Stats.* 13 *Geo.* 2. *cap.* 29: 29 *Geo.* 2. *c.* 29. § 13: 30 *Geo.* 2. *c.* 26. § 14—See also *stat.* 13 *Geo.* 3. *c.* 82, regulating *Lying-in Hospitals*, and ordering them to be licenced. And further in general this Dict. titles *Mortmain*; *Corporation* I. IV

HOSPITALARIA, *See Hostilaria.*

HOSPITIUM, *Hostagium.* Procuration, or visitation-money. *Neubrigensis, lib.* 4. *c.* 14: *Brompton, fol.* 1193.

HOSTELAGIUM, a right to have lodging and entertainment; reserved by Lords in the houses of their tenants. *Cartular. Radinges, M. S.* 157.

HOSTELER, *Hostellarius.* From the Fr. *hosteler*, i. e. *hospes.*] An Inn-keeper, See *Stat.* 31 *E.* 3. *st.* 2. *c.* 2: and this Dict. title *Hostelers.*

HOSTLERS, Inn-keepers, See *Stat.* 9 *Ed.* 3. *st.* 2. *c.* 2.

HOSTERIUM, A hoe, an instrument well known: *Chart. Antiq.*

HOSTIÆ, Hoast bread, or consecrated wafers in the *Holy Eucharist*: and from this word *hostia*, *Somner* derives the Sax. *husel*, used for the Lord's supper, and *huslian* to administer the sacrament; which were kept long in our old *English*, under *housel*, and to *housal*. *Paroch. Antiq.* 270.

Shakespeare uses the term *unhouseled*, &c. in *Hamlet*; meaning that his father gave up the ghost, without having the holy bread, or sacrament, administered to him. See *Fabian's Chron.* edit. 1516. fo. 14.

HOSTILARIUS, An *hospitaller.*

HOSTILARIA, HOSPITALARIA, A place or room in religious houses, allotted to the use of receiving guests and strangers; for the care of which there was a peculiar officer appointed, called *Hostillarius*, and *Hospitalarius.* *Cart. Eccl. Elv MSS.*

HOSTRICUS, *Austricus*, from the Lat. *astur.*] a goshawk. *Paroch. Antiquities*, p. 569.

HOTCHPOT, *In partem positio.*] A word brought from the Fr. *hotchepot*, used for a confused mingling of divers things together, and among the *Dutch* it signifies flesh cut into pieces, and sodden with herbs or roots; but by a *metaphor* it is *A blending or mixing of lands given in marriage, with other lands in fee falling by descent*: as if a man seised of thirty acres of land in fee, hath issue only two daughters, and he gives with one of them ten acres in marriage to the man that marries her; and dies seised of the other twenty acres: now she that is thus married, to gain her share of the rest of the land, must put her part given in marriage, into *Hotchpot*, *i. e.* she must refuse to take the sole profits thereof, and cause her land to be mingled with the other; so that an equal division may be made of the whole between her and her sister, as if none had been given to her; and thus for her ten acres she shall have fifteen, otherwise her sister will have the twenty acres of which her father died seised. *Lit.* 55: *Co. Lit. lib.* 3. *cap.* 12.

This seems to be a right of waiving a provision, made for a child in a man's life-time, at his death, though as it depends upon *frank-marriage*, and gifts of lands therein, it now seldom happens. See this Dict. tit. *Parceners.*

But there a bringing of *money* into *Hotchpot*, upon the clauses and within the intent of the statute for distribution of intestates' estates, *Stat.* 22 & 23 *Car.* 2. *c.* 10. Where a certain sum is to be raised, and paid to a daughter for her portion, by a marriage settlement, this has been decreed to be an advancement by the father in his life-time, within the meaning of the *statute*, though future and contingent; and if the daughter would have any further share of her father's personal estate, she must bring this *money* into *Hotchpot*; and shall not have both the one and the other. 1 *Eq. Ab.* 253; See 2 *Vern.* 638. and this Dict. tit. *Executor*, V. 8.

By the custom of *London*, there is likewise a term of *Hotchpot*, where the children of a *freeman* are to have an equal share of one third part of his personal estate, after his death. *Preced. Canc.* 3. See title *London*: & title *Executor*, V. 9.

There is also in the Civil law *collatio bonorum* answerable to this, whereby if a child advanced by the father, do after his father's decease challenge a child's part with the rest he must cast in all that he had formerly received, and then take out an equal share with the others. *Cowell.* See farther *Britton, c.* 72: *Lit. sect.* 267, 268: 2 *Comm.* 190. 517.

HOVEL, *Mandra.*] A place wherein husbandmen set their ploughs and carts out of the rain or sun. *Law Lat. Dict.*

HOUNSLOW HEATH, A large *heath* containing 4293 acres of ground and extending into several parishes; so much thereof as is in the King's inheritance, and fit for pasture, meadow, or other several grounds, shall be of the nature of *copyhold lands*; or the steward of the manor may let it for twenty-one years, &c. and the lessees may improve the same. *Stat.* 37 *H.* 8. *c.* 2.

HOUR, *Hora.*] Is a certain space of time of sixty minutes, twenty-four of which make the natural day. It is not material at what *hour* of the day one is born. *Co. Lit.* 135. See titles *Age*: *Fraction*: *Time*.

HOUSAGE, A fee paid for *housing* goods by a carrier, or at a wharf or key, &c. *Shep. Epit.* 1725.

HOUSE, *Domus.*] A place of dwelling or habitation; also a family or household. Every man has a right to air and light, in his own *house*; and therefore if any thing of infectious smell be laid near the house of another, or his lights be stopped up and darkened by buildings, &c. they are nusances punishable by our laws. 3 *Inst.* 231: 1 *Danv. Abr.* 173. But for a prospect, which is only matter of delight, no action will lie for its being stopped. 9 *Rep.* 58. See title *Nusance*.

The dwelling *house* of every man, is as his castle; therefore if thieves come to a man's *house* to rob or kill him, and the owner or his servant kill the thieves in defending him and his *house*, that is not felony, nor shall he forfeit any thing. 2 *Inst.* 316. See title *Homicide*. A man ought to use his own *house*, so as not to damnify his neighbour: and one may compel another to repair his *house*, in several cases, by the writ *de domo reparanda*. 1 *Salk. Rep.* 360. Doors of a *house* may *not* be broke open on arrests, unless it be for treason. or felony, &c. *H. P. C.* 137: *Plowd.* 5: 5 *Rep.* 91. Se tit. *Arrest*.

Several things have been resolved on the subject, as to the protection a man's house affords him, as, 1. That every man's house is as his castle, as well to defend him against injuries as for his repose. 2. Upon recovery in any real action or ejectment, the sheriff may break the house and deliver seisin, &c. to the plaintiff, the writ being *habere facias seisinam* or *possessionem*; and after judgment it is not the house of the defendant in right and judgment of law. 3. In all cases, where the King is party, the sheriff (if no door be open) may break the party's house to take him, or to execute other process of the King, if he cannot otherwise enter; but he ought first to signify the cause of his coming, and request the door to be opened; and this appears by the *Stat. Westm.* 1. *c.* 17, which is only in affirmance of the Common-law; and without default in the owner, the law will not suffer a house to be broken. 4. In all cases, when the door is open, the sheriff may enter and make execution at the suit of any Subject, either of body or goods; but otherwise where the door is shut, there he cannot break it to execute process at the suit of a Subject. 5. Though a house is a castle for the owner himself and his family and his own goods, &c. yet it is no protection for a stranger flying thither, or the goods of such an one, to prevent lawful execution; and therefore in such case, after request to enter, and denial, the sheriff may break the house. 5 *Rep.* 91 *a* to 93 *a*.

From the particular and tender regard which the law of *England* has to a man's house arises in part the animadversion of the law upon *eaves-droppers*, *nusancers* and *incendiaries*: and to this principle it must be assigned that a man may assemble people together lawfully (at least if they do not exceed *eleven*) without danger of raising a *riot*, *rout*, or unlawful assembly, in order to protect and defend his house, which he is not permitted to do in any other case. 4 *Comm. c.* 19. *p.* 223 cites 1 *Hal. P. C.* 547.

Commissioners of bankruptcy cannot break open a house to search for the bankrupt's goods, unless it be the house of the bankrupt. 2 *Show.* 247. See title *Bankrupt*.

Hundred liable to damages by the burning of houses, 9 *G.* 1. *c.* 22. *sect.* 7. See further titles *Arrest*; *Execution*; *Constable*; *Homicide*, &c. as to the cases in which officers may break open a house to execute legal process. As to the *House-tax*,—See this Dict. tit. *Taxes*.—As to felonies in or relative to Houses, See titles *Arson*; *Burglary*; *Felony*; *Larceny*; *Riot*; *Robbery*, &c.

HOUSEBOLD AND HAYBOLD, Seem to signify *housebote* and *hedgebote*, in *Mon. Ang.* 2. *par. fol.* 633: *Cowell, edit.* 1727.

