Dordrecht is ten avoirdupois, and every avoirdupois 50 gallons: The rood of
Antwerp is fourteen avoirdupois, and every avoirdupois 35 gallons.

AWNKHINE. See Third-night-awn-hinde.

AYLE. See Ayle.

AZALDUS, A poor horse or jade. Claus. 4 Edw. III.

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

BACINNIUM, or Bacina, A basin or vessel to hold water to wash
Petrus Pius Petri Picoi tenet meditatem Heydena per serijanum ser-
viendi de bacinis. This was a service of holding the basin, or waiting
at the basin, on the day of the king's coronation. Lib. Rub. Seaccar. f.
137.

BACHELERIA, The commonalty or yeomanry, as distinguished

BACHELOR, Baccalaureus, from the Fr. bachelier, viz. tyro, a learn-
er.] In the universities there are bachelors of arts, &c. which is the
first degree taken by students, before they come to greater dignity.
And those that are called bachelors of the companies of London, are
such of each company as are springing towards the estate of those
that are employed in council, but as yet are inferiors: for every of the
twelve companies consists of a master, two wardens, the livery, (which
are assistants in matters of council, or such as the assistants are
chosen out of,) and the bachelors, in other companies, called the yeo-
manry. The word bachelor is also used, and signifies the same with
knight-bachelor, a simple knight, and not knight banneret, or knight of
the Bath. The name of bachelor was also applied to that species of
esquire, ten of whom were retained by each knight banneret on his crea-
tion. Anno 28 Edw. III. a petition was recorded in the Tower,
beginning thus : A nostre Seigneur le Roy mons.

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 Warton.
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 and 6 Edw. VI. c. 14. from the punishment of an ingrosser within that statute. But by 5 Eliz. c. 12. Badgers are to be licensed by the justices of peace in the sessions; whose licenses will be in force for one year, and no longer; and the persons to whom granted must enter into a recognisance that they will not by colour of their licenses forestall, or do any thing contrary to the statutes made against forestallers, ingrossers, and regrators. If any person shall act as a Badger without license, he is to forfeit sl. one moiety to the king, and the other to the prosecutor, leviable by warrant from justices of peace, &c. Vide 13 Eliz. c. 25. § 20.

BAG. An uncertain quantity of goods and merchandise, from three to four hundred. Lex Mercat.


BAGAVEL. The citizens of Exeter had granted to them by charter from king Edw. I. the collection of a certain tribute or toll upon all manner of wares brought to that city to be sold, towards the paving of the streets, repairing of the walls, and maintenance of the city, which was commonly called in old English, be gavel, bethugavel, and chesting-gavel. Antiq. of Exeter.

BAHADUM, A chest or coffer. Fleta, lib. 2. c. 21.


BAIL, ballium, from the Fr. bailier, which comes of the Greek Ballein, and signifies to deliver into hands. Is used in our common law for the freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, on surety taken for his appearance at a day and place certain. Bract. lib. 3. tract. 2. cap. 8. The reason why it is called bail, is because, by this means, the party restrained is delivered into the hands of those that bind themselves for his forthcoming, in order to a safe keeping or protection from prison: and the end of bail is to satisfy the condemnation and costs, or render the defendant to prison.

With respect to bail in civil cases it is to be observed, that there is both common and special bail: common bail is in actions of small concernment, being called common, because any sureties in that case are taken; whereas, in causes of greater weight and value, special bail or surety must be taken, and they according to the value. 4 Inst. 179. See tit. Appearance.

By stat. 23 Henry VI. c. 9. sheriffs, &c. are to let to bail persons by them arrested by force of any writ, in any personal action, &c. upon reasonable sureties, having sufficient within the county to keep their days in such place, &c. as the writs require.

Bail and mainprieve are often used promiscuously in our law books, as signifying one and the same thing, and agree in this notion, that they save a man from imprisonment in the common gaol; his friends undertaking for him, before certain persons for that purpose authorised, that he shall appear at a certain day, and answer whatever shall be objected to him in a legal way. 2 Hawk. P. C. c. 15. § 29. 4 Inst. 180. The chief difference is, that a man's mainprieve 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. Compt. 228. n. Vide Doug. Rep. 465. 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 R. B. nor persons outlawed after judgment. R. M. 14 Geo. II. The keeper of the Poultry Compter was rejected. Doug. 466.

I. Of Bail in Civil Cases. As to the form and requisites of affidavits to hold to bail, see title Affidavit.] In actions of battery, trespass, slander, &c. though the plaintiff is likely to recover large damages, special bail is not to be had, unless by order of court, and the process is marked for special bail; nor is it required in actions of account, or of covenant, except it be to pay money; nor against heirs or executors, &c. for the debt of the testator, unless they have wasted the testator’s goods. 1 Dani. Abr. 681.

If baron and feme are sued, the husband must put in bail for both; but if the husband does not appear upon the arrest, the wife must file common bail before she can be discharged; for otherwise the plaintiff could not proceed to obtain judgment. Golds. 127. Cro. Eliz. 370. Cro. Jac. 445. Sty. 475. 1 Mod. 8. 6 Mod. 17. 105. Tidd’s Pract.

A feme covert was discharged out of custody, because she was arrested without her husband; though the writ was sued against both, and non est inventus returned as to the husband. 1 Term Rep. 486. See tit. Arrest.

In all actions brought in B. R. upon any penal law, the defendant is to put in but common bail. Yelv. 53. In actions where damages are uncertain, bail is to be at the discretion of the court: on a dangerous assault and battery, upon affidavit of special damages, a judge’s hand may be procured for allowance of an ac etiam in the writ: and in action of scandalum magnatum, the court, on motion, ordered special bail. Raym. 74. When bail is taken by the chief justice, or other judge, on a habeas corpus, the bail taken in the inferior court is dismissed, though the last bail be not filed presently, nor till the next term. Yelv. 120, 121. Yet it has been held, where a cause is removed out of an inferior court by habeas corpus, if the bail below offer themselves to be bail above, they shall be taken, not being excepted against below, unless the cause comes out of London. For the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff: so that the plaintiff had not the liberty of excepting against them, and the clerk is not responsible for their deficiency in the court above, though he was in London. 1 Salk. 97.

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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 Pcb. 404.

There is not only bail to appear, &c. on writs of error; but also in audiæ querela, a recognizance of bail must be acknowledged; and upon a writ of attainder, to prosecute, &c. 2 Jn. 129.

By the 3 Jac. I. c. 8. No execution shall be delayed by any writ of error or supersedeas thereupon, unless bail shall be given in double the sum adjudged, to prosecute the writ of error with effect; and also to satisfy the debt, damages, and costs adjudged, &c.

If a cause, removed from an inferior court, be remanded back by proceeding the same term, the original bail in the inferior court are chargeable, but not if remanded in another, term. 2 Cro. Jac. 363. One taken on a writ of execution is not bailable by law; except an audiæ 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 Nils. 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. 2 Cro. Jac. 384.

On caecias ad satisfacendum against the defendant returned non est inventa, 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. 2 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, 3 Cas. 1249. 2 Leon. 59. See Hobs. 210.

There must be an exoneretur entered to discharge the bail. If the defendant dies before a caecias ad satisfac. against him returned and filed, the bill will be discharged. 1 Lill. 177.

The bail upon a writ of error cannot render the party in their discharge; because they are bound in a recognisance that the party shall prosecute the writ of error with effect, or pay the money if judgment be affirmed. 1 Lill. Abr. 173. 2 Cre. 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 Ref. 624. See Scire Facias.

Before a scire facias taken out against bail, the principal may render his body in discharge of the bail: and if the bail bring in the principal before the return of the second sci. fa. against them, they shall be discharged. 1 Roll. Abr. 250. 1 Lill. 471. Anciently the bail were to bring in the principal upon the first sci. fa. or it would not be allowed. 3 Bulst. 182.

If the bail mean to acquit themselves of their recognisance entirely, and run no hazard of the death of the defendant, then they must render him in their discharge, before the return of the ca. sa. as the death of the principal afterwards will not discharge them. 2 Wils. 67.

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BAIL I.

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 nulli is returned thereon, then until the return day, sedente curiâ of the second scire facias. N. on R. E. 5 Geo. II. And if the proceedings be by original, they have till the quarto die post of the return of the first scire facias. If returned scire feci; if not, then till the quarto die post of the return day of the second. 4 Burr. 2134. 1 Wilde. 270. If an action be brought, then eight days in full term after the return. R. Trin. 1 Ann. See further Tiptre'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, 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. 2. c. 6. § 3.

The judges of the courts at Westminster have power by statute to appoint commissioners in every county to take recognisances of bail, in causes depending in their courts; and to make such rules for justifying the bail as they shall think fit, &c. Stat. 4 and 5 Wm. & M. c. 4. The commissioners are to take bail, but are obliged by rule of court to keep a book wherein are the names of the plaintiff, defendant, and bail, and the person who transmits the same, and who makes affidavit that the recognizance was duly acknowledged in his presence: on such affidavit the judges make a conditional allocatur; and the bail are to stand absolute, unless the plaintiff excepts against them within twenty days, and if he excepts, the bail may justify by affidavit before commissioners in the country. Gilb. H. C. B. 32.

If a defendant puts in bail by a wrong name, the proceedings shall nevertheless be good; for otherwise every man impeached may give a false name to his attorney by which he will be bailed, and then plead it in arrest of judgment. Goldsb. 138. But it hath been held, that if the bail be entered in one name, and the declaration and all the proceedings are by a contrary name, it will be erroneous. Cro. Eliz. 223. So if there is bail, and the bail be taken off the file, the plaintiff is without remedy; though where a habeas corpus and bail-piece were lost in B. R. new ones were ordered to be made out. Sty. 261.

Stat. 21 Jac. 1. cap. 26. enacts, That it is felony without benefit of clergy to acknowledge, or procure to be acknowledged, any bail in the name of another person not privy or consenting thereto; provided that it shall not corrupt the blood, or take away dower.

Stat. 4 and 5 Wm. & M. cap. 4. § 4. enacts, That any person representing or personating another before commissioners appointed to take bail, shall be adjudged guilty of felony.

Special bail, which is taken before a judge, or by commissioners in the country, when accepted, is to be filed; after twenty days notice given of putting in special bail before a judge, on a capi corpus, if there be no exception, the bail shall be filed in four days. 1 Litt. Abr.
174. Upon a *capi corpus* twenty days are allowed to except against the bail: so on a writ of error; and you need not give notice; but you cannot take out execution without giving a four days rule to put in better bail: in all other cases, notice must be given. Upon a *habeas corpus* eight and twenty days are appointed to except against the bail, and after that, if it be not excepted against, it shall be filed in four days. 1 Salk. 98. R. M. 8 Ann.

The exception to bail put in before a judge, must be entered in the bail-book, at the judge's chambers at the side of the bail there put in, after this manner: *I do except against this bail, A. B.* attorn. *for the plaintiff.* And if there be no such exception, the defendant's attorney may take the bail-piece from the judge's chamber, and file it. Bail is not properly such until it is filed, when it is of record: but it shall be accounted good, till the same is questioned and disallowed. Bail cannot be justified before a judge in his chamber, except it be by consent, or for necessity in vacation; but in the latter case they ought to be justified again *in term,* and upon that the defendant is compelled to accept a declaration to go to trial at the assises, if it be an issuable term; and upon putting in bail, it is not enough to give notice of their being put in, but it ought to be of their names, places of abode, and trade or vocation, that the plaintiff may know how to inquire after them. 6 Mod. 24, 25.

It being doubtful whether Sunday should be reckoned as one day in notice to justify bail, it was determined *per cur.* that for the future, Sunday shall not be counted one; (it not being a proper day to inquire after bail;) but two days' notice must be given, of which Sunday shall not be one; upon motion for defendant to justify bail, notice was served Saturday, June 23, to justify bail Monday, 25; the notice being insufficient, the bail was not suffered to justify. Notes in C. B. 220.

After the plaintiff has entered his exception, and given notice thereof to the defendant, the bail (to discharge the bond) must personally appear in court within the time limited by the rules thereof, and justify themselves, [or by affidavit if taken before commissioners in the country,] and the plaintiff may oppose them by his counsel: if it appear they are insufficient the court will reject them, and leave the plaintiff at liberty to proceed upon the bail-bond, or against the sheriff.

Bail coming to justify and not being present at the sitting of the court, must wait until the rising.

Generally, bail are opposed on five grounds with effect. 1st. That there is some mistake in the notice to justify; namely, that it should have been given *two days* previous, instead of one. 2dly. That the bail have assumed names that are either *feigned,* or belong to other persons, contrary to the stats. 21 Jac. I. and 4 and 5 Wm. & M. But the court will not vacate the proceedings against the party personated, until the offender be convicted. 1 Vent. 301. Nor can a conviction take place, until the bail-piece be filed. 2 Sid. 90. 3dly. A third ground of opposing bail is, that they are not housekeepers; if they be, the rent paid is immaterial, though under 10l. *Lott.* 148. Nor is it necessary they should have been assessed to the poor's rate. *Ibid.* 528. 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 15s.
in the pound. M. 24 Geo. III. Lastly, after the expiration of the rule to bring in the body. Loft. 438. M. 20 Geo. III.

If the bail do not justify at the day given, (being the last day they have,) they are out of court. Nor can they justify after the rule upon the sheriff to bring in the body is expired, without leave of the court. Loft. 88.

In case the defendant by neglect has suffered the plaintiff to take an assignment of the bond, and he has lost a trial; if he would wish to try the cause, he must move the court for that purpose on a special affidavit containing merits, if it be in term time; if in vacation, he may apply and obtain a judge’s order, which will be granted upon putting in and perfecting bail, paying the costs incurred, receiving a declaration in the original action, pleading issuable, and taking short notice of trial, so as not to delay the plaintiff, and consenting that the bond stand as a security. But the court of K. B. has not yet said, that the plaintiff shall take judgment on the actions upon the bond, although the practice in the Common Pleas is so.

If the bond be irregularly assigned, defendant may move the court to set the proceedings aside for irregularity, upon an affidavit, stating the particular facts.

If the court stay the proceedings on the bond, the defendant is not at liberty to plead in abatement, but in chief. Salk. 519. Nor will the court order the bond to be delivered up to be cancelled, on the ground of a misnomer. 3 Term Rep. 572.

Pending a rule to set aside proceedings for irregularity, and to stay the proceedings, plaintiff took an assignment of the bond in the mean time; the court agreed that the proceedings were totally suspended by an act of the court, and made the rule absolute to set aside the assignment of the bond, as having been made too soon. 4 Term Rep. 176.

The court may adjudge bail sufficient, when the plaintiff will not accept of it. Also the court on motion, or a judge at his chamber, will order a common appearance to be taken, when special bail is not required, on affidavit made by the defendant of the smallness of the debt due, &c. The putting in of a declaration, and the acceptance of it by the defendant’s attorney, with the privity of the plaintiff’s attorney, is an acceptance of the bail.

When the sheriff hath taken good bail of the defendant, he will on a rule return a cepti, and assign the bail-bond to plaintiff, which may be done by indorsement without stamp; so as it be stamped before action brought thereupon; and then the defendant and bail may be sued on the bond, by the plaintiff in his own name, i.e. as assignee of the sheriff. Stat. 4 and 5 Ann. c. 16. The action must be brought in the same court where the original writ was sued out. 3 Burr. 1923. 1 Burr. 642. The venue may be laid in any county. 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 cepti 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. Litt. 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 Just. 532. Bail-pieces are written on a small square piece of parchment, with the corners cut off at the bottom. Bail are not regularly put in, unless the name of the proper county be inserted in the bail-piece. Smith v. Miller, 7 Term Rts. 96.

If a sheriff's officer on an arrest take an undertaking for the appearance of the party instead of a bail-bond without the plaintiff's assent, and bail above is not duly put in, the sheriff is liable to an action for an escape, and the court will not relieve him by permitting him to put in and justify bail afterwards. Fuller v. Prest, Ibid. 109.

But if the sheriff permit the defendant to go at large without taking a bail-bond, he may retake him before the return of the writ. Ibid.

Where a bail-bond has been taken, it may be cancelled if the defendant return into the sheriff's custody before the return of the writ. Stamp v. Milbourne, Ib. 129.

The court on the application of the defendant's bail, granted a habeas corpus to the sheriff of H. in whose custody the defendant was under a charge of felony to bring him up in order that he might be surrendered by his bail. Sharp v. Sheriff, Ib. 226.

If an action be brought here against bail on a recognisance of bail taken in C. B. they have the same indulgence (of eight days in full term after the return of the writ against them) to render the principal, as if the recognisance had been taken in this court. Fisher v. Bramcombe, 7 Term Rep. 355.

It is not necessary to give bail in error on a judgment in debt, for goods sold and delivered, and on an account stated. Alexander v. Biss, Ib. 449.

If a defendant be sent out of the kingdom under the alien bill after he has given a bail-bond and before the return of the writ, the court will order the bail-bond to be cancelled. Postel v. Williams, Ib. 517.

But bail to the sheriff are liable to the plaintiff's whole debt (without regard to the sum sworn to) and costs, provided they no not exceed the penalty of the bail-bond. Stevenson v. Cameron, 8 Term Rep. 28.

But bail in the action are not liable beyond the sum sworn to and the costs. Ib.

Bail in the original action after judgment recovered against them on the bail-bond, may be holden to bail in an action on such judgment. Prendergast v. Davis, Ib. 85.

But bail to the sheriffs, cannot themselves be holden to bail in an action on the bail-bond. Ib.

An action on the bail-bond must be brought in the court where the original action was brought. Donatt v. Berkeley, Ib. 152.

Bail have eight days to render the principal from the return of that writ on which there is an effectual proceeding against them. Wilkinson v. Vaux, Ib. 422.

Therefore where the plaintiff sued the bail on their recognisance, who did not render the principal within eight days, and then the plaintiff died, and his executors brought another action against the bail, it was ruled that the bail had eight days from the return of the process in the second action in which to render the principal. Ib.
A defendant who has given a bail-bond cannot be holden to bail in an action brought by the sheriff on that bond. *Mellish v. Patherich*, *ib. 450.*

Bail above may be put in before the return of the writ; and consequently the plaintiff cannot afterwards proceed on the bail-bond. *Hyde v. Wishard*, *ib. 456.*

When the rule to bring in the body expires the last day of a term, the bail have the whole of the first day of the next term to justify; and if the defendant surrender in discharge of the bail on any part of that day, the sheriff cannot be attached for not bringing in the body. *R. v. The Sheriff of Middlesex*, *ib. 454.*

The plaintiff may sue out a writ against the bail on their recognisance, on the return day of the *ca. sa.* against the principals. *Shivers v. Brooks*, *ib. 628.*

The same persons who were bail in *B. R.* may justify again, or bail upon a writ of error returnable in parliament. *Martin v. Justice*, *ib. 639.*

If a defendant be arrested by process of *K. B.* and removed by habeas corpus to *C. B.*, he may put in and justify bail in either court. *Knowlys et al. v. Reading*, *C. B. 1 B. & P. 341.*

Bail were allowed to justify after the rule to bring in the body had expired, on payment of the costs of the opposition. *Weddall v. Berger*, *ib. 328.*

If a man carry on business at a lodging in one place, and keep a house at another, notice of bail describing him as of the former place is sufficient. *ib.*

The court allowed the defendant to justify bail after an attachment had issued against the sheriff, but gave leave to the plaintiff to oppose them without prejudice. *Williams v. Waterfield*, *ib. 334.*

Where bail are regularly put in and excepted to, the defendant need not describe them in his notice of justification. *England v. Kerwan*, *8 Term Rep. 333.*

The court will not discharge a defendant on a common appearance on the ground of infancy. *Madox v. Eden*, *ib. 480.*


But each bail shall bind himself in double the sum sworn to. *ib.*

In *C. B.* two days notice of justification must be given whether the bail originally put in, or added bail be brought up. *Nation v. Barret*, *C. B. 2 B. & P. 30. Secus in B. R. Wright v. Ley*, *ib. 31.*

It is not a sufficient ground for rejecting a person as bail, that he is described to be "of A. in the county of B. gaol-keeper." *Faulkner v. Wise*, *ib. 150.*

The court will not discharge a defendant on common appearance on the ground of his having obtained his certificate as a bankrupt, and of the debt being thereby barred, if the validity of the certificate is meant to be disputed. *Stacy v. Federici*, *ib. 390.*

If a defendant in error, (the plaintiff in an action,) upon judgment being affirmed, take in execution the body of the plaintiff in error, for the debt, damages and costs in error, he does not thereby discharge the bail in error, but may sue them upon their recognisance. *Perkins v. Petit and Gate*, *ib. 440.*

A recognisance entered into by the bail in error without the principal is good. *Dixon v. Dixon*, *ib. 443.*

If on a bond debt, double the sum secured by the bond be the sum for which the bail bind themselves in the recognisance in error, it is
sufficient, though a further sum be due for interest and costs, and
nominal damages have been recovered. Ib.

If bail be put in with the filazer of the county in which the defend­
ant is arrested on a testatum capitans, the bail may be treated as a nulli­

But if the plaintiff appear to have been aware that the bail were ac­
tually put in, though with the wrong filazer, the court will relieve
against the attachment. Id. Ib.

An indorsor of a bill of exchange may be bail for the drawer, in an
action against him on the same bill. Harris v. Manley, Ib. 526.

An attorney's clerk, though not clerk to the defendant's attorney,

Court will stay proceedings against both the bail on payment of the
sum sworn to, and costs, although less than the damages recovered,
or than the sum named in the process. Clark v. Bradshaw, 1 East,
86.

Sci. fa. against bail must lie four days in the office as well where
seire feci is returned as nihil. Williams v. Mason, cited in the above
case.

Where defendant was sued by original in London the sci. fa. against
the bail must be sued there also; and it does not help the plaintiff
who sued out the sci. fa. in Middlesex, that bail had by mistake has
been put in there. Harris and another v. Calvert and another, 1 East,
603.

A writ of error though not returned is of itself a supersedeas,
and may be pleaded by bail to have been issued and allowed after issuing,
and before the return of the ca. sa. against the principal, so as to
avoid proceedings against them in sci. fa. upon the recognisance
of bail prosecuted after a return by the sheriff of non est inventus made
pending such writ of error. Sampson v. Brown, 2 East, 439.

Bail in error are not required by stat 3 Jac. 1. c. 8. on error brought
on a judgment by default in debt on a count for a promissory note
more than on counts for goods sold and delivered, and on an account
stated; though if there were one count, on which judgment was en­
tered up, for which bail in error were not required, it seems suf­
ficient to excuse the plaintiff in error. Trier v. Bridgman, 2 East,
339.

An omission in the ac etiam part of the writ of the sum for which
the defendant is arrested, on bailable process is irregular, and he can­
ot be held to special bail thereon. Davisson v. Frost, Ibid. 305.

Time enlarged for bail to surrender a bankrupt under examination.
Maude v. Jouett, 3 East, 145.

B. R. have power to bail in discretion in all cases of felony, as well
as other offences. Rex v. Marks, Ib. 163.

One who was committed to Newgate by commissioners of bankrupt
for not answering satisfactorily to certain questions, must for the pur­
pose of being surrendered by his bail in a civil suit, be brought up by
habeas corpus issued on the crown side of the court, on which side also
must be taken the subsequent rule of his surrender in the action,
his commitment pro forma to the marshal, and his recommittal to
Newgate charged with the several matters. Taylor's case, Ib. 232.

After notice of render, all proceedings against bail shall cease. (T.
1 Ann.) Byrne v. Aguilar, Ib. 306.

Upon a writ of error sued out by the principal after the bail are
fixed and proceedings against them in sci. fa. the court will only stay
proceedings against the bail pending the writ of error, on the terms of
the bail's undertaking to pay the condemnation money and the costs of the *sci. fa.* and (if it be a case in which there is no bail in error) to pay the costs also of a writ of error if judgment should be affirmed. 

Buchanan *v.* Alders and another, *10. 546.*

If the second writ of *sci. jis.* be in proper time on the file in the sheriff's office, that is sufficient to warrant proceedings against the bail, though it were not entered in the *sci. fa.* book in the sheriff's office, which is merely a private book for his own convenience. 


If bail apply to stay proceedings upon the bail-bond, or against the sheriff, they need not swear to merits, though a trial has been lost. 1 *B. & P.*

II. *As to Bail for Crimes.* At common law, bail was allowed for all offences except murder. 2 *Inst. 109.* And if the party accused could find sureties, he was not to be committed to prison; for all persons might be bailed till convicted of the offence. 2 *Inst. 185.* But by statute it was after enacted, that in case of homicide the offender should not be bailed: and by our statutes, murderers, outlaws, house-burners, thieves openly defamed, &c. are not bailable; but where persons are accused of larceny, as accessaries to felony, or under light suspicion, they may be admitted to bail. Stat. 3 *Edw. I.* c. 15.

One indicted and found guilty of the death of a man by misadventure, as by casting a stone over a house, and by chance killing a man, woman or child, is not bailable. 3 *Edw. III.* Corone, 354.

One indicted of conspiracy, viz. that he with others conspired falsely to indict another of murder or felony, by means whereof he was indicted, and afterwards convicted, shall not be bailed. The resolution of all the judges, upon the question demanded by King *Edw. III.* himself, as appears, 27 *Ass. 1.*

One indicted for burglary may be bailed. 29 *Ass. 44.*

One indicted on suspicion of robbery was outlawed, and taken on the outlawry, and brought writ of error; and being brought to B. R. by habeas corpus, prayed to be bailed and took two exceptions to the indictment; 1 st. That he was in prison, and knew nothing of the outlawry; 2 dly. That the charge is too general, and nobody prosecutes; but per Rolle, Ch. J. He cannot be bailed. *Sty. 418.* But see stat. 4 and 5 *Wm. & M.* c. 18. which enacts that persons outlawed, except for treason or felony, may appear by attorney and reverse the same without bail; except special bail shall be ordered by the court: and that persons arrested upon any *capias utlagatum*, except for treason or felony, may be discharged by an attorney's engagement to appear: and in cases where special bail is required, the sheriff may take bond with sureties.

By the common law the sheriff might bail persons arrested on suspicion of felony, or for other offence bailable; but he hath lost this power by the stat. 1 *Edw. IV.* c. 2. Justices of peace may let to bail persons suspected of felony, or others bailable, until the next sessions; though where persons are arrested for manslaughter or felony, being bailable by law, they are not to be let to bail by justices of peace but in open sessions, or where two justices (quorum nume) are present; and the same is to be certified with the examination of the offender, and the accusers bound over to prosecute, &c. 3 *Hen. VII.* c. 3. 1 and 2 *P. & M.* c. 13. § 3. Nor to restrain justices in *London* and *Middlesex,* and towns corporate. 1 and 2 *P. & M.* c. 13. § 6. If a
person be dangerously wounded, the offender may be bailed till the person is dead; but it is usual to have assurance from some skilful surgeon, that the party is like to do well. 2 Inst. 188. A man arrested and imprisoned for felony, being bailable, shall be bailed before it appears whether he is guilty or not; but when convicted, or if on examination he confesseth the felony, he cannot be bailed. 4 Inst. 178.

It is to be observed, that the stat. Westm. 1. 3 Edw. I. c. 15. above mentioned, doth not extend to the judges of B. R. &c. only to sheriffs and other inferior officers. H. P. C. 98, 99. Likewise, justices of gaol delivery, not being within the restraint of the statute of Westm. 1. may bail persons convicted before them of homicide by misadventure, or self-defence, the better to enable them to purchase their pardon. Cromph. 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. Cromph. 153.

The court of B. R. has power to bail in all cases whatsoever, and will exercise their discretion in all cases not capital; in capital cases, where innocence may be fairly presumed; and in every case where the charge is not alleged with sufficient certainty. Leach's Hawk. P. C. 2. c. 15. § 80. in note, where several cases are enumerated.

It is to be observed that with respect to the nature of the offence, although this court is not tied down by the rules prescribed by the stat. of Westm. 1. yet it will in discretion pay a due regard to those rules, and not admit a person to bail who is expressly declared to be irreplevisable, without some particular circumstances in his favour. 2 Inst. 185, 186, 189. H. P. C. 104. 1 Salk. 61. 3 Bulst. 113. 2 Hawk. P. C. c. 15. § 80. 5 Mod. 454.

And therefore if a person be attainted of felony, or convicted thereof by verdict general or special, or notoriously guilty of treason or manslaughter, &c. by his own confession or otherwise, he is not to be admitted to bail, without some special motive to induce the court to grant it. Kelinge, 90. Dyer, 79. 1 Bulst. 87. 2 Hawk. P. C. c. 15. § 80.

Upon a commitment of either house of parliament, when it stands indifferent on the return of the habeas corpus, whether it be legal or not, the court of B. R. ought not to bail a prisoner. Leach's Hawk. P. C. 2. c. 15. § 73. But if it be demanded in case a subject should be committed by either of the houses, for a matter manifestly out of their jurisdiction, what remedy can he have? I answer, (says the learned and cautious Serjeant Hawkins,) as this is a case which I am persuaded will never happen, it seems needless over nicely to examine it. See Leach's notes. 2 Hawk. P. C. c. 15. § 72. From the cases cited there, (viz. The Hon. Alex. Murray's, 1 Wils. 239. John Wilkes's, 2 Wils. 158. Enlick v. Carrington, 11 St. Tr. 317. Brass Crosby's, 3 Wils. 188. 2 Black. 755.) it appears that the courts in Westminster Hall have been positively of opinion, "that they have no power to decide on the privileges of parliament; that the rights of the house of commons are paramount to the jurisdiction of those courts; that the commons are the exclusive arbiters of their own peculiar privileges; that their power of commitment is inherent in the very nature of their constitution; and finally that their adjudication is tantamount to a conviction, and their commitment equal to an execu-
tion; and that no court can discharge a prisoner committed in execution by another court."

However, a person committed for a contempt, by order of either house of parliament, may be discharged by B. R. after a dissolution or prorogation, which determine all orders of parliament: also it is said on an impeachment, when the parliament is not sitting, and the party has been long in prison. B. R. may bail him. The court of B. R. hath bailed persons committed to the Fleet Prison by the lord chancellor; when the crime of commitment was not mentioned, or only in general terms, &c. 2 Hawk. P. C. c. 15. § 76.

And B. R. having the control of all inferior courts, may at their discretion bail any person unjustly committed by any of those courts. In admitting a person to bail in the court of B. R. for felony, &c. a several recognisance is entered into to the king in a certain sum from each of the bail, that the prisoner shall appear at a certain day, &c. And also that the bail shall be liable for the default of such appearance, body for body. And it is at the discretion of justices of the peace, in admitting any person to bail for felony, to take the recognisance in a certain sum, or body for body: but where a person is bailed by any court, &c. for a crime of an inferior nature, the recognisance ought to be only in a certain sum of money, and not body for body. 2 Hawk. c. 15. § 83. And the bail are to be bound in double the sum of the criminal. Where persons are bound body for body, if the offender doth not appear, whereby the recognisance is forfeited, the bail are not liable to such punishment to which the principal would be adjudged if found guilty, but only to be fined, &c. Wood's Inst. 618.

If bail suspect the prisoner will fly, they may carry him before a justice to find new sureties; or to be committed in their discharge. 1 Retb. 99.

The courts of King's Bench, Common Pleas and Exchequer, in term time, and the Chancery in the term or vacation, may bail persons by the habeas corpus act. See tit. Habeas Corpus.

To refuse bail when any one is bailable on the one hand; or on the other to admit any to bail who ought not by law to be admitted, or to take slender bail, is punishable by fine, &c. 2 Inst. 291. H. P. C. 97. And see further, 3 Edw. I. c. 15. 27 Edw. I. st. 1. c. 3. 4 Edw. III. c. 2. 1 and 2 P. & M. c. 13. and 31 Car. II. c. 2.

No person shall be bailed for felony by less than two; and it is said not to be usual for the King's Bench to bail a man on a habeas corpus, on a commitment of treason or felony, without four sureties; the sum in which the sureties are to be bound, ought to be never less than 40l. for a capital crime; but it may be higher in discretion, on consideration of the ability and quality of the prisoner, and the nature of the offence; and the sureties may be examined on oath concerning their sufficiency, by him that takes the bail; and if a person be bailed by insufficient sureties, he may be required, either by him who took the bail, or by any other who hath power to bail him, to find better sureties, and on his refusal may be committed; for insufficient sureties are as none. 2 Hawk. P. C. c. 15. § 4. H. P. C. 97.

But justices must take care, that under pretence of demanding sufficient surety, they do not make so excessive a demand, as in effect amounts to a denial of bail; for this is looked upon as a great grievance, and is complained of as such by 1 Wm. & M. st. 2. c. 2. (the bill of rights,) by which it is declared, that excessive bail ought not to be required. 2 Hawk. P. C. & 15.
If where a felony is committed, one is brought before a justice on suspicion, the person suspected is to be bailed or committed to prison; but if there is no felony done, he may be discharged. *H. P. C.* 98. 106.

Persons committed for treason or felony, and not indicted the next term, are to be bailed. *31 Car. II.* c. 2. § 7.

Where bail may have writ of detainer against the prisoner. See 1 Ann. st. 2. c. 6. § 3.

Justices of peace are required to bail officers of customs and excise, who kill persons resisting. *9 Geo. II.* c. 35. § 35.

The court of King’s Bench and Justiciary in Scotland not restrained from bailing persons committed for felonies, against the laws of customs or excise. *9 Geo. II.* c. 34. § 12.

For further particulars relative to bail in criminal cases, see *Leach’s Hawk.* P. C. 2. c. 15. very much at large.

**BAILIFF.**

Bails signify bone fires. Scotch Diet.

**BAILIFF, ballimts.** From the French word *bailiff*, that is *prefectus provinciae*, 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 *bailiva*: as in the return of a writ, where the person is not arrested, the sheriff saith, *Infra nonominatus A. B. non est inventus in bailiva mea*, &c. Kitch. Ret. *Brev. sol.* 285. And in the statute of *Magna Charta*, cap. 28. and 14 *Edw. III.* c. 9. the word *bailiff* seems to comprise as well sheriffs, as *bailiffs of hundreds*.

As this realm is divided into counties, so every county is divided into hundreds; within which in ancient times the people had justice administered to them by the several officers of every hundred, which were the *bailiffs*. And it appears by Bracton (lib. 3. tract. 2. cap. 34.) that *bailiffs* of hundreds might anciently hold plea of appeal and answers: but since that time the hundred courts, except certain franchises, are swallowed in the county courts; and now the *bailiff’s* name and office is grown into contempt, they being generally officers to serve writs, &c. within their liberties. Though in other respects, the name is still in good esteem; for the chief magistrates in divers towns, are called *bailiffs*; and sometimes the persons to whom the king’s castles are committed are termed *bailiffs*, as the *bailiff* of *Dover Castle*, &c.

Of the ordinary *bailiffs* there are several sorts, *viz.* *bailiffs* of liberties; sheriff’s *bailiffs*; *bailiffs* of lords of manors; *bailiffs* of husbandry, &c.

*Bailiffs of liberties* are those *bailiffs* who are appointed by every lord within his liberty, to execute process and do such offices therein, as the *bailiff errant* doth at large in the county; but *bailiffs* errant or itinerant, to go up and down the county to serve process, are out of use.

*Bailiffs* of liberties and franchises, are to be sworn to take distresses, truly impanel jurors, make returns by indenture between them...
and sheriffs, &c. and shall be punished for malicious distresses by fine and treble damages, by ancient statutes. Vide 12 Edw. II. st. 1. c. 5. 14 Edw. III. st. 1. c. 9. 20 Edw. III. c. 6. 1 Edw. III. st. 1. c. 5. 2 Edw. III. c. 4. 5 Edw. III. c. 4. 11 Hen. VII. c. 15. 27 Hen. VIII. c. 24. 3 Geo. I. c. 15. § 10.

The bailiff of a liberty may make an inquisition and extent upon an elegit. The sheriff returned on a writ of elegit, that the party had not any lands but within the liberty of St. Edmund's Bury, and that J. S. Jailiff there, had the execution and return of all writs, and that he inquired and returned an extent by inquisition, and the bailiff delivered the moiety of the lands extended to the plaintiff, who, by virtue thereof, entered, &c. This was held a good return. Cro. Car. 319. These bailiffs of liberties cannot arrest a man without a warrant from the sheriff of the county: and yet the sheriff may not enter the liberty himself, at the suit of a subject, (unless it be on a quo minus, or cajus utlagatum,) without clause in his writ, Non omittas juro in te 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. 433.

Sheriffs' bailiffs are such as are servants to sheriffs of counties, to execute writs, warrants, &c. Formerly bailiffs of hundreds were the officers to execute writs; but now it is done by special bailiffs, put in with them by the sheriff. A bailiff of a liberty is an officer which the court takes notice of; though a sheriff's bailiff is not an officer of the court, but only the sheriff himself. Pasch. 23 Car. I. B. R. The arrest of the sheriff's bailiff is the arrest of the sheriff; and if any recourse 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 hence are called bound bailiffs; which the common people have corrupted to a more humble appellation.

There are thirty-six serjeants at mace in London who may be termed bailiffs, and they each give security to the sheriffs.

By stat. 14 Edw. III. c. 9. sheriffs shall appoint such bailiffs, for whom they will answer; and by stat. 1 Hen. V. c. 4. no sheriff's bailiff shall be attorney in the king's court. R. M. 1654.

Bailiffs of lords of manors, are those that collect their rents, and levy their fines and amercements: but such a bailiff cannot distrain for an amercement without a special warrant from the lord or his steward. Cro. Eliz. 698. He cannot give license to commit a trespass, as to cut down trees, &c. though he may license one to go over land, being a trespass to the possession only, the profits whereof are at his disposal. Cro. Jac. 337. 377. A bailiff may by himself, or by command of another, take cattle damage-feasant upon the land. 1 Danv. Abr. 685. Yet amends cannot be tendered to the bailiff, for he may not accept of amends, nor deliver the distress when once taken. 5 Rep. 76. These bailiffs may do any thing for the benefit of their masters, and it shall stand good till the master disagrees; but they can do nothing to the prejudice of their masters. Lit. Rep. 70.

Bailiffs of courts-baron summon those courts, and execute the process thereof; they present all pound-breaches, cattle-strayed, &c.

Bailiffs of husbandry are belonging to private men of good estates, and have the disposal of the under-servants, every man to his labour;
they also fell trees, repair houses, hedges, &c. and collect the profits of the land for their lord and master, for which they render account yearly, &c.

Besides these, there are also bailiffs of the forest, of which see Manwood, part 1. page 113.

An Appointment of a Bailiff of a Manor.

KNOW all men by these presents, That I W. B. of, &c. Esq. lord of the manor of D. in the county of G. Have made, ordained, deputed, and appointed, and by these presents do make, ordain, depute, and appoint J. G. of, &c. my bailiff, for me, and in my name, and to my use, to collect and gather, and to ask, require, demand, and receive of all and every my tenants, that have held or enjoyed, or now do, or hereafter shall hold or enjoy, any messuages, lands, or tenements, from, by, or under me, within my said manor of D. all rents, and arrears of rent, heriots, and other profits, that now are, or hereafter shall become payable, due, owing, or belonging to me within the said manor; and, in default of payment thereof, to distress for the same from time to time, and such distress or distresses to impound, detain, and keep, until payment be made of the said rents and profits, and the arrears thereof. And I do also further empower and authorise the said J. G. to take care of and inspect all and every my messuages, lands, and woods within the said manor, and to take an account of all defects, decay, waste, spoils, trespasses, or other misdemainours, committed or permitted within my said manor, or in any messuages, lands, or woods thereof; and from time to time, to give me a just and true account in writing thereof; and further to act and do all other things that to the office of a bailiff of the said manor belongs and appertains, during my will and pleasure. In Witness, &c.

BAILIS, are letters to raise fire and sword. Scotch Dict.

BAILIWICK, bailiva.] 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 bailer, 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 bailed:” [the person to whom they are delivered:] 2 Comm. 451. which see; to which Sir W. Jones adds, “and the goods redelivered as soon as the time or use, for which they were bailed, shall have elapsed or be performed.” Law of Bailments, p. 117.

It is to be known that there are six sorts of bailments, which lay a care and obligation on the party to whom goods are bailed; and which, consequently, subject him to an action, if he misbehave in the trust reposed in him.

1. A bare and naked bailment, to keep for the use of the bailor, which is called depositum; and such bailed is not chargeable for a common neglect, but it must be a gross one to make him liable. 2 Stra. 1099.

2. A delivery of goods which are useful to keep, and they are to be returned again in specie, which is called accommodatum, which is a lending gratis; and in such case the borrower is strictly bound to keep them; for if he be guilty of the least neglect, he shall be an-
sverable, but he shall not be charged where there is no default in him. See post.

3. A delivery of goods for hire, which is called locatio, or conductio; and the hirer is to take all imaginable care, and restore them at the time; which care, if he so use, he shall not be bound.

4. A delivery by way of pledge, which is called vadium; and in such goods the pawnee has a special property; and if the goods will be the worse for using, the pawnee must not use them; otherwise he may use them at his peril; as jewels pawned to a lady, if she keep them in a bag, and they are stolen, she shall not be charged; but if she go with them to a play, and they are stolen, she shall be answerable. So if the pawnee be at a charge in keeping them, he may use them for his reasonable charge; and if notwithstanding all his diligence he lose the pledge, yet he shall recover the debt. But if he lose it after the money tendered, he shall be chargeable, for he is a wrong-doer; after money paid (and tender and refusal is the same) it ceases to be a pledge, and therefore the pawnor may either bring an action of assumpsit, and declare that the defendant promised to return the goods upon request; or trover, the property being vested in him by the tender.

5. A delivery of goods to be carried for a reward, of which enough is said under title Carrier. It may here be added, that the plaintiff ought to prove the defendant used to carry goods, and that the goods were delivered to him or his servant to be carried. And if a price be alleged in the declaration, it ought to be proved the usual price for such a stage; and if the price be proved there need no proof, the defendant being a common carrier: but there need not be a proof of a price certain.

6. A delivery of goods to do some act about them (as to carry) without a reward, which is called by Bracion, 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.


Having mentioned Sir W. Jones's Essay on the Law of Bailment, we cannot help recommending it to the attention of the rational student; and for the use of such, extracting the following analysis, which will in general be found to be consonant with the determinations in the books, and convey much knowledge in a short compass. Sir W. Jones differs in a few points from Lord Holt and Lord Coke, and his reasons are deserving of much attention.

"I. Definitions. 1. Bailment, as before at the beginning of this article. 2. Deposit is a bailment of goods to be kept for the bailor without recompense. 3. Mandate is a bailment of goods, without reward, to be carried from place to place, or to have some act performed about them. 4. Lending for use is a bailment of a thing for a certain time to be used by the borrower without paying for it. 5. Pledging is a bailment of goods by a debtor to his creditor, to be kept till the debt
be discharged. 6. Letting to hire is (1) a bailment of a thing to be used by the hirer for a compensation in money; or (2) a letting out of, work and labour to be done, or care and attention to be bestowed, by the bailee on the goods bailed, and that for a pecuniary recompense; or (3) of care and pains in carrying the things delivered from one place to another, for a stipulated or implied reward. 7. Immunominate bailments are those where the compensation for the use of a thing, or for labour and attention is not pecuniary; but either (1) the reciprocal use or the gift of some other thing; or (2) work and pains reciprocally undertaken; or (3) the use or gift of another thing in consideration of care and labour; and conversely. 8. Ordinary neglect is the omission of that care, which every man of common prudence, and capable of governing a family, takes of his own concerns. 9. Gross neglect, is the want of that care, which every man of common sense, how inattentive soever, takes of his own property. See post, II. 8. 10. Slight neglect is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels. 11. A naked contract is a contract made without consideration or recompense.

"II. THE RULES which may be considered as axioms flowing from natural reason, good morals, and sound policy, are these. 1. A bailee who derives no benefit from his undertaking, is responsible only for gross neglect. 2. A bailee who alone receives benefit from the bailment, is responsible for slight neglect. 3. When the bailment is beneficial to both parties, the bailee must answer for ordinary neglect. 4. A special agreement of any bailee to answer for more or less, is in general valid. 5. All bailees are answerable for actual fraud, even though the contrary be stipulated. 6. No bailee shall be charged for a loss by inevitable accident or irresistible force, except by special agreement. 7. Robbery by force is considered as irresistible; but a loss by private stealth, is presumptive evidence of ordinary neglect. 8. Gross neglect is a violation of good faith. 9. No action lies to compel performance of a naked contract. 10. A reparation may be obtained by suit for every damage occasioned by an injury. 11. The negligence of a servant acting by his master's express or implied order, is the negligence of the master.

"III. From these rules the following Propositions are evidently deducible. 1. A depositary is responsible only for gross neglect; or in other words for a violation of good faith. 2. A depositary whose character is known to his depositor, shall not answer for mere neglect, if he take no better care of his own goods, and they also be spoiled or destroyed. 3. A mandatary to carry is responsible only for gross neglect, or a breach of good faith. 4. A mandatary to perform a work is bound to use a degree of diligence adequate to the performance of it. 5. A man cannot be compelled by action to perform his promise of engaging in a deposit or a mandate; but, 6. A reparation may be obtained by suit for damage occasioned by the non-performance of a promise to become a depositary, or a mandatary. 7. A borrower for use is responsible for slight negligence. 8. A pawnee is answerable for ordinary neglect. 9. The hirer of a thing is answerable for ordinary neglect. 10. A workman for hire must answer for ordinary neglect of the goods bailed, and must apply a degree of skill equal to his undertaking. 11. A letter to hire of his care and attention, is responsible for ordinary negligence. 12. A carrier for hire by land or by water is answerable for ordinary neglect.
"IV. EXCEPTIONS to the above rules and propositions. 1. A man who spontaneously and officiously engages to keep or to carry the goods of another, though without reward, must answer for slight neglect. 2. If a man through strong persuasion and with reluctance undertake the execution of a mandate, no more can be required of him than a fair exertion of his ability. 3. All bailees become responsible for losses by casualty or violence, after their refusal to return the things bailed, on a lawful demand. 4. A borrower and a hirer are answerable in all events, if they keep the things borrowed or hired after the stipulated time, or use them differently from their agreement. 5. A depositor and a pawnee are answerable in all events, if they use the things deposited or pawned. 6. An innkeeper is chargeable for the goods of his guest within his inn, if the guest be robbed by the servants or inmates of the keeper. 7. A common carrier by land or by water, must indemnify the owner of the goods carried if he be robbed of them.

"V. It is no exception but a Corollary from the rules, that every bailee is responsible for a loss by accident or force, however inevitable or irresistible, if it be occasioned by that degree of negligence for which the nature of his contract makes him generally answerable."

The cases cited and commented on by Sir Wm. Jones, besides the above of Coggs v. Bernard, and which lead to the whole law on this subject, are 1 Str. 128. 143. 2 Str. 1099. Allen. 93. Fitz. Deatme, 59. (Bonjon's case, the earliest on the subject.) 8 Rep. 32. 1 Wils. 281. Burr. 2298. 1 Vest. 121. 190. 238. Carth. 485. 487. 2 Bulst. 280. 1 Roll. Abr. 2. 4. 10. 2 Roll. abr. 567. 12 Mod. 480. 2 Raym. 220. Moor. 462. 543. Owen. 141. 1 Leon. 224. 1 Cro. 219. Bro. Abr. tit. Bailment. Hob. 30. 2 Cro. 339. 667. Palm. 548. W. Jo. 139. 4 Rep. 83. b. (Southce'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 Litt. Abr. 193, 194. And vide 1 Roll. Abr. 338. 2 Show. pl. 166.

If I deliver 100l. to A. to buy cattle, and he bestows 50l. 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. 266.

If A. delivers goods to B. to be delivered over to C. C. hath the property, and C. hath the action against B. for B. undertakes for the safe delivery to C. and hath no property or interest but in order to that purpose. 1 Roll. Abr. 606. see 1 Bulst. 68, 69. where it is said
that, in case of conversion to his own use, the bailee shall be answerable to both.

But if the bailment were not on valuable consideration, the delivery is countermandable; and in that case, if A. the bailor, bring trover, he reduces the property again in himself, for the action amounts to a countermand; but if the delivery was on a valuable consideration, then A. cannot have trover, because the property is altered; and in trover the property must be proved in the plaintiff. 1 Bulst. 68. See 1 Leon. 30.

And where a man delivers goods to another, to be redelivered to the deliverer at such a day, and before that day the bailee doth sell the goods in market overt; the bailor may at the day seize and take his goods, for the property is not altered. Godb. 160.

If A. borrows a horse to ride to Dover, and he rides out of his way, and the owner of the horse meets him, he cannot take the horse from him; for A. has a special property in the horse till the journey is determined; and being in lawful possession of the horse, the owner cannot violently seize and take it away; for the continuance of all property is to be taken from the form of the original bargain, which, in this case, was limited till the appointed journey was finished. Yrlvo. 172.

But the owner may have an action on the case against the bailee for exceeding the purposes of the loan: for so far it is a secret and fallacious abuse of his property; but no general action of trespass, because it is not an open and violent invasion of it. 1 Roll. Reh. 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. Docut. & Stud. 129.

But if one lend a horse, &c. he must have the same restored. If a thing lent for use be used to any other end or purpose than that for which it was borrowed, the party may have his action on the case for it; though the thing be never the worse; and if what is borrowed be lost, although it be not by any negligence of the borrower, as if he be robbed of it; or where the thing is impaired or destroyed by his neglect, admitting that he put it to no more service than that for which borrowed, he must make it good: so where one borrows a horse, and puts him in an old rotten house ready to fall, which falls on and kills him, the borrower must answer for the horse. But if such goods borrowed perish by the act of God, (or rather, as Sir Wm. Jones says it ought more reverentially to be termed, by inevitable accident,) in the right use of them; as where the borrower puts the horse, &c. in a strong house, and it falls and kills him, or it dies by disease, or by default of the owner, the borrower shall not be charged. 1 Inst. 89. 29 Ass. 28. 2 Hen. VII. 11.

If one delivers a ring to another to keep, and he breaks and converts the same to his own use; or if I deliver my sheep to another to be kept, and he suffers them to be drowned by his negligence; or if the bailee of a horse, or goods, &c. kill or spoil them, in these cases action will lie. 5 Reh. 13. 15 Eldon. IV. 20. b. 12 Eldon. IV. 13.

If a man deliver goods to another, the bailee shall have a general action of trespass against a stranger, because he is answerable over to the bailor; for a man ought not to be charged with an injury to another, without being able to retire to the original cause of that injury.
and in amends there to do himself right. 13 Co. 69. 14 Hen. IV.
23 Hen. VII. 14. 13


BAIRNS' PART, (Children's part,) Is a third part of the defunct's
free moveables, debts deducted, if the wife survived; and a half (if
there be no relict) due to the children. Scot. Diet.

BAKERS. See Bread.

BALANCE OF TRADE, A computation of the value of all com-
modities 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.

BALCONIES to houses in London, are regulated by the Building
Act, 14 Geo. III. c. 78. § 48. &c.

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

BALENGA, A territory or precinct. Chart. Hen. II. See Ban-
num.

BALSAMARIA, A balister, or cross-bowman. Gerward de la War
is recorded to have been balistarius domeni regis, &c. 28 and 29
Hen. III.

BALIVIA, A bailiwick or jurisdiction. See tit. Bailiwick.

BALIVO AMOVENDO, A writ to remove a bailiff's office, for want of sufficient land in the bailiwick.
Reg. Orig. 78. See tit. Bailiff, Sheriff.

BALKERS, Are derived from the word balk, because they stand
higher, as it were on a balk or ridge of ground, to give notice of
something to others. Stew. Epitom. vide Conders.

BALLARE, To dance. Spelman. 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 em-
ploy ballast men, and regulate them, and their lighters to be marked,
&c. on pain of 10l. Stat. 6 Geo. II. c. 29. continued by several acts.
See Harbours.

BALLIUM, A fortress or bulwark. Matt. Westm. anno 1265.

BAN, or bans, from the Brit. ban, i. e. clamour.] A proclamation or
public notice; any public summons, or edict, whereby a thing is com-
manded or forbidden. It is a word ordinary among the feudists; and
for its various significations, see Spelman v. bannum. The word ban,
in its common acceptance, 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, Banæ sunt proclamations apostis et sponsa in
ecclesiis fieri solvere. But there may be a faculty or license for the
marriage, and then this ceremony is omitted. See tit. Marriage.
BANCALE, A covering of ease and ornament for a bench, or other seat. Monasticon, tom. 1. p. 222.

BANE, from the Sax. bana, a murderer.] Signifies destruction or overthrow: as, I will be the bane of such a man, is a common saying; so when a person receives a mortal injury by any thing, we say it was his bane: and he who is the cause of another man's death, is said to be le bane, i.e. malefactor. Bract. lib. 2. tract. 3. cap. 1.

BANERET, banercetus, miles vexillarius.] Sir Thomas Smith, in his Repub. Angl. cap. 18. says, is a knight made in the field, with the ceremony of cutting off the point of his standard, and making it, as it were, a banner, and accounted so honourable that they are allowed to display their arms in the king's army, as barons do, and may bear arms with supporters. See Camden and Spelman, from whom it appears banerets are the degree between barons and knights. Spelm. in v. Banerctus. 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. 3 Rich. II. stat. 2. cap. 4. and 14 Rich. II. c. 11. William de la Pole was created baneret by King Edward the third, by letters patent, anno regni sui, 13. And those banerets, who were created sub vexillis regis, in exercitio regali, in operto bello, et ipso regis personatetu presente, explicatis, take place of all baronets; as we may learn by the letters patent for creation of baronets. 4 Inst. 6. Some maintain that banerets ought not to be made in a civil war: but Hen. VII. made divers banerets upon the Cornish commotion, in the year 1495. See Selden's Titles of Honour, f. 799.

BANISHMENT, Fr. banissement; exilium abjuratio.] Is a forsaking or quitting of the realm; and a kind of civil death, inflicted on an offender: there are two kinds of it, one voluntary and upon oath, called abjuration, and the other upon compulsion for some offence. Stuudf. Pl. Cr. f. 117. See tit. Abjuration. Transportation.

BANK, Lat. bancus, Fr. banque.] In our common law is usually taken for a seat or bench of judgment; as Bank le Roy, the King's Bench, Bank le Common Pleas, the bench of Common Pleas, or the Common Bench; called also in Latin Bancus Regis, and Bancus Communium Placitorum. Cron. Just. 67. 91. Just. Banci, or the privilege of the Bench, was anciently allowed only to the king's judges, qui summum administrativum justitiae; for inferior courts were not allowed that privilege.

There are, in each of the terms, stated days, called days in bank, dies in banco, that is, days of appearance in the court of common pleas. They are generally at the distance of about a week from each other, and regulated by some festival of the church. On some one of these days in bank all original writs must be made returnable; and therefore they are generally called the returns of that term. See tit. Day.

A bank, in common acceptation, signifies a place where a great sum of money is deposited, returned by exchange, or otherwise disposed of to profit.

The Bank of England is managed by a governor and directors, established by parliament, with funds for maintaining thereof, appropriated to such persons as were subscribers; and the capital stock, which is enlarged by divers statutes, is exempted from taxes, accounted a personal estate assignable over, not subject to forfeiture; and the company make dividends of the profits half yearly, &c. The funds are redeemable by the parliament, on paying the money borrowed; and the company of the Bank is to continue a corporation, and enjoy annuities till redeemed, &c. During the continuance of
the Bank, no body politic, &c. other than the company, shall borrow any sums on bills payable at demand; and forging the seal of the bank, and forging or altering Bank notes, or tendering such forged notes in payment, demanding to have them exchanged for money, &c. and forging the names of cashiers of the bank, are all capital felonies. See the several statutes 5 and 6 Wm. & M. c. 20. 8 and 9 Wm. III. c. 20. 11 Geo. I. c. 9. 12 Geo. I. c. 32. 15 Geo. II. c. 13. And officers or servants of the company, that embezzle any Bank note, &c. wherewith they are intrusted, being duly convicted, shall suffer death as felons.

By stat. 13 Geo. III. c. 79. persons not authorized by the bank, making or using moulds for the marking of paper, with the words Bank of England visible in the substance, or having such moulds in their possession, are guilty of felony without benefit of clergy: and persons issuing notes and bills engraved to resemble those of the bank, or having the sum expressed in white characters on a black ground, may be punished by imprisonment, not exceeding six months. But innocent persons possessed of such notes, carrying them for payment, not affected. See stat. 34 Geo. II. c. 4. to regulate the holding general courts, and courts of directors.

See the several statutes 21 Geo. III. cc. 14. 60. 22 Geo. III. c. 8. 23 Geo. III. c. 35. 24 Geo. III. ses. 2. cc. 10. 39. 25 Geo. III. c. 32. 29 Geo. III. c. 37. 39 and 40 Geo. III. c. 28. and a vast variety of previous statutes, as to the continuance of the bank charter, which is also regularly continued by every loan act, till the stock created by such act is paid. By 39 and 40 Geo. III. c. 28. § 14, the bank is continued a corporation till the end of twelve months’ notice after 1st August, 1833.

By stat. 31 Geo. III. c. 33. the bank is to keep in hand only 600,000l. above the sum necessary to pay the current dividends; the remaining surplus to be applied to the use of the public.

Persons making, or assisting in making, transfers of stock in any other name than that of the owner, or forging transfers or dividend warrants, or making false entries in the bank books, are made guilty of felony without clergy. Persons making out false dividend warrants transportable for seven years. 33 Geo. III. c. 30. 35 Geo. III. c. 66.

See the acts 41 Geo. III. (U. K.) c. 39. and 45 Geo. III. c. 89. for preventing forgery of bank notes, bank bills of exchange, and bank post bills. By these acts, persons not authorized making paper with the bank water-mark, &c. or publishing same, or engraving plates, &c. or having such in their possession, shall be transported for fourteen years. [There is an inaccuracy in the act 45 Geo. III. c. 89. § 7.]

35 Geo. III. c. 90. § 1. When trustees, in whose name stock stands in the bank, shall be out of the kingdom, &c. or become bankrupts, the court may order such stock to be transferred, or the dividends paid, &c.

By 37 Geo. III. c. 28. notes issued by the bank for sums under 5l. are declared valid.

By 37 Geo. III. c. 28. and afterwards by 37 Geo. III. c. 45. continued and amended by 37. Geo. III. c. 91. 38 Geo. III. c. 1. 42 Geo. III. c. 40. 43 Geo. III. c. 18. and 44 Geo. III. c. 1. the bank of England is restrained from making payments in cash during the war: and if the amount of any debt is tendered in bank notes, or bank notes and cash,
the party tendering cannot be arrested. [Like provisions are made as to the bank of Ireland by the Irish act, 37 Geo. III. c. 51. amended since the Union, by 43 Geo. III. c. 44. 44 Geo. III. c. 21.]

Bank of Scotland. This bank was erected by an act of the Scots parliament, in 1695, with a capital of 1,200,000L Scots. (1,000,000L sterling.) By British acts, 14 Geo. III. c. 32. 24 Geo. III. c. 12. 32 Geo. III. c. 25. 54 Geo. III. c. 19. and 44 Geo. III. c. 23. (local and personal,) this capital has been increased to the amount, in the whole, of 1,500,000L sterling.

Bank of Ireland. This was established by an act of the Irish parliament, 21 and 22 Geo. III. c. 16. Payments in cash by this bank are restrained during the war, in the same manner as by the Bank of England. See that title. By 42 Geo. III. c. 87. this bank was enabled to purchase the parliament house in Dublin; rendered useless by the Union. See tit. Ireland.

Bankers. The monied goldsmiths first got the name of bankers in the reign of King Charles II. but bankers now are those private persons in whose hands money is deposited and lodged for safety, to be drawn out again as the owners have occasion for it. See the preceding title.

41 Geo. III. (U. K.) c. 57. penalty on persons unauthorized making paper with name, &c. of any banker appearing in the substance of the paper, or vending the same—first offence six months' imprisonment; and for second offence, transportation for seven years. § 1.

Like punishment for engraving any bill, &c. of any banker, or using any engraved plate, &c. or knowingly having such plate, &c. § 2.

Penalty for engraving, &c. on any plate, any subscriptions to any bill, &c. of any person, or banking company, payable to bearer on demand, or having such in possession—for first offence, imprisonment from three years to twelve months; second offence, transportation for seven years. § 3.

Bankrupt; A trader, who secrets himself or does certain other acts, tending to defraud his creditors. 2 Comm. 285. 471. The word itself is derived from bancus, or banque, the table or counter of a tradesman; (DuFresne, 1. 969.) and ruptus broken, denoting thereby one whose shop or place of trade is broken or gone; though others rather choose to adopt the French word route, a trace or track; a bankrupt, say they, being one who has removed his banque, leaving but a trace behind. Cowel. 4 Inst. 277. It is observable that the title of the first English statute concerning this offence, stat. 34 Hen. VIII. c. 4. "against such persons as do make bankrupt," is a literal translation of the French idiom, qui font banque route. 2 Comm. 472. n.

The bankrupt law is a system of positive regulations by various statutes, the construction of which have produced the multiplied cases on the subject, from whence the following principles and rules are extracted. These statutes are, stat. 13 Eliz. c. 7. (which almost totally altered the old stat. 34 Hen. VIII. c. 4. mentioned above.) 1 Jac. I. c. 15. 21 Jac. I. c. 19. 10 Ann. c. 15. 7 Geo. I. c. 31. 5 Geo. II. c. 30. (made perpetual by 37 Geo. III. c. 124.) 46 Geo. III. c. 135.