HOUSEBOTE, A compound of *house* and *bote*, *i. e. compensatio*; signifies *estovers*, or an allowance of necessary timber out of the lord's wood, for the repairing and support of a *house* or tenement. And this belongs of common right to any lessee for years or for life: but if he take more than is needful, he may be punished by an action of waste. *Housebote*, says *Co.* on *Lit fo.* 41, is twofold, *viz. Estoveriam ædificandi & ardendi. Cowell.* See titles *Bote*; *Estovers*; *Common of Estover*..

HOUSE-BREAKING, OR HOUSE ROBBING, See See titles *Burglary*; *Larceny*; *Robbery*.

HOUSE-BURNING, See *Arson*; *Burning*.

HOUSE OF CORRECTION. In every county of *England* there shall be a *House of correction* built at the charge of the county, with conveniencies for the setting of people to work, or every justice of peace shall forfeit 5 *l.* and the justices in sessions are to appoint governors or masters of such *Houses of correction*, and their salaries, &c. which are to be paid quarterly by the treasurer out of the county stock: These governors are to set the persons sent on work, and moderately correct them, by whipping, &c. and to yield a true account every quarter-sessions of persons committed to their custody; and if they suffer any to escape or neglect their duty, the justices may fine them. See *Stats.* 7 *Jac.* 1. *c.* 4: 14 *Geo.* 2. *c.* 33.

The *House of correction* is chiefly for the punishing of idle and disorderly persons; parents of bastard children, beggars, servants running away; trespassers, rogues, vagabonds, &c. Poor persons refusing to work are to be there whipped, and set to work and labour: and any person who lives extravagantly, having no visible estate to support him, may be sent to the *House of correction*, and set at work there, and may be continued there until he gives the justice satisfaction in respect to his living; but not be whipped. A person ought to be convicted of vagrancy, &c. before he is ordered to be whipped. 2 *Bulst.* 351: *Sid.* 281. *Bridewell* is a prison for correction in *London*, and one may be sent thither. *Style* 57.

By *Stats.* 14 *Geo.* 2. *c.* 33: 17 *Geo.* 2. *c.* 5, upon presentment of the Grand Jury, or under *Stat.* 22 *Geo.* 3. *c.* 64, on presentment of any one justice, on view, the justices at Sessions may build, or purchase land for building, or enlarge, buy or hire fit *Houses of correction*. And the justices are to take care that the *House of correction* be provided with proper materials for relieving, employing and correcting persons sent to the same: And two justices shall visit the same twice or oftener in a year, and examine

examine into the eſtate and management thereof, and report the ſame at the Seſſions. The governor or maſter of a *Houſe of correction* miſbehaving himſelf, may be fined or turned out, at the diſcretion of the juſtices. Offenders liable to be ſent to the *Houſe of correction*, where the time and manner of their puniſhment is not expreſsly limited by law, may be committed until the next Seſſions, ot until diſcharged by due courſe of law.

By the ſaid *Stat.* 22 *Geo.* 3. *c.* 64. § 1, and the *Stat.* 24 *Geo.* 3. *ſt.* 2. *c.* 55. § 1, the Quarter Seſſions may appoint certain juſtices to be viſitors and inſpectors of ſuch houſes.—The *Stat.* 31 *Geo.* 3. *c.* 46, regulates the appointment and conduct of the governor and other officers of ſuch houſes; as alſo the appointment of the viſiting juſtices.—The above ſtatutes contain alſo many other regulations as to ſuch *Houſes of correction*, a ſchedule of *Rules and Orders* for their government, as to employing and feeding the perſons therein; and which rules and orders are to be fixed up in every Houſe of Correction. See further titles *Poor*; *Tranſportation*; *Vagrants*.

HOUSEL, See *Hoſtiæ*.

HOUSEHOLDER, *Pater-familias.*] Is the occupier of a houſe, a houſe keeper or maſter of a family.

HREDIGE, Readily, or quickly. *Leg. Adelſtan. c.* 16. From the Sax. *herdinge*, *i. e. brevi*, in a ſhort time. *Cowell.*

HUDEGELD, See *Hidgild.*

HUDSON'S BAY COMPANY.—An excluſive trade to a part of *America*, was granted in 1670, by *Charles* II, *to the Governor and Company of Adventurers of England trading to Hudſon's Bay*: They were to have the ſole trade and commerce of and to all the ſeas, bays, ſtraits, creeks, lakes, rivers and ſounds in whatſoever latitude, that lie within the entrance of the Streight commonly called *Hudſon's Streights*; together with all the lands, countries and territories upon the coaſts of ſuch ſeas, bays and ſtreights, which were then poſſeſſed by any *Engliſh* Subject, or the Subjects of any other Chriſtian State; together with the fiſhing of all ſorts of fiſh, of whales, ſturgeon and all other royal fiſh, together with the royalty of the ſea. But this extenſive charter has not received any parliamentary confirmation or ſanction. *Reeves's Law of Shipping.* See this Dict. title *Navigation Acts.*

HUE-AND-CRY,

HUTESIUM ET CLAMOR; from two *French* words *Huer* and *Crier*, both ſignifying to ſhout or *cry* aloud.] *Manwood in his Foreſt Law, cap.* 19. *num.* 11, ſaith, that *Hue* in Latin, *eſt vox dolentis*, as ſignifying the complaint of the party, and *Cry* is the purſuit of the felon upon the highway upon that complaint; for if the party robbed, or any in the company of one robbed or murdered, come to the conſtable of the next town, and deſire him to raiſe the *Hue* and *Cry*, that is, make the complaint known, and follow the purſuit after the offender, deſcribing the party, and ſhewing as near as he can which way he went; the conſtable ought forthwith to call upon the pariſh for aid in ſeeking the felon, and if he be not found there, then to give the next conſtable notice, and the next, until the offender be apprehended, or at leaſt until he be thus purſued unto the ſea ſide. Of this See *Bracton, lib.* 3. *tract.* 2. *cap.* 5: *Smith de Rep. Anglor. lib.* 2. *cap.* 20, and the *Stat.* of *Wincheſter*, 13 *Edw.* 1: *Stats.* 28 *Ed.* 3. 11: 27 *Eliz.* 13.

The *Normans* had ſuch purſuit with a *Cry* after offenders, which they called *Clamor de haro*; See *Grand Cuſtumary, cap.* 54. And it may probably be derived from *harrier*, *flagitare*. *Hue* is uſed alone in *Stat.* 4 *Ed.* 1. *ſt.* 2. In the ancient records this is called *Huteſium & clamor*. See 2 *Inſt. fol.* 172.

But the *clamor de haro* was not a purſuit after offenders, but a challenge of any thing to be his own after this manner, *viz.* He who demanded the thing did with a loud voice, before many witneſſes, affirm it to be his proper goods, and demanded reſtitution. This the *Scots* call *huteſium*; and *Skene* ſaith, it is reduced from the French *oyer*, *i. e. audire*, (or rather *oyez*,) being a *Cry* uſed before a proclamation; the manner of their *Hue and Cry* he thus deſcribeth; If a robbery be done, a horn is blown, and an *out-cry* made, after which, if the party flee away, and doth not yield himſelf to the King's bailiff, he may lawfully be ſlain, and hanged upon the next gallows. See *Skene* in v. *Huteſium.*

In *Rot. Clauſ.* 30 *H.* 3. *m.* 5, we find a command to the King's treaſurer, to take the city of *London* into the King's hands, becauſe the citizens did not, *ſecundum legem & conſuetudinem Regni*, raiſe the *Hue and Cry* for the death of *Guido de Aretto* and others who were ſlain. *Cowell.*

Hue and Cry, is alſo defined the purſuit of an offender from town to town till he be taken; which all that are preſent when a felony is committed, or a dangerous wound given, are by the Common-law, as well as by the ſtatute, bound to raiſe againſt the offenders who eſcape, on pain of fine and impriſonment. 3 *Inſt.* 116, 117: 2 *Inſt.* 172: *Dalt. Juſtice, cap.* 28, 109: *Fitz. Coron.* 395: *Cro. Eliz.* 654.

The raiſing of *Hue and Cry* is enjoined by the Common law, which may be called a raiſing of it at the ſuit of the King; as well as by ſeveral acts of parliament, which may be called a raiſing of it at the ſuit of a private perſon. 3 *New Abr.* 61.