On this subject, recourse has chiefly been had to Cooke's Bankrupt Laws; together with the Commentaries, and the modern reported determinations.
The matter, to suit the present purpose, has thus been arranged.

I. Who may be a bankrupt.

II. By what acts a person may become so.

III. A general view of the proceedings on, and effects of a commission of bankruptcy.

1. As they relate to the bankrupt himself.

2. As they transfer his estate and property.

IV. To this it has seemed necessary to add some more minute particulars, as to the following parts of the subject:

1. Of the petitioning creditor's debt.

2. Of the proof of debts.

3. Of creditors by marriage articles.

4. Of contingent debts.

5. Of annuitants, and certain other peculiar creditors.

6. Of removing the assignees.

7. Of partners.

V. Practical notes and forms.

I. THE stat. 13 Eliz. c. 7. enacts, "That any merchant or other person, being subject or denizen, using or exercising the trade of merchandise, by way of bargaining, exchange, rechange, barter, chevisance, or otherwise, in gross or by retail, or seeking his or her trade or living by buying and selling," may become bankrupts. Drawing and redrawing bills of exchange may, in certain cases, be considered as trading. 1 Atk. 128. See Cowp. 745.

Every person being a trader, and capable of making binding contracts, is liable to become a bankrupt. As a nobleman, member of parliament, clergyman, &c. And where it is said, that farmers, innkeepers, &c. cannot be bankrupts, it means, in respect to that particular description; and not as affording protection, if in any other shape they come within the bankrupt laws. But infants and married women cannot be bankrupts. As to the latter, however, there are exceptions; for a feme covert in London, being a sole trader according to the custom, is liable to a commission of bankruptcy; and, as repeated determinations have settled that a feme covert, living apart from her husband as a feme sole, is liable to execution for debts contracted by her, there seems no doubt that such a married woman is equally liable to a commission of bankruptcy. But if a feme sole trader commit an act of bankruptcy, and afterwards marry, and live with her husband, she cannot be made a bankrupt. Ex parte Mear, see Cooke B. L. c. 3. § 1. 4 Term Ref. 362. and this Dictionary, tit. Baron and Feme.

Buying only, or selling only, will not qualify a man to be a bankrupt; but it must be both buying and selling, and thereby attempting to get a livelihood. 2 Comm. 476. 2 Wils. 171.

There can be no such thing as an equitable bankruptcy; it must be a legal one; and the party must be a trader in his own right; for if a person that is a trader, makes another his executor, who only disposes of the stock of his trade, it will not make the executor a trader, and liable to a commission of bankruptcy. 2 P. Wms. 429. 1 Atk. 162.
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. Coop. 398. 402. Raym. 375. Salt. 110.

If a merchant gives over his trade, and some years after become insolvent for money he owed while a merchant, he may be a bankrupt: but if it be for new debts, or old debts continued on new security, it is otherwise. 1 Vent. 5. 29.

To enumerate every trade sufficient to make a man a bankrupt would be tedious. The following seem now settled: and some others are enumerated which have afforded cause of dispute, chiefly from the particular facts of the case. It is to be premised that a chapman, or one that buys and sells any thing, though his dealing does not come under the denomination of any particular trade, may become a bankrupt.

* Bankers, brokers, coal-dealers, factors, scriveners, vintners, brick-makers, butchers, bakers, brewers, clothiers, goldsmiths, dyers, iron-manufacturers who buy iron and work it into wares, locksmiths, milliners, sailors, plumbers, salesmen, shoemakers, smiths and farriers. 2 Wils. 170. 172. 4 Burr. 2148. 3 Mod. 330. Cro. Jac. 585. 2 Id. Raym. 1460. 2 Comm. 476. 3 Mod. 330. 1 Roll. Abr. 60. fl. 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.

Allum-manufacturers, not. Cooke, 34. 46.
Bankers, may. Stat. 5 Geo. II. c. 30.
Bakers, may. See ante.*
Brewers, may. See ante.*
Brokers, may. Stat. 5 Geo. II. c. 30.
Brick-makers, may. 2 Wils. 172. Brown, Ch. Ca. 173. See the case of Parker v. Wells, 1 Brown, 494. 1 Term Rep. 34. Cooke's B. L. c. 3. § 2.

*In this case, and that of allum-manufacturers, though they seem to differ, the same principle is recognised, viz. "If a man exercises a manufacture upon the produce of his own land, as a necessary and usual mode of reaping and enjoying that produce, and bringing it advantageously to market, he shall not be considered as a trader, though he buys materials or ingredients—as in the case of cheese, cider, allum, and coal mines; and the like. But where the produce of land is merely the raw materials of a manufacture, and used as such, and not as the mode of raising the produce of the land; in short, where the produce of the land is an insignificant article, compared with the expense of the whole manufacture, there in truth he is, and ought to be, considered as a trader. As this distinction turns on the nature and manner of exercising the manufacture, and the motive with which it is carried on, it depends so much upon the light in which a jury sees the whole transaction, the law and the fact are so blended together, that it is hardly possible to distinguish them."
Butchers, may. See ante.* 4 Burr. 2148.

Carpenters; not merely workmen, but buying timber and materials to carry on trade, may. 3 Mod. 155. Ld. Raym. 741.

Clergymen trading, may. Cowp. 745.

Clothiers, may. See ante.*

Coal-dealers, may. See ante.* But not owners or lessees of coal-mines. 2 Wils. 169, 170.

Companies or corporations, proprietors of shares in, generally—not except perhaps in the stationers' company. See 2 Ld. Raym. 851. And by statute, "no member of the Bank of England; of the East India, or English Linen company; no person circulating exchequer bills; no adventurer in the royal fishing trade, or Guinea company; no member of the London Assurance, Royal Exchange, or South Sea companies, shall be deemed a bankrupt, on account of their stock in those companies." Stat. 3 Geo. I. c. 3. § 43. 13 and 14 Car. II. c. 24. 4 Geo. III. c. 37. 6 Geo. I. c. 18. 8 Geo. I. c. 21.

Contractors, public, and such other public officers, not. 3 Keb. 451.

Butlers and stewards of Inns of courts; farmers of customs, receivers-general, excisemen, &c. not, all on the same principle.

Drovers of cattle, not. Stat. 5 Geo. II. c. 30.

Dyers, may. See ante.*

Factors, may. Stat. 5 Geo. III. c. 30.


Funds or stocks, public, dealers in, not. 2 P. Wms. 308. and see ante, companies.

Goldsmith, may. See ante.*

Glaziers, not. Stat 5 Geo. II. c. 30.

Innkeepers, not. 3 Mod. 339. Cro. Cas. 395.

Iron-manufacturers, may. See ante.*

Labourers, not. See ante, artificers.

Land-jobber, not. 2 Wils. 169.

Members of parliament, may. See stat. 4 Geo. III. c. 33. 45 Geo. III. c. 124. and post, II.

Milliners, may. See ante.*

Nailors, may. §

Pawnbrokers—it seems may. 1 Atk. 206. 218.

Plumbers, may. See ante.*

Receiver-general of taxes, not. Stat. 5 Geo. II. c. 30.

Salesmen, may. See ante.* Good. 12.


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.

Vicuallers, not. 4 Burr. 2067. 2 Wils. 383.

Vintners, being wine-merchants, may. Cooke, 37.

The above Alphabetical List, is probably not so perfect or extensive as it might have been made; but the general principles, already laid down, will serve to direct the student in cases of doubt or difficulty.
II. To learn what the particular Acts of Bankruptcy are, which render a man a bankrupt, the several statutes must be consulted, and the resolutions of the courts thereon. Among these are to be reckoned:

1. To depart the realm, or from his dwelling-house, with intent to defraud or hinder his creditors. Stat. 13 Eliz. c. 7.

2. To begin to keep his house privately, to absent himself from and avoid his creditors. Stat. ib.

3. To procure or suffer himself willingly to be arrested, without just or lawful cause; to suffer himself to be outlawed; or to yield himself to prison. Stat. 13 Eliz. c. 7. 1 Jac. I. c. 15. § 2.

4. Willingly or fraudulently to procure his goods, money or chattels, to be attached or sequestered. Stat. 1 Jac. I. c. 15.

5. To make any fraudulent grant or conveyance of his lands, tenements, goods or chattels, to the intent, or whereby his creditors shall and may be defeated or delayed for the recovery of their just debts. Stat. ib.

6. Being arrested for debt, to lie in prison two months after his arrest, upon that or any other arrest or detention for debt. Stat. 21 Jac. I. c. 19.

7. To obtain privilege, other than that of parliament, against arrest. Stat. ib.

8. Being arrested for 100L or more, to escape out of prison. Stat. ib.

9. To prefer to any court, any petition or bill against any of the creditors, thereby endeavouring to enforce them to accept less than their just debts, or to procure time, or longer days of payment, than was given at the time of the original contracts. Stat. ib.

10. For a bankrupt to pay, satisfy, or secure the petitioning creditor his debt, is an act of bankruptcy which shall supersede that commission, and be sufficient on which to ground another; and such petitioning creditor shall lose his debt, to be divided among the other creditors. See Cooke's B. L. c. 4. § 1. Stat. 5 Geo. II. c. 30. § 24.

11. Neglecting to make satisfaction for any just debt or debts, to the amount of 100L or more, within two months after service of legal process, for such debt, upon any trader, having privilege of parliament, is an act of bankruptcy. Stat. 4 Geo. III. c. 33. enforced and explained by 45 Geo. III. c. 124.

The legislature having thus, by positive laws, declared what acts shall be considered as criterions of insolvency or fraud, whereon to ground a commission, none other can be admitted by inference or analogy. Therefore it is not an act of bankruptcy for a trader secretly to convey his goods out of his house, and conceal them, to prevent their being taken in execution, nor to give money for notice when a writ should come into the sheriff's office. 1 Lid. Raym. 735. Bull. N. P. 40. So if a trader procure his goods fraudulently to be taken in execution, or makes a fraudulent sale of them, it is not an act of bankruptcy, though void against creditors. 4 Burr. 2478. Comp. 429.

Many of the acts of bankruptcy above described are in themselves equivocal, and capable of being explained by circumstances; for, to bring them within the purview and meaning of the statute, it is absolutely necessary they should be done to defraud and delay creditors from recovering their just debts.

The better to obtain a clear and comprehensive view of the decisions on this part of the subject, each act of bankruptcy, on which any question appears to have been raised, shall be considered separately; pre-
Bankrupt II.

1,111 sing 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 bankrupter, 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 prima 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. Eisk. cites Harekes v. Sanders, T. 24 Geo. III.

Keeping in another man’s house or chamber, having no house of his own, or on ship-board, is an act of bankruptcy; so a miller keeping his mill. Com. Dig. tit. Bankrupt.

Any keeping house for the purpose of delaying a creditor, even for a very short time, will be an act of bankruptcy; notwithstanding the party afterwards goes abroad, and appears in public. 2 Stra. 809. 2 Term Rep. 59.

A general denial will not be sufficient, but it must be a denial to a creditor who has a debt at that time due; for if he is only a creditor by a note payable at a future day, a denial to him will be no act of bankruptcy. 7 Vin. 6. pt. 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 prima facie evidence of an intention to defraud or delay his creditors; but it must be a voluntary absenting, and not by means of an arrest. 1 Salk. 110. 1 Burr. 484. 2 Stra. 809. Green, 53.

Suffering himself to be outlawed. An outlawry in Ireland does not make one a bankrupt; but in the county palatine of Durham it does. However, an outlawry does not appear to be an act of bankruptcy, unless it be suffered with intent to defraud creditors. Com. Dig. tit. Bankrupt. Stone, 124. Billing. 94. Good. 23. 1 Lev. 13.

Yielding himself to prison, is to be intended of a voluntary yielding for debt; and if a person capable of paying, will, notwithstanding, from fraudulent motives, voluntarily go to prison, it is an act of bankruptcy. Bill. 95. Good. 25. Vin. tit. Creditor and Bankrupt, 62.
Willingly or fraudulently procuring his goods to be attached or sequestered; which is a plain and direct endeavour to disappoint his creditors of their security. 2 Comm. 478. The attachment here meant, and which the legislature had in view, is that sort of attachment, only by which suits are commenced; as in London and other places where that species of process is used. Com. 427.

Making any fraudulent conveyance of his lands or goods. A fraudulent grant, to come within the meaning of the statute, must be by deed; therefore a fraudulent sale of goods not by deed, is no act of bankruptcy in itself; but being a scheme concerted at the eve of bankruptcy to cheat innocent persons, in order to secure particular creditors, is such a fraud as shall render the sale void. 4 Burr. 2478.

A grant or conveyance fraudulent within stat. 13 Eliz. c. 5. or 27 Eliz. c. 4. is an act of bankruptcy. Com. Dig. Cooke.

A trader before he becomes a bankrupt may prefer one creditor to another; and may pay him his debt; or may make him a mortgage, with possession delivered, or may assign part of his effects; but a preference of one creditor to the rest, by conveying by deed all his effects to him, is a fraud upon the whole bankrupt law, and an act of bankruptcy. 1 Burr. 467.

Whether a transaction be fair or fraudulent, is often a question of law; it is the judgment of law upon facts and intents; but transactions valid as between the parties may be fraudulent by reason of covin, collusion, or confederacy to injure third persons. 2 Burr. 927. 1 Burr. 467.

Nor will the case be different, if the assignment is made to indemnify a surety; for the inconvenience and mischief arising from an undue preference is the same. Cooke's B. L. 78. Doug. 382.

An equal distribution among creditors who equally give a general personal credit to the bankrupt, is anxiously provided for; ever since the act 21 Jac. I. c. 19. therefore when a bankrupt by deed, convey all his effects to trustees to pay all but one creditor, it is fraudulent and an act of bankruptcy. 1 Burr. 477.

But though a conveyance by deed of all a bankrupt's effects, or so much of his stock in trade, as to disable him from being a trader, or all his household goods, is itself an act of bankruptcy; a conveyance of part is very different; that may be public, fair, and honest. As a trader may sell, so may he openly transfer many kinds of property by way of security. What assignment of part will or will not be fraudulent, must depend on the particular circumstances of the case; but a colourable exception of a small part of his estate or effects, will not prevent the deed being declared fraudulent; for the law will never suffer an evasion to prevail to take a case out of the general rule, which is so essential to justice. 1 Black. Rep. 441. 2 Black. Rep. 362. 996. 1 Burr. 477.

An assignment by deed of part of a trader's effects, will be good, if made bona 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. Compt. 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 for­
mal bail, put in for the purpose of changing from one custody to an­
other. 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
N. P. 38.

Escape out of prison on arrest for 100l. or more. The act clearly
intends such an escape as shows he means to run away, and thereby
to defeat his creditors; it must be an escape against the will of the
sheriff; for a man shall not be made a criminal, where he has not the
least criminal intention to disobey any law. 1 Burr. 440.

It is not an act of bankruptcy for a banker to refuse payment, if he
appears and keeps his shop open. 7 Mod. 139. S. C. C. 42.

An act of bankruptcy, if once plainly committed, can never be
purged, even though the party continues to carry on a great trade.
2 Term Ref. 59. But if the act was doubtful, then circumstances may
explain the intent of the first act, and show it not to have been done
with a view to defraud creditors. But if, after a plain act of bank­
ruptcy, a man pays off and compounds with all his creditors, he be­
comes a new man. 1 Burr. 484. 1 Salk. 110. See stat. 46 Geo. III.
c. 135.

III. THE PROCEEDINGS on a commission of bankrupt, depend en­
tirely 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 100l. or by two to the amount of 150l. or by three
or more to the amount of 200l. which debts must be proved by affida­
vit. (Stat. 5 Geo. II. c. 30.) Upon which he grants a commission to such
discreet persons as to him shall seem good, who are then styled com­
missioners of bankrupt. Stat. 13 Eliiz. c. 7. Of these commissioners
there are several existing lists, which take the commissioners of bank­
r uptcy in turn. The petitioners, to prevent malicious applications,
must be bound in a bond to the lord chancellor for 200l. to make the
party amends in case they do not prove him a bankrupt. And if, on
the other hand, they receive any money or effects from the bankrupt, as
a recompense for suing out the commission, so as to receive more than
their ratable dividends of the bankrupt’s estate, they forfeit not only
what they shall have so received, but their whole debt. These provi­
sions are made, as well to secure persons in good credit from being
damnnified by malicious petitions, as to prevent knavish combinations
between the creditors and bankrupt, in order to obtain the benefit of a
commission. When the commission is awarded and issued, the com­
mmissioners are to meet at their own expense, and take an oath for the
due execution of their commission, and to be allowed a sum not ex­
ceeding 20s. per diem, each, at every sitting. And no commission of
bankrupt shall abate, or be void by the death of the bankrupt subse­
quent to the commission. Stat. 1 Jac. I. c. 15. Nor upon any demise
of the crown. Stat. 5 Geo. II. c. 30. The granting a commission of
bankruptcy is not discretionary, but a matter of right. 1 Vern. 153.

By stat. 5 Geo. II. c. 30. § 25. the petitioning creditor is directed at
his own costs, to prosecute the commission until assignees shall be
chosen; which costs are to be ascertained by the commissioners at the
meeting for the choice of assignees; and are to be paid by the as-
signees to the petitioning creditor out of the first money or effects
received by them, under the commission. But these costs may be
taxed by a master in chancery, on petition to the lord chancellor.
Cooke's B. L. c. 1. § 3.

Notwithstanding the statute 5 Geo. II. has provided a remedy
against maliciously suing out commissions of bankrupt, yet it is held
not to take away the common law remedy by an action for damages,
but that the party may proceed at law to obtain such redress for the
injury he has sustained, as a jury may think he is entitled to. 3 Barr.
1418. 1 Atk. 144.

If more than two of the commissioners should die, by which means
there would not be a sufficient number to execute the commission, or
if it should be lost, it must be renewed; upon which renewal only half
the fees are paid, and the commissioners under the renewed commis-
sion proceed from that step which was left incomplete by the former.
Cooke, B. I.

The commissioners are first to receive proof of the person's being
a trader, and having committed some act of bankruptcy; and then to
declare him a bankrupt, if proved so; and to give notice thereof in the
Gazette, and at the same time to appoint three meetings. At one
of these meetings, an election must be made of assignees or persons to
whom the bankrupt's estate shall be assigned, and in whom it shall be
vested for the benefit of the creditors; and assignees are to be chosen
by the major part in value of the creditors who shall have then proved
their debts; and one creditor, if to a sufficient amount, may choose
himself assignee; but a provisional assignee or assignees may be, if
necessary, originally appointed by the commissioners, and afterwards
approved or rejected by the creditors: but no creditor shall be
admit-
ted to vote in the choice of assignees, whose debt on the balance of
accounts does not amount to 10l. And at the third meeting at far-
thest, 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 cir-
cumstances of involuntary default by the bankrupt, 1 Atk. 222,) the
bankrupt, upon notice also served upon him, or left at his usual place
of abode, must surrender himself personally to the commissioners;
which surrender (if voluntary) protects him from all arrests till his
final examination is past: and he must henceforth in all respects con-
form to the directions of the statutes of bankruptcy; or, in default of
either surrender or conformity, he shall be guilty of felony without
benefit of clergy, and shall suffer death, and his goods and estates
shall be distributed among his creditors. Stat. 5 Geo. II. c. 30.

In case the bankrupt absconds, or is likely to run away, between
the time of the commission issued, and the last day of surrender, he
may by warrant from any judge or justice of the peace be apprehen-
sed and committed to the county gaol in order to be forthcoming to
the commissioners; who are also empowered immediately to grant a
warrant for seizing his goods and papers. Stat. 5 Geo. II. c. 30. and
see 1 Atk. 240.
When the bankrupt appears, the commissioners are to examine him, touching all matters relating to his trade and effects. They may also summon before them, and examine the bankrupt’s wife, (stat. 21 Jac. I. c. 19. see 1 P. Wms. 610, 611.) and any other person whatsoever, as to all matters relating to the bankrupt’s affairs. And in case any of them should refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison without bail, till they, submit themselves and make and sign a full answer: the commissioners specifying in their warrant of commitment the question so refused to be answered. And any gaoler, permitting such person to escape, or go out of prison, shall forfeit 300l. to the creditors. Stat. 5 Geo. II. c. 30.

The bankrupt, upon this examination, is bound upon pain of death to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners; (except the necessary apparel of himself, his wife and children;) or, in case he conceals or embezzles any effects to the amount of 20l. or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy; and his goods and estate shall be divided among his creditors. Stat. 5 Geo. II. c. 30. And unless it shall appear, that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment for such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off. Stat. 21 Jac. I. c. 19.

And so careful is the law to avoid any fraud, dishonesty or concealment, on the part of the bankrupt, that an agreement by the friends of the bankrupt, to pay a sum, in consideration that the creditors would not examine him as to particular points, is void. Nerat v. Wallace, 3 Term Rep. 17.

After the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to five per cent. out of the effects so discovered, and such further reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing the estate of any bankrupt, after the expiration of the two and forty days, shall forfeit 100l. and double the value of the estate concealed, to the creditors. Stat. 5 Geo. II. c. 30.

Hitherto every thing is in favour of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigour and severity. For if the bankrupt hath made an ingenuous discovery, (of the truth and sufficiency of which there remains no reason to doubt,) and hath conformed in all points to the directions of the law; and, if in consequence thereof, the creditors, or four parts in five of them in number and value, (but none of them creditors for less than 20l.) will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the lord chancellor, and he, or two of the judges whom he shall appoint, on oath made by the bankrupt that such certificate was obtained without fraud, may allow the same; or disallow it upon cause shown by any of the creditors of the bankrupt. Stat. 5 Geo. II. c. 30.
If no cause be shown to the contrary, the certificate is allowed of course, and then the bankrupt is entitled to a decent and reasonable allowance out of his effects for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one-half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have a competent sum allowed him, not exceeding three per cent. But if they pay ten shillings in the pound, he is to be allowed five per cent. If twelve shillings and six-pence, then seven and a half per cent. And if fifteen shillings in the pound, then the bankrupt shall be allowed ten per cent. provided, that such allowance do not in the first case exceed 200l. in the second 250l. and in the third 300l. Stat. 5 Geo. II. c. 30.

Besides this allowance, he has also an indemnity granted him of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts. And for that among other purposes, all proceedings in commissions of bankrupt are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account; though in general, the production of the certificate, properly allowed, shall be sufficient evidence of all previous proceedings. Stat. 5 Geo. II. c. 30.

The allowing the certificate of a bankrupt, will not discharge his sureties; but if a bankrupt obtains his certificate before his bail are fixed, it will discharge them; but if not till after they are fixed, they will remain liable notwithstanding the certificate, for it has no relation back; and till allowed it is nothing. And if the creditor proves his debt, with intent to obstruct the certificate, it does not preclude him from pursuing his legal remedies; and even if he had received his debt, or part of it, under the commission, still he might proceed to fix the bail who would be entitled to their remedy, so far as they are oppressed by audita querela; or by motion. 1 Atk. 84. 1 Burr. 244. 2 Burr. 716. 2 Black. 812.

However, the bankrupt's certificate, obtained after judgment in an action upon a bail-bond against the bankrupt himself, will not discharge the bail-bond, although it discharged the original debt, for it is a new and distinct cause of action. 1 Burr. 436. 2 Stra. 1196. 1 Wils. 41.

The certificate does not discharge a bankrupt from his own express collateral covenant, which does not run with the land. 4 Burr. 2443. Nor from a covenant to pay rent. 4 Term Rep. 94.

A bankrupt after a commission of bankruptcy sued out, may, in consideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit, under the commission, make such creditor a satisfaction, in part, or for the whole of his debt, by a new undertaking or agreement, and assumptio will lie upon such new promise or undertaking. 1 Atk. 67.

If a bankrupt has his certificate, and an action be brought against him afterwards for a debt precedent to the commission, he may plead his certificate, or otherwise he is without relief. 2 Vern. 696, 697.

The common method of pleading is, generally, that he became a bankrupt within the intent and meaning of the statutes made and in
force concerning bankrupts, and that the cause of action accrued before he became a bankrupt. This general plea is given by stat. 5 Geo. II. c. 30. § 7.

Though a creditor of a bankrupt under 20L. is excluded from assent or dissent to the certificate, yet as he is affected by the consequence of allowing the certificate, he hath right to petition, and show any fraud against allowing the certificate. 7 Vin. Abr. 134. pl. 18.

No allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed; and also if any creditor produces a fictitious debt, or is induced by money or notes to sign his certificate, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he loses all title to these advantages. Stat. 24 Geo. II. c. 57. See Doug. 216. 673. Neither can he claim them, if he has given with any of his children above 100L. 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 5L. or in the whole 100L. 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 100L. 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 15s. in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades. Stat. 5 Geo. II. c. 30. And an action may accordingly be maintained for such debt. 5 Term Rep. 287. But money gained by his trade or profession for the necessary maintenance of himself and family may be recovered by action by an uncertificated bankrupt. Chittenden 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 enrolled, or divide them proportionably among his creditors. This statute expressly included not only freehold, but customary and copyhold lands; and the lord of the manor is thereby bound to admit the assignee, (see Cro. Cas. 568. 1 Ack. 96;) but did not extend to estates-tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 Jac. I. c. 19. enacts, that the commissioners shall be empowered to sell or convey, by deed indented and enrolled, any lands or tenements of the bankrupt, wherein he shall be seised of an estate-tail in possession, remainder or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issue in tail, remainder-men, and reversioners, whom the bank-
rupt himself might have barred by a common recovery, or other means; and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same, as the bankrupt himself might have done, and after redemption to sell them. And the commissioners may sell a copyhold entailed by custom. Stone, 127. Billing, 148. And also, by this and a former act, 1 Jac. I. c. 15. all fraudulent conveyances to defeat the intent of these statutes are declared void; but it is provided, that no purchaser bona fide, for a good or valuable consideration, shall be affected by the bankrupt laws, unless the commission be sued forth within five years after the act of bankruptcy committed. See Cooke's B. L. c. 8.

If there be two joint-tenants, and the one becomes bankrupt and dies, Billinghurst is of opinion the bankrupt's part shall be sold, and that there shall be no survivorship; because the bankrupt's moiety is bound by the statutes, and also the bankrupt had power to sell the same in his life-time, and might depart with it. And by stat. 1 Jac. c. 15. (see ante, III. 1.) the commissioners after the bankrupt's death, may proceed in execution, in and upon the commission, for and concerning the offender's lands, tenements, &c. in such sort as if the offender had been living; which they cannot do, if the survivorship is held to take place.

If the bankrupt be a joint-tenant in fee, for life or years, the commissioners may sell a moiety. So if he be seised in right of his wife, they may sell during the coverture. 1 Com. Dig. 530.

In case of a patron becoming bankrupt, the commissioners may sell the advowson of the living; but if the church be void at the time of the sale, the vendee shall not present to the void turn, but the bankrupt himself, because the void turn of the church is not applicable. 1 Brown's Ecc. Law, 4th ed. p. 123.

The commissioners may sell offices of inheritance and for terms of years; but an office concerning the execution of justice (and therefore within 5 and 6 Ed. VI. c. 16.) cannot be sold. 1 Atk. 213. But a place that does not concern the execution of justice, but only the police, may be sold. 1 Atk. 210. 215.

If a mortgage is made by a bankrupt, tenant in tail, without suffering a recovery, the assignees shall take advantage of this defect, and hold the land clear of the mortgage. 1 Wilk. 276.

The commissioners may assign a possibility of right belonging to the bankrupt. 3 P. Wms. 132.

When assignees are chosen under a commission, all the estate and effects of the bankrupt, whether they be goods in actual possession, or debts, contracts and legacies, and other choses in action, are vested in them by assignment; (but until the assignment, the property is not transferred out of the bankrupt;) and every new acquisition previous to the certificate will vest in the assignees; but as to future real estates, there must be a new assignment of them. 1 Atk. 253. Billing, 118. 1 P. Wms. 385, 386.

The commissioners, by their warrant, may cause any house or tenement of the bankrupt to be broken open, in order to enter and seize the same. See 2 Show. 247.

When the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them; in which assignment the provisional assignee or assignees (if any have been chosen) must join, and the property of every part of the estate is
thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it. 12 Mod. 324.

By stat. 36 Geo. III. c. 90. § 2. if bankrupts refuse to transfer stock over which they have power, the lord chancellor may order it to be transferred to the assignees.

The commissioners in England may sell the bankrupt's goods in Ireland; and (notwithstanding a dictum of lord Mansfield to the contrary, see Doug. 151.) it seems now decided, that by the assignment of the commissioners, all the bankrupt's property, whether in England or abroad, is conveyed to the use of his creditors. See Hunter v. Potts, 4 Term Rep. 182. and Cooke's B. L. c. 8. § 10.

If a man sends bills of exchange, or consigns a cargo, and the person to whom he sends them, has paid the value before, though he did not know of the sending them at that time, the sending of them to the carrier will be sufficient to prevent the assignees from taking these goods back, in case of an intervening act of 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, independent of the act of parliament, and in a course of dealing and trade, it would be good. Where an act is done, that is right to be done, and the single motive is not to give an unjust preference, the creditor will have a preference. Cowsh. 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. 205. 1 Atk. 248. Cowsh. 296.

The future profits arising from a bankrupt's personal labour are not subject to the assignment. Chippendale v. Toulminson, T. 35 Geo. III. B. R.

The property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for; therefore when the commission is awarded, the commission and the property of the assignees, shall have a relation, or reference, back to the first and original act of bankruptcy. 1 Burr. 32. In so much that all transactions of the bankrupt, are from that time absolutely null and void; either with regard to the alienation of his property, or the receipt of his debts, from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. Therefore, even if a banker pay the draft of a trader keeping cash with him after knowledge of an act of bankruptcy, the assignees may recover the money. 2 Term Rep. 113. 3 Bro. C. R. 313. Vernon v. Hankey, and see 2 Term Rep. 287. And, if an execution be sued out, but not served and executed on the bankrupt's effects till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is within the statutes of bankrupts; 1 Atk. 262. W. Jones, 202. 2 Show. 480. for if, after the act of bankruptcy committed, and before
the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby. Vin. Abr. tit. Creditor and Bankrupt, 104. Cooke's B. L. c. 14. § 7.

As these acts of bankruptcy however may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by stat. 19 Geo. II. c. 32 that no money paid by a bankrupt to a bona 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.

By 46 Geo. III. c. 135. reciting that great inconveniences and injustice have been occasioned by reason of the fair and honest dealings and transactions of and with traders being defeated by secret acts of bankruptcy, in cases not already provided for, or not sufficiently provided for by law, it is enacted, that all conveyances by, all payments by and to, and all contracts with, any bankrupt bona fide made two months before the date of a commission of bankruptcy, shall be good, notwithstanding any secret act of bankruptcy prior to such conveyance, &c. 46 Geo. III. c. 135. § 1.

Bonas fide creditors whose debts might have been proved under a commission of bankruptcy, if no prior act of bankruptcy had been committed, shall be admitted to prove such debts, if they had no notice of such prior act of bankruptcy. § 2.

Where it shall appear that there has been mutual credit given, or mutual debts contracted between the bankrupt and any other person, one debt or demand may be set off against the other, notwithstanding any prior act of bankruptcy, provided the credit was given to the bankrupt two calendar months before the date of the commission, and that the person claiming the benefit of such set-off had not notice of any prior act of bankruptcy by such bankrupt, or that he was insolvent. § 3. The issuing a commission, though afterwards superseded, or the striking a docket, shall be deemed notice of a prior act of bankruptcy, if any such were really committed. § 3.

Bankrupts on obtaining their certificates shall be discharged of debts provable under this act, as if no secret act of bankruptcy had been committed. § 4.

Commissions of bankrupt shall not be avoided by reason of any secret act of bankruptcy having been committed, prior to the contracting the debt of the petitioning creditor. § 5.

Sale of goods by a bankrupt after an act of bankruptcy, is not merely void; the contract is good between the parties, but it may be avoided by the commissioners or assignees at pleasure; therefore they may either bring trover for the goods, as supposing the contract may be void, or may bring debt or assumpsit for the value, which affirms the contract. 3 Salk. 59. j.f. 2. 2 Term Rep. 143. 4 Term Rep. 215, 217.

And so if a bankrupt on the eve of bankruptcy, fraudulently deliver goods to a creditor. 4 Term Rep. 211.

The assignees may pursue any legal method of recovering the property vested in them, by their own authority; but cannot commence a suit in equity, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them, in value, at a meeting to be held in pursuance of notice in the gazette. Stat. 5 Geo. II. c. 30. § 34, 35, 38. See 1 Atk. 91. 107. 210. 233. Cooke's B. L. c. 14.
When they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after 4, and within 12 months after the commission issued, give 21 days notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required. [And under stat. 5 Geo. II. c. 30. § 6. by affidavit if living in the country, and if Quakers by affirmation.] And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove, their debts. This dividend must be made equally, and in a ratable proportion, to all the creditors, according to the quantity of their debts; no regard being had to the quality of them. Mortgages, indeed, for which the creditor has a real security in his own hands, are entirely safe, for the commission of bankrupt reaches only the equity of redemption. Finch. Ref. 466. 2 Ref. 25. So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution. But, otherwise, judgments and recognisances, (both which are debts of record, and therefore at other times have a priority,) and also bonds and obligations by deed or special instrument, (which are called debts by specialty, and are usually the next in order,) these are all put on a level with debts by mere simple contract, and all paid pari passu. Stat. 21 Jac. I. c. 19. Nay, so far is this matter carried, that, by the express provision of the stat. 7 Geo. I. c. 31. (see stat. 5 Geo. II. c. 30. § 22. Conv. 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, bond fide made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy. Stat. 19 Geo. II. c. 32. § 2. Also annuity bonds, though not forfeited at the time of the bankruptcy. Conv. 540. but see 2 Black. Rep. 110. b. And policies of insurances for life. Doug. (2d edit.) 166.

Within eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first. Stat. 5 Geo. II. c. 30. It is the duty of assignees to make a dividend as early as possible after the time given by statute. And if they neglect to do so, and keep the money in their own hands, they will be liable to pay interest for it. 1 Atk. 90. Cooke's B. L. c. 7. § 3.

And if any surplus remains after selling his estates, and paying every creditor his full debt, it shall be restored to the bankrupt. Stat. 13 Eliz. c. 7. This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And if any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence, except that, upon satisfaction made to all the creditors, the commission may be superseded. 2 Cha. Ca. 144. This case may also happen, when a knife is desirous of defrauding his creditors, and is compelled by a commission to do them that justice which otherwise he wanted to evade. And, therefore, though the usual rule is, that all interest on debts carrying interest shall cease
from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt or his representatives. 1 Atk. 244.

A supersedeas is a writ issuing under the great seal, to supersede the commission, and this writ may be issued at the discretion of the lord chancellor, when the creditors of the bankrupt agree to supersede the commission; or because the party appears not to have been a trader; that the party had not committed an act of bankruptcy; that the commission was not opened till three months after it issued; or that he has paid all his creditors. 1 Atk. 154. 2 Cha. Ca. 192. Sel. Ca. Cha. 46. 1 Atk. 135. 1 Atk. 244. Ex parte Nutt, 1 Atk. 102.

Though the usual course is for the lord chancellor to order a feigned issue to try the bankruptcy at law, yet if it appears plainly to have been taken out fraudulently and vexatiously, the court will at once supersede the commission, and order the petitioning creditor's bond to be assigned. 1 Atk. 128. 144. 218.

IV. 1. The acts of parliament relating to bankrupts, being made for the relief of creditors, none but a creditor could at any time have taken out a commission; and now he must have a legal demand to the amount specified in stat. 5 Geo. II. c. 30. § 23. But a debt in equity will in no circumstances be a foundation for a commission; therefore if a legal demand is not in its own nature assignable, the assignee, notwithstanding his equitable claim, cannot be a petitioning creditor. 46 Geo. III. c. 135. § 5. ante, III. 2.

A debt at law, notwithstanding the statute of limitations has incurred, will support a commission; for the statute does not extinguish the debt, but the remedy, and the least hint will revive it. 2 Black. Rep. 703.

It has been determined, that a creditor, by notes bought in at 10s. in the pound, was a creditor for the full sum, and might take out a commission. 1 P. Wms. 783.

A creditor, before the party entered into trade, may on account of such debt, sue out a commission, but a creditor for a debt contracted after leaving off trade, cannot. But when a commission is sued out, those creditors who have become such since the quitting trade, may come in and share the dividend with those who were creditors before or during the trading, provided they are not barred by a prior act of bankruptcy. 12 Mod. 159. Ld. Raym. 287. 1 Sid. 411. Doug. 282.

If a creditor has his debtor in execution, he cannot petition for a commission of bankruptcy; for the body of the debtor being in execution, is a satisfaction of the debt, in point of law. Therefore where a commission had issued on the petition of a creditor who had the bankrupt in execution, it was upon that account superseded. 3 Wils. 271. 1 Stra. 533.

Nor has the petitioning creditor the ordinary election to sue the bankrupt at law, or come under the commission as other creditors
have; (see post, 2.) for if he was to elect to proceed at law, the commission must be superseded, which would affect those creditors who had proved debts under it. 1 Atk. 154.

2. Debts may be proved at any of the public meetings appointed by the commissioners; the usual proof is the oath of the creditor, which, if not objected to by the bankrupt himself or any of those creditors, is generally esteemed sufficient; but if any objection is raised, the demand must be further substantiated by evidence. For though the creditor should make a positive oath of the debt, the commissioners, if they conceive themselves to have just grounds to doubt its fairness, ought to admit it only as a claim; and if it is not made out to their satisfaction, it may be rejected. 1 Atk. 71. 221.

Upon the principle of equality among the creditors proving under the commission, the privilege of debtors to come in and prove their debts, and bankrupts to be discharged therefrom, is coextensive and commensurate; therefore a man shall not prove a debt, and proceed in an action at law, at the same time. However, the court will not absolutely stop him from bringing an action, but put him to his election; and should he elect to proceed at law, he will still be allowed to prove his debt for the purpose of assenting to, or dissenting from the certificate; which permission is absolutely requisite, to make his remedy at law of any avail, for should the bankrupt procure his certificate, he will be thereby discharged from that action, as well as from all debts contracted before the act of bankruptcy. 1 Atk. 83. 119. 220. 1 P. Wms. 562.

If the creditor, before he proves his debt, proceeds at law against the bankrupt, he cannot be obliged to make his election till a dividend is declared. And where the creditor has already proceeded at law, he is not at liberty to come in and prove his debt under the commission, without relinquishing his proceedings at law; unless by order from the great seal, for the purpose of assenting to, or dissenting from the certificate. See 1 Atk. 219. 2 Black. Ref. 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. Coke's B. L. c. 6. § 2.

The being chosen assignee, will not prevent the creditor from suing the bankrupt at law, if he has not proved his debt; for in that case he can only be considered as a creditor at large; and even if he has proved his debt and chosen himself assignee, he may still elect to proceed at law, and be discharged as a creditor under the commission. 1 Atk. 153. 221. But a petitioning creditor has not this election; see ante, 1.

A debt made void by statute, ought not to be permitted to be proved; as a debt on a usurious contract; and though the rule of the court of chancery is, upon a bill to be relieved against demands of usurious interest, not to make void the whole debt, but to make the partie pay what is really due; yet in a commission of bankruptcy, the assignees have a right to insist that the whole is void, as a usurious contract. And unless the assignees and creditors submit to pay what is really due, the lord chancellor has not power to order it; and applications of this nature have been frequently refused. 2 Vez. 489.

If the bankrupt's estate is in arrear for taxes, the collector, when he comes to prove the debt, must produce his authority, that the commissioners may judge of the legality of it. Corporations usually
have a clerk or treasurer who is the person to prove debts due to them; he must however produce his appointment under seal to the commissioners. Every security that a creditor has for his debt, must be produced at the time of his proving, when the commissioners will mark them as having been exhibited. In the same manner, any person acting for another, must produce his authority to the commissioners and they will mark them as exhibits. Cooke's Bankrupt Law.

One inhabitant of a parish may prove for himself and the other inhabitants. 1 Akb. 111. and see Cooke's B. L. c. 4. § 1.

In case of debts uncertain in point of liquidation, as between two merchants in balancing accounts, the matter rests upon a claim to ascertain the sum that was due at the time of the bankruptcy. So where a creditor cannot ascertain his debt with certainty sufficient to enable him to swear to it, or is not able in other respects satisfactorily to substantiate it, or where the agent of a creditor cannot produce his authority, and in many other cases where there appears a probable foundation of a demand, though not sufficiently made out, it is usual for the commissioners to suffer a claim to be entered; but that will not entitle the party to a dividend, which he cannot receive without completely proving his debt. If a claim is not substantiated in a reasonable time the commissioners may strike it out; and they generally do so before a dividend is declared, unless sufficiently reason is offered to them for prolonging the time; but the creditor is, notwithstanding, afterwards at liberty to prove his debt, and receive his share upon any future dividends. However in such cases where there has not been gross neglect, the chancellor will make an order that such creditor shall be paid his proportion of the first dividend out of the money in the assignees' hands, upon condition that it does not break in upon any former dividend. 3 Wils. 271. Cooke's B. L.

Aliens as well as denizens may come in as creditors; for all statutes concerning bankrupts extend to aliens. Hob. 287. See stat. 21 Jac. I. c. 19.

3. The distinction of debts payable in futuro on a day certain, and debts depending upon contingency, has given rise to frequent questions, whether the bankrupt's wife or her trustees should be admitted to prove the sum settled on her by marriage articles, under a commission against her husband.

Lord Hardwicke, on a petition Ex parte Winchester, (1 Akb. 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 Will. 271. See 2 P. Wms. 497. 2 La. Raym. 1545. 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 provable. 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 5th. 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 Will. 270. 2 Stra. 1160. And this, though the surety is called upon, and liable to pay the debt, if it is not actually paid. 1 Term Rep. 599.

So, if a lessee plows up meadow ground, for which he is bound to pay the lessor a certain sum of money as a penalty, that penalty cannot be proved as a debt under the commission; nor if a man be bound in an obligation, in a certain sum, to perform covenants, and the obligor, before he becomes a bankrupt, breaks those covenants, the obligee cannot prove this as a debt. If a bond by a principal and surety has not been forfeited, before the surety became bankrupt, the debt cannot be proved under his commission, but he may be sued upon it notwithstanding his certificate. Doug. 155. 3 Will. 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. Crew. 525. 3 Will. 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. *Coapt. 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.*

5. The general rule as to common annuities is, that where one is entitled to an annuity from another, which is not a rent-charge on land, or on a specific part of the grantor's estate, but personal, to be paid by him, who afterwards becomes bankrupt, it is only a general demand on him and his estate; and nothing is a debt on his estate but the arrears of the annuity at the time of the bankruptcy, unless the penalty of the annuity bond has become forfeited; for otherwise the payments accruing afterwards became a debt after the bankruptcy, and cannot be proved. But where there has been a forfeiture prior to the bankruptcy, in order to prevent the injustice of admitting the creditor only to prove the arrears, and the great inconvenience that would ensue if the annuity should be received from time to time, as an accruing debt on the estate, by which means the division of the estate would be perpetual, and there could be no final dividend during the annuitant's life, the court of chancery puts it in another shape of setting a value on the annuity, because it was only a general personal demand. And in setting this value, consideration must be had of the time the annuitant has enjoyed it. *2 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 assignables 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 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 indorser, and to receive a dividend from each, upon his whole debt, provided he does not, in the whole, receive more than 20s. 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. 169.* *129.* *2 Vez. 114.* *115.*

Creditors are not allowed to prove interest on notes or bills, unless it is expressed in the body of them. But the creditor may prove the full sum for which the notes were given, notwithstanding he received 5l. per cent. discount. *Cooke's B. L.* *1 Atk. 151.*
A child living with the father, and earning money for itself, may, if the father receives that money, be admitted a creditor under the commission against him. 2 Vez. 675.

A landlord having a legal right to distrain goods while they remain on the premises, the issuing a commission of bankrupt against the tenant, and the messenger’s possession of the tenant’s goods, will not hinder him from distraining for rent: for it is not such a custodia legis as an execution: and even there the law allows the landlord a year’s rent. And the assignment of the commissioners of the bankrupt’s estate and effects is only changing the property of the goods, and while upon the premises they remain liable to be distrained. 1 Aik. 101—104.

And as a creditor, after proving his debt, may elect to abide by such proof, or relinquish it, and proceed at law, so a landlord, who is considered in a higher degree than a common creditor, may make his election to waive his proof in his distress for rent. Cooke’s B. L. But particular circumstances may deprive the landlord of this right; as if he neglects to distrain, and suffers the goods to be sold by the assignees. 1 Aik. 104. See 1 Bro. C. R. 427. And a landlord may distrain before the end of the term by custom, as in Norfolk. 2 Term Rep. 600. A proviso in a lease, that it shall be void in case of the bankruptcy of the lessee is valid. 2 Term Rep. 133.

If an executor becomes bankrupt, as he acts in auctor dไรต์, 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 Aik. 101, or direct the bankrupt himself to be admitted a creditor for what he may be entitled to as executor, and order the dividend to be paid into the bank. See Cooke’s B. L. c. 6. § 3. The effects possessed by a bankrupt as executor, are not liable to the assignment of commissioners. 3 Barr. 1399.

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 Aik. 79, 80.

If a bankrupt is a factor, and goods are consigned to him or his order, which come to his possession, though he has the power of immediately selling them, and taking the money, in which case the consignor can only come as a general creditor upon his estate, yet, notwithstanding the legal property the factor had in, and power over them, if they remain in specie in his hands, they shall be delivered to the principal, who has a lien upon them as his own property; and the bankrupt only as agent and trustee for him. And even where the factor had sold the goods, and taken notes for them, it has been determined that the original owner had a specific lien upon, and was entitled to the notes. 2 Vez. 536. 1 Aik. 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 Aik. 97. 7 Vin. Abr. 77. Or if the commissioners act improperly at the choice of assignees. When an assignee is removed, he must join with the old assignee and the commissioners in making an assignment
to the new assignee. The common practice where only one assignee is removed, is, to make him join with his companion in assigning to the new assignee, and to the one retained, whereby a man is made to convey to himself, which appears absurd. The most feasible plan seems for the old assignees to convey to a third person, in trust, that he should immediately reconvey to the old and new appointed assignee. See Cooke's B. L.

Assignees are in the nature of trustees; and where they employ an agent to receive or pay money, and he abuses this confidence, an assignee cannot be distinguished from any other trustee, who, if his agent deceive him, must answer over to the cestui que trust. 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 special debt, and therefore they may come upon his real estate. 1 Atk. 89.

7. If there is a joint commission against two partners, they must be each found bankrupts; and though one of them should die, the commission may still go on; but if one of the joint traders be dead at the time of the taking out the commission, it abates, and is absolutely void. Cooke's B. L.

It was formerly the practice, where there were several partners, to take out several commissions against each, as well as a joint commission; but this has been since disapproved, 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. 188. 198. But it seems now to be considered that a joint commission cannot legally be supported while there is a separate one subsisting; because a trader having been declared a bankrupt, the whole of his property is assigned under the first commission, and, till he obtains his certificate, he is incapable of trading or contracting for his own benefit. However it is certain that, in practice, joint commissions are taken out after the parties have been declared bankrupts under separate commissions, by which means great expense is saved, and the joint effects disposed to better advantage; and therefore in a fair case, and where it can be made to appear that the bankrupt's estate will be benefited by prosecuting a joint commission, the lord chancellor, to make it valid, will supersede the prior separate one. Compn. 824. 1 Atk. 252. Cooke's B. L. c. 1. § 2.

Joint creditors are entitled to a distribution of the joint or partnership estate, without the separate creditors being permitted to partici-
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pate with them; but, notwithstanding separate creditors are not entitled to share the dividend of the joint property, until the joint creditors have received 20s. 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. 375. 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 20s. in the whole. Cooke's B. L.

Where there is a joint and several creditor, he must, according to the rule of the court now firmly established, make his election whether he will come in upon the joint or the separate estate; that is, which he will come in upon in preference; for which ever he may elect, he will be entitled to come in upon the surplus of the other, if there should be any. And in order to make his election, he must have a reasonable time to inquire into the state of the different funds, but he is not entitled to defer such election until a dividend be declared. Cooke's B. L. c. 6. § 15.

An act of bankruptcy by one partner is to many purposes a dissolution of the partnership, by virtue of the relation in the statutes, which avoids all the acts of a bankrupt from the day of the bankruptcy; and from the necessity of the thing, all his property being vested in the assignees, who cannot carry on a trade. But after a dissolution of partnership by agreement, by an execution, or by a bankruptcy, the partner out of possession of the partnership effects, has the same lien on any new goods brought in which he had upon the old. One partner has not, after a dissolution, a right to change the possession, or to make an actual division of the specific effects; for one partner may be a creditor of the partnership to ten times the value of all the effects. The other partner, in that case, can only have a right to an account of the partnership, and to the balance due to him, if any on that account; and no person deriving under the partner can be in a better condition than himself; his executor stands in the very same light. So the assignees under a commission of bankruptcy against one partner must be in the same state. They can only be tenants in
common of an undivided moiety, subject to all the rights of the other partner. 4 Burr. 2176. Conv. 448. 471. 12 Mod. 446.

If a partner is a creditor on the partnership account, he can have no satisfaction but out of the surplus which shall remain after the joint creditors are paid; for the joint creditors rely upon the ostensible state of the fund, and give credit to it accordingly. But Lord Hardwicke said, that where there are joint and separate creditors, if one partner lends a sum of money to the partnership, the creditors of his separate estate have a right to this in the first place. 1 Atk. 287. Vez. jun. 167.

But this has since been determined contrary; as where there was a joint commission against two partners, and a separate one against one of them. The petitioners, assignees under the separate commission, petitioned to be admitted creditors under the joint commission, for a sum of money brought by their bankrupt into the partnership, beyond his share, and as being, therefore, a creditor on the partnership for that sum; but refused on the principle that he cannot be a creditor on the partnership in competition with the joint creditors. Cooke's B. L. c. 13.

So, where one partner has taken more than his share out of the joint fund, the joint creditors, as the rule seems to be now settled, cannot be admitted to prove against the separate estate of the partner who drew out the money, until his separate creditors are satisfied, unless it can be shown that the partner acted fraudulently, with a view to benefit his separate creditors, at the expense of the joint creditors. Cooke's B. L. c. 13. See tit. Partners.

One partner may be a creditor to another, and may, if he continues solvent, prove his debt under a separate commission. 1 Atk. 225. 2 C. R. 226. Cooke's B. L. c. 13.

If there be two partners, and one of them becomes bankrupt, and, on a separate commission being sued out against him, his certificate is allowed; this does not only discharge the bankrupt of what he owed separately, but also of what he owed jointly, and on the partnership account; because, by the act of parliament, the bankrupt, upon making a full discovery, and obtaining his certificate, is to be discharged of all debts. 3 P. Wins. 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. Wins. 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:
BANKRUPT V.

A. R. 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 100l. and upwards, for goods sold and delivered by this deponent, and his said partner, to and for the use of the said John Wilson; and this deponent further saith, that the said John Wilson is become a bankrupt, within the true intent and meaning of some or one of the statutes made, and now in force concerning bankrupts, as this deponent hath been informed and believes.

Sworn at the public office, the 1st day of September, 1784, before me Peter Holford.

When the affidavit is sworn, it is carried to the secretary of bankrupts' office, where the party suing for the commission enters into the bond. See III. 1.

The clerk of the bankrupts fills up a blank petition in the name of the person that makes the affidavit; and annexes the affidavit and bond to the petition, when he prefers the same to the lord chancellor.

This petition is answered in a few days, and the petitioning creditor has a commission without any further trouble.

A COMMISSION OF BANKRUPT.

GEORGE the Third, by the Grace of God, of Great Britain, France and Ireland, king, defender of the faith, &c. to our trusty and well beloved William Bumstead, Henry Hunter, Henry Cowper, Henry Russel, Esquires, and Richard Hargrave, gentleman, greeting. Whereas, we are informed that John Wilson, of, &c. using and exercising the trade of a merchant by way of bargaining, exchange, bartering, and chevisance; seeking his trade and living, by buying and selling; about since, did become bankrupt within the several statutes made against bankrupts, to the intent to defraud and hinder Thomas Abel, of, &c. and other his creditors of their just debts and duties to them due and owing: We, minding the due execution as well of the statute touching orders for bankrupts, made in the parliament begun and holden at Westminster, the 2d day of April, in the thirteenth year of the reign of Elizabeth, late queen of England, made and provided; as of the stat. &c. [mentioning stats. 1 Jac. I. 21 Jac. I. and 5 Geo. II.] Upon trust of the wisdom, fidelity, diligence and provident circumspection, which we have conceived in you, do by these presents, name, assign, appoint, constitute and ordain you our special commissioners; Hereby giving full power and authority unto you, four or three of you, to proceed according to the said statutes, and all other statutes in force concerning bankrupts; not only concerning the said bankrupt, his body, lands, tenements, freehold and customary, goods, debts, and all other things whatsoever; but also concerning all other persons, who by concealment, claim, or otherwise, do, or shall offer, touching the premises, or any part thereof, contrary to the true intent and meaning of the said statutes; And to do and to execute all and every thing and things whatsoever, as well for and towards satisfaction and payment of the said creditors; as towards and for all other intents and purposes, according to the ordinance, and provision of the same statutes. Willing and commanding you, four or three of you, to proceed to the execution and accomplishment of this our commission, according to the true intent and meaning of the same statutes, with all diligence and
effect. *Witness* ourself at Westminster, the — day of —, in the — year of our reign.

J. Yorke.

Having got the commission, the petitioning creditor must employ one of the messengers to summon a meeting of the major part of the commissioners to open the same; when the petitioning creditor must come prepared to prove his debt, and the party a bankrupt, within the statutes.

**OATH to be administered by the Commissioners to Witnesses, upon their Examination.**

YOU are here produced, as witnesses, by virtue of a commission out of the high court of chancery, to us and others directed, to be by us examined, concerning the bankruptcy of John Wilson, of, &c. Now to all such questions and interrogatories as shall be asked you, by virtue of this commission of bankrupt concerning the said John Wilson, his trade or profession, his absconding, and other acts which he hath done or suffered, by which he may be discovered to be a bankrupt, and also concerning his lands and tenements, goods and chattels, debts and duties, frauds and concealments, and other matters and things, in obedience to the said commission, and pursuant to the several statutes made concerning bankrupts, you, and every of you shall, true and direct answer make, and swear the truth, the whole truth, and nothing but the truth.

So help you God.

All the depositions must be signed by the witnesses. If the party is a Quaker, then instead of swear, say, "You shall solemnly, sincerely, and truly, declare, and affirm."

Immediately upon the commissioners’ declaring the party a bankrupt, they issue their warrant for seizure of his effects, and the messenger by virtue thereof seizes the effects, and continues to keep possession till the commissioners have executed the assignment.

The application to enlarge the time for the bankrupt’s surrender, must be by petition to the great seal, six days at least before the last sitting appointed in the *gazette*; this petition may be either in the name of the bankrupt, or of his assignees.

It is usual for the commissioners to recommend, and the creditors to agree, to return the bankrupts their rings, moneys, &c. particularly the jewels, &c. of their wives.

If the bankrupt happens to be a foreigner, and does not understand English, his English examination must be interpreted, and read to him in the language he understands, by a person versed in both languages, who must be first sworn to interpret truly; of which oath and interpretation there must be a memorandum made and annexed to the bankrupt’s examination.

If the bankrupt does not surrender himself to the commissioners by 12 o’clock at night of the last day given, the messenger warns him so to do, by a proclamation made by him in the middle of Guildhall; the commissioners continuing sitting till that time.
FORM OF A BANKRUPT'S CERTIFICATE.

To the Right Honourable the Lord High Chancellor of Great-Britain.

WE, whose names and seals are hereunto subscribed and set, being the major part of the commissioners, named and authorized in and by a commission of bankruptcy, awarded, and issued against John Thomas, of, &c. (as described in the commission,) bearing date at Westminster, the 8th day of, &c. directed to William Bumstead, &c. do humbly certify to your lordship, that the major part of the commissioners by the said commission authorized, having begun to put the said commission into execution, did find that the said John Thomas became a bankrupt, since the 10th day of May, 1784, and before the date and setting forth of the said commission, within the true intent and meaning of the statutes made, and now in force concerning bankrupts, or some of them; and did thereupon declare and adjudge him a bankrupt accordingly. And we further humbly certify to your lordship, that the said John Thomas, being so declared a bankrupt, the major part of the commissioners by the said commission authorized, pursuant to the directions of the act of parliament made in the 5th year of the reign of his late majesty king George II. entitled "an act to prevent the committing of frauds by bankrupts," did cause due notice to be given and published in the London gazette of such commission being issued, and of the times and places of three several meetings of the said commissioners, within 42 days next after such notice; (the last of which meetings, was appointed to be on the forty-second day;) at which time the said John Thomas was required to surrender himself to the said commissioners named in the said commission, or the major part of them, and to make a full disclosure and discovery of his estate and effects; and the creditors of the said John Thomas, were desired to come prepared to prove their debts, and to assent to or dissent from the making this certificate. And we further humbly certify to your lordship, that such three several meetings of the major part of the commissioners by the said commission authorized, were had pursuant to such notice so given and published; and that at one of those meetings the said John Thomas did surrender himself to the major part of the commissioners, by the said commission authorized, and did sign and subscribe such surrender, and did submit to be examined from time to time upon oath, by and before the major part of the commissioners, by the said commission authorized: and in all things to conform to the several statutes made and now in force concerning bankrupts; and particularly to the said act made in the 5th year of his late majesty's reign. And we further humbly certify to your lordship, that at the last of the said three meetings, the said John Thomas finished his examination, before the major part of the said commissioners, by the said commission authorized, according to the directions of the said last mentioned act, and upon such his examination made a full disclosure and discovery of his estate and effects; and in all things conformed himself to the several statutes made and now in force concerning bankrupts, and particularly according to the directions of the said statute made in the 5th year of his late majesty's reign; and there doth not appear to us any reason to doubt of the truth of such discovery, or that the same is not a full discovery of all the estate and effects of the said John Thomas. And we further humbly certify to your lordship, that the creditors whose names or marks are subscribed to this certificate, are full four parts in five 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 authorized thereunto, did, before our signing hereof, sign this certificate, and testify their consent to our signing the same, and to the said John Thomas having such allowance and benefit, as by the said last-mentioned act are allowed to bankrupts, and to the said John Thomas being discharged from his debts, in pursuance of the same act. In witness whereof we have hereunto set our hands and seals, this day of , in the year of the reign of, &c. and in the year of our Lord, 1784.

We the creditors of the above named John Thomas, whose names or marks are hereunder subscribed, do hereby testify and declare our consent, that the major part of the commissioners, by the above-mentioned commission authorized, may sign and seal the certificate above written; and that the said John Thomas may have such allowance and benefit as are given to bankrupts by the act of parliament made in the 5th year of the reign of his late majesty king George II. entitled, " an act to prevent the committing of frauds by bankrupts ;" and be discharged from his debts in pursuance of the same act.

(The creditors' names.) A. B. C. D.

The messengers have printed forms of certificates, therefore the best way is to get a blank from them.

If any person sign the bankrupt's certificate by virtue of a letter of attorney, such letter of attorney must be left at the bankrupts' office.

The certificate, together with the affidavit of seeing the creditors sign it, and also letters of attorney, (if any such there be,) must be lodged with the secretary of bankrupts; who will thereupon give the messenger an authority to the printer of the gazette, to insert an advertisement therein signifying that the acting commissioners have certified to the great seal, that the bankrupt hath conformed, and that the certificate will be allowed and confirmed, unless cause shown to the contrary, within twenty-one days from the date of the said advertisement.

If no cause is shown within the 21 days, against the allowance of the certificate, the lord chancellor will allow the same, by the following subscription on the said certificate:

"—— day of ——, 1784.

WHEREAS the usual notice hath been given in the London gazette, of ——, the —— day of —— last, and none of the creditors of the above-named John Thomas have shown any cause to the contrary, I do allow and confirm this certificate.

Thurlow, C."
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 four or three of them to execute the same. And we do further certify, that we, being the major part of the commissioners, by the said commission authorized, have proceeded in the execution of the said commission, and have found upon the due examination of witnesses, and other good proof upon oath, before us had and taken, that the said John Thomas, before the date and suing forth of the said commission, became bankrupt, to all intents and purposes within the compass, true intent and meaning of the several statutes made and now in force concerning bankrupts, or within some or one of them, before the date and suing forth of the said commission. Given under our hands and seals at St. John'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. Wiliam Bumpstead, (L. S.)
Henry Hunter, (L. S.)
Henry Russell, (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 Combé the sum of ---, being her dividend of --- shillings in the pound on her debt of ---, proved under the commission of bankrupt against Francis Gibbons, of, &c.

"Yours, &c. John Knight, 14th July, 1780.

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

The assignees, upon receiving this authority, pay the creditor, and take a receipt in a book to the following purport, viz.

"Received this --- day of July, 1780, of Messrs. Partridge and Dennis, assignees of the estate and effects of Francis Gibbons, of, &c. bankrupt, the sum of ---, being a dividend of --- shillings in the pound, on my debt of ---, proved under the said commission.

"Mary Combé."