HUE AND CRY, ſays *Blackſtone*, is the old Common-law proceſs, of purſuing with horn and with voice, all felons, and ſuch as have dangerouſly wounded another. *Bract. l.* 3. *tr.* 2. *c.* 1. § 1: *Mirr. c.* 2. § 6. It is alſo mentioned in *Stat. Weſtm.* 1, 3 *E.* 1. *c.* 9, and 4 *E.* 1. *de officio coronatoris.* But the principal ſtatute relative to this matter, is that of *Wincheſter* 13 *E.* 1. *cc.* 1, 4, which directs, that from henceforth every county ſhall be ſo well kept, that immediately upon robberies and felonies committed, freſh ſuit ſhall be made from town to town, and from county to county; and that *Hue and Cry* ſhall be raiſed upon the felons, and they that keep the town ſhall follow with Hue and Cry, with all the town and the towns near; and ſo Hue and Cry ſhall be made from town to town, until they be taken and delivered to the ſheriff. And, that ſuch Hue and Cry may more effectually be made, the Hundred is bound by the ſame ſtatute *c.* 3, to anſwer for all robberies therein committed, unleſs they take the felon; which is the foundation of an action againſt the Hundred in caſe of any loſs by robbery. By *Stat.* 27 *Eliz. c.* 13, no Hue and Cry is ſufficient, unleſs made with both horſemen and footmen. And by *Stat.* 8 *Geo.* 2. *c.* 16, the conſtable or like officer refuſing or neglecting to make Hue and Cry, forfeits 5 *l.* half to the King and half to the proſecutor, with full coſts; and the whole vill or diſtrict is ſtill in ſtrictneſs liable to be amerced, according to the law of *Alfred*, if any felony be committed therein, and the felon eſcapes. Hue and Cry may be raiſed either by precept of a Juſtice of the peace, or by a peace officer, or by any private man that knows of

of a felony. 2 *Hal. P. C.* 100, 104. The party raiſing it muſt acquaint the Conſtable of the vill with all the circumſtances which he knows of the felony, and the perſon of the felon; and thereupon the Conſtable is to ſearch his own town, and raiſe all the neighbouring vills, and make purſuit with horſe and foot; and in the proſecution of ſuch Hue and Cry the Conſtable and his attendants have the ſame powers, protection, and indemnification, as if acting under the warrant of a Juſtice of peace. But if a man wantonly or maliciouſly raiſes an Hue and Cry, without cauſe, he ſhall be ſeverely puniſhed as a diſturber of the public peace. 1 *Hawk. P. C. c.* 12. § 5.

As to *Hue and Cry* at Common-law, it ſeems to be clearly agreed, that a private perſon who hath been robbed, or who knows that a felony hath been committed, is not only authorized to levy *Hue and Cry*, but is alſo bound to do it under pain of fine and impriſonment. 2 *Inſt.* 172: 3 *Inſt.* 116: 1 *Hal. Hiſt. P. C.* 464.

From hence it follows, that although it is a good courſe, as Lord *Hale* ſays, to have a precept or warrant from a juſtice of peace for raiſing *Hue and Cry*, yet it is neither of abſolute neceſſity, nor ſometimes convenient, for the felons may eſcape before the juſtice can be found; alſo *Hue and Cry* was part of the law before the *Stat.* 1 *Ed.* 3. *cap.* 16, which firſt inſtituted juſtices of the peace. 2 *Hal. H. P. C.* 99.

It is incumbent upon conſtables to purſue *Hue and Cry* when called upon, and they are ſeverely puniſhable if they neglect it: and it prevents many inconveniencies if they be there; for it gives a greater authority to their purſuit, and enables the purſuant, in his aſſiſtance, to plead the general iſſue upon the ſtatutes 7 *Jac.* 1. *cap.* 5: 21 *Jac.* 1. *cap.* 12; without being driven to ſpecial pleading: therefore, to prevent inconveniences which may happen by unruline's, it is moſt adviſable that the conſtable be called: yet upon a robbery, or other felony committed, *Hue and Cry* may be raiſed by the country in the abſence of the conſtable; and in this there is no inconveniency, for if *Hue and Cry* be raiſed without cauſe, they that raiſe it are puniſhable by fine and impriſonment. 2 *Hal. Hiſt. P. C.* 99, 100.

The regular method of levying *Hue and Cry* is for the party to go to the conſtable of the next town, and declare the fact, and deſcribe the offender, and the way he is gone; whereupon the conſtable ought immediately, whether it be night or day, to raiſe his own town, and make ſearch for the offender; and upon the not finding him, to ſend the like notice, with the utmoſt expedition to the conſtables of all the neighbouring towns, who ought in like manner to ſearch for the offender, and alſo to give notice to their neighbouring conſtables, and they to the next, till the offender be found. 3 *Inſt.* 116: *Dalt. Juſtice. cap.* 28: *Cromp.* 178: 2 *Hawk. P. C.* 75.

The conſtable is not only to make ſearch in his own vill, but alſo to raiſe all the neighbouring vills, who are all to purſue the *Hue and Cry* with horſemen as well as footmen until the offender be taken. 2 *Hal. Hiſt. P. C.* 101. In caſe of *Hue and Cry* once raiſed and levied upon ſuppoſal of a felony committed, though in truth there was no felony committed; yet thoſe who purſue *Hue and Cry* may arreſt, and proceed as if a felony had been really commited. 2 *Hal. Hiſt. P. C.* 101: 5 *H.* 5 *a*: 21 *H.* 7. 28 *a. per Rede*: 2 *Ed.* 4. 8 & 9: 29 *Ed.* 3. 39: 2 *Inſt.* 173: 2 *Hal. Hiſt. P. C.* 102.

If *Hue and Cry* be raiſed againſt a perſon certain for felony, though poſſibly he is innocent, yet the conſtables, and thoſe that follow the *Hue and Cry*, may arreſt and impriſon him in the common gaol, or carry him to a juſtice of the peace. 2 *Hal. Hiſt. P. C.* 102.

If the perſon purſued by *Hue and Cry* be in a houſe and the doors are ſhut, and refuſed to be opened upon demand of the conſtable, and notice given of his buſineſs, he may break open the doors; and this he may do in any caſe where he may arreſt, tho' it be only on ſuſpicion of felony, for it is for the King and Commonwealth, and therefore a virtual *non omittas* is in the caſe; and the ſame law is upon a dangerous wound given, and a *Hue and Cry* levied upon the offender. 7 *Ed.* 3. 16 *b*: 2 *Hal. Hiſt. P. C.* 102. See title *Conſtable.*

It ſeems in this caſe, that if he cannot be otherwiſe taken, he may be killed, and the neceſſity excuſeth the conſtable. 1 *Hal. Hiſt. P. C.* 102. See title *Homicide.*

Upon *Hue and Cry* levied againſt any perſon, or where any *Hue and Cry* comes to a conſtable, whether the perſon be certain or uncertain, the conſtable may ſearch in ſuſpected places within his vill, for the apprehending of the felons. *Dalt. cap.* 28: 2 *Ed.* 4. 8 *b*: *Cromp. de Pace* 178: 2 *Hal. Hiſt. P. C.* 103. See title *Conſtable.*

But though he may ſearch ſuſpected places or houſes, yet his entry muſt be by *open doors*, for he cannot break open doors barely to ſearch, unleſs the perſon againſt whom the *Hue and Cry* is levied be there, and then it is true he may; therefore, in caſe of ſuch a ſearch, the breaking open the door is at his peril, *viz.* juſtifiable if he be there; but it muſt be always remembered, that in caſe of breaking open a door, there muſt be firſt a notice given to them *within*, of his buſineſs, and a demand of entrance, and a refuſal, before doors can be broken. 2 *Hal. Hiſt. P. C.* 103. See title *Conſtable.*

If the *Hue and Cry* be not againſt a perſon certain, but by the deſcription of his ſtature, perſon, clothes, horſe, &c. the *Hue and Cry* doth juſtify the conſtable, or other perſon, following it, in apprehending the perſon ſo deſcribed, whether innocent or guilty, for that is his warrant; it is a kind of proceſs that the law allows, (not uſual in other caſes) *viz.* to arreſt a perſon by deſcription. 2 *Hal. Hiſt. P. C.* 103.

But if the *Hue and Cry* be upon a robbery, burglary, manſlaughter or other felony committed, but the perſon that did the fact is neither known nor deſcribed by perſon, clothes or the like; yet ſuch a *Hue and Cry* is good as hath been ſaid, and muſt be purſued, though no perſon certain be named or deſcribed. 2 *Hal. Hiſt. P. C.* 103.

And therefore in this caſe, all that can be done is, for thoſe who purſue the *Hue and Cry*, to take ſuch perſons as they have probable cauſe to ſuſpect; as for inſtance, ſuch perſons as are vagrants, that cannot give an account where they live, whence they are, or ſuch ſuſpicious perſons as come late into their inn or lodgings, and give no reaſonable account where they had been, and the like. 2 *Ed.* 4. 8 *b*: 2 *Hal. Hiſt. P. C.* 103.

There can be no doubt but that both by the Common-law, as alſo by the ſeveral ſtatutes which injoin the levying of *Hue and Cry*, they who neglect to levy one, (whether officers of juſtice or others) or who neglect to purſue it when rightly levied, are puniſhable by indictment, and may be fined and impriſoned for ſuch neglect, 2 *Hal. Hiſt. P. C.* 104.

We

We ſhall proceed to enquire more particularly, 1. On what robbery Hue and Cry may be raiſed, and how it ought to be purſued: 2. Of bringing the Action; at what Time; and the Evidence neceſſary; and what ſhall excuſe the Hundred: 3. Of levying the Money.

1. The levying of Hue and Cry is enjoined by ſeveral acts of parliament, and to this purpoſe it is enacted by *Stat. Weſtm.* 1. 3 *Ed.* 1. *cap.* 9, "That all be ready and apparelled at the ſummons of the ſheriff, to purſue and arreſt felons."