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 Russell, Henry Cooper, Esquires, and Richard Hargrave, gentleman, greeting: Whereas we being informed that John Thomas, of, &c. using and exercising the trade of merchandise, by way of bargaining, exchange, bartering, chevisance, seeking his trade of living by buying and selling, did become bankrupt within the several statutes made against bankrupts; to the intent to defraud and hinder Charles Jones, of, &c. and others, his creditors, of their just debts and duties, to them due and owing; and we, minding the due execution of the several statutes made against bankrupts, did, by our commission, under the great seal of Great Britain, bearing date at Westminster, the day of —, in the — year of our reign, name, assign, appoint, constitute and ordain you our special commissioners, thereby giving, &c. (here recite the original commission to "diligence and effect," then add) Now forasmuch as the said John Thomas, the bankrupt, by his humble petition, exhibited to our Lord High Chancellor of Great Britain, for the reasons therein contained, prayed that the said commission might be superseded, whereunto we graciously inclining, do by these presents, will and command you, and every of you, to stay and surcease all further proceedings upon the said commission, and that you supersede the same accordingly, as our special trust is in you reposed. Witness ourselves at Westminster, the — day of —, in the — year of our reign.

When this writ is obtained, the commissioners must be served therewith, by delivering to each of them a copy, and, at the same time, showing them respectively, the original writ under seal, and then the proceedings are at an end; but it is usual to give notice thereof in the gazette.

BANKS. See tit. Sea Banks.
BANLEUGA. Vide Bannum.
BANNIMUS. The form of an expulsion of any member from the University of Oxford, by affixing the sentence in some public places, as a denunciation or promulgation of it. And the word bannning is, taken for an exclamation against, or cursing of another.
BANNITUS, or Bannitius.] An outlaw, or banished man. Pat. Ed. 2.
BANNS vel BANLEUGA, The utmost bounds of a manor or town; so used 47 Hen. III. Rot. 44. &c. Banleuga de Arundel is taken for all that is comprehended within the limits or lands adjoining, and so belonging to the castle or town. Selid. Hist. of Tythes, f. 75.
BAR. See Berr.
BARATRY. See tit. Insurance.
BARBERS, Were incorporated with the surgeons of London; but not to practise surgery except drawing of teeth, &c. 32 Hen. VIII. c. 42. but separated by 13 Geo. II. c. 15. See Surgeon.
BARBICAN, barbicanum.] A watch-tower or bulwark.
BARBICANAGE, barbicanagium.] Money given for the maintenance of a barbican, or watch-tower; or a tribute towards the repairing or building a bulwark. Carta 17 Edw. III. Monasticon. tom. 1. ft. 976.
BARCARIUM, barcaria.] A sheep-cote, and someones used for a sheep-walk. MS. de Placit. Ed. III. See Bercaria.
BARGAIN AND SALE.

BARGAIN AND SALE, is an instrument whereby the property of lands and tenements is for valuable consideration granted and transferred from one person to another: it is called a real contract upon a valuable consideration for passing of lands, tenements and hereditaments, by deed indented and enrolled. 2 Inst. 673.

Since the introduction of uses and trusts, and the stat. 27 Hen. VIII. c. 10. for transferring the possession to the use, the necessity of livery of seisin for passing a freehold in corporeal hereditaments, has been almost wholly superseded; and in consequence of it, the conveyance by foreshment is now very little in use. Before the statute of uses, equitable estates of freehold might be created through the medium of trusts, without livery; and by the operation of the statute, legal estates of freehold may now be created in the same way. They who framed the statute of uses evidently foresaw, that it would render livery unnecessary to the passing of a freehold; and that a freehold of such things as do not lie in grant would become transferable by parol only, without any solemnity whatever. To prevent the inconveniences which might arise from a mode of conveyance so uncertain in the proof, and so liable to misconstruction and abuse, it was enacted in the same session of parliament, that an estate of freehold should not pass by bargain and sale only, unless it was by indenture enrolled in one of the courts at Westminster, or in the county where the lands lie; such enrolment to be made within six months after the date of the indenture. Stat. 27 Hen. VIII. c. 16. See 2 Inst. 675. Dyer, 229. Poph. 48. Dal. 63. The objects of this provision evidently were, first, to enforce the contracting parties to ascertain the terms of the conveyance, by reducing it into writing; secondly, to make the proof of it easy by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances, by substituting the more effectual notoriety of enrolment, for the more ancient one of livery. But the latter part of this provision, which if it had not been evaded, would have introduced almost a universal register of conveyances of the freehold, in case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from the omission to extend the statute to bargains and sales for terms of years: (see 8 Co. 93. 2 Roll. Abr. 204. 2 Inst. 671.) and the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold, though created without deed or writing. The inconveniences from this insufficiency of the statute of enrolments are now in some measure prevented by stat. 29 Car. II. c. 3. which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. 1 Inst. 48. a. n. 3.

This may serve at present to illustrate the doctrine of Bargain and Sale; but to obtain a clear and distinct idea of this part of the law, see further titles Conveyance, Deed, Feoffment, Lease and Release, Use, &c. and 1 Inst. by Hargrave and Butler.

At present it may be fit to consider,

I. What things may be bargained and sold.

II. 1. By whom, to whom, and,

2. By what words a bargain and sale may be made.

III. 1. Of the consideration, and,

2. Inrolment 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 Rev. 176. 11 Rev. 25.

Any freehold or inheritance in possession, reversion, or remainder upon an estate for years, or life, or in tail, may be bargained and sold, but the deed shall be enrolled. 2 Co. 74. Dyer, 309. 2 Inst. 671.

But if tenant for life bargains and sells his land by deed enrolled, it will be a forfeiture of his estate. 4 Leon. 251.

But a man seised of a freehold may bargain and sell for years, and this shall be executed by the statute of uses. 27 Hen. VIII. c. 10.

A man possessed of a term cannot bargain and sell it, so as to be executed by the statute. 2 Co. 35, 36. Pojoh. 76.

A bargain and sale of the profits of lands, is a bargain and sale of the land itself; for the profits and the land are the same thing in substance. Dyer, 71.

A rent in esse may be bargained and sold, because this is a freehold within the statute; and, before the statute, a rent newly created might be bargained and sold, because when money, as an equivalent was given, and ceremonies or words of law were wanting, the chancery supplied them; but it seems that, since the statute, a rent newly created cannot be bargained and sold, because there ought to be a freehold in some other person, to be executed in cestui que use; but here can be no seisin of his rent in the bargainor, because no man can be seised of a rent in his own land, and consequently there can be no estate to be executed in the bargainee. Kieff. 85. 1 Co. 126. 1 And. 327. 1 Jones, 179. Sed qu. de hoc.

If A. by indenture enrolled, bargains and sells lands to B. and his heirs, with a way over other lands of A. this is void as to the way; for nothing but a use passes by the deed, and there can be no use of a thing not in esse, as a way, common, &c. before they are created. Cro. Jac. 189.

II. 1. The king, and all other persons that cannot be seised to a use, cannot bargain and sell; for at common law, when a man had sold his land for money without giving livery, the use only passed in equity, and this is now executed, and becomes a bargain and sale by the statute; but, antecedent to any such execution, there must be a use well raised, which cannot be without a person capable of being seised to a use, which the king is not, there being no means to compel him to perform the use or trust; for the chancery has only a delegated power from the king over the consciences of his subjects; and the king is the universal judge of property, and ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate as a trustee. Bro. Feoffment to Uses, 33. Hard. 468. Pojoh. 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. 58. 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. 54. 2 Roll. Abr. 788.

A man may bargain and sell to his son; but then the consideration of money ought to be expressed, and it ought to have all the other circumstances of bargain and sale; but this shall operate as a covenant to stand seised, if there be none but the consideration of natural love and affection expressed. 7 Co. 40. 2 Co. 24. Cro. Eliz. 394. 1 Vent. 137. 1 Lev. 55. 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. 1 Keh. 84. Co. Lit. 265.

If an infant bargains and sells his land by deed indented and enrolled, yet he may plead nonage; for, notwithstanding the statute, the bargainee claims by the deed as at common law, which was, and therefore is, still defeasible by nonage. 2 Inst. 673.

If a husband seised of lands, in right of his wife, or tenant in tail, bargains and sells the trees growing on the lands, and dies before severance, the bargainee cannot afterwards cut them down and take them away. Mo. 41. See tit. Baron and Feme, IV.

If there be two joint-tenants, and one of them makes a bargain and sale of his own estate in fee, and then the other dies, the other moiety shall survive to the bargainor: for, since the freehold is in the bargainor, the inheritance continues; but if such joint-tenant had bargained and sold totum statum omnium in fee, though he died before enrolment; yet, if the deed were afterwards enrolled, the moiety would not survive, but would pass to the bargainee. Cro. Jac. 53. Co. Lit. 186. 1 Bulst. 3.

2. The very words bargain and sell are not of absolute necessity in this deed, for other words equivalent will suffice, as if a man, seised of lands in fee, sell the same to another, by the words alien or grant, the deed being made in consideration of money, and indented and enrolled, will be an effectual bargain and sale. In short, whatever words upon valuable consideration would have raised a use of any lands, &c. at common law, the same would amount to a bargain and sale within this act; as if a man by deed, &c. for a valuable consideration, covenants to stand seised to the use of another, &c. 2 Inst. 672. Cro. Jac. 210. Mo. 34. Cro. Eliz. 166.

III. 1. There must be a good consideration given, or, at least, said to be given, for lands in these deeds; and, for a competent sum of money, is a good consideration: but not the general words for divers considerations, &c. Med. Ca. 777. Where money is mentioned to be paid in a bargain and sale, and in truth no money is paid, some of our books tell us this may be a good bargain and sale; because no averment will lie against that which is expressly affirmed by the deed, except it comes to be questioned whether fraudulent or no, upon the statute against fraudulent deeds. Dyer, 90. If no consideration of money is expressed in a deed of bargain and sale, it may be supplied by an averment that it was made for money; and after a verdict on a trial, it shall be intended that evidence was given at the trial of money paid. 1 Vent. 108. If lands are bargained and sold for money only,
the deed is to be enrolled according to the statute; but if it be in consideration of money, and natural affection, &c. the estate will pass without it. 2 Inst. 672. 2 Lev. 56.

If a man, in consideration of so much money to be paid at a day to come, bargains and sells, the use passes presently, and after the day, the party has an action for the money, for it is a sale, be the money paid presently or hereafter. Dyer, 337. a.

2. If the deed of bargain and sale be not enrolled within the six months, (which are to be reckoned after twenty-eight days to the month, the day of the date taken exclusively,) it is of no force; so that if a man bargains and sells his land to me, and the trees upon it, although the trees might be sold by deed without enrolment, yet, in this case, if the deed be not enrolled, it will be good neither for the trees nor the land. Dyer, 90. 7 Rep. 40. 2 Bulst. 8. A bargain and sale of a manor, to which an advowson is appendant by indenture not enrolled, will not pass the advowson or the manor, for it was to go as appendant. Bro. Cas. 240.

But in some cases, where a deed will not enure by way of bargain and sale, by reason of some defect therein, it may be good to another purpose. Dyer, 90.

If two bargains and sales are made of the same land, to two several persons, and the last deed is first enrolled; if afterwards, the first deed is also enrolled within six months, the first buyer shall have the land; for, when the deed is enrolled, the bargainee is seized of the land from the delivery of the deed, and the enrolment shall relate to it. Hob. 165. Wood's Inst. 259. Neither the death of the bargainor or bargainee, before the enrolment of the deed of bargain and sale, will hinder the passing of the estate to the bargainee: but the estate of freehold is in the bargainor until the deed is enrolled; so that the bargainee cannot bring any action of trespass before entry had, though it is said he may surrender, assign, &c. Cro. Jac. 52. Co. Lit. 147.

A bargainee shall have rent which incurs after the bargain and sale, and before the enrolment. Sid. 310. Upon the enrolment of the deed, the estate settles ab initio, by the stat. 27 Hen. VIII. c. 16, which says, that it shall not vest, except the deed be enrolled; and when it is enrolled, the estate vests presently by the statute of uses. 1 Dowl. Abr. 696.

If several seal a deed of bargain and sale, and but one acknowledge it, and thereupon the deed is enrolled; this is a good enrolment within the statute. Sty. 462. None can make a bargain and sale of lands that hath not the actual possession thereof at the time of the sale; if he hath not the possession, the deed must be sealed upon the land to make it good. 2 Inst. 672. 1 Litt. 290.

Houses and lands in London and any city, &c. are exempted out of the statute of enrolments. 2 Inst. 676. 1 Nels. Abr. 342. See further tit. Enrolment.

IV. In pleading a bargain and sale the deed itself must be shown under seal. 1 Inst. 225. For though the enrolment being on record is of undoubted veracity, being the transaction of the court, yet the private deed has not the sanction of a record, though publicly acknowledged and enrolled; for it might have been falsely and fraudulently dated, or ill executed. Co. Lit. 225. b. 251. b. 2 Inst. 673. 4 Co. 71. 5 Co. 53. 2 Roll. Rep. 119.
It must likewise be set forth that the enrolment was within six months, or secondum formam statutum, &c. vide Allen, 19. Carter, 221. Stig. 34. S. C.

In pleading a bargain and sale, the party ought regularly to aver payment of the money. 1 Leon. 170. See Moor, 504.

In replevin the case upon the pleadings was, that the defendant made a title under bargain and sale, enrolled within six months, and the statute of usages, and did not show that it was made a title under bargain and sale, enrolled within six months, and be intended, that evidence was probable that, formerly, in this kingdom, all those were barons, though they had a

It includes all the nobility of England, because, regularly, all noblemen were barons, though they had a higher dignity; and therefore the

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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 barone, quasi robur belli. In which signification it agrees with other nations, where baronae are as much as provincie: 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 seignories as we now call courts-baron; as they were called seigneurs in France, who had any manor or lordship; and soon after the conquest, all such came to parliament, and set as peers in the lords' house. But when, by experience, it appeared that the parliament was too much thronged by these barons, who were very numerous, it was, in the reign of King John, ordained, that none but the barones majoris should come to parliament, who, for their extraordinary wisdom, interest or quality, should be summoned by writ. After this, men observing the estate of nobility to be but casual, and depending merely upon the king's will, they obtained of the king letters patent of this dignity to them and their heirs male, who were called barons by letters patent, or by creation, whose posterity are now, by inheritance, those barons that are called lords of the parliament; of which kind the king may create at his pleasure. Nevertheless, there are still barons by writ, as well as barons by letters patent; and those barons who were first by writ, may now also justly be called barons by prescription, for that they and their ancestors have continued barons beyond the memory of man. 2 Inst. 48. See tit. Peers of the Realm. The original of barons by writ, Camden refers to King Hen. III. and barons by letters patent or creation, commenced 11 Rich. II. Camb. Brit. page 109. To these is added a third kind of barons, called barons by tenure, which are some of our ancient barons; and likewise the bishops, who, by virtue of baronies annexed to their bishopricks, always had place in the lords' house of parliament, as barons by succession. Seager of Honour, lib. 4. cap. 15.

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 EdeIII., 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 dukces, marquises, &c. were all comprehended under the name de la concell 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 magni concilii regis; and, secondly, they are girt with a sword, that they should ever be ready to defend their king and country. 2 Inst. 5. A baron is vir notabilis et principalis: and the chief burgesses of London were, in former times, barons before there was a lord mayor, as appears by the city seal, and their ancient charters. Henricus III. Rex. Solicis nos concessisse et hac praesenti charta nostra confirmasse baronibus nostri de civitate nostra London quod eignit sibi mayor de sepulis singulis annis, &c. Speim. Gloss. The earls palatine and marches of England had ancienly their barons under them; but no barons, but those who held immediately of the king, were peers of the realm. 'Tis certain the king’s tenants were called barons; as we may find in Matt. Paris, and other writers: and in days of old, all men were styled barons, whence the present law term of baron and feme for husband and wife; which see.

BARONY, baronía.] Is that honour and territory which gives title to a baron; comprehending not only the fees and lands of temporal barons, but of bishops also who have two estates: one as they are spiritual persons, by reason of their spiritual revenues and promotions; the other grew from the bounty of our English kings, whereby they have baronies and lands added to their spiritual livings and prerogatives. The baronies belonging to bishops are by some called regalia, because ex sola liberallitate regum et eam concessa et a regibus in feudum tenentur. Blount. Barony, Bracton says, (lib. 2. cap. 34.) is a right indivisible; and, therefore, if an inheritance be to be divided among coparceners, though some capital messuages may be divided, yet si capitale messuagium sit caput contitabit vel caput baroniam, they may not be parcelled. In ancient times thirteen knight fees and a quarter made a tenure per baroniam, which amounted to 400 marks per annum.

BARONET, baronettus.] Is a dignity of inheritance created by letters patent, and usually descendible to the issue male: a degree of honour which hath precedence before all knights, as knights of the bath, knights bachelors, &c. except baronetcis, made sub vexillis regis in exercitu regalis in aperio bello, et quo regi personätares et tempore King James I. in the year 1611, and was then purchased honour, for the purpose of raising money to pay troops sent out to quell some insurgents in the province of Ulster in Ireland. The arms of which province being a red or bloody hand, every baronet has added, on his creation, to his coat of arms. Their number at first was but two hundred; but now they are without limitation: they are created by patent with a habendum sibi et hereditibus 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 husband 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 unscript-
natural marriages, is the province of the spiritual court. Taking marriage in a civil light, the law treats it as it does all other contracts; on this part of the subject, therefore, as well as on what relates to marriage promises, marriage settlements, &c. see this Dict. tit. Marriage.

By marriage, the husband and wife are one person in law; 1 Inst. 112. that is, the very being, or legal existence, of the woman is suspended during the marriage; or at least is incorporated and consolidated into that of her husband: under whose wing, protection and cover, she performs every thing; and is therefore called in our law-french a feme covert, [femina viro coeperta], is said to be covert-baron, or under the protection and influence of her husband, her baron or lord; and her condition during her marriage is called her coverture. Therefore, if an estate be granted or conveyed to a husband and wife, and their heirs, they do not take by moieties, as other joint-tenants, but the entire estate is in both. 2 Lev. 59. And if an estate be granted to a husband and wife, and another person, the husband and wife have but one moiety, and the other person the other moiety. Lit. § 291. A woman may be attorney for her husband; for that implies no separation from, but is rather a representation of her lord. F. N. B. 27. Upon this principle of a union of person in husband and wife, depend almost all the legal rights, duties and disabilities that either of them acquire by the marriage.

We may consider the effect of these rights, duties and disabilities according to the following arrangement:

I. 1. Of grants and contracts between husband and wife. 2. Of their being evidence for or against each other.

II. What acts and agreements of the wife before marriage, bind the husband.

III. 1. Of the husband's power over the person of his wife, and of her remedy for any injury done to her by him. 2. Of actions by him for criminal conversation with her.

IV. Of his interest in her estate and property, and hers in his, as to her paraphernalia.

V. Where the husband shall be liable to the wife's debts contracted before marriage; and therein of a wife that is executrix or administratrix.

VI. Of her contracts during marriage, and how far the husband is bound by such contracts; and where a wife shall be considered as a feme sole.

VII. Where she alone shall be punished for a criminal offence, and where the husband shall be answerable for what she does in a civil action.

VIII. What acts done by the husband, or wife alone, or jointly with the wife, will bind the wife; and therein of her agreement or disagreement to such acts after the death of the husband.

IX. Where the husband and wife must join in bringing actions.

X. Where they must be jointly sued.

XI. Of the effects of divorce; and of separate maintenance, almony, and finn money. And see title Divorce.

I. 1. At common law a man could neither in possession, reversion or remainder, limit an estate to his wife; but by stat. 27 Hen. VIII. c. 10. a man may covenant with other persons to stand seised to the use of
his wife; or may make any other conveyance to her use, but he may not covenant with his wife to stand seised to her use. A man may devise lands by will to his wife, because the devise doth not take effect till after his death. Co. Litt. 112.

As to devises by feme 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. Br. Custom, 36. And it seems that a donatio causa moris 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 obliger 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. Cur. 551.

In the case of Smith v. Stafford, (Hob. 216.) the husband promised the wife before marriage, that he would leave her worth 1,001. The marriage took effect, and the question was, whether the marriage was a release of the promise. All the judges but Hobart were of opinion, that as the action could not arise during the marriage, the marriage could not be a release of it. The doctrine of this case seems to be admitted in the case of Gage v. Acton; (1 Salk. 325. 12 Mod. 290.) The case there arose upon a bond executed by the husband to the wife before marriage, with a condition making it void if she survived him, and he left her 1,000L. Two of the judges were of opinion that the debt was only suspended, as it was on a contingency which could not by any possibility happen during the marriage. But Lord Ch. J. Holt differed from them; he admitted that a covenant or promise by the husband to the wife, to leave her so much in case she survives him is good, because it is only a future debt on a contingency, which cannot happen during the marriage, and that is precedent to the debt; but that a bond debt was a present debt, and the condition was not precedent but subsequent, that made it a present duty; and the marriage was consequently a release of it. The case afterwards went into chancery; the bond was there taken to be the agreement of the parties and relief accordingly decreed. 2 Vern. 481. A like decree was made in the case of Carne v. Buckle, 2 P. Wms. 243. and see 2 Freem. 205. See tit. Bankr. IV. 3.

A. before marriage with M. agrees with M. by deed in writing, that she, or such as she should appoint, should during the coverture, receive and dispose of the rents of her jointure, by a former husband, as she pleased. It was decreed that, this agreement being with the feme herself before marriage, was by the marriage extinguished. Cha. Ca. 21. But where a man before marriage, Article 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 as law of the baron, that the articles should be executed. 2 Vern. 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
firoftTia cawla 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, Str. 633.) and therefore by stat. 3 Hen. VII. c. 2. in case a woman be forcibly taken away and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract; and also, there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if by forcibly marrying a woman he could prevent her from being a witness, who is perhaps the only witness to that very fact. 1 Comm. 443, 444. See tit. Marriage.

The husband cannot be a witness against the wife, nor the wife against the husband, to prove the first marriage on an indictment, on stat. 1 Jac. I. c. 11. for a second marriage. But the second wife or husband may be a witness; the second marriage being void. Bull. N. P. 287. 1 Holt. P. C. 593.

In Raym. I. there is an opinion, that a husband and wife may be witnesses against one another in treason; but the contrary is adjudged, 1 Brownd. 47. see 2 Keb. 403. and 1 H. P. C. 301. The rule in Lord Audley's case, is denied to be law, 1 Raym. 1. and perhaps was admitted on the particular circumstances of the facts which were detestable in the extreme, the husband having assisted in the rape of his wife. In an information against two, one for perjury, and the other for subornation, in swearing on the trial of an ejectment, that a child was supposititious, the husband of one of the defendants was admitted to give evidence of the birth, but refused as to the subornation. Sid. 377. 2 Keb. 403. Mar. 150. And the evidence of a wife has been disallowed even against others, where her husband might be indirectly in danger. Dalt. 540. 2 Leach's Hawk. P. C. 607, 608. A husband and wife may demand surety of the peace against each other, and their evidence must then of necessity be admitted against each other. 1 Hawk. P. C. 233. See Str. 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 Str. 504. and see 1 Str. 527.

II. As by marriage the husband and wife become one person in law, therefore such a union works an extinguishment or revocation of several acts done by her before the marriage; and this not only for the benefit of the husband, but likewise of the wife, who, if she were allowed at her pleasure to rescind and break through, or confirm several acts, might be so far influenced by her husband, as to do things greatly to her disadvantage. 4 Co. 60. 5 Co. 10. Keibw. 162. Co. Lit. 55. Helt. 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 Saik. 117. 399.

But if a *feme sole* makes her will, and devises her land to J. S. and afterwards marries him, and then dies, yet J. S. takes nothing by the will, because the marriage was a revocation of it. 4 Co. 60. See tit. Devise, Will.

Equity will set aside the intended wife's contracts, though legally executed, when they appear to have been entered into with an intent to deceive the husband, and are in derogation of the rights of marriage; as where a widow made a deed of settlement of her estate and married a second husband, who was not privy to such settlement; and it appearing to the court, that it was in confidence of her having such estate that the husband married her, the court set aside the deed as fraudulent; so where the intended wife, the day before her marriage, entered privately into a recognisance to her brother, it was decreed to be delivered up. See 2 Cha. Rep. 41. 79. 81. 2 Vern. 17. 2 Vez. 264. see ante, I. 2.

But where a widow, before her marriage with a second husband, assigned over the greatest part of her estate to trustees for children by her former husband; though it was insisted that this was without the privity of the husband, and done with a design to cheat him, yet the court thought, that a widow might thus provide for her children before she put herself under the power of a husband; and it being proved that £8,000 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 Hansk. P. C. 258. but this power was confined within reasonable bounds. Moor, 874. E. N. B. 89. 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. 873. But if he threaten to kill her, &c. she may make him find surety of the peace, by suing a writ of *sufficient 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. 23. 136. F. N. B. 80. Hett. 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 *hominem replegiandam* against her husband; for he has by law a right to the custody of her, and may, if he thinks fit, confine her, but he must not imprison her; if he does, it will be a good cause for her to apply to the spiritual court for a *divorce propter sævitiam*; and the nature and proceedings in the writ *de homine replegiando* show that it
cannot be maintained by the wife against the husband. Prec. in Ch. 492.

The courts of law will grant a habeas corpus to relieve a wife from unjust imprisonment.

2. The ground of the action for adultery, is the injury done to the husband, by alienating the affections of his wife, destroying the comforts arising from her company, and that of her children, and imposing on him a spurious issue.

For this among other reasons it has been ruled that action for crim. con. can be brought for act of adultery, after separation between husband and wife. 5 T. R. 337. This doctrine was shaken in a later case. See Chambers v. Caulfield, 6 East, 244.

In this action the plaintiff must bring proof of the actual solemnization of a marriage; nothing shall supply its place; cohabitation or reputation are not sufficient, nor any collateral proof whatever. 4 Burr. 2057. Bull. N. P. 27. Doug. 162. E. H. N. P. 343. But it is not necessary to prove a marriage according to the ceremony of the church of England; if the parties are Jews, Quakers, &c. proof of a marriage according to their rites is sufficient. Bull. N. P. 28. The confession of the wife will be no proof against the defendant; but a discourse between her and the defendant may be proved, and the defendant's letters to her; but the wife's letters to the defendant will be no evidence for him. Id.

The injury in case of adultery being great, the damages are generally considerable, but depend on circumstances; such on the one hand as go in aggravation of damages, and to show the circumstances and property of defendant; or on the other hand, such as go in extenuation of the offence, and mitigation of damages. Bull. N. P. 27. E. H. N. P. 343, 344. The defendant may prove particular acts of criminality in the wife, previous to her guilt with him, but not her general character, in extenuation. Id. ib.

If a woman is suffered by her husband to live as a common prostitute, and a man is thereby drawn into crim. con. no action at the suit of the husband will lie; but if the husband does not know this, it goes only in mitigation of damages. Id. ib.

It is now determined that if the husband consent to his wife's adultery, this will go in bar of his action. 4 Term Rep. 657. in the case of Duberly v. Gunning. See 12 Mod. 252.

It seems to be in the discretion of the court to grant a new trial in this action, on account of excessive damages; but which they will be very cautious in doing. 4 Term Rep. 651.

If adultery be committed with another man's wife without any force, but by her own consent, though the husband may have assault and battery, and lay it vi et armis, yet they shall in that case punish him below for that very offence; for an indictment will not lie for such an assault and battery; neither shall the husband and wife join in an action at common law; and therefore they proceed below, either civilly, that is, to divorce them, or criminally, because they were not criminally prosecuted above. 7 Mod. 81.

IV. As to the lands of the wife. The freehold or right of possession of all the lands of inheritance, vests in the husband immediately upon the marriage, the right of property still being preserved to her. 1 Inst. 351. a. 273. b. 326. b. in note. This estate he may convey to another. An incorrect statement in the book called Cases in Equity, temp. J. D. TELBOT, 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 husband's estate, for the purpose of suffering a common recovery of it, without the wife's previously joining in a fine; but it now seems to be a settled point that he can. See Cruise on Recoveries; and post, tit. Fine and Recovery. By stat. 32 Hen. VIII. c. 28. leases of the wife's inheritance must be made by indenture, to which the husband and wife are both parties, to be sealed by the wife, and the rent to be reserved to the husband and wife, and to the heirs of the wife; and the husband shall not alien the rent longer than during the coverture, except by fine levied by husband and wife. By the same act it is provided, that no fine or other act done by the husband only of the inheritance or freehold of his wife, shall be any discontinuance thereof, or prejudicial to the wife or her heirs, but they may enter according to their rights; fines whereunto the wife is party and privy [and the above mentioned leases] only excepted. As to alienations of a husband's estate by a woman tenant in dower, c. see stat. 11 Hen. VII. c. 20. which makes them void. See post, div. VIII. and also tit. Forfeiture.

As to chattels real, and things in action of the wife; where the husband survives the wife.

At the common law no person had a right to administer. The ordinary might grant administration to whom he pleased, till the statutes, which gave it to the next of kin, and if there were persons of equal kindred, which ever took administration first, was entitled to the surplus. The statute of distribution was made to prevent this. Where the wife was entitled only to the trust of a chattel real, or to any chose in action, or contingent interest in any kind of personalty, it seems to have been doubted, whether, if the husband survived her, he was entitled to the benefit of it or not. See 1 Inst. 351. 4 Inst. 87. Roll. Abr. 346. All. 13. Cro. Eliz. 466. 3 C. R. 37. Gilb. Cas. Eq. 234. See tit. Executor I. 1. V. 8.

Upon the construction of the statute of distributions, (see tit. Executor V. 8.) it has been held that the husband may administer to his deceased wife; and that he is entitled, for his own benefit, to all her chattels real, things in action, trusts, and every other species of personal property, whether actually vested in her, and reduced into possession or contingent, or recoverable only by action or suit. It was, however, made a question after the stat. 29 Car. II. c. 3. § 25. whether, if the husband having survived his wife, afterwards die, during the suspense of the contingency upon which any part of his wife's property depended, or without having reduced into possession such of her property as lay in action or suit, his representative, or his wife's next of kin, were entitled thereto. But by a series of cases, it is now settled, that the representative of the husband is entitled as much to this species of his wife's property, as to any other; that the right of administration follows the right of the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin of the husband. See Mr. Hargrave's Law Tracts, 475. And that if administration de bonis non of the wife is obtained by any third person, he is a trustee for the representative of the husband. See 1 P. Wms. 578. 382.

If the wife survive the husband. As to this point, there is a material difference with respect to chattels real, and goods, cattle, money, and other chattels personal. All chattels personal become the property of the husband immediately on the marriage; he may dispose of them, without the consent or concurrence of his wife; and at his death,
whether he dies in her life-time, or survives her, they belong to his personal representative. See 10 Co. 42. 2 Inst. 510.

With respect to her chattels real, as leases for years, there is a distinction between those which are in the nature of a present vested interest in the wife, and those in which she has only a possible or contingent interest. To explain this fully, it seems proper to mention, that it was formerly held that a disposition of a term of years to a man for his life, was such a total disposition of the term, that no disposition could be made of the possible residue of the term; or at least, that if it was made, the first devisee might dispose of the whole term, notwithstanding the devise of the residue. This is reported (Dyer, 74.) to have been determined by all the judges in a case in 6 Edw. VI. The court of chancery first broke through this rule, and supported such future dispositions when made by way of trust; their example was followed by the courts of law in Mat. Manning's case, 8 Rep. 94. b. and Lamnet's case, 10 Rep. 45. b. This disposition of the residue of a term, after a previous disposition of it to one for life, operates by way of executory devise, and the interest of the devisee of the residue is called a possibility. This possible interest in a term of years differs from a contingent interest created by way of remainder. If a person limits a real estate to A. for life, and after the decease of A. and if B. dies in A.'s life-time, to C. for a term of years; this operates not as an executory devise, but as a remainder, and therefore is not to be considered as a possibility, but as a contingent interest.

Now if a person marries a woman possessed of, or entitled to, the trust of a present, actual, and vested interest in a term of years, or any other chattel real, it so far becomes his property, that he may dispose of it during her life; and if he survives her, it vests in him absolutely; but if he makes no disposition of it, and she survives him, it belongs to her, and not to his representatives: nor is he in this case entitled to dispose of it from her by will. Prec. Ch. 418. 2 Vern. 270.

If a person marries a woman entitled to a possible or contingent interest in a term of years, if it is a legal interest, that is, such an interest, as, upon the determination of the previous estate, or the happening of the contingency, will immediately vest in possession in the wife; there the husband may assign it; unless, perhaps, in those cases, where the possibility or contingency is of such a nature that it cannot happen during the husband's life-time. 1 Inst. 46. b. 10 Rep. 51. a. Hutt. 17. 1 Salk. 326. But it is an exception to this rule, at least in equity, that if a future or executory interest in a term, or other chattel, is provided for the wife, by or with the consent of the husband, there he cannot dispose of it from the wife, as it would be absurd to allow him to defeat his own agreement. But this supposes the provision to be made before marriage; for, if made subsequent, it is a mere voluntary act, and void against an assignee for a valuable consideration. 1 Cha. Cas. 223. 1 Vern. 7. 18. 1 Eq. Abr. 58.

If a wife have a chattel real en auter droit, as executor or administrator, the husband cannot dispose of it. 1 Inst. 351. a. But if the wife had it as executrix to a former husband, the husband may dispose of it. 3 Wilh. 277. And if a woman be joint-tenant of a chattel real, and marries and dies, the husband shall not have it, but it survives to the other joint-tenant. 1 Inst. 183. b. And the husband hath not power over a chattel real, which the wife hath as guardian. Floyd, 294.

Things in action do not vest in the husband till he reduces them into possession. It has been held that the husband may sue alone for a
debt due to the wife upon bond; but that if he join her in the action, and recover judgment and die, the judgment will survive to her. 1 Fern. 395. See All. 56. 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 seire facies on the judgment. In 3 Aik. 21. Lord Hardwicke is reported to say, that at law, if the husband has recovered a judgment for a debt of the wife, and dies before execution, the surviving wife, not the husband's executors, is entitled.

These appear to be the general principles of the courts of law, respecting the interest which the husband takes in, and the power given him over, the things in action of his wife; but the courts of equity have admitted many very nice distinctions respecting them.

1. A settlement made before marriage, if made in consideration of the wife's fortune, entitled the representative of the husband, dying in his wife's life-time, to the whole of her things in action; but it has been said that, if it is not made in consideration of her fortune, the surviving wife will be entitled to the things in action, the property of which has not been reduced [into his power] by the husband in his life-time; so, if the settlement is in consideration of a particular part of her fortune, such of the things in action, as are not comprised in that part, it has been said, survive to the wife. See Prec. Ch. 63. 2 Vern. 502. Talb. 168. In the case of Blois v. Countess of Hereford, (2 Vern. 591,) a settlement was made for the benefit of the wife, but no mention was made of her personal estate; it was decreed to belong to the representative of the husband; and it was then said, that in all cases where there was a settlement equivalent to the wife's portion, it should be intended that he is to have the portion, though there is no agreement for that purpose. See Eq. Abr. 69.

2. If the husband cannot recover the things in action of his wife but by the assistance of a court of equity, the court, upon the principle that he who seeks equity must do equity, will not give him their assistance to recover the property, unless he either has made a previous provision for her, or agrees to do it out of the property prayed for; or unless the wife appears in court, and consents to the property being made over to him. 2 P. Wms. 641. 3 P. Wms. 12. Talb. 179. 2 Vez. 669. Neither will the court, where no settlement is made for the wife, direct the fortune to be paid to the husband, in all cases where she does appear personally and consent to it. 2 Vez. 579. It appears to be agreed, that the interest is always payable to the husband, if he maintains his wife. 2 Vez. 561, 562. Yet where the husband receives a great part of the wife's fortune, and will not settle the rest, the court will not only stop the payment of the residue of her fortune, but will even prevent his receiving the interest of the residue, that it may accumulate for her benefit. 3 Aik. 21.

3. Volunteers and assignees under a commission of bankruptcy are, in cases of this nature, subject to the same equity as the husband; and are therefore required by the court, if they apply for its assistance in recovering the wife's fortune, to make a proper provision for her out of it. 2 Aik. 420. 1 P. Wms. 385. But if the husband actually assigns either a trust term of his wife, or a thing in action, for a valuable consideration, the court does not compel the assignee to make a pro-
vision for the wife. 1 Vern. 7. See 1 Vern. 18. and Cox's P. Wms. i. 439. 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. 3 Atk. 420. In Prec. Ch. 414. it is observed, that if the trustees pay the wife's fortune, it is without remedy.

5. Money due on mortgage is considered as a thing in action. It seems to have been formerly understood, that as the husband could not dispose of lands mortgaged in fee without the wife, the estate remaining in the wife carried the money along with it to her and her representatives; but that as to the trust and the absolute power of a term of years, there was nothing to keep a mortgage-debt, secured by a term, from going to the husband's representatives: but this distinction no longer prevails; and it is now held, that though in the case of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt. See 1 P. Wms. 458. 2 Atk. 207.

6. If baron and feme have a decree for money in right of the feme, and then the baron dies, the benefit of the decree belongs to the feme, and not to the executor of the husband. This was certified by Hyde, Ch. J. and his certificate confirmed by lord chancellor. 1 Cha. Cas. 27. If the wife has a judgment, and it is extended upon an elegit, the husband may assign it without a consideration. So if a judgment be given in trust for a feme sole, who marries, and, by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest; and, by the same reason, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without any consideration, for it is in nature of an extent. 3 P. Wms. 200.

The above summary on this part of the law relative to baron and feme, is principally taken from the ingenious and laborious notes on 1 Inst. To which may be added the following miscellaneous observations.

7. If a lease be conveyed by a feme sole, in trust for the use of herself, if she afterwards marries, it cannot be disposed of by the husband; if she dies, he shall not have it, but the executors of the wife. March, 44. See 2 Vern. 270.

If a feme, having a rent for life, takes husband, the baron shall have action of debt for the rent incurred during the coverture, after the death of the feme. 1 Danw. 719. And arrears due in the life-time of the husband, after his death shall survive to the wife, if she outlives him, and her administrators after her death. 2 Lutw. 1151. A feme, lessee for life, rendering rent, takes husband and dies, the baron shall
be charged in action of debt for the rent which was grown due during the coverture, because he took the profits out of which the rent ought to issue. *Keilw.* 125. *Raym.* 6.

If a *feme covert* sues a woman in the spiritual court for adultery with her husband, and obtains a sentence against her and costs, the husband may release these costs, for the marriage continues; and whatever accrues to the wife during coverture belongs to the husband; *per Holt, Ch. J.* on motion for prohibition. 1 *Salk.* 115.

But if the husband and wife be divorced *a mensa et thoro*, and the wife has her alimony, and sues for defamation or other injury, and there has costs, and the husband releases them, this shall not bar the wife, for these costs come in lieu of what she hath spent out of her alimony, which is a separate maintenance; and not in the power of her husband. 1 *Roll. Rep.* 426. 3 *Bulst.* 264. 1 *Roll. Abr.* 343. 2 *Roll. Abr.* 295. 1 *Salk.* 115.

A legacy was given to a *feme covert*, who lived separate from her husband, and the executor paid it to the *feme*, and took her receipt for it: yet on a bill brought by the husband against the executor, he was decreed to pay it over again, with interest. 1 *Vern.* 261.

If husband is attainted of felony, and pardoned on condition of transportation for life, and afterwards the wife becomes entitled to an orphanage share of personal estate, it shall not belong to the husband, but to the wife. 3 *P. Wms.* 37.

Trinkets and jewels given to a wife before marriage, become the husband's again by marriage, and are liable to his debts, if his personal estate is not sufficient. 2 *Atk.* 104.

8. And as the husband may generally acquire a property in all the personal substance of the wife, so, in one particular instance, the wife may acquire a property in some of her husband's goods, which shall remain to her after his death, and not go to his executors. These are called her *paraphernalia*; which is a term borrowed from the civil law, and is derived from the Greek, and signifies something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife suitable to her rank and degree; and therefore even the jewels of a peeress, usually worn by her, have been held to be *paraphernalia*. *Noer.* 213. These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives. *Cro. Cas.* 343. 7. 1 *Roll. Abr.* 911. 2 *Leon.* 166. Neither can the husband devise by his will such ornaments or jewels of his wife; though, during his life, perhaps, he hath the power to sell or give them away. *Noy's Max.* c. 49. 2 *Comm.* 436. But if she continue in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors, where there is a deficiency of assets. 1 *P. Wms.* 730. And her necessary apparel is protected even against the claim of creditors. *Noy's Max.* c. 49.

That the widow's *paraphernalia* are subject to the debts, but preferred to the legacies of the husband; and that the general rules of marshalling assets are applicable in giving effect to such priority, see not only 1 *P. Wms.* 730. quoted above, but also 2 *P. Wms.* 544. 2 *Atk.* 104. 642. 5 *Atk.* 369. 383. 2 *Vez.* 7. See also *Cha. Cas.* 240. 1 *C. R.* 27.

In one place *Rolle* says, the wife shall have a necessary bed and apparel. 1 *Roll.* 911. 1. 20. See further on the subject of *paraphernalia*, *Com. Dig.* tit. *Baron and Feme*; (F. 3.)
V. If a feme sole indebted takes husband; her debt becomes that of the husband and wife, and both are to be sued for it; but the husband is not liable after the death of the wife, unless there be a judgment against both during the coverture. 1 Roll. Abr. 381. 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 seire facias against baron and feme, and then the feme dies, he shall be charged. 3 Mod. 186. In action brought against a feme sole, if, pending the action, she marries, this shall not abate the action; but the plaintiff may proceed to judgment and execution against her, according as the action was commenced. 1 Litt. 217. Trin. 12 W. III. And if habeas corpus be brought to remove the cause, the plaintiff is to move for a procedendo on the return of the habeas corpus: also the court of B. R. may refuse it, where brought to abate a just action. 1 Salk. 8.

In general the husband is liable to the wife's debts, contracted before marriage, whether he had any portion with her or not; and this the law presumes reasonable, because by the marriage the husband acquires an absolute interest in the personal estate of the wife, and has the receipt of the rents and profits of her real estate during coverture; also whatever accrues to her by her labour, or otherwise, during the coverture, belongs to the husband; so that in favour of creditors, and that no person's act should prejudice another, the law makes the husband liable to those debts with which he took her attached. F. N. B. 265. 20 Hen. VI. 22. 6. Moor, 468. 1 Roll. Abr. 352. 3 Mod. 186.

If baron and feme are sued on the wife's bond, entered into by the feme before marriage, and judgment is had thereupon, and the wife dies before execution, yet the husband is liable; for the judgment has altered the debt. 1 Sid. 337.

If judgment be against husband and wife, he dies, and she survives, execution may be against her. 1 Roll. Abr. 890. 1. 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 fieri cur. Abr. Eq. Cas. 227. Hil. 1719.

D. confessed a judgment to F. who made his wife, the plaintiff, executrix, and died; she administered, and married a second husband, and then, she alone, without her husband, acknowledged satisfaction, though no real satisfaction was made. The court held that this was not good. Sid. 31.

A wife, administratrix, under seventeen, shall join with her husband in an action; fier Twisden, J. Mod. 297.

If a feme executrix takes baron, and he releases all actions, this shall be a bar during the coverture without question; by the justices. Bro. Releases, fl. 79.

If a feme executrix take baron, and the baron puts himself in arbitration for death of the testator, and award is made, and the baron dies, the feme shall be barred; fier tot. cur. Brooke says that from hence it seems to him, that the release of the baron without the feme is a good bar against the feme; quod conceditur, anno 39 Hen. V. and therefore he excepted those debts in his release, otherwise they had been extinct. Bro. Releases, fl. 79.

If a man marries an administratrix to a former husband, who, in her widowhood, wasted the assets of her intestate, the husband is liable to
the debts of the intestate during the life of the wife; and this shall be deemed a devastavit in him. Cro. Car. 603.

VI. Every gift, grant, or disposition of goods, lands, or other thing whatsoever; and all obligations and feoffments made by a feme covert, without her husband's consent, are void. 1 Hen. V. 125. Fitz. Covert, 18.

The husband is obliged to maintain his wife in necessaries: yet they must be according to his degree and estate, to charge him; and necessaries may be suitable to a husband's degree of quality, but not to his estate; also they may be necessaries, but not ex necessitate, to charge the husband. 1 Mod. 129. 1 Nels. Abr. 354. If a woman buys anything 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 anything for herself, children, or family, and the baron does any act precedent or subsequent, whereby he shows his consent, he may be charged thereupon. 1 Sid. 120. The expenses of a feme covert's funeral, paid by her father while her husband had left her, and was gone abroad, deemed necessaries. H. Black. Rep. 90. Though a wife is very lewd, if she cohabits with her husband, he is chargeable for all necessaries for her, because he took her for better for worse: and so he is if he runs away from her, or turns her away: but if she goes away from her husband, then as soon as such separation is notorious, whoever gives her credit doth it at his peril, and the husband is not liable, unless he takes her again. 1 Salk. 119. See 1 Stra. 647. 706. and as to actions against femes covert having eloped, See 2 Black. Rep. 1079.

If a man cohabits with a woman, allows her to assume his name, and passes her for his wife, though in fact he is not married to her, yet he is liable to her contracts for necessaries; and therefore ne uniques accouler is a bad plea in an action on the case for the debt of a wife; it is good only in dower or an appeal. Bull. N. P. 136. Esp. N. P. 124.

Although a husband be bound to pay his wife's debts for her reasonable provision, yet if she parts from him, especially by reason of any misbehaviour, and he allows her a maintenance, he shall never after be charged with her debts, till a new cohabitation; but if the husband receive her, or come after her, and lie with her but for a night, that may make him liable to the debts. Pasch. 3 Ann. Mod. Cas. 147. 171. If there be an agreement in writing between husband and wife to live separate, and that she shall have a separate maintenance, it shall bind them both till they both agree to cohabit again; and if the wife is willing to return to her husband, she may; but it has been adjudged, that the husband hath no coercive power over the wife to force her, though he may visit her, and use all lawful means in order to a reconciliation. Mich. Geo. I. Mod. Cas. in L. & E. 22.

Where there is a separation by consent, and the wife hath a separate allowance, those who trust her, do it upon her own credit. 1 Salk. 116. If a husband makes his wife an allowance for clothes, &c. which is constantly paid her, it is said he shall not be charged. 1 Sid. 109. And if he forbids particular persons to trust her, he will not be chargeable: but a prohibition in general, by putting her in the newspapers, is no legal notice not to trust her. 1 Vent. 42.

It may now safely be assumed as a principle, that "where the husband and wife part by consent, and she has a separate maintenance from the husband, she shall in all cases be subject to her own debts." This was first finally decided and settled in the case of Ringstead v.
Lady Lanesborough, M. 23 Geo. III. and H. 23 Geo. III. where in actions against the defendant for goods sold she pleaded coverture; and the plaintiff's replication "that she lived separate and apart from her husband, from whom she had a separate maintenance; and so was liable to her own debts," was on demurrer held to be good; and plaintiff had judgment. In the above case the plea also stated that the husband lived in Ireland, which being out of the process of the court, some stress was laid on it in the decision; but in the case of Barwell v. Brooks, H. 24 Geo. III. it was decided as a general principle, that the husband was not liable in any case where the wife lived apart, and had a separate maintenance: and this principle was recognised in Corbett v. Poelnitz, which followed it. 1 Term Rep. 5.

It has been said, that when the husband and wife live apart, the wife must have a separate maintenance from the husband, in order to discharge him. 4 Burr. 2078. But this opinion seems much shaken by that of Lord Mansfield, in 1 Term Rep. 5—11, where he says, the cases (already mentioned) do not rest on one or two circumstances, but on the great principle which the court has laid down, "that where a woman has a separate estate, and acts and receives credit as a feme sole, she shall be liable as such." A principle which extends further than the facts of any cases yet determined. And it seems that now a determination in 12 Mod. 603, where coverture and the life of the husband in Ireland was given in evidence in an action against a woman who had traded for 12 years as a widow, is not law.

The baron in an account shall not be charged by the receipt of his wife, except it came to his use. 1 Danv. 707. Yet if she usually receives and pays money, it will bind him in equity. Abr. Cas. Eq. 61. And why not in law, in an action for money had and received? For goods sold to a wife, to the use of the husband, the husband shall be charged, and be obliged to pay for the same. Sid. 425.

If the wife pawn her clothes for money, and afterwards borrows money to redeem them, the husband is not chargeable unless he were consenting, or that the first sum came to his use. 2 Show. 283.

If a wife takes up clothes, as silk, &c. and pawn them before made into clothes, the husband shall not pay for them, because they never came to his use; otherwise if made up and worn, and then pawned; per Holt, Ch. J. at Guildhall. 1 Salk. 118.

A wife may use the goods of her husband, but she may not dispose of them; and if she takes them away, it is not felony, for she cannot by our law steal the goods of her husband; but if she delivers them to an adulterer, and he receives them, it will be felony in him. 3 Inst. 308. 310.

If the baron is beyond sea in any voyage, and during his absence the wife buys necessaries, this is a good evidence for a jury to find that the baron assumpsit. Sid. 127.

A husband who has abjured the realm, or who is banished, is thereby civiliter mortuus; and being disabled to sue or be sued in right of his wife, she must be considered as a feme sole; for it would be unreasonable that she should be remediless on her part, and equally hard on those who had any demands on her, that, not being able to have any redress from the husband, they should not have any against her. Bro. Baron and Feme, 66. Co. Litt. 133. 1 Roll. Rep. 400. Moor, 851. 3 Bulst. 188. 1 Bulst. 140. 2 Vern. 104.

In assumpsit the defendant proved that she was married, and her husband alive in France, the plaintiff had judgment, upon which, as a verdict against evidence, she moved for a new trial, but it was denied;
for it shall be intended that she was divorced; besides the husband is an alien enemy, and in that case, why is not his wife chargeable as a feme sole? 1 Sal. 116. Deery 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.


Where a married man is transported for any felony, &c. the wife may be sued alone, for any debt contracted by her, after the transportation. 1 Term Rep. 9.

VII. In some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit bare theft or burglary by the coercion of her husband, (or even in his company, which the law construes a coercion,) she is not guilty of any crime, being considered as acting by compulsion, and not of her own will.

But for crimes mala in se, not being merely offences against the laws of society, she is answerable; as for murder and the like; not only because these are of a deeper die; but also since in a state of nature, no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason also, (the highest crime which a member of society can, as such, be guilty of,) no plea of coverture shall excuse the wife: no presumption of the husband's coercion shall extenuate her guilt. 1 Hale's P. C. 47. And this as well because of the odiousness and dangerous consequence of the crime itself, as because the husband having broken through the most sacred tie of social community, by rebellion against the state, has no right to that obedience from a wife which he himself as a subject has forgotten to pay. 4 Comm. 28, 29. (But she shall not be considered criminal for receiving her husband, though guilty of treason, nor for receiving another offender jointly with her husband. 1 Leach's Hawk. P. C. c. 1. § 11. in note.) See tit. Accessory.

If also a feme commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder or robbery, though in company with, or by coercion of her husband, she is punishable. 1 Hawk. P. C. c. 1. § 11. The distinction between her guilt in burglary or theft and robbery, seems to be, that in the former, if committed through the means of her husband "she cannot know what property her husband may claim in the goods taken; 10 Mod. 63," but in robbery the wife has an opportunity of judging in what sort of right the goods are taken. 1 Leach's Hawk. P. C. c. 1. § 9, in note.

If the wife receive stolen goods of her own separate act, without the privity of her husband, or if he knowing thereof, leave the house and forsake her company, she alone shall be guilty as accessory. 22 Bea. 40. Deltt. 137. 1 Hale's P. C. 516.

In inferior misdemeanors also, another exception may be remarked; that a wife may be indicted and set in the pillory with her husband,
for keeping a brothel; for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex. 1 Hawk. P. C. c. 1. § 12. 10 Mod. 63.

A feme covert generally shall answer, as much as if she were sole, for any offence not capital against the common law or statute; and if it be of such nature, that it may be committed by her alone, without the concurrence of her husband, she may be punished for it without the husband by way of indictment, which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is no way privy. 9 Co. 71. 1 Hawk. P. C. c. 1. § 9. See Moor. 813. Hob. 93. Noy. 103. Sav. 25. Cro. Jac. 482. 11 Co. 61.

A feme may be indicted alone for a riot. Dall. 447. For selling gin against the stat. 9 Geo. II. c. 23. Stra. 1120. For recusancy. Id. ib. Hob. 96. 1 Sid. 410. 11 Co. 64. Sav. 25. For being a common scold. 6 Mod. 213. 239. For assault and battery. Satk. 384. For forrestalling. Sid. 410. For usury. Skin. 348. For barranty. 1 Hawk. P. C. c. 81. § 6. See c. 1. § 13. For a forcible entry. 1 Hawk. P. C. c. 64. § 85. 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. Keitz. 61. Roll. Abr. 251. Leon. 122. Cro. Car. 376. See 1 Hawk. P. C. c. 1. § 13. in note.

A man must answer for the trespasses of his wife: if a feme covers slander any person, &c. the husband and wife must be sued for it, and execution is to be awarded against him. 11 Rep. 62. See post. X.

Husband and wife may be found guilty of nuisance, battery, &c. 10 Mod. 63.

If the wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same; as he may be generally to any suit for a cause of action given by his wife, and shall be liable to answer what shall be recovered thereon. 1 Hawk. P. C. c. 1.

For the punishment of fames covert, see tit. Felony, Treason, &c.

VIII. A wife is sub potestate viri, and therefore her acts shall not bind her, unless she levy a fine, &c. when she is examined in private, whether she doth it freely, or by compulsion of her husband; if baron and feme levy a fine, this will bar the feme: and where the feme is examined by writ, she shall be bound; else not. 1 Dan. Abr. 708. See ante. IV.

If a common recovery be suffered by husband and wife of the wife's lands this is a bar to the wife: for she ought to be examined upon the recovery. Pl. Com. 514. a. 10 Co. 43. a. 1 Roll. 347. 1. 19.

So if husband and wife are voouchees 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. Std. 319, 320.

A recovery, as well as a fine by a feme covert, is good to bar her, because the praecipe in the recovery answers the writ of covenant in the fine, to bring her into court, where the examination of the judges destroys the presumption of the law, that this is done by the coercion of the husband, for then it is to be presumed they would have refused her. 10 Co. 43. 2 Roll. Abr. 395.
By the custom in some cities and boroughs, a bargain and sale by the husband and wife, where the wife is examined by the mayor or other officer, binds the wife after the husband's death. 2 Inst. 673. And it seems that by stat. 34 Hen. VIII. c. 22, all such customary conveyances shall be of force notwithstanding the stat. 32 Hen. VIII. c. 28. See ante, division IV.

So by custom in Denbigh in Wales, a surrender by husband and wife, where the wife is examined in court there, binds the wife and her heirs as a fine does; and this custom is not taken away by stat. 27 Hen. VIII. c. 26. For it is reasonable and agreeable to some customs in England. Dyer, 363 b.

So a surrender of a copyhold by husband and wife, the wife being examined by the steward, binds the wife. Com. Dig. tit. Baron and Feme, (G. 4) there cites Litt. 274 b, but which is to a different purpose.

A wife is disabled to make contracts, &c. 3 Inst. 110. And if a married woman enters into a bond as feme sole, if she is sued as feme sole, she may plead non est factum, and the coverture will avoid her bond, 1 Litt. Abr. 217. A feme covert may plead non assumpsit, and give coverture in evidence, which makes it no promise, &c. Raym. 393.

In case money be due to the husband by bill or bond, or for rent on a lease, and it is paid to the wife; this shall not prejudice him, if after payment he publicly disagrees to it. 19 Jac. I. B. R. 2 Shep. Abr. 426. Contra, if she is used to receive money for him, or if it can be proved the money paid came to his use.

If a feme covert levies a fine of her own inheritance without her husband, this shall bind her and her heirs, because they are estopped to claim any thing in the land, and cannot be admitted to say she was covert against the record; but the husband may enter and defeat it, either during the coverture, to restore him to the freehold he held jure uxoris, or after her death to restore himself to his tenancy by the curtesy, because no act of a feme covert can transfer that interest which the intermarriage has vested in the husband; and if the husband avoids it during the coverture, the wife or her heirs shall never after be bound by it. Bro. tit. Fines, 33. 10 Co. 43. Hob. 225. 7 Co. 8. Co. Lit. 46.

Lease made by baron and feme, shall be said to be the lease of them both, till the feme disagrees, which she cannot do in the life of the baron. Br. Agreement, pl. 6.

The examination of a feme covert is not always necessary in levying of fines, because that being provided that she may not at the instance of her husband make any unwary disposition of her property, it follows, that when the husband and wife do not take an estate by the fine, and part with nothing, the feme need not be examined; but where she is to convey or pass any estate or interest, either by herself or jointly with her husband, there she ought to be examined; therefore if J. levies a fine że me eco to baron and feme, and they render to the conusor, the feme shall be examined; so it is where she takes an estate by the fine rendering rent. 2 Inst. 515. 2 Roll. Abr. 17.

If baron and feme by fine sur concessit, grant land to J. S. for ninety-nine years, and warrant the said land to J. S. during the said term, and the baron dies, and J. S. is evicted by one that hath a prior title, he may thereupon bring covenant against the feme, notwithstanding she was covert at the time when the fine was levied. 2 Saund. 177. 1 Sid. 466. S. C. 1 Mod. 290. 2 Keob. 683. 703. See tit. Fines.
If a husband disseise another to the use of his wife, this does not make her a disseisoress, she having no will of her own, nor will any agreement of hers to the disseisin during the coverture, make her guilty of the disseisin, for the same reason: but her agreement after her husband’s death will make her a disseisoress, because then she is capable of giving her consent, and that makes her tenant of the freehold, and so subject to the remedy of the disseisin. 1 Roll. Abr. 660. Bro. Disseisin, 67.

But if a feme covert actually enters and commits a disseisin either sole or together with her husband, then she is a disseisoress, because she thereby gains a wrongful possession; but such actual entry cannot be to the use of her husband or a stranger, so as to make them disseisinors, because though by such entry she gains an estate, yet she has no power of transferring it to another. Co. Lit. 357. 1 Roll. Abr. 660. Bro. Disseisin, 15. 67. See 8 Hen. VI. 14. cont.

If the husband, seised of lands in right of his wife, makes a lease thereof for years by indenture or deed poll, reserving rent; all the books agree this to be a good lease for the whole term, unless the wife, by some act after the husband’s death, shows her dissent thereto; for if she accepts rent which becomes due after his death, the lease is thereby become absolute and unavoidable; the reason whereof is, that the wife, after her intermarriage, being by law disabled to contract for, or make any disposition of, her own possessions, as having subjected herself and her whole will to the will and power of her husband; the law therefore transfers the power of dealing and contracting for her possessions, to the husband, because no other can then intermeddle therewith, and without such power in the husband, they would be obliged to keep them in their own manurance or occupation, which might be greatly to the prejudice of both; but to prevent the husband’s abusing such power, and lest he should make leases to the prejudice of his wife’s inheritance, the law has left her at liberty after his death, either to affirm and make good such lease, or defeat and avoid it, as she finds it subservient to her own interest; and this she may do, though she joined in such lease, unless made pursuant to statute 32 Hen. VIII. c. 28. See ante, IV. Bro. Acceptance, 10. Bro. Leases, 24. Cro. Jac. 332. 2 And. 42. Co. Lit. 45. Plew. 137. Cro. Jac. 563. Yeb. 1. Cro. Eliz. 769.

Husband and wife make a lease for years, by indenture, of the wife’s lands, reserving rent; the lessee enters, the husband before any day of payment dies; the wife takes a second husband, and he at the day accepts the rents, and dies; and it was held, that the wife could not now avoid the lease, for by her second marriage she transferred her power of avoiding it to her husband, and his acceptance of the rent binds her, as her own act before such marriage would have done; for he by the marriage succeeded into the power and place of the wife, and what she might have done either as to affirming or avoiding such lease, before marriage, the same may the husband do after the marriage. Dyer, 159. 1 Roll. Abr. 475. 1 Roll. Ref. 132.

A redelivery by the wife after the death of her husband, of a deed delivered by her during the coverture is a sufficient confirmation of such deed, so as to bind her, without its being re-executed or re-attested—and circumstances alone may be equivalent to such 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 willful waste by the husband, which tends to the destruction of the manor; so of non-payment of rent, denial of suit or service; for such forfeitures as these bind the inheritance of the wife after the husband's death; but in the other case the husband cannot forfeit by this lease more than he can grant, which is but for his own life. 2 Roll. Rep. 344, 361, 372. Cro. Car. 7. Cro. Eliz. 149. 4 Co. 27.

A feme covert is capable of purchasing, for such an act does not make the property of the husband liable to any disadvantage, and the husband is supposed to assent to this, as being to his advantage, but the husband may disagree; and that shall avoid the purchase; but if he neither agrees nor disagrees, the purchase is good, for his conduct shall be esteemed a tacit consent, since it is to turn to his advantage; but in this case, though the husband should agree to the purchase, yet after his death she may waive it, for having no will of her own at the time of the purchase, she is not indispensably bound by the contract; therefore if she does not, when under her own management and will, by some act express her disagreement to such purchase, her heirs shall have the privilege of departing from it. Co. Litt. 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. Chanc. 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 200l. 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. 54, 65. pl. 58. Trin. 1688.

It is a general rule that a feme covert, acting with respect to her separate property, is competent to act in all respects as if she were a feme sole. 2 Vez. 190. 1 Bro. C. R. 20. and see 1 Vez. 163. Where the wife, being authorized by settlement to dispose of her separate estate, contracted to sell it, the court of chancery will bind her to a specific performance. 1 Vez. 517. 1 Bro. C. R. 20. So the bond of a feme covert, jointly with her husband, shall bind her separate estate. 1 Bro. C. R. 16. 2 Vez. 190.