Though ſome imagined that Hue and Cry was grounded on this ſtatute; yet Lord *Coke* ſays, That it was uſed long before, as appears even by this ſtatute, which, inſtead of introducing a new law, inforces obedience to that which was founded on the ancient laws of the realm. 2 *Inſt.* 171.

By the ſtatute of 4 *Ed.* 1, *De officio coronatoris*, Hue and Cry ſhall be levied for all murders, burglaries, men ſlain, or in peril to be ſlain, as otherwhere is uſed in *England*; and all ſhall follow the Hue and ſteps as near as they can.

Next came the *Stat.* of *Wincheſter*, the effect of which has been already ſtated.

By *Stat.* 27 *Eliz. c.* 13. § 2, it is enacted, "That the inhabitants and reſiants of every hundred (with the franchiſes within the precinct thereof) wherein *negligence*, fault or defect of purſuit and freſh ſuit after Hue and Cry made ſhall happen to be, ſhall anſwer and *ſatisfy the one moiety* of all ſuch money and damages as ſhall be recovered againſt the hundred, with the franchiſes therein, in which any robbery or felony ſhall be committed, to be recovered by action of debt, &c. by and in the name of the clerk of the peace for the time being, of or in every ſuch county, and recovery by the party or parties robbed ſhall be, without naming the chriſtian name or ſurname of the ſaid clerk of the peace; which moiety ſo recovered ſhall be to the uſe of the inhabitants of the hundred where any ſuch robbery, &c. ſhall be committed."

It ſeems to be admitted, that no kind of robbery will make the hundred liable, but that which is done openly, and with force and violence; and that therefore the private ſtealing, or taking any thing from the party, does not come within the ſtatutes which make the hundred liable, becauſe the hundred is not liable for not preventing the robbery, but becauſe they did not apprehend the robbers, which in private felonies, and of which they had no notice, it would be difficult, if not impoſſible, for them to do. 7 *Co.* 6, 7: 2 *Salk.* 614.

Alſo it hath been adjudged, and is admitted in all the books which ſpeak of this matter, that a robbery in a houſe, whether it be by day or by night, does not make the hundred liable: The reaſons whereof are, that every man's houſe is in law eſteemed his caſtle, which he himſelf is obliged to defend, and into which no man can enter, to ſee what is doing there, without his leave; alſo being done in a houſe, the inhabitants of the hundred cannot be preſumed to have notice of it, ſo as to be able to apprehend the offenders. 7 *Co.* 6 *a. Sendil's* caſe.

But if a perſon be aſſaulted in the highway, and carried into a houſe, and there robbed, it ſeems the hundred ſhall be liable; for otherwiſe the proviſion made by the ſtatute would be eluded. 1 *Sid.* 263. and ſee 1 *Salk.* 614: 7 *Mod.* 159. Alſo it does not ſeems neceſſary, that the robbery ſhould be committed in the highway, nor alledged to have been ſo by the plaintiff in his declaration. 7 *Mod.* 159. It may be in a private way, or be in a coppice; and in both caſes the hundred ſhall be chargeable. 2 *Salk.* 614. and *vide Carth.* 71: 1 *Mod.* 221: 3 *Mod.* 258: 1 *Show.* 60: *Comb.* 150. S. C.

It is clearly agreed that for a robbery committed in the night the hundred is not chargeable, becauſe they cannot be preſumed to have notice thereof, ſo as to be able to apprehend the robbers. 7 *Co.* 6 *b*: 2 *Inſt.* 569: 3 *Leon.* 350.

But yet it is not neceſſary that the robbery ſhould be committed after ſun-riſe, and before ſun-ſet, for if there be as much day-light at the time, that a man's countenance may be diſcerned thereby, though it be before ſun-riſe or after ſun-ſet, the hundred ſhall be liable. 7 *Co.* 6 *a*: *Cro. Jac.* 106: 1 *And.* 158: 1 *Leon.* 57: *Savil* 33: *vide Carth.* 71: *Comb.* 150: 3 *Mod.* 258: 1 *Show.* 60. S. P.

It hath been held, that if robbers drive or oblige the waggoner to drive his waggon from the highway by day, but do not rob or take any thing till night, that yet this is a robbery in the day-time ſo as to charge the hundred. 1 *Sid.* 263: 7 *Mod.* 159: *Hutton* 125.

If he that is robbed, after *Hue and Cry*, make no further purſuit after the robbers, action lies againſt the hundred. 4 *Leon.* 180. The party robbed is not bound to purſue the robbers himſelf, or to lend his horſe for that purpoſe; but ſtill has his remedy againſt the hundred, if they are not taken: tho' if any of them are taken, either within forty days after the robbery, or before the plaintiff recovers, the hundred is diſcharged. *Sid.* 11. When a man is robbed on a *Sunday*, on which day perſons are ſuppoſed to be at church, and none ought to travel, the hundred is not liable. See *ſtat.* 27 *El. c.* 13. But where a robbery is done on a *Sunday*, tho' the hundred is not chargeable, *Hue and Cry* ſhall be made by *Stat.* 29 *Car.* 2. *c.* 7; And if a perſon be robbed going to church in a country town or village, on a *Sunday*, which is a religious duty required by law, it has been held an action lies againſt the hundred; but not if one be robbed on that day in other travelling for pleaſure, &c. which is prohibited by ſtatute.—6 *Geo.* 1. *C. B.* per *King*, chief juſtice.

And it was formerly ruled by three judges on the *Stat.* of *Winton*, where a man was robbed on a *Sunday*, in time of divine ſervice, and made *Hue and Cry*, that the hundred ſhould be charged; for many perſons are neceſſitated to travel on this day; as phyſicians, &c. 2 *Cro.* 496: 2 *Rol.* 59: *Godb.* 280: See 2 *Neſſ. Abr.* 937, 938. A robbery muſt be an open robbery, that the country may take notice of it, to make the hundred anſwerable. 7 *Rep.* 6.

A man is ſet upon and aſſaulted by robbers in one hundred, and carried into a wood, &c. in another hundred, near the highway, and there robbed; the action ſhall be brought againſt the hundred where the robbery was done as particularly expreſſed in the ſtatute, and not the hundred where the man was taken or aſſaulted; becauſe the aſſault is not the efficient cauſe of the robbery, as a ſtroke is the cauſe of murder. 2 *Salk.* 614; 7 *Mod.* 157.

But where goods are taken from a man in one hundred, and opened in another; where they are firſt taken or

ſeized, they are ſtolen; and the robbery is committed. 2 *Lill. Abr.* 27.

By the *Stat.* 8 *Geo.* 2. *c.* 16, no proceſs for appearance is to be ſerved againſt the hundred, *&c.* for a robbery committed, but on the high conſtable, who ſhall give notice of it in one of the principal market-towns, *&c.* and then enter an appearance, and defend the action. By *Stat.* 22 *Geo.* 2. *c.* 24, No perſon ſhall recover on any of the ſtatutes of *Hue and Cry*, above 200*l.* unleſs the perſon or perſons ſo robbed ſhall at the time of ſuch robbery be together in company, and be in number two at the leaſt, to atteſt the truth of his or their being ſo robbed.

And by *Stat.* 30 *Geo.* 2. *c.* 3. § 116, and 4 *Geo.* 3. *c.* 2. § 118, no receiver general of the land-tax, or his agents, can ſue the hundred for a robbery, unleſs the perſons carrying the money be three in company.

2. The general doctrine as to actions is as follows. Where a robbery is done on the highway, in the day-time, of any day except *Sunday*, the hundred where committed is anſwerable for it: but notice is to be given of it, with convenient ſpeed, to ſome of the inhabitants of the next village, to the intent that they may make *Hue and Cry* for the apprehending of the robbers, or no action will lie againſt the hundred: and if any of the robbers are taken within forty days, and convicted, the hundred ſhall be excuſed.

In 3 *Lev.* 320, it is ſaid, that upon ſearch of the parliament roll it appears, that the ſtatute of *Winton* gives only forty days to the county, and that the ſtatute 28 *Ed.* 3. *c.* 11, is but a confirmation thereof; and accordingly it was adjudged good, where the plaintiff brought an action on the ſtatute of *Winton*, and declared that he was robbed, and none of the robbers taken within forty days, according to the ſaid ſtatute, and with this the modern precedents agree, as *Raſt. Ent.* 406: *Co. Ent.* 351: *Hern.* 215.: *Theſ. Brev.* 141: 2 *Salk.* 376.

If a ſervant be robbed in the abſence of his maſter, of his maſter's money, it is clear that the maſter may maintain an action for it againſt the hundred, but then the ſervant muſt make oath that he knew not any of the robbers. *Cro. Car.* 37. Alſo the ſervant being robbed in his maſter's abſence, may himſelf maintain an action againſt the hundred, and may declare that he was poſſeſſed *ut de bonis ſuis propriis*, *&c.* And though the jury find that he was robbed of his maſter's money, yet ſhall he recover; for the ſervant is poſſeſſed *ut de bonis ſuis propriis*, againſt all, and in reſpect of all, but him that hath the very right. 2 *Salk.* 613-4: 4 *Mod.* 303: *Comb.* 263: 1 *Sid.* 45.

If a ſervant be robbed in the preſence of the maſter, the maſter muſt ſue; and the oath of the maſter is ſufficient. 2 *Salk.* 613: *Carth.* 147.

There muſt be an oath, *vide Carth.* 145: 2 *Salk.* 613; 1 *Show.* 94: 3 *Mod.* 287.

Where a ſervant is robbed, he muſt be examined and ſworn; but if the maſter be preſent, it is a robbery of him. *Show.* 241: 1 *Leon.* 323. If a quaker be robbed, or a man's ſervant being a quaker, and either refuſe to take an oath of the robbery, and that he did not know any of the robbers, the hundred is not anſwerable; for the *Stat.* of 27 *Eliz. c.* 13, was made to prevent combination between perſons robbed and the robbers. 2 *Salk.* 613.

But the maſter's oath where the ſervant is a quaker, or otherwiſe, and being robbed in his preſence, will maintain the action in his own name. *Carth.* 146. And a plaintiff had judgment on his oath, though his ſervant that was robbed with him knew one of the robbers. When a carrier is robbed of another man's goods, he or the owner may ſue the hundred; but the carrier is to give notice, and make oath, *&c.* though the owner of the goods brings the action. 2 *Saund.* 380.

If *A.* and *B.* travelling together are robbed of a ſum of money, to which they are both jointly intitled, they may both join in an action againſt the hundred; but otherwiſe if they had ſeparate and diſtinct intereſts. *Dyer* 370 *a. pl.* 59.

By *Stat.* 27 *Eliz. c.* 13. § 11, it is enacted, That no perſon that ſhall happen to be robbed ſhall maintain any action, or take any benefit of the ſtatutes which make the hundred liable, except the perſon ſo robbed ſhall, with as much convenient ſpeed as may be, give notice of the robbery ſo committed unto ſome of the inhabitants of ſome town, village or hamlet, near unto the place where any ſuch robbery ſhall be committed.

In the conſtruction of this clauſe of the ſtatute it hath been holden, That if a perſon be robbed in a highway *in diviſis hundredorum*, he need not give notice to the inhabitants of each hundred, but notice to either of them is ſufficient. *Cro. Jac.* 675, See *Cro. Car.* 41, 379: 1 *Show.* 94.

It hath been reſolved, that though the notice given be five miles from the place where the robbery was committed, that it is ſufficient; the reaſon whereof is, becauſe that the party, who is a ſtranger to the country, cannot have conuzance of the neareſt place or town. *March.* 11: and ſee 2 *Leon.* 82.

Alſo if the party robbed give notice with as much convenient ſpeed as may be, though he be otherwiſe remiſs in not purſuing the robbers, or refuſes to lend his horſe for that purpoſe, yet he ſhall not loſe his action for this, nor the hundred be excuſed. *March* 11: 2 *Leon.* 82.

Now by *Stat.* 8 *Geo.* 2. *cap.* 16. § 1, it is further enacted, "That no perſon ſhall maintain any action againſt the hundred, unleſs he ſhall, (beſides the notice already required by the *Stat.* 27 *Eliz. c.* 13,) with as much convenient ſpeed as may be, after any robbery committed, give notice thereof to one of the conſtables of the hundred, or to ſome conſtable, borſholder, headborough or tithingman of ſome town, pariſh, village, hamlet or tithing near unto the place where ſuch robbery ſhall happen, or ſhall leave notice in writing of ſuch robbery at the dwelling houſe of ſuch conſtable, *&c.* deſcribing, ſo far as the nature and circumſtances of the caſe will admit, the felon, and the time and place of the robbery, and alſo ſhall, within the ſpace of twenty days next after the robbery committed, cauſe public notice to be given thereof in the *London* Gazette, therein likewiſe deſcribing, ſo far as the nature and circumſtances of the caſe will admit, the felon, and the time and place of ſuch robbery, together with the goods and effect whereof he was robbed."

By *Stat.* 27 *Eliz. c.* 13. § 11, it is enacted, "That the party robbed ſhall not have any action, except he ſhall firſt, within twenty days next before ſuch action to be brought, be examined upon his corporal oath, before ſome juſtice of the peace of the county where the robbery was committed, whether he knows the parties that committed

mitted the robbery, or any of them; and if, upon examination, it be confeſſed, that he knows the parties, or any of them, that then he ſhall, before the action be commenced, enter into ſufficient bond by recognizance before the ſaid juſtice, effectually to proſecute the ſame perſon and perſons."

In the conſtruction of this clauſe of the ſtatute, the following points have been holden;

That if the party does not know the robbers at the time of the robbery committed, tho' he happens to know them afterward, it is not material. *March* 11.

It hath been adjudged, that the oath may be taken before a juſtice of the county, though not in the county at the time of adminiſtering it. 1 *Jones* 239.

As to giving bond for payment of coſts, by *Stat.* 8 *Geo.* 2. *cap.* 16. it is enacted, "That, before any action commenced, the party ſhall go before the chief clerk, or ſecondary, or the filazer of the county wherein ſuch robbery ſhall happen, or the clerk of the pleas of that court wherein ſuch action is intended to be brought, or their reſpective deputies, or before the ſheriff of the county wherein the robbery ſhall happen, and enter into a bond to the high conſtable, or high conſtables of the hundred in which the robbery ſhall be committed, in the penal ſum of one hundred pounds with two ſufficient ſureties to be approved of by ſuch chief clerk, *&c.* with condition for ſecuring to ſuch high conſtable or high conſtables, the due payment of his or their coſts, after the ſame ſhall be taxed by the proper officer, in caſe the plaintiff in ſuch action ſhall happen to be nonſuited, or ſhall diſcontinue the action, or in caſe judgment ſhall be given on demurrer, or a verdict againſt him."

Coſts are always given in actions on the ſtatutes of Hue and Cry, where damages are recovered. 1 *Term Rep.* 72.

By *Stat.* 27 *Eliz.* *c.* 13. § 9, The action is to be brought within *one year* after the robbery committed.

In the conſtruction of this ſtatute it hath been holden; That if a perſon be robbed the 9th of *October* 13 *Jac.* and ſo laid that the teſte of the writ be the 9th *October* 14 *Jac.* that this is not purſuant to the ſtatute; and that in this action, which is penal againſt the hundred, there is no reaſon to exclude the day on which the fact was done, nor to make ſuch conſtruction as is done in proteſtions and the inrolment of deeds, which have always received a benign interpretation. *Hob.* 139, 140: *Moor* 878. *pl.* 1233: 1 *Brownl.* 156. S. C. Vide 1 *Sid.* 139: 1 *Keb.* 495.

An action was brought by the maſter, on the ſtatute of *Winton*, for a robbery committed on his ſervant, in which he declared of an aſſault and battery done to himſelf, (though then 50 miles from the place), alſo that he made oath that he did not know any of the perſons; the iſſue was entered of record, and the jury appeared at the bar ready to try it; but being for other buſineſs adjourned to another day, the plaintiff obſerving his miſtake moved to amend, by declaring of a robbery on his ſervant, *&c.* and it appearing that the year in which the action muſt be brought was expired, and conſequently the action muſt be loſt if not allowed, the court, after long debate and conſideration of former precedents, admitted him to amend. 3 *Lev.* 347.

It ſeems that, from the neceſſity of the caſe, the party himſelf that was robbed is to be admitted as a witneſs, but then his teſtimony muſt be corroborated by collateral proof and circumſtances, and ſuch as may induce a jury to believe that a robbery was actually committed, and that the party loſt what he declared for. 2 *Leon.* 12.

By *Stat.* 8 *Geo.* 2. *c.* 16, it is enacted, "That in any action againſt any hundred, any perſon inhabiting within the hundred, or any franchiſe thereof, ſhall be admitted as witneſs for or on behalf of the hundred."

If an action againſt the hundred be diſcontinued, on a new action brought, there muſt be a new oath taken within forty days before the laſt action brought. *Sid.* 139. In action upon the ſtatute of *Hue and Cry*, the declaration is good, though the plaintiff doth not ſay, that the juſtice of peace who took the oath lived *prope locum* where the robbery was committed. And oath was made before a juſtice of peace of the county where the robbery was done, in a place of another neighbouring county; and it was held good. *Cro. Car.* 211.

If a juſtice of peace refuſe to examine a perſon robbed, and to take his oath, action on the ſtatute lies againſt the juſtice. 1 *Leon.* 323. It is ſafe to ſay the plaintiff gave notice at ſuch a place, near the place where the robbery was done; and though that place where notice is given be in another hundred or county, yet it is good enough; for a ſtranger may not know the confines of the hundred or county. *Cro. Car.* 41, 379: 3 *Salk.* 184.

If there be a miſtake of the pariſh in the declaration where the robbery was, if it be laid in the right hundred it is well enough. 2 *Leon.* 212. And though the party puts more in his declaration than he can prove, for ſo much as he can prove it ſhall be good. *Cro. Jac.* 348.

Upon a trial in theſe caſes, the party muſt file his original, and be ſure to have a true copy thereof, and witneſſes to prove it; and he muſt alſo have the affidavit or oath, and a witneſs to prove the taking it. 2 *Lill. Abr.* 25.