IX. In those cases where the debt or cause of action will survive to the wife, the husband and wife are regularly to join in action; as in recovering debts due to the wife before marriage; in actions relating to her freehold or inheritance, or injuries done to the person of the wife. 1 Roll. Abr. 347. 2 Mod. 269.

But if a feme sole hath a rent-charge, and rent is in arrear, and she marries, and the baron distrains for this rent, and thereupon a rescourse
is made, this is a tort to the baron himself, and he may have an action alone. Cro. Eliz. 439. Owen, 82. S. P. Moor, 584. S. C.

So if a feme sole hath right to have common for life, and she takes husband, and she is hindered in taking the common, he may have an action alone without his wife, it being only to recover damages. 2 Bulst. 14.

But if baron and feme are disseised of the lands of the feme, they must join in action for the recovery of this land. 1 Bulst. 21.

The baron may have an action alone upon the stat. 5 Rich. II. st. 1. c. 8. for entering into the land of the feme; trespass and taking charters of the inheritance of the feme; quare impedit, &c. But for personal torts they must join, though the baron is to have the damages. 1 Darrv. 709. 1 Roll. Rep. 360. The husband is to join in actions for battery to the wife; and a wife may not bring any action for wrong to her without her husband. Co. Lit. 132. 326. An action for a battery on the wife, brought by husband and wife, must be laid to the damage of both. 2 Ld. Raym. 1209. For an injury done to the wife alone, action cannot be maintained by the husband alone, without her; but for assault, and debauching or lying with the wife, or for a loss and injury done to the husband, in depriving him of the conversation and service of his wife, he alone may bring an action; and these last actions are laid for assault, and detaining, &c. the wife, per quod consortium amisit, &c. Cro. Jac. 538. See Yelv. 89.

For taking any thing from the wife, the husband only is to bring the action, who has the property; for the wife hath not the property. In all cases where the feme shall not have the thing recovered, but the husband only, he alone is to bring the action. 1 Roll. Rep. 360. except as above, &c. For a personal duty to the wife, the baron only may bring the action; and the husband is entitled to the fruits of his wife's labour, for which he may bring quantum meruit. 1 Litt. Abbr. 227. 1 Salk. 114. In case, before marriage, a feme enters into articles concerning her estate, she is as a separate person; and the husband may be plaintiff in equity against the wife. Prec. in Chan. 24.

Where the feme is administratrix, the suit must be in both their names; for, by the intermarriage, the husband hath authority to intermeddle with the goods as well as the wife; but, in the declaration, the granting administration to the feme must be set forth. Vide the Books of Entries, and Godb. 40. pl. 44.

In action for goods which the feme hath as executrix, they must join, to the end that the damages thereby recovered may accrue to her as executrix, in lieu of the goods. Went. Off. Ex. 207.

In an action upon a trover before marriage, and a conversion after, the baron and feme ought to join; for this action, as a trespass, disaffirms the property; but the baron alone ought to bring a repellevia, detinere, &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 Kebr. 641. S. C. 1 Vent. 261. 2 Lev. 107. S. P. and that he may join the wife at his election.

If A. declares that the defendant, being indebted to him and his wife, as executrix to one J. S. in consideration that A. would forbear to sue him for three months, assumed, &c. and avers that he forbore, and that his wife is still alive, the action is well maintainable by the husband alone, for this is on a new contract, to which the wife is a stranger. Carth. 462. 1 Salk. 117. Yelv. 84. Cro. Jac. 110. S. P.
Where a right of action doth accrue to a woman before marriage, as where a bond is made to her and forfeited, there, if she marry, she must be joined with the husband in an action of debt against the obligor. Owen, 82.

In all actions real for the land of the wife, the husband and wife ought to join. R. 1 Bulst. 21. So, in actions personal for a chose in action, due to the wife before coverture. 1 Roll. 347. l. 63. Cro. Eliz. 537. Vide Com. Dig.

In the civil law the husband and the wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries; and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband. 2 Roll. Abr. 298. See tit. Action.

X. The husband is by law answerable for all actions for which his wife stood attached at the time of the coverture, and also for all torts and trespasses during coverture, in which cases the action must be joint against them both: for if she alone were sued, it might be a means of making the husband's property liable, without giving him an opportunity of defending himself. Co. Litt. 133. Doct. Placit. 3. 2 Hen. VI. 4.

If goods come to a feme covert by trover, the action may be brought against husband and wife, but the conversion may be laid only in the husband, because the wife cannot convert goods to her own use; and the action is brought against both, because both were concerned in the trespass of taking them. See Co. Litt. 331. 1 Roll. Abr. 6. pl. 7. Lev. 166. Noy. 79. 1 Leon. 312. Cro. Car. 254. 494. 1 Roll. Abr. 348. But in debt upon a devastavit against baron and feme executrix, it shall not be laid quod devastaverunt, for a feme covert cannot waste. 2 Lev. 145.

An action on the case was brought against baron and feme for retaining and keeping the servant of the plaintiff, and judgment accordingly. 2 Lev. 63.

If a lease for life or years be made to baron and feme, reserving rent, an action of debt for rent arrear may be brought against both; for this is for the advantage of the wife. 1 Roll. Abr. 348.

If an action be brought against a husband and wife, for the debt of the wife when sole, and the plaintiff recovers judgment, the ca. sa. shall issue to take both the husband and wife in execution. Moor, 704. But if the action was originally brought against herself when sole, and pending the suit she marries, the ca. sa. shall be awarded against her only and not against the husband. Crs. Jac. 323. Yet if judgment be recovered against a husband and wife for the contract, nay, even for the personal misbehaviour (Cro. Car. 513.) of the wife during her coverture, the ca. sa. shall issue against the husband only: which is (says Mr. J. Blackstone) one of the many great privileges of English wives. 3 Com. 414. See 3 Wils. 124. See tit. Arrest, Bail, Execution, Action, &c. But in an action against husband and wife, for an assault by the wife, it was held that both may be taken in execution. 1 Wils. 149. See Eszinasse'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 caussa adulterii, which is a divorce a mensa et thoro, they continue baron and feme: it is otherwise in a divorce a vinculo matrimonii, which dissolves the marriage.

The feme, after divorce, shall re-have the goods which she had before marriage. Bro. Cowverture, pl. 82. 1. D. 15. pl. 63. per Fitzherbert. Kel. 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 divorce, there is no remedy; but if by collusion, she may aver the divorce; and have detinue for the whole, whereof the property may be known; and as for the rest, which consists of money, &c. she shall sue in the spiritual court. Bro. Derangement and Divorce, pl. 1. cites 26 Hen. VIII. 7.

If a man is bound to a feme sole, and after marries her, and after they are divorced, the obligation is revived. Bro. Cowverture, pl. 82. Because the divorce being a 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 feastment in fee of the lands of his wife, and then the divorce had been, that would have been a discontinuance as well as if the husband had died, because there the interest of a third person had been concerned, but between the parties themselves it will have relation to destroy the husband's title to the goods, and it proves no more than the common rule, viz. that relations will make a nullity between the parties themselves, but not amongst strangers. Ld. Raym. 521. Hl. 11 Wm. III.

If a man gives lands in tail to baron and feme, and they have issue, and after divorce is sued, now they have only frank tenement, and the issue shall not inherit. Bro. Tail et Donex, &c. pl. 9.

If the baron and feme, purchase jointly and are disseised, and the baron releases, and after they are divorced, the feme shall have the moiety, though before the divorce there were no moieties; for the divorce converts it into moieties. Bro. Derangement, pl. 18. cites 32 Hen. VIII.

If baron alien the wife's land, and then there is a divorce causa precontractus, or any other divorce which dissolves the marriage a vinculo matrimonii, the wife during the life of the baron may enter by stat. 23 Hen. VIII c. 28. Dyer, 13. pl. 61. But vide Ld. Raym. 521.

But if after such alienation and divorce the baron dies, she is put to her cur in vita ante divorcium; and yet the words of the statute are, that such alienation shall be void, but this shall be intended to toll the cur in vita. Mod. 58. pl. 164. Pasch. 8 Eliz. Broughton v. Conway.

Divorce causă 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. 508. Vide 1 Salk. 115.

Holt held, if feme covert, after divorce a mensa et thoro, sues for a legacy, which, if recovered, comes to her husband, there the husband may release it, because there is no alimony; and if he may release the duty, he may release the costs. 1 Salk. 115, pl. 1. S. C. and S. P. and see 1 Vern. 261.

A divorce was a mensa et thoro, and then the husband dies intestate. The wife, by bill, prayed assistance as to dower and administration, (it being granted to another) and distribution. The master of the rolls bid her go to law, to try if she was entitled to her dower, there being no impediment, and as to that dismissed the bill; and as to the administration, the granting that is in the ecclesiastical court; but the dis-
tribution more properly belongs to this court; but since in that court
she is such a wife as is not entitled to administration, he dismissed the
bill as to distribution too, and said, if they could repeal that sentence,
she then would be entitled to distribution. *Ch. Prec. 111.*

In case of a divorce a mensa et thoro the law allows alimony to the
wife; which is that allowance which is made to a woman for her sup-
port 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 estoveris 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 al-
imony. *Cowel. 1 Inst. 235.* a. 12 *Reph. 30.*

A bill may be brought in chancery for a specific performance of an
agreement by the husband with a third person, for a separate mainte-
nance of the wife; notwithstanding that alimony belongs to the spiri-

The court of chancery has decreed the wife a separate mainte-
nance 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 agree-
ment that the fund in dispute should be so applied. *2 Vern. 752.* And
in another case the husband having quitted the kingdom, Lord Hard-
wicke decreed the wife the interest of a trust fund till he should re-
turn and maintain her as he ought. *2 Atk. 96.* Yet in a subsequent
case Lord Hardwicke observes, that he could find no decree to com-
pel a husband to pay a separate maintenance to his wife, except upon
an agreement between them, and even then unwillingly. *3 Atk. 547.*
And this latter opinion seems most reconcilable with principle; for
the case of a divorce *propter sevitiun* (see *2 Vern. 493.*) may be con-
sidered as an implied agreement; and if there be an express or im-
plied agreement, there seems no doubt but that courts of equity may,
concurrently with the spiritual court, in proceeding upon it, decree a
MSS. The spiritual court, however, would be the more proper juris-
diction if it acted *in rem.* *Litt. Rep. 78.* *2 Atk. 511.* But if after an
agreement between husband and wife to live separate, they appear
to have cohabited, equity will consider the agreement as waived
thereby, *Fletcher v. Fletcher,* Mich. 1788. See Fonblanque's *Treat.
Eq. 96, 97.*

Where, on a separation, lands are conveyed by the baron in trust for
the feme, chancery will not bar the feme from suing the baron in the
trustee's name, and a surrender or release by the baron shall not be
made use of against the feme. *2 Chon. Cas. 103.*

A woman living separate from her husband, and having a separate
maintenance, *contracte debis.* 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, be-
cause the executor of the husband, who may have paid the debt, is no
party. *Vern. 326.*

Where the husband, during his cohabitation with the wife, makes
her an allowance of so much a year for her expenses, if she out of
her own good housewifery saves any thing out of it, this will be the
husband's estate and he shall reap the benefit of his wife's frugality; because when he agrees to allow her a certain sum yearly, the end of the agreement is, that she may be provided with clothes and other necessaries, and whatsoever is saved out of this, redounds to the husband; \textit{per} Lord Keeper Finch. Freeman, Rep. 304.

A term was created on the marriage of \textit{A}. with \textit{B}. for raising 200l. a year for pin-money, and in the settlement \textit{A}. covenanted for payment of it. There was an \textit{arrear of one year} at \textit{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; \textit{secus} had it been in arrear for several years. \textit{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; \textit{I am indebted to my wife 100l. which became due to her such a day; after by his will he makes provision out of his lands for payment of all his debts, and all moneys which he owed to any person in trust for his wife}; and the question was, whether the 100l. 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. \textit{Hil. 1701.} between \textit{Cornwall} and the earl of \textit{Montague}. But \textit{quaere}; for the testator looked on this as a debt, and seems to intend to provide for it by his will. \textit{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. \textit{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 she should receive it; \textit{per} Lord C. Macclesfield. 2 P. Wms. 82, 83.

So where 50l. a year was reserved for clothes and private expenses, secured by a term for years, and ten years after the husband died, and soon after the wife died; the executors in equity demanded 500l. 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.

\textbf{BARONET.} \textit{See Precedence; Baron and Feme.}

BAR, or BARR. \textit{Lat. barra, Fr. barre.} In a legal sense, is a \textit{plea} or peremptory exception of a defendant, sufficient to destroy the plaintiff's action. And it is divided into \textit{bar} to common intendment, and \textit{bar} special; \textit{bar temporary}, and \textit{perpetual}; \textit{bar} to a common intendment is an ordinary or \textit{general} bar, which usually is a bar to the declaration of the plaintiff; \textit{bar special} is that which is more than ordinary, and falls out upon some special circumstances of the fact, as to the case in hand. \textit{Terms de Ley.}

\textit{Bar temporary} is such a bar that is good for the present, but may afterwards fail; and \textit{bar perpetual} is that which overthrows the action of the plaintiff for ever. \textit{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 \textit{Litt. Abr. 211}. If one be barred by a plea to the \textit{verit} or to the \textit{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 \textit{personal Vol. I.}
actions. 6 Ref. 7. And a recovery in debt is a good bar to action on the case for the same thing; also a recovery on assumption in case, is a good bar in debt, &c. Cro. Jac. 110. 4 Ref. 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 attainder; 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 formdon in descender, yet he may have a formdon in the remainder, &c. 6 Ref. 7. It has been resolved, that a bar in any action real or personal by judgment upon demurrer, verdict, or confession, is a bar to that action, or any action of the like nature for ever; but, according to Pemberton, Ch. J. this is to be understood, when it doth appear that the evidence in one action would maintain the other; for otherwise the court shall intend that the party hath mistaken his action. Skin. 57, 58.

Bar to a common intent is good; and if an executor be sued for his testator's debt, and he pleadeth that he had no goods left in his hands at the day the writ was taken out against him, this is a good bar to a common intention, till it is shown that there are goods; but if the plaintiff can show by way of replication, that more goods have fallen into his hands since that time, then, except the defendant allege a better bar, he shall be condemned in the action. Plowd 26. Kitch. 215. Bar. tit. Barre.

There is a bar material, and a bar at large; bar material may be also called special bar; as when one, in stay of the plaintiff's action, pleadeth some particular matter, viz. a descent from him that was owner of the land, &c. a feoffment made by the ancestor of the plaintiff, or the like; a bar at large is, when the defendant, by way of exception, doth not traverse the plaintiff's title, by pleading, nor confess, nor avoid it, but only makes to himself a title in his bar. Kitch. 68. 5 Hen. VII. 29.

See tit. Abatement, Action, Judgment, and especially Pleading.

This word Bar is likewise used for the place where serjeants and counsellors at law stand to plead the causes in court; and where prisoners are brought to answer their indictments, &c. whence our lawyers, that are called to the bar, are termed barristers. 24 Hen. VIII. c. 24.

BARRASTER, BARRISTER, barrasteries.] 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 licenciati in jure; and anciently barristers at law were called apprentices of the law, (from the French apprendre to learn,) in Lat. appreni-ti:j juris nobiliores. Porttee. 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 gratia,) were twelve, grand moots performed in the inns of chancery, in the time of the grand readings, and twenty-four petty moots in the term times, before the readers of the respective inns; and a barrister newly called was to attend the six (or four) next long vacations the exercise of the house, viz. in Lent and Summer, and was thereupon for those three (or two) years styled a vacation barrister. Also they are called uter barristers, i. e. pleaders oyster the bar, to distinguish them from benchers, or those that have been readers, who are sometimes admitted to plead within the bar, as the king, queen or prince's counsel are.
From the degrees of barristers and serjeants at law, (see tit. Serjeants,) 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 causa, without either patent or fee; so that the first of the modern order, who are now the sworn servants of the crown with a standing salary, seems to have been Sir Francis North, afterwards Lord Keeper to Charles II. These king's counsel must not be employed in any cause against the crown without special license, but which is never refused, and costs about 9l. 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 held, that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured. Cro. Jac. 90. And counsel guilty of deceit or collusion, are punishable by stat. Westm. 1. 3 Edw. I. c. 28. with imprisonment for a year and a day, and perpetual silence in the courts; and the latter punishment is still sometimes inflicted for gross misdemeanors in practice. Raym. 376. 3 Comm. 29.

Barristers who constantly attend the king's bench, &c. are to have the privilege of being sued in transitory actions in the county of Middlesex. But the court will not change the venue because some of the defendants are barristers. Sir. 610. See tit. Privilege. Pleas, before they are filed, must be signed by a barrister or serjeant. See tit. Abatement, Pleading. See further tit. Counselor, Non-conformists, Oaths.

BARRATOR, or BARRETOR, Lat. barrectator, 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 barrator from the Lat. bulatro, 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 barrator 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 barrator, which is a term of art appropriated by law to this purpose. 1 Mod. 282. 1 Sid. 282. Cro. Jac. 526. 1 Hawk. P. C. c. 81 § 9.

A common barrator 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 barrator in respect of one act only; for every indictment for such crime must charge the defendant with being communis barrator, and conclude contra pacem, &c. And it hath been helden, that a man shall not be adjudged a barrator for bringing any number of suits in his own right, though they are vexatious, especially if there be any colour for them; for if they prove false he shall pay the defendant costs. 1 Roll. Abr. 355. 3 Mod. 98.

A barrister at law entertaining a person in his house and bringing several actions in his name, where nothing was due, was found guilty of barrery. 3 Mod. 97. An attorney is in no danger of being convicted of barrery, 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 barrator, and may be indicted thereof, because it is no profession in law. 1 Darr. 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 barrator who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future. See the stat. 12 Geo. I. c. 29. under tit. Attorneys at Law. 4 Comm. 134. and see stat. 34 Edw. III. c. 1. 1 Hawk. P. C. c. 81.

It seems to be the settled practice not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters which he intends to prove against him; for otherwise it would be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances. 5 Mod. 18. 1 Ied. Raym 490. 12 Mod. 516. 2 Arch. 340. 1 Hawk. P. C. c. 81 § 13.

To this head may also be referred another offence of equal malignity and audaciousness, that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king’s superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by stat. 8 Eliz. c. 2. to be punished by six months’ imprisonment, and treble damages to the party injured. 4 Comm. 134.

BARRATRY, see Insurance II. 4. This term was applied to the obtaining benefices at Rome. Scotch Diet.

BARREL. barratium.] A measure of wine, ale, oil, &c. Of wine it contains the eighth part of a tun, the fourth part of a pipe, and the moiety of a hogshead; that is, thirty-one gallons and a half. Stat. 1 Rich. III. c. 13. Of beer it contains thirty-six gallons; and of ale, thirty-two gallons. Stats. 23 Hen. VIII. c. 4. 12 Car. II. c. 23. The assise of herring barrels is thirty-two gallons wine measure, containing
in every barrel usually a thousand full herrings. Stat. 13 Eliz. c. 11.

The eel barrel contains thirty gallons. 2 Hen. VI. c. 11.

BARRIERS, Fr. barrières; jeu de barres, i. e. joust. A martial exercise of men armed and fighting together with short swords, within certain bars or rails which separated them from the spectators; it is now disused here in England. Cowel. There are likewise barrier towns, or places of defence on the frontiers of kingdoms.

BARRISTER. See BARRASTER.

BARROW, from the Sax. boerg, a heap of earth.] A large hillock or mount, raised or cast up in many parts of England, which seem to have been a mark of the Roman tumuli, or sepulchres of the dead. The Sax. beora was commonly taken for a grove of trees on the top of a hill. Kemet's Gloss.

To BARTER, from the Fr. bamer, or Span. baratar, circumvenire.] To exchange one commodity for another, or truck wares for wares. Stat. 1 Rich. III. c. 9. Because probably they that exchange in this manner do endeavour, for the most part, one to overreach and circumvent the other. So bartery the substantive in stat. 13 Eliz. c. 7. of Bankriffs.

BARTON or BERTON, a word used in Devonshire for the demesne lands of a manor; sometimes the manor house itself, and in some places for out houses and fold yards. In the stat. 2 and 3 Edw. VI. c. 12. barton lands and demesne lands, are used as synonyma. Blount says it always signifies a farm distinct from a mansion—and bertonarii were farmers, husbandmen that held bartons at the will of the lord. In the west, they called a great farm a barton or barton; and a small farm, a living. Blount in v. Barton and Berton.

BAS CHEVALIERS, Low or inferior knights by tenure of a base military fee; as distinguished from bannerets, the chief or superior knights; hence we call our simple knights, viz. knights bachelors, bas chevaliers. Kemet's Gloss. to Paroch. Antig.

BASE COURT, Fr. cour basse.] Is any inferior court, that is not of record, as the court baren, &c. Kitch. fol. 95, 96.

BASE ESTATE, Fr. bas estat.] Or Base Tenure. That estate which base tenants have in their lands. And base tenants, according to Lambard, are those who perform villenous services to their lords; but there is a difference between a base estate and villenage; for to hold in pure villenage is to do all that the lord will command him; and if a copyholder have but a base estate, he not holding by the performance of every commandment of his lord, cannot be said to hold in villenage. See Kitch. 41. This Dict. tit. Tenures.

BASE FEE, Is at tenure in fee at the will of the lord, distinguished from seceage 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. Basa tenura, or base tenure, was a holding by villenage, or other customary service, opposed to alta tenura, the higher tenure in capite or by military service, &c. See tit. Tenure, Tail.

BASE INFEFTMENT, Is when the vassal disposes lands to be helden of himself. Scotch Dict.

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

BASEL, bassell, A kind of coin abolished by King Hen. II. anno 1158. Hollingshed's Chron. p. 67.

BASELARD, or BASILLARD, in the stat. 12 Rich. II. c. 6. signifies a weapon, which Mr. Skeight, in his exposition upon Chaucer, calls fugionem vel sicam, a poniard. Knighton, lib. 5. p. 2731.
BASILEUS, A word mentioned in several of our historians signifying King, and seems peculiar to the kings of England. Monasticon, tom. 1. p. 65. Ego Edgar totius Anglie basileus confirmavi. In many places of the Monasticon this word occurs; and also in Ingulphus, Malmesbury, Mat. Paris, Hoveden, &c.

BASKET-TENURE of lands. See Canestellus.

BASNETUM, A basnet, or helmet.

BASSINET, A skin with which the soldiers covered themselves. Blount.

BASTARD, bastardus; fancifully derived from the Greek; but more truly from the Brit. Bastuard, notius, spurious; or according to Speelman from the German. bastard—bas low, and start risen, Sax. sitort; 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. I. Who are bastards, and of their incapacities.

2. Of the trial of bastardy.

II. I. Of the case of infant bastards, their maintenance and protection.

2. Of the murder of infant bastards.

I. 1. A bastard by our English laws, is one that is not only begotten, but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry; and herein they differ most materially from our law; which though not so strict as to require that the child shall be begotten, yet makes it an indispensable condition to make it legitimate, that it shall be born after lawful wedlock. 1 Comm. 454. 2 Inst. 96, 97.

Blackstone observes, that the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of the marriage contract taken in a civil light. He then recapitulates several motives, which he concludes we may suppose actuated the peers at the parliament of Merton, when they refused to enact that children born before marriage should be esteemed legitimate. 1 Comm. 456. And see 1 Inst. 244. b. and 245. a. in the notes.

If a man marries a woman grossly big with child by another, and within three days after, she is delivered, the issue is no bastard. 1 Derw. Abr. 729. If a child is born within a day after the marriage between parties of full age, if there be no apparent impossibility that the husband should be the father of it, the child is no bastard, but supposed to be the child of the husband. 1 Roll. Abr. 358.

As all children born before matrimony are bastards; so are all children born so long after the death of the husband, that by the usual course of gestation they could not be begotten by him. But this being a matter of some uncertainty, the law is not exact as to a few days. Cro. Jac. 451. See 1 Inst. 123. b. in notes 1 and 2, where the time of gestation as connected with this question is inquired into at great length, and with exquisite nicety and accuracy. On the whole it appears that what is commonly considered as the usual period is forty weeks, or 280 days. But though the child is born some time after, it only affords presumption, not proof of illegitimacy. The information of the late celebrated anatomist, Dr. Hunter, is also given, from which we learn, 1. That the usual period is nine calendar months...
(from 270 to 280 days; but there is very commonly a difference of one, two, or three weeks. 2. A child may be born alive at any time, from three months, but we see none born with powers of coming to manhood, or of being reared before seven calendar months, or near that time; at six months it cannot be. 3. The doctor said he had known a woman bear a living child in a perfectly natural way, fourteen days later than nine calendar months; and he believed two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception.

This case of birth of children after the death of the husband, gives occasion to the writ de ventre inspiciendo. See tit. Ventre Inspectando.

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. Ls. Ethel. A. D. 1008. Lt. Canut. c. 71. 1 Comm. 436, 437. See 1 Inst. 8. a. in note 7, where it is said, "Brooke questions this doctrine, from which it seems as if he thought it reasonable that the circumstances of the case, instead of the choice of the issue, should determine who is the father." See Bro. Abr. Bastardy, p. 18. Palm. 10. See further, 1 Inst. 123. b. in note 1, where additional authorities are cited, to show that in this case a jury ought to decide on the question, according to proof of the woman's condition.

Children born during wedlock, may also in some circumstances be bastards. As if the husband be out of the kingdom of England, (or as the law somewhat loosely phrases it, extra quatuor maria,) for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards. 1 Inst. 244. But generally, during the coverture, access of the husband shall be presumed, unless the contrary can be shown. Salk. 123. 3 P. Wms. 276. Str. 925.

Which is such a negative as can only be proved by showing him to be elsewhere; for the general rule is presumitur pro legitimatione. 5 Rep. 98. See also 1 Inst. 126. a. in note 2, and as to these phrases infra (or more classically infra) and extra, quatuor maria, see some incomplete notes in 1 Inst. 108. a. note 6, and 261. a. note 1. Although a feme covert may on a question of bastardy give evidence of the fact of criminal conversation, yet she shall not be admitted to prove the non-access of her husband. Amul. 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. 231. 556.

In a divorce à mensà et thoro, if the wife has children, they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved; but in a voluntary separation by agreement, the law will suppose access unless the negative be shown; and the children, prima factae shall not be esteemed bastards. Salk. 123. In case of divorce in the spiritual court à vinculo matrimonii, all the issues born during the coverture are bastards; because such divorce is always upon some cause, that rendered the marriage unlawful and null from the beginning. 1 Inst. 235.
If a man or woman marry a second wife or husband, the first being living, and have issue by such second wife or husband, the issue is a bastard. See Bott. (ed. 1793, by Const.) 397, n. 2. Before the statute 2 and 3 Edw. VI. c. 21, one was adjudged a bastard, quis 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 eigne, and the second a mulier, or mulier puisné; by the common law, as hath been said, such bastard eigne 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 eigne enters; and the mulier during his whole life never disturbs him, he cannot upon the death of the bastard eigne 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 eigne during his life, but a descent to his issue. Co. Lit. 244. 1 Roll. Abr. 624. See 2 Comm. c. 2, § 5.

No man can bastardize another after his death, that was a mulier by the laws of holy church, and who carried the reputation of legitimate during his life; for a man must be bastardized by the rules of the civil or common law; by the rules of the civil law, this person is by supposition legitimate; and if the common law be made the judge, he cannot be bastardized: for it is a rule of common law, that a personal defect dies with the person, and cannot after his death be objected to his successor that represents him; and this rule of law was taken from the humanity of the ancient, 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 was an easy matter to throw on them the aspersion of bastardy by any forged evidence, which cannot be confronted by opposite proof; and so it is fit to limit a time in which all proofs of bastardy are to be disallowed. 7 Co. 44. Jenk. Rep. 268. 1 Brownd. 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 eigne 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 popull. Fortesc. de. Li. 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. Aud. 79. Co. 77. Noy. 35.

A court of equity will not supply the want of a surrender of a copyhold estate, in favour of a bastard, as it will for a legitimate child. Prec. Chan. 473.

The incapacity of a bastard consists principally in this, that he cannot be heir to anyone, neither can he have heirs but of his own body; for being as was before said nullius filius, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. But though bastards are not looked upon as children to any civil purposes, yet the ties of nature hold as to maintenance, and many other purposes; as particularly that a man shall not marry his bastard sister or daughter. 3 Salk. 66, 67. Ld. Raym. 63. Comb. 356. And see post, II.

A bastard was, in strictness of law, incapable of holy orders, and though that were dispensed, yet he was utterly disqualified from holding any dignity in the church. Fortesc. c. 40. 5 Rep. 58. But this doctrine seems now obsolete; and there is a very ancient decision that a felon should have the benefit of clergy, though he were a bastard. Bro. Clergy, 20. In all other respects, therefore, except those mentioned, there is no distinction between a bastard and another man. 1 Comm. 459.

A bastard may be made legitimate, and capable of inheriting by the transcendant power of an act of parliament, and not otherwise; 4 Inst. 36. as was done in the case of John of Gaunt’s bastard children, by a stat. of Rich. II. 1 Comm. 459.

2. Bastardy, in relation to the several manners of its trial, is distinguished into general and special bastardy.

Till the stat. of Merton, 20 Hen. III. the question, whether born before or after marriage, was examined before the ecclesiastical judge, and his judgment was certified to the king or his justices, and the king’s court either abided by it or rejected it at pleasure. But after the solemn protest made by the barons at Merton, against the introduction of the doctrine of the civil and canon law in this respect, special bastardy has been always triable at common law; and general bastardy alone has been left to the judgment of the ecclesiastical judge, who in this case agrees with the temporal. 2 Inst. 99. Reeves’ Hist. Eng. Law, 85. 201. And see 1 Inst. 126. a. note 2, and 245. a. note 1.

General bastardy, tried by the bishop, in its notion contains two things. 1st. It should not be a bastard made legitimate by a subsequent marriage. 2dly. That it should be a point collateral to the original cause of action. 1 Roll. Abr. 361.

Formerly bastards had a way in such issues to trick themselves into legitimation; for they used to bring forged 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

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of the court, all persons were concluded by it; but this created great inconveniences, as is taken notice of in the preamble of stat. 9 Hen. VI. c. 11. in the case of several persons of quality; for the evidence of the contrary parties concerned were never heard at the trial, and yet their interest was concluded: to remedy this inconvenience without altering the rules of law, it was enacted, that, before any writ to the bishop, there should be a proclamation made in the court, where the plea depends, and after that, the issue should be certified into chancery, where proclamation should be made once in every month for three months, and then the chancellor should certify to the court where the plea depends, and afterwards it shall be again proclaimed in the same court, that all that are concerned may go to the ordinary to make their allegations; and without these circumstances, any writ granted to the ordinary, and all proceedings thereupon, shall be utterly void. 1 Roll. Abr. 361.