By *Stat.* 27 *Eliz.* *c.* 13. § 8, it is enacted, "That where any robbery is committed by two, or a greater number of malefactors, and that it happen any one of the ſaid offenders to be apprehended by purſuit, to be made according to the ſtatutes, that then, no hundred or franchiſe ſhall in any wiſe incur the penalty loſs or forfeiture mentioned in the ſtatutes, although the reſidue of the malefactors ſhall happen to eſcape." See 1 *Vent.* 118, 325: *Raym.* 221: 2 *Lev.* 4.

If Hue and Cry be made towards one part of the county, and an inhabitant of the hundred apprehends one of the robbers within another, this is a taking within the ſtatute. 1 *Vent.* 118, 119.

By the *Stat.* 8 *Geo.* 2. *cap.* 16. it is enacted, "That no hundred, or franchiſe therein, ſhall be chargeable by virtue of any of the ſtatutes, if any one or more of the felons, by whom ſuch robbery ſhall be committed, be apprehended within the ſpace of forty days next after public notice given in the *London* Gazette, as by the ſtatute is provided."

3. By *Stat.* 27 *Eliz.* *c.* 13. § 14. it is enacted, "That after execution of damages by the party or parties ſo robbed had, it ſhall be lawful (upon complaint made by the party charged) to and for two juſtices of the peace (whereof one to be of the *quorum*) of the ſame county, inhabiting within the hundred, or near unto the ſame where any ſuch execution ſhall be had, to aſſeſs and tax rateably and proportionably, according to their diſcretions, all and every the towns, pariſhes, villages and hamlets, as well of the ſaid hundred where any ſuch robbery ſhall be

committed, as of the liberties within the ſaid hundred, to and toward an equal contribution, to be had and made for the relief of the inhabitants, againſt whom the party or parties robbed before that time had execution."

The conſtables, &c. are to levy the money and pay it over to the juſtices, and they are to deliver it over to the inhabitants, for whoſe uſe it was collected.

The ſame taxation is to be in caſes where there is default or negligence of purſuit and freſh ſuit, for the benefit of inhabitants having damages or money levied on them, (See ante 1.)

By the *Stat.* 8 *Geo.* 2. *c.* 16, already referred to, after judgment againſt the hundred, no proceſs ſhall be ſerved on the high conſtable or any inhabitant: but the ſheriff on receipt of the writ of execution ſhall ſhew it *gratis* to two juſtices of the peace in or near the hundred, who ſhall ſpeedily cauſe an aſſeſſment to be levied purſuant to the *Stat.* 27 *El. c.* 13. and alſo for the neceſſary expences of the high conſtable above the coſts and damages recovered, of which, on notice from the two juſtices, he ſhall give an account and proof on oath to their ſatisfaction, having firſt cauſed his attorney's bill to be taxed. § 4.

The ſheriff ſhall pay the money levied to the parties without fee, and indorſe the day of receiving the writ of execution, and not be called upon for a return till ſixty days after. And See *Stat.* 22 *Geo.* 2. *c.* 46. § 34.

And the like aſſeſſment ſhall be in caſe the plaintiff be nonſuit, diſcontinue, or have a verdict or judgment on demurrer againſt him, if by inſolvency of the plaintiff or his ſureties, he cannot be reimburſed on the bond of 100*l.* penalty; and the money levied ſhall be paid to the juſtices for the high conſtable in ten days after it is levied. § 7, 8. of ſaid *Stat.* 8 *Geo.* 2. *c.* 16.

And the juſtices may limit a time not exceeding thirty days for levying ſuch aſſeſſment; and the officer appointed refuſing or neglecting to levy and pay the money, &c. in ſuch time, forfeits double the ſum. § 9, 10.

If there be judgment againſt the hundred, it may be levied againſt the inhabitants of the ſame hundred by *fieri facias*. So it may be levied upon any one, who has lands in his poſſeſſion within the hundred, though he has no houſe nor lodging there; for he is an inhabitant. *R.* 2 *Saund.* 423.—Upon a leſſee, or purchaſer after the robbery committed. *R. Noy* 155.—So it may be levied upon one or two of the inhabitants. But if a man come to inhabit in an hundred after a robbery done, he ſhall not be charged, *R. Hutt.* 125: *Cout. per Barckley, Mar. pl.* 28.

HUISSERIUM, A ſhip uſed to tranſport horſes; derived, as ſome will have it, from the Fr. *huis*, *i.e.* a door; becauſe, when the horſes are put on ſhipboard, the doors or hatches are ſhut upon them, to keep out the water. *Brompton Anno* 1190.—Theſe ſhips have been termed *Uſſers*.

HUISSIER. An uſher of a court, or in the King's palace, &c. See *Uſher*.

HULKA, A hulk or ſmall veſſel. *Walſing.* 394.

HULKS, for felons; See title *Tranſportation*.

HULL, A reſtraint of exactions taken there, *Stat.* 27 *Hen.* 8. *c.* 3. Their duties on ſalt fiſh and herrings reſtored. *Stats.* 33 *Hen.* 8. *c.* 33: 5 *Eliz. c.* 5. *ſect.* 3. The Cuſtomer of *Hull* to have a deputy reſident at *York*, *Stat.* 1 *Eliz. c.* 11. *ſ.* 8. For erecting workhouſes and maintaining the poor at *Hull*, See *ſtats.* 15 *Geo.* 1. *c.* 10: 28 *Geo.* 2. *c.* 27. See this Dict. tits. *Fiſh*: *Navigation Acts*.

HULLUS, A hill.—*In* hullis *&* *holmis*, *i.e.* in hills and dales. *Mon. Angl. tom.* 2. *p.* 292.

HUMAGIUM, A moiſt place, *Mon. Angl.* 1 *par. f.* 628 *a*.

HUMBER, (river) in *Yorkſhire*, fiſh-garths and piles, &c. to be removed. *Stat.* 23 *Hen.* 8. *c.* 18. See title *Fiſh*.

HUNDRED.

HUNDREDUM, *Centuria.*] A part or diviſion of a Shire; ſo called, either becauſe of old each *hundred* found 100 ſidejuſſors of the King's peace, or a hundred able men for his wars. But more probably it is ſo called, becauſe it was compoſed of an hundred families. It is true, *Brompton* tells us, that an hundred contains *centum villas*; and *Giraldus Cambrenſis* writes, that the *Iſle of Man* hath 343 *villas*. But in theſe places the word *villa* muſt be taken for a country family; for it cannot mean a village, becauſe there are not above 40 villages in that iſland. So where *Lambard* ſays, that an hundred is ſo called, *à numero centum hominum*, it muſt be underſtood of an hundred men, who are heads or chiefs of ſo many families.

Theſe were firſt ordained by King *Alfred*, the 29th King of the *Weſt Saxons*: *Lambard verbo* Centuria. This dividing counties into hundreds, for better government, King *Alfred* brought from *Germany*: For there *centa*, or *centena*, is a juriſdiction over an hundred towns. See 1 *Comm.* 115: *Introd.* § 4.

In ancient times, it was ordained for the more ſure keeping of the Peace, that all free-born men ſhould caſt themſelves into ſeveral companies by 10 in each company, and that every of theſe ten men ſhould be ſurety and pledge for the forth-coming of his fellows. For which cauſe theſe companies in ſome places were called *tithings*, and as ten times ten makes an 100, ſo becauſe it was alſo appointed that ten of theſe tithings ſhould at certain times meet together for matters of greater weight, therefore that general aſſembly was called an hundred.—*Lamb. Conſt.*

The hundred is governed by an high conſtable or bailiff; and formerly there was regularly held in it the hundred-court for the trial of cauſes though now fallen into diſuſe. In ſome of the more Northern counties theſe hundreds are called wapentakes. 1 *Comm. Introd.* § 4. *p.* 115: and See 4 *Comm. c.* 33.

This is the original of hundreds, which ſtill retain the name, but the juriſdiction is devolved to the county-court, ſome few excepted, which have been by privilege annexed to the crown, or granted to ſome great Subject, and ſo remain ſtill in the nature of a franchiſe. This has been ever ſince the *Stat.* 14 *Ed.* 3. *ſt.* 1. *cap.* 9, whereby theſe hundred-courts, formerly farmed out by the Sheriff to other men, were all, or the moſt part reduced to the County-court, and ſo remain at preſent.

But now, by hundred-courts we underſtand ſeveral franchiſes, wherein the ſheriff has nothing to do by his ordinary authority, except they of the hundred refuſe to do their office. See *Weſt part* 1: *Symbol, lib.* 2. *ſect.* 228. *Ad* hundredum *poſt Paſcha*, *&* *ad proximum* hundredum *poſt feſtum St. Mich.*—*Mon. Angl.* 2 *par. f.* 293 *a*.

An hundred is to have juriſdiction or power to adminiſter juſtice in 100 vills, or of 100 men, or of 100 pariſhes. *Br. Court Baron, pl.* 8. cites 8 *H.* 7. 3. *per Rede*.

Every ward in *London* is an hundred in a county, and every pariſh in *London* is a vill in an hundred. 9 *Rep.* 66 *b*.

Hundreds

Hundreds were either parcel of the counties, and there the sheriffs did constitute bailiffs, (*viz.* those hundreds which were anciently parcel of the farm of the sheriffs, that the statute 2 *Ed.* 3. *c.* 12, speaks of); or else they were such as were granted out, which the lord of the hundred sometimes held at farm, and sometimes in fee, called hundreds in fee, liberties of hundreds, franchises of hundreds. *Kent.* 405.

In the time of King *Alfred* the kingdom was in gross, and then divided into counties and hundreds, and all persons then came within one hundred or other; and then the King's relations had the government of them, and therefore they were called *Consanguinei*; (*cousins*) and so are the Earls, (*Comites*) Lord lieutenants, styled at this day; but when the office became troublesome, there were ordained *Vicecomites*, (*Sheriffs*) which name remains to this day, and the others continue to be called *Consanguinei*, but have no power in the county, having only the honorary name of Earls or *Comites* of such or such a county, &c. For the better government of these counties, the *Vicecomites* had two courts; but out of those the King granted petty leets and courts-baron; but the tourn of the sheriff had yet a superintendant power, they being derived out of the sheriff's tourn. See *Dyer* 13.

The King afterwards granted away some hundreds in fee-simple, and some franchises, and the last excluded the King utterly, but the hundreds granted in fee were not wholly exempt. On this arose some confusion, and the parliament hereon took notice, that the execution of justice was by this much interrupted, and therefore came the statute of *Linc.* 9 *Ed.* 2. *st.* 2; That sheriffs should be sufficient persons, and have lands in the county, and so be able to answer both the King and county, and that bailiffs and farmers of hundreds should be sufficient men. And at this time hundreds were grantable for years.

Then came the statute of 2 *Ed.* 3. *cc.* 4, 5; That sheriffs should continue but for one year. But this took not away the whole inconvenience: for the Crown still granted away bailiwicks and hundreds, for lives, at rents at such excessive dear rates, that made them endeavour to make up their money by unlawful means; and therefore came the *statutes* 2 *Ed.* 3. *cap.* 12: 14 *Ed.* 3. *cap.* 9. By the first it was enacted, That all hundreds and wapentakes granted by the King shall be annexed to the county, and not severed. And by the other statute, that all should be annexed, and the sheriff should have power to put in bailiffs, for which he will answer, and no more should be granted for the future; and one reason of this was, because the King granted away hundreds, and abated not the sheriff's farm. *Ang.* 2 *Show.* 98, 99.

Hundreds are liable to penalty on exportation of wool, 7 & 8 *Will.* 3. *c.* 28. § 8.—Liable to damages sustained by riotously pulling down buildings, 1 *Geo.* 1. *st.* 2. *c.* 5. § 6.—By killing cattle, cutting down trees, burning houses, &c. 9 *Geo.* 1. *c.* 22. § 7: 29 *Geo.* 2. *c.* 36. § 9. By destroying turnpikes, or works on navigable rivers, 8 *Geo.* 2. *c.* 20. § 6.—By cutting hop-binds; 10 *Geo.* 2. *c.* 32. § 4.—By destroying corn to prevent exportation, 11 *Geo.* 2. *c.* 22. § 5.—By wounding officers of the customs, 19 *Geo.* 2. *c.* 34. § 6.—Or by destroying woods, &c. 29 *Geo.* 2. *c.* 36. § 9.—So in cases of robbery. See title *Hue and Cry*.—So for the destruction of mines or pits of *coal*. *Burn*'s J. title *Hundred*. See this Dict. under the several titles.

Inhabitants within the hundred may be witnesses for the hundred, 8 *Geo.* 2. *c.* 16.

The word *hundredum* is sometimes taken for an immunity or privilege, whereby a man is quit of money or customs due to the hundreds. *Cowell.*

HUNDRED-COURT, Is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. The free suitors are here the judges, and the steward the register, as in the case of a court-baron. It is *not a Court of record*, and it resembles a court-baron in all points, except that in point of territory it is of a greater jurisdiction.

According to *Blackstone*, its institution was probably co-eval with that of hundreds themselves, introduced, though not invented, by *Alfred*, being derived from the polity of the ancient *Germans*. See 1 *Comm. Introd.* § 4. and this Dict. titles *County Court*; *Court Baron*; *Court Leet*; *Constable*, *Hundred*, &c.

HUNDREDORS, *hundredarii.*] Persons serving on *juries*, or fit to be impanelled thereon for trials, dwelling within the hundred where the land in question lies. *Stat.* 35 *H.* 8. *c.* 6. And default of *Hundredors* was a challenge or exception to panels of sheriffs, by our law, till the *Stat.* 4 & 5 *Ann. cap.* 16. ordained, that, to prevent delays by reason of challenges to panels of jurors for default of *Hundredors*, &c. writs of *venire facias* for trial of any action in the courts at *Westminster*, shall be awarded of the *body* of the proper *county* where the issue is triable. See title *Jury* I. II.

Hundredor also signifies him that hath the jurisdiction of the *hundred*, and is in some places applied to the *bailiff* of an *hundred*. See *Stats.* 13 *Ed.* 1. *c.* 38: 9 *Ed.* 2: 2 *Ed.* 3: *Horn's Mirror*, *lib.* 1.

HUNDRED-LAGH, from the Sax. *laga*, lex.] Is in *Saxon* the *hundred* court. *Manwood*, *par.* 1. *pag.* 1.

HUNDRED-PENNY. Was collected by the sheriff or lord of the *hundred*, *in oneris sui subsidium*. *Camd.* and see *Spelm. Gloss.* *Pence* of the *hundred* is mentioned in *Domesday*. And it is elsewhere called, *hundredsfeh*. *Chart. K. Joh. Egidio Episc. Heref.*

HUNDRED-SETENA. Dwellers or inhabitants of a *Hundred*. *Charta Edgar. Reg*; *Mon. Ang. tom.* 1. p. 16.

HUNGER. According to the present doctrine, *Hunger* will not justify stealing food, to relieve a present necessity. 1 *Hal. P. C.* 54. And the doctrine seems just, as (on conviction) a judge may respite and a King *pardon*, an advantage which is wanting in many States; particularly those which are democratical. The ancient doctrine, (that it would justify) if now in force, might open a door to many villanies. And, in this commercial state, those who can labour need not fear starving. Those that cannot, and who are *poor*, the laws have made a provision for. See 4 *Comm.* 31.

HUNTING. By stat. 1 *Hen.* 7. *c.* 7. *unlawful hunting*, in any legal forest, park or warren, not being the King's property, *by night*, or with *painted faces* declared to be single *felony*. And by *Stat.* 9 *Geo.* 1. *c.* 22, Appearing armed with faces *blacked*, or disguised, to *hunt*, wound, kill, or steal deer, to rob a warren, or steal fish, is *felony*, without benefit of clergy. See titles *Deer Stealers*: *Game*: *Black Act*.

HURDLE, A sledge or Hurdle used to draw traitors to execution. See title *Execution* (*Criminal.*)

HURDEREFERST.

HURDEREFERST, A Domeſtick or one of the family, from the Sax. *hyred, familia*, and *fæeſt, firmus. Leg. H.* 1. *c.* 8.

HURRERS. The cappers and hat-makers of *London* were formerly one diviſion of the *Haberdaſhers*, called by this name. *Stow's Surv. Lond.* 312.

HURST, HYRST, HERST, from the Sax. *Hyrſt, i. e.* a wood or grove of trees.] There are many places in *Kent, Suſſex* and *Hampſhire*, which begin and end with this ſyllable; and the reaſon may be, becauſe the great wood called *Andreſwold* extended through thoſe counties. *Cowell.*

HURST CASTLE, Is ſo called, becauſe ſituated near the woods. So *Hurſtega* is a woody place; and probably from thence is derived *Hurſley*, now, *Hurley*, a village in *Berkſhire. Cowell.*

HURTARDUS, HURTUS, A ram or wether, a ſheep. *Mon. Angl. tom.* 2. *pag.* 666.

HUS AND HANT, Words uſed in ancient pleadings.—Henricus P. *captus per querimoniam mercatorum Flandriæ & impriſonatus, offert Domino Regi* Hus & Hant *in plegio ad ſtandum recto, & ad reſpondendum prædictis mercatoribus & omnibus aliis, qui verſus eum loqui voluerint: et diverſi veniunt qui manucapiunt quod dictus* Hen. P. *per* Hus & Hant *veniet ad ſummonitionem Regis vel Concilii ſui in Curia Regis apud* Shepway, *& quod ſtabit ibi recto, &c. Placit. coram Concilio Dom. Reg. Anno* 27 H. 3: Rot. 9. See *commune Plegium, ſicut* Johannes Doe & Richardus Roe. 4 *Inſt.* 72.

HUSBAND AND WIFE, Are made ſo by marriage, and being thus joined, are accounted but one perſon in law. *Lit.* 168. See this Dict. title *Baron and Feme.*

HUSBANDRY AND HUSBANDMAN. There having been great decay of *Huſbandry* and hoſpitality, it was enacted by *ſtat.* 39 *Eliz. c.* 1, now obſolete, that one half of the houſes decayed ſhould be erected, and forty acres of arable land laid to them, by the perſon, his heir, executor, *&c.* who ſuffered the decay: and they were to keep the houſes and lands in repair.