If the ordinary certify or try bastardy without a writ from the king's temporal courts, it is void; for the spiritual jurisdiction within these kingdoms is derived from the king, and therefore it must be exercised in the manner the king hath appointed; for it would be injurious if they should declare legitimation where the rights of inheritance are so nearly concerned, without any apparent necessity. 1 Roll. Abr. 361.

The certificate must be under the seal of the ordinary, and not under the seal of the commissary only: for the command is to the bishop himself to certify, and therefore the execution of the command must appear to be by the bishop in proper person. 1 Roll. Abr. 362.

If a man be certified bastard, this binds perpetually, though the person so adjudged a bastard is not party to the action, for all persons are estopped to speak against the memorial of any judicatory; because the act of the public judicatory under which any person lives, is his own act; and were he not thus bound, there might be contradiction in certificates. 1 Roll. Abr. 362.

If a man be certified bastard, that doth not bind a stranger till returned of record, because it is no judicial act till recorded in the place appointed to record such transactions; nor doth it bind the party to the action till judgment thereon, because if he avoid the action he avoids all consequences of the action; and therefore if the defendant be certified bastard by the ordinary, yet if the plaintiff be nonsuit they cannot go on to trial, and so the bishop's certificate never appears of record, and therefore is not binding. 1 Roll. Abr. 362.

If a man be certified multer, no man is estopped to bastardize him, for though he may be a multer by the spiritual law, yet he may be a bastard by our law; and therefore any man, notwithstanding the certificate, may plead the issue of special bastardy. 1 Roll. Abr. 362.

Special bastardy is two fold: 1st. Where the bastardy is the gist of the action, and the material part of the issue. 2dly. Where those are bastards by the common law that are multer by the spiritual law. 1 New Abr. 344. Co. Lit. 134. 1 Roll. 367. Hob. 117.

If a man receives any temporal damage by being called a bastard, and brings his action in the temporal courts, and the defendant justifies that the plaintiff is a bastard, this must be tried at common law, and not by writ to the bishop; for otherwise you suppose an action brought in a court which hath not a capacity to try the cause of action. 1 Browne v. 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 consuance. *Bst. Basterly, 97.*

II. 1. By stat. 18 Eliz. c. 3. (and see stat. 3 Car. I. c. 4.) two justices of peace may make an order on the *mother* or *reputed father* of a bastard to maintain the infant by weekly payments or otherwise; and if the party disobey such order, he or she may be committed to gaol, until they give security to perform it; or to appear at the sessions. By stat. 7 Jac. I. c. 4. § 7. the justices may commit the mother of a bastard, *likely to become chargeable*, to the house of correction for a year; or for a second offence, till she give security for her good behaviour. By stat. 13 and 14 Car. II. c. 12. § 19. if the putative father or lewd mother run away from the parish, the overseers may, by authority of two justices, *seize*, and by order of the sessions, sell the effects of the father or mother to maintain the child. By stat. 6 Geo. II. c. 31. the mother of a bastard may, *before* or *after* it is born, swear it to any person; and the putative father shall then on application by the overseer of the parish be apprehended and committed; unless he give security to indemnify the parish; or to appear at the next sessions: but if the woman die or marry before delivery, or miscarry, or prove not to be with child, the reputed father shall be discharged. Any justice near the parish, on application of the reputed father in custody, shall summon the overseer to show cause against his being discharged; and if no order be made, in pursuance of stat. 43 Eliz. c. 2. (for the maintenance of the child) within six weeks after the woman's delivery, he shall be discharged. By the said stat. 6 Geo. II. c. 31.§ 4. it is expressly provided that "it shall not be lawful for the justice to send for any woman before she shall be delivered, or for a month after, in order to be examined concerning her pregnancy; or to compel any woman before her delivery to answer any question relating to her pregnancy." By stat. 13 Geo. III. c. 83. § 5. bastards born in any licensed hospital for pregnant women, are settled in the parishes to which their mothers belong. And the like provision is made by stat. 20 Geo. III. c. 36. § 2. as to bastards born in houses of industry.

The putative father of a bastard, although no legal relationship subsists between them, is so far considered as its natural guardian, as to be entitled to the custody of it, for its maintenance and education; 2 *Stra.* 1162. and therefore while under his care and protection, and not likely to become chargeable to the parish, the parish officers have no concern with it. 1 *Mod.* 43. 1 *Sid.* 444. Under the marriage act, stat. 26 Geo. II. c. 33. which requires the consent of the father, mother or guardian, a bastard being a minor cannot be married without the consent of a guardian named by the court of chancery. See 1 *Term. Rep.* K. B. 96. and the case of *Homer v. Liddiard*, determined in Doctors Commons, in 1799, and reported by Dr. Croke, 8vo. pamph. 1800, and this *Dict. ut.* *Marriage, Guardian.*

As however, without the protection of its natural parents, a bastard is settled in the parish in which it is born; (Salk. 427. 3 *Burn. J. Paul's P. O.* 81.) unless such birth be procured by fraud, *Salk. Ca.* 66. or happen under an order of removal; 1 *Sess. Ca.* 33. *Salk.* 121. 474. 532. or in a state of vagrancy; stat. 17 Geo. II. c. 5. or in the house of correction; 2 *Bulst.* 358. or under a certificate; *Stra.* 186.] and the parish of consequence becomes charged with its maintenance,
then, and not before, the authority of the churchwardens and overseers begins; Say. 93. and they may act without an order from the justices. 3 Term Rep. C. P. 253. It seems, however, that until a bastard attain the age of seven years, it cannot be separated from its mother; Cald. 6. but may be removed to the place of her settlement, while the age of nurture continues; Carth. 279. and must under these circumstances be maintained by the parish where it was born. Doug. 7.

An order of bastardy must be made by two justices, 2 Salt. 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; 5 Mod. 130. 2 Black. Rep. 1027. but it is not necessary that the putative father should be present to hear what she deposes, Cald. 308. although he must be summoned before an order of filiation can be made; 8 Mod. 3. 1 Sett. Ca. 179. for he cannot be compelled to give security, or be committed until he has made default; Ld. Raym. 853. 858. 3 Salt. 66. but if an order of filiation is once made, the fact of bastardy is established until the order is reversed. Cro. Jac. 535. The justice may commit if the putative father neglect to pay the maintenance therein ordered for the support of the child, unless he give a bond to bear the parish harmless, or to appear at the sessions. I Sid. 363. 1 Vent. 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 Salt. 480. 482. and if the sessions reverse the order of the two justices, yet they may on summons make another, on the same or on any other person; for in this respect they have an original jurisdiction. 2 Bulst. 355. 1 Stra. 475. Doug. 632. The order however may before appeal to the sessions be removed by certiorari, into K. B. and there quashed for errors on the face of it. Cald. 172. But no order of bastardy made at sessions can be quashed in K. B. unless the putative father is present in court; 2 Salt. 475. for on its being quashed, he shall enter into a recognisance to abide the order of the sessions below. 1 Bl. Refr. 198.

On this part of the subject, see further Bott's Poor Laws, Const's edit. 1793.

In an ancient MS. temp. Edw. III. it is said that he who gets a bastard in the hundred of Middleton in Kent, shall forfeit all his goods and chattels to the king.

2. By stat. 21 Jac. I. c. 27. (now repealed by 43 Geo. III. c. 58. § 3.) it was enacted, "That if any woman be delivered of any issue of her body, which being born alive, should by the laws of this realm be a bastard, and she endeavour privately, either by drowning, or secret burying thereof, or any other way, either by herself, or the procuring of others, so to conceal the death thereof, as it may not come to light, whether it were born alive or not, but be concealed; in every such case the said mother so offending shall suffer death, as in case of murder; except such mother can make proof by one witness at the least, that the child, whose death was by her so intended to be concealed, was born dead."

Under this act it was determined that where a woman appeared to have endeavoured to conceal the death of such child within the statute, there was no need of any proof that the child was born alive, or that there were any signs of hurt upon the body, but it should be undeniably taken that the child was born alive, and murdered by the mother. 2 Hawk. P. C. ub. sup.
But it was adjudged, that where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night, and knocked for help but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the following night, yet she was not within the statute, because she knocked for help. 2 Hawk. P. C. ub. sup.

Also, it was agreed, that if a woman confess herself with child beforehand, and afterwards be surprised and delivered, no body being with her, she is not within the statute, because there was no intent of concealment, and therefore in such cases it must appear by signs of hurt upon the body, or some other way, that the child was born alive.

Also it was determined that if a woman were with child, and any gave her a potion to destroy the child within her, and she took it, and it worked so strongly that it killed the woman, this was murder. 1 Hal. H. P. C. 429, 430.

Before the act 43 Geo. III. c. 58, it was held that if a woman quick or great with child took, or any other gave her any portion to cause an abortion, or struck her, whereby the child within her was killed; it was not murder nor manslaughter by the law of England, because the child is not yet in reum natura, nor can it legally be known whether it were killed or not; and so if such child were born alive, and after died of the stroke given to the mother. 1 Hal. H. P. C. 433.

By 43 Geo. III. c. 48, it was enacted, (§1.) that any person who shall wilfully, maliciously and unlawfully administer any deadly poison, or other noxious and destructive substance or thing, with intent thereby to cause and procure the miscarriage of any woman quick with child, shall be guilty of felony, without clergy. And (§2.) that any person who shall wilfully and maliciously administer to any woman any medicine, drug or thing, or employ any instrument or means whatsoever with intent to procure the miscarriage of any woman not being, or not being proved to be quick with child, shall be guilty of felony, and may be fined, imprisoned, pilloried, and whipped or transported for 14 years. It is also provided, (§3.) that the trials of women charged with the murder of their bastard children shall proceed and be governed by the like rules of evidence and presumption as in other cases of murder, and also, (§4.) that if the jury acquit the woman of the murder, they may find that by secret burying or otherwise she endeavoured to conceal the birth of the child: in which case she may be imprisoned for two years. This act extends to Ireland.

If a man procure a woman with child to destroy her infant when born, and the child is born, and the woman in pursuance of that procurement kill the infant; this is murder in the mother, and the procurer is accessory. 1 Hal. H. P. C. 433.

BASTARDY, bastardia.] The defect of birth, objected to one born out of wedlock. Bract. lib. 5. c. 19. See Bastardy.

BASTARD EIGNE. See Bastard.

BASTON, Fr.] A staff, or club. In the statutes it signifies one of the wardens of the king's servants or officers who attend the king's courts with a red staff for taking such into custody who were committed by the court. Stat, 1 Rich. II. c. 12. 2 Ediz. c. 23. See Tift-staff.

BASUS, per basum totnetum capere, To take toll by strike, and not by heap; per basum, being opposed to in cumulo vel cantello. See Consuetud. Domus de Farcendon, MS. f. 42.
BATTLE. A boat.

BATTLE, Fr. battaille. A trial by combat, anciently allowed of in our laws, (among other cases,) where the defendant in appeal of murder or felony might fight with the appellant, and make proof thereby whether he be culpable or innocent of the crime. When an appellee of felony wages battled, 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 battled 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, &c. at B. as you surmise, nor am I any way guilty of the said felony; so help me God. 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 cut 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 until the stars appear, he shall have judgment to be quit of the appeal: and if the appellee 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 libertas legem. If an appellee becomes blind by the act of God after he has waged battel, the court will discharge him of the battel; in such case it is said that the appellee shall go free.

This trial by battel is at the defendant's choice; but if the plaintiff be under an apparent disability of fighting, as under age, married, &c. he may counterplead the wager of battel, and compel the defendant to put himself upon his country, no champions being allowed in criminal appeals; also any plaintiff may counterplead a wager of battel, by alleging such matters against the defendant, as induce a violent presumption of guilt; as in appeal of death, that he was found lying upon the deceased with a bloody knife in his hand, &c. for here the law will not oblige the plaintiff to make good his accusation in so extraordinary a manner, when in all appearance he may prove it in the ordinary way. It is a good counterplea of battel that the defendant hath been indicted for the same fact; when if appeal be brought, the defendant shall not wage battel. And if a peer of the realm bring an appeal, the defendant shall not be admitted to wage battel, by reason of the dignity of the appellant.

The citizens of London are privileged by charter, that in appeals by any of them, there shall be no wager of battel; and by stat. 6 Rich. II. c. 5. defendant shall not be received to wage battel in an appeal of rape. 2 Hawk. P. C. c. 45. This trial by battel is before the constable and marshal; but is now disused. See Glanv. lib. 14. Bract. lib. 3. Britton, c. 22. Smith, de Ref. Angl. lib. 2. Co. Lit. 294. &c.

For the manner of waging battel in an appeal of treason, Hawkins cites Russett, Col. part 2. vol. 1. 112—128. and 3 Comm. 338. cites vol. 2.

This species of trial by wager of battel, (says Blackstone,) was introduced into England, among other Norman customs, by William the Conqueror; but was only used in three cases, one military, one criminal, and the third civil. The first in the court martial, or court of chivalry and honour; (Co. Lit. 261.) the second in appeals of felony; (of which above;) and the third, upon issue joined in a writ of right, the last and most solemn decision of real property. For in writs of right the jus proprietatis, which is frequently a matter of difficulty, is in question; but other real actions being merely questions of the jus possessionis, which are usually more plain and obvious, our ancestors did not in them appeal to the decision of providence. Another [and as it seems the juster] pretext for allowing it upon these final writs of right, was for the sake of such claimants as might have the true right, but yet by the death of witnesses or other defect of evidence, be unable to prove it to a jury.

Although the writ of right itself, and of course this trial thereof, is at present much disused, yet it is law at this day; and on that account as matter of curiosity the forms of proceeding therein are collected and preserved in 3 Comm. 338. &c. and the appendix thereto; and are similar to those above recited in criminal cases.
The last trial by battel that was waged in the court of common pleas at Westminster, [though there was afterwards one in the court of chivalry in 1631, 6 Car. I. between Donald Lord Rey, appellant, and David Ramsey, Esquire, defendant, which was compromised; see Orig. Jurid. 65. 19 Raym. 322. and another in the county palatine of Durham, in 1638. Cro. Car. 512.] was in 13 Eliz. A. D. 1571. as reported by Dyer, and held in Tothill-fields, Westminster. See Dyer, 301. and Spelm. in v. Campin ; the latter of whom was present at the ceremony.

In this trial by battel, on a writ of right, the battel is waged by champions, and not by the parties themselves; because in civil actions, if any party to the suit dies, the suit must abate and be at an end for the present: and therefore no judgment could be given for lands in question, if either of the parties were slain and also that no person might claim an exemption from this trial, as was allowed in criminal cases. Co. Lit. 294.

This form of trial by battel, the tenant or defendant in a writ of right, has it in his election at this day to demand. 3 Comm. 341. And it was the only decision of such writ of right from the conquest, till Hen. II. by consent of parliament introduced the grand assise; a particular species of trial by jury, in concurrence therewith, giving the tenant his choice of either the one or the other. See Glavv. lib. 2. c. 7. See this Dict. tit. Champion.

BATELLUS, See Batus.

BATTERY, See tit. Assault.

BATUS, Lat. from the Sax. bat. A boat, and battellus, a little boat. Chart. Edw. I. 20 Julli 18 regni. Hence we have an old word bateswain, for such as we now call boatswain of a ship.

BAUBELLA, baubles. A word mentioned in Hoveden, in Rich. I. and signifies jewels or precious stones.

BAUDEKIN, baldicum und baudekinum. Cloth of baukekin, 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, Lupenar, foriniz. A house of ill fame, kept for the resort and commerce of lewd people of both sexes. The keeping of a bawdy-house comes under the cognisance of the temporal law as a common nuisance, not only in respect of its endangering the public peace by drawing together dissolute and debauched persons, and promoting quarrels, but also in respect of its tendency to corrupt the manners of the people, by an open profession of lewdness. 3 Inst. 205. 1 Hawk. P. C. c. 74. Those who keep bawdy-houses are punishable with fine and imprisonment; and all such infamous punishment, as pillory, &c. as the court in discretion shall inflict: and a dredger who keeps only a single room for the use of bawdy, is indictable for keeping a bawdy-house. 1 Bak. 382. Persons resorting to a bawdy-house are punishable, and they may be bound to their good behaviour, &c. But if one be indicted for keeping or frequenting a bawdy-house, it must be expressly alleged to be such a house, and that the party knew it; and not by suspicion only. Poth. 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. Bell. 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 Femme 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 Halst. P. C. c. 74. § 1. 1 Salk. 333.

It was always held infamous to keep a bawdy-house; yet some of our historians mention bawdy-houses, brothel-houses, or stews publicly allowed here in former times, till the reign of Hen. VIII. by whom they were suppressed about A. D. 1546; and writers assign the number to be eighteen thus allowed on the bank-side in Southwark. See Brothel-houses.

By stat. 25 Geo. II. c. 36. made perpetual by stat. 28 Geo. II. c. 19. if two inhabitants, paying scot and lot, shall give notice to a constable of any person keeping a bawdy-house, the constable shall go with them before a justice of peace, and shall (upon such inhabitants making oath, that they believe the contents of such notice to be true, and entering into a recognisance of 20l. each, to give material evidence of the offence) enter into a recognisance of 30l. to prosecute with effect such person for such offence at the next sessions; the constable shall be paid his reasonable expenses by the overseers of the poor, to be ascertained by two justices; and if the offender be convicted, the overseers shall pay to the two inhabitants 10l. each. On the constable's entering into such recognisance as aforesaid, the justice shall bind over the person accused to the next sessions, and if he shall think proper, demand security for such person's good behaviour in the mean time. A constable neglecting his duty forfeits 20l. 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 fen, 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 floodgate. Stat. 27 Eliz. c. 19. A harbour where ships ride at sea, near some port, is also called a bay.

Beacon, from the Sax. beaon, signum, whence the English, beckon, to nod or to make a sign.] A signal well known; being a fire maintained on some eminence near the coasts of the sea. 4 Inst. 148. Hence beaconage (beaconagium) money paid towards the maintenance of beacons. See stat. 5 Hen. IV. c. 3. as to keeping watch on the sea coast.

Barrington in his observations on this statute, introduces the copy of an order of ancient date cited by Prynne, in his remarks on Coke's 4 Inst. showing the stations fixed on for beacons in Kent and Essex, viz. at the Isle of Sheppey in Kent; at Shorebury in Essex; at Hoo in Kent; at Tolbing in Essex; at Cleve in Kent; at Tolbury in Essex; at Gravesend in Kent, and at Famedon in Essex. See Barr. 5 edit. p. 369.

The erection of beacons, light-houses and sea-marks, is a branch of the royal prerogative; whereof the first was anciently used in order...
to alarm the country, in case of the approach of an enemy; and all
of them are signally useful in guiding and preserving vessels at sea
by night as well as by day. For this purpose the king hath the ex-
clusive 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. 146.) as well upon the lands of the subject as upon the de-
mones of the crown; which power is usually vested by letters patent
in the office of the Lord High Admiral, (Stat. 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 100l. or in case
of inability to pay it, shall be ipso facto outlawed. 1 Comm. 263. See
the stats. 2 Ann. c. 20. and 8 Ann. c. 17. for building the Eddystone
light-house near Plymouth, and raising the duties payable by ships for
its support; and stat. 3 Geo. II. c. 36. as to the light-house on the rock
Sterries near Holyhead in the county of Anglesa.

BEAD, or bedel, Sax. bedel, orato.) 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 manu-
script 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. 15. Eliz. c. 2.

BEAM, That part of the head of a stag where the horns grow,
from the Sax. beam, i.e. arbor; because they grow out of the head as
branches out of a tree. Beam is likewise used for a common balance
of weights in cities and towns.

BEAMS and BALANCE, for weighing goods and merchandise in
the city of London. See it. Weights and Measures.

BEARERS, Such as bear down or oppress others, and is said to be
all one with maintainers. Justice of assise shall inquire of, hear, and
determine maintainers, bearers, and conspirators, &c. stat. 4 Edw. III.
c. 11.

BEASTS of chase, ferre campestres.] Are five, viz. the buck, doe,
fox, marten and roe. Manu. part 1. page 342. Beasts of the forest,
(fere silvestres,) otherwise called beasts of venary are the hart, hind,
boar and wolf. Ibid. part 2. c. 4. Beasts and fowls of the waren, are
the hare, coney, pleasant, and partridge. Ibid. Reg. Orig. 95, 96. &c.
Co. Lit. 233. See tit. Game.

BEAU-PLEADER, pulchre placitando, Fr. beauplieuder, i.e. to plead
fairly.] Is a writ upon the statute of Marlbridge, 32 Hen. III. c. 11.
whereby it is enacted, that neither in the circuit of justices nor in
counties, hundreds, or courts-baron, any fines shall be taken for fair
pleading, viz. for not pleading fairly or aptly to the purpose; upon
which statute this writ was ordained, directed to the sheriff, bailiff,
or him who shall demand such fine, and it is a prohibition not to do
it; whereupon an alias and auries and attachment may be had, &c.
New Nat. Br. 396, 397. And beau-pleader is as well in respect of
vitiates pleadings, as of the fair pleading, by way of amendment. 2
Inst. 122.

BEDEL, bedelius, Sax. bedel, Fr. bedelau.] A cryer or messenger of
a court, that cites men to appear and answer; and is an inferior officer
of a parish or liberty, very well known in London and the suburbs.
There are likewise university bedels and church bedels; now called
summoners and apparitors: and Manwood in his Forest Laws, saith there are forest bedels, that make all manner of garnishments for the courts of the forest, and all proclamations, and also execute the process of the forests, like unto bailiffs errant of a sheriff in his county. Cowell.

**BEDELARY, bedelaria.** The same to a bedel, as bailiwick to a bailiff. Lit. lib. 3. c. 3. Blount. Cowell.

**BEREREPE, 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 praecaria bidereptam, &c. See Magna Praecaria.

**BEDEWERI, Those which we now call banditti; profligate and excommunicated persons. The word is mentioned in Mat. Paris, anno 1258.**

**BEER, As to the exporting, selling, measuring, &c. See tit. Alehouses, Brewers, Navigation Acts, Weights and Measures.**

**BEGGARS, See Vagrants.**

**BEHAVING AS HEIR, is the same as Gestio pro Herede, in the civil law. Scotch Dict.**

**BEHAVIOUR of persons. Vide Good behaviour.**

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

**BELLS. See Churchwardens.**

**BENEFICE, beneficium.] Is generally taken for any ecclesiastical living or promotion; and benefices are by stat. 13 Rich. II. st. 2. c. 2. divided into elective and donative; so also it is used in the canon law. 3 Inst. 155. Duaremus de Beneficiis, lib. 2. c. 3. All church preferments and dignities are benefices; but they must be given for life, not for years, or at will. Deaneries, prebendaries, &c. are benefices with cure of souls, though not comprehended as such within the stat. 21 Hen. VIII. c. 13. of residence; but, according to a more strict and proper acceptation, benefices are only rectories, and vicarages. The word benefice was formerly applied to portions of land, &c. given by lords to their followers for their maintenance; but afterwards, as these tenures became perpetual and hereditary, they left their name of beneficia to the livings of the clergy, and retained to themselves the name of feuda. 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 abbeys, 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. Steim. of Feuds, c. 21. Blount, verb. Beneficium. See tit. Tenure. For matter relating to Ecclesiastical Benefices, and the requisites of the clergy admitted thereto, &c. see tit. Advowson, Parson.**

**BENEFICIO PRIMO ECCLESIASTICO HABENDO, A writ directed from the king to the chancellor, to bestow the benefice that shall**
first fall in the king's gift, above or under such value, upon such a particular person. **Reg. Grim.** 307.

**Benefit of Clergy.** See Clergy.

**Benefit Societies.** See Friendly Societies.

**Benefit of Discussion.** Is that whereby the antecedent heir, such as the heir of line, in a pursuit against the heir of talzie, &c. must be first pursued to fulfill the defunct's deeds, and pay his debts; this benefit is likewise competent in many cases to cautioners. **Scotch Dict.**

**Benerth.** An ancient service which the tenant rendered to his lord with his plough and cart. *Lamb. Lit. p. 222. Co. Lit. 86.*

**Benevolence.** *Benevolencia.* Is used in the chronicles and statutes of this realm for a voluntary gratuity given by the subjects to the king. *Stow's Annals, p. 701.* And Stow saith that it grew from Edward the Fourth's days; you may find it also *anno 11 Hen. VII. c. 10.* yielded to that prince in regard of his great expenses in wars, and otherwise. *12 Rep. 19.* And by act of parliament, *13 Car. II. c. 4.* it was given to his majesty king Charles II. but with a proviso that it should not be drawn into future examples; as those benevolences were frequently extorted without a real and voluntary consent, so that all supplies of this nature are now by way of taxes, by grant of parliament; any other way of raising money for the crown is illegal. *Stat 1 Wm. & M. st. 2. c. 2.* In other nations benevolences are sometimes given to lords of the fee by their tenants, &c. *Cassan de Consuet. Burg. p. 134. 136.* See tit. *Taxes.*

**Benevolentia Regis Habenda.** The form of purchasing the king's pardon and favour, in ancient fines and submissions, to be restored to estate, title, or place. *Paroch. Antiq. p. 172.*

**Bent.** See tit. *Sea Banks.*


**Bericaria.** A sheep down, or ground to feed sheep. *Leg. Alfred. c. 9.* *Monasticon, tom. 1. p. 308.* See the next article.

**Bercaria.** *Bercherie,* from the Fr. *bergere.* A sheep-fold, or other inclosure, for the keeping of sheep; in *Domesday* it is written *berquariun.* *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 *berbicua* a ram, *berbica,* an ewe, *caro berbicae,* a mutton. *Cowell.*

**Berefellaria.** There were seven churchmen so called, anciently belonging to the church of St. John of Beverley. *Cowell. Blount.*

**Berefreet, Berfreid.** A large wooden tower. *Simeon Dunelm. Anno 1123.* *Blount.*

**Berghmaster.** From the Sax. *berg,* a hill, *quasi,* master of the mountains. Is a bailiff or chief officer among the *Derbyshire* miners, who also executes the office of a coroner. *Esc. de An. 16 Ed. I. num. 34. in Tuæl London.* The Germans call a mountaineer, or miner, a bergmann. *Blount.*

**Berghmoth, or Berghmote.** Comes from the Sax. *berg,* a hill, and *genere,* an assembly; and is as much as to say, an assembly or court upon a hill, which is held in *Derbyshire,* for deciding pleads and controversies among the miners. And on this court of *berghmote,* Mr. *Maniche,* in his *Treatise of the Customs of the Miners,* hath a copy of
BERTON. rejoining plain. To this may be added, that many flat and wide fields: presented by the ancient laws of acts of the same, confirmed during the reign of the kingdom of Scotland, by the subsequent cession by Edward Balliol, to be for ever united to the crown and realm of England was confirmed by 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 James I. and all its liberties, franchises, and customs were confirmed in parliament by acts. 22 Edw. IV. c. 8. and 2 Jac. I. c. 28. Though, therefore, it hath some local peculiarities, derived from the ancient laws of Scotland; (see Hale's Hist. C. L. 183. 1 Sid. 382. 462. 2 Show. 355.) yet it is clearly part of the realm of England, being represented by burgesses in the house of commons, and bound by all acts of the British parliament, whether specially named or otherwise. And therefore it was perhaps superfluously declared by stat. 20 Geo. II. c. 42. that where England only is mentioned in any act of parliament, the same, notwithstanding, hath been, and shall be, deemed to compre-
hend the dominion of Wales and town of Berwick upon Tweed. And though certain of the king’s writs or processes of the courts of Westminster do not usually run into Berwick, any more than the principalities of Wales, yet it hath been solemnly adjudged, that all prerogative writs (as those of mandamus, prohibition, habeas corpus, certiorari, &c.) may issue to Berwick, as well as to every other of the dominions of the crown of England; and that indictments and other local matters arising in the town of Berwick, may be tried by a jury of the county of Northumberland. Cro. Jac. 543. 2 Roll. Abr. 292. Stat. 11 Geo. I. c. 4. 2 Burr. 834. 1 Comm. 99.

BERY, or BURY, The vill or seat of habitation of a nobleman, a dwelling or mansion-house, being the chief of the manor; from the Sax. beorg, which signifies a hill or castle; for heretofore, noblemen’s seats were castles, situate on hills, of which we have still some remains. As in Herefordshire, there are the beries of Stockton, Hohe, &c. It was anciently taken for a sanctuary. See Beria.

BESAILE, or BEASYLE, Fr. besayiel, fidavus.] The father of the grandfather: and in the common law it signifies a writ that lies where the great grandfather was seised the day that he died, of any lands or tenements in fee-simple; and, after his death, a stranger entereth the same day upon him, and keeps out the heir. F. N. B. 222. See tit. Mort d’ Ancestor.

BESCHA, from the Fr. bercher, sedere, to dig.] A spade or shovel. Hence perhaps, ana Bescata terra inclusa. Mon. Ang. tom. 2. fol. 642. may signify a piece of land usually turned up with the spade, as gardeners fit and prepare their grounds: or may be taken for as much land as one man can dig with a spade in a day.

BESTIALS, bestiales.] Beasts or cattle of any sort; stat. 4 Edw. III. c. 3. it is written bestyle; and is generally used for all kinds of cattle, though it has been restrained to those anciently purveyed for the king’s provision.

BATACHES, Laymen using glebe lands. Parl. 14 Edw. II.

BEBERCHES, Bid-works, or customary services done at the bidding of the lord by his inferior tenants. Cowel.

BEWARED, An old Saxon word signifying expended; for, before the Britons and Saxons had plenty of money, they traded wholly in exchange of wares. Blount.

BIDALE, or BIDALL, presaria potaria, from the Sax. bidden, to pray or supplicate.] Is the invitation of friends to drink ale at the house of some poor man, who thereby hopes a charitable contribution for his relief: it is still in use in the west of England: and is mentioned stat. 26 Hen. VIII. c. 6. And something like this seems to be what we commonly call house warning, when persons are invited and visited in this manner on their first beginning house-keeping.

BIDDING OF THE BEADE, bidding from the Sax. bidden.] Was anciently a charge or warning given by the parish priest to his parishioners at some special times to come to prayers, either for the soul of some friend departed, or upon some other particular occasion. And at this day, our ministers, on the Sunday preceding any festival or holiday in the following week, give notice of them, and desire and exhort their parishioners to observe them as they ought, which is required by our canons.

BIDENTES, Two yearlings, tags, or sheep of the second year. Paroch. Antig. p. 216.

BIDUANA, A fasting for the space of two days. Matt. Westm. f. 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, vain or waggon. Mon. Anti. tom. 2. fol. 256.

BIGAMUS, One guilty of bigamy.

BIGAMY, bigamia.] A double marriage; this word properly signifies the being twice married; but is now used by an almost universal corruption