The decaying of houſes of huſbandry prohibited, *ſtats.* 4 *H.* 7. *c.* 19: 6 *H.* 8. *c.* 5: 7 *H.* 8. *c.* 1: 27 *H.* 8. *c.* 22: 2 & 3 *Ph. & Ma. cc.* 1, 2: 39 *El. c.* 1. All now apparently expired or obſolete.—Wood not to be turned to tillage or paſture. *ſtat.* 35 *H.* 8. *c.* 17. § 3. Land to be re-converted to tillage, 5 & 6 *Ed.* 6. *c.* 5: 5 *El. c.* 2. repealed by *ſtat.* 35 *El. c.* 7. § 20. Who may be compelled to ſerve in huſbandry, 5 *El. c.* 4. § 7.—How Huſbandmen ſhall take apprentices. 5 *El. c.* 4. § 25. See titles *Labourers: Apprentices.* Arable land not to be converted to paſture, 39 *El. c.* 2.; but not to extend to *Northumberland* 43 *El. c.* 9. § 32.—*Obſolete.*

HUSBRECE, from Sax. *hus*, a houſe and *brice*, a breaking.] Was that offence formerly which we now call *burglary. Blount.* See title *Burglary.*

HUSCARLE, A menial ſervant: It ſignifies properly a ſtout man, or a domeſtic; alſo the *domeſtical* gatherers of the *Danes* tributes were anciently called *haſcarles.* The word is often found in *Domeſday*, where it is ſaid the town of *Dorcheſter* paid to the uſe of *huſcarles* or *houſecarles*, one mark of ſilver. *Domeſday.*

HUSCANS, Fr. *hauſeau.*] A ſort of boot, or buſkin made of coarſe cloth, and worn over the ſtockings, mentioned in the ancient *Stat.* 4 *Ed.* 4. *c.* 7.

HUSFASTNE, Sax. *hus*, i. e. domus & *fæeſt*, fixus.] He that holdeth houſe and land.—*Bract. lib.* 3. *tract.* 2. *cap.* 10. See *Heordfeſte.*

HUSGABLE, *huſgablum.*] Houſe-rent, or ſome tax or tribute laid upon houſes. *Mon. Ang. tom.* 3. *p.* 254.

HUSSELING-PEOPLE, Communicants; from the Sax. *houſel* or *huſſel*, which ſignifies the holy ſacrament: See title *Hoſtiæ.*

HUSTINGS, *huſtingum*, from the Sax. *huſtinge*, i. e. *concilium*, or *curia.*] A court held before the *Lord Mayor* and Aldermen of *London*, and is the principal and ſupreme court of the city: and of the great antiquity of this court, we find honourable mention made in the laws of King *Edward the Confeſſor: Debet etiam in* London, *quæ eſt caput Regni & Legum, ſemper Curia Domini Regis ſingulis ſeptimanis die lunæ* huſtings *ſedere & teneri; fundata enim erat olim & ædificata ad inſtar, & ad modum & in memoriam veteris Magnæ* Trojæ, *& uſque in hodiernum diem leges & jura & dignitates, & libertates regiaſque conſuetudines antiquæ magnæ* Trojæ, *in ſe continet: et conſuetudines ſuas una ſemper inviolabilitate conſervat,' &c.* Other cities and towns have alſo had a Court of the ſame name; as *Winchester, York, Lincoln, &c. Fleta lib.* 2. *c.* 55: 4 *Inſt.* 247: *Stat.* 10 *Ed.* 2. *c.* 1. See this Dict. titles *Court of Huſtings: London.*

HUTESIUM ET CLAMOR, A HUE AND CRY; See that title.

HUTILAN, Taxes. *Mon. Angl. tom.* 1. p. 586.

HYBERNAGIUM, The ſeaſon for ſowing winter corn, between *Michaelmas* and *Chriſtmas*; as *Tremagium* is the ſeaſon for ſowing the ſummer corn in the ſpring of the year: Theſe words were taken ſometimes for the different ſeaſons; other times for the different lands on which the ſeveral kinds of grain were ſowed; and ſometimes for the different corn; as *Hybernagium* was applied to wheat and rye, which we ſtill call *winter-corn*; and *tremagium* to barley, oats, *&c.* which we term *ſummer-corn*: theſe words are likewiſe written *ibernagium* and *thornagium. Fleta, lib.* 2. *cap.* 73. § 18.

HYDAGE. See *Hidage.*

HYDE OF LAND, AND HYDEGILD. See *Hide* and *Hidage.*

HYPOTHECA, In the civil law, was where the poſſeſſion of the thing pledged remained with the *debtor. Inſt. l.* 4. *c.* 6. *f.* 7: 2 *Comm.* 159. See titles *Bailment.*

To HYPOTHECATE, A ſhip, from the Lat. *hypotheca*, a pledge.] Is to pawn the ſame for neceſſaries; and a maſter may hypothecate either ſhip or goods for relief when in diſtreſs at ſea; for he repreſents the traders as well as owners: and in whoſe hands ſoever a ſhip or goods hypothecated come, they are liable. 1 *Salk.* 34; 2 *Lil. Abr.* 195. See titles *Inſurance* IV: *Factor; Merchant; Ship; Mortgage, &c.*

HYTH, A port or little haven to lade or unlade wares at, as *Queen-hyth, Lamb-hyth, &c. New Book of Entries, fol.* 3.—*De tota medietate hythæ ſuæ in, &c. cum libero introitu & exitu, &c. Mon. Angl.* 2 *par. fol.* 142. Alſo a Wharf, *&c.*

THE END OF THE FIRST VOLUME.

ADDENDA ET CORRIGENDA;

IN THIS VOLUME.

Tit. ACCESSARY, II. 4. After the recital of *Stat.* 1 *Ann. c.* 9. and its effects, add "and by *Stat.* 10 *Geo.* 3. *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."

ADMIRAL AND ADMIRALTY } In the laſt column but one of this article, the 4th parag. of the col. after "See the *St.* and *Dougl.* 614." add "and *Stat.* 33 *Geo.* 3. *cc.* 34, 66, and this Dict. tit. *Navy*."

ANNUITY,——At the end of this article add "See *Stat.* 33 *Geo.* 3. *c.* 14; as to the Royal Exchange Aſſurance Annuity Company."

APPRENTICE.——Before the laſt par. in the 3d col. of this article "The juſtices" *&c.* put II. and in the 3d par. of the next col. line 10, after the word "paid" add "(and by *Stat.* 33 *Geo.* 3. *c.* 55, may fine the maſter for ſuch ill uſage)"—In the next par. line 6. for 33 *Geo.* 3. read 32 *Geo.* 3.

ARREST.—Col. 3. line 23. for "*term*" read "*town*."

AUCTIONS.—Line 6. after the words "explained by ſtatutes" add "28 *Geo.* 3. *c.* 37."

BANK.—Col. 2. after line 24. add "See *Stat.* 33 *Geo.* 3. *c.* 30; as to the forgery of transfers and dividend-warrants, *&c.*"

BANKRUPT, III. 1. In the laſt par. of this Diviſion after *Stat.* 5 *Geo.* 2. *c.* 30. add "And an action may accordingly be maintained for ſuch debt. 5 *Term Rep.* 287."

BOOKS.—At the end of par. 3. of this article, add "See *Stat.* 34 *Geo.* 3. *c.* 20; and this Dict. title *Literary Property*."

BREAD.—Par. 2. line 1. after 29. add "(explained and reſtrained as to the time of proſecution, which is limited to *ſeven days*, by *Stat.* 33 *Geo.* 3. *c.* 37.)

For CAUTIONE ADMITTENDT read ADMITTENDA.

COALS.—Line 29. after 13. add "(explained as to coals carried coaſtwiſe in *Scotland*, by *Stat.* 33 *Geo.* 3. *c.* 69.)"

DOWER, IV. Col. 2. par. 2 and 4. for "1 *Inſt.* 366." read "1 *Inſt.* 36 *b.*"

EXECUTION, III. 4. Col. 2. par. 3. line 3. after "200 *l.*" add "and by *Stat.* 33 *Geo.* 3. *c.* 5. to 300 *l.*"

EXECUTOR, V. 6. Col. ult. par. 2. line 18. for "*rent aſſets*" read "*real aſſets.*"

——————, V. 8. Par. 3. line 5. for "*attend*" read "*intend.*"

FELONY.—Col. 2. line penult. for "Foreign State, ſerving." read "Foreign State, going out of the realm to ſerve, without taking Oath of Allegiance."

GAOL AND GAOLER.—Line 11. for "*healed*" read "*treated*"

HIGHWAYS, VI. (A) 1. col. 2. par. 3. line 12-16. *dele* from "Perſons above 18—to—ſix days duty"—that part of the *Stat.* 13 *Geo.* 3. *c.* 78, being repealed by *Stat.* 34 *Geo.* 3. *c.* 74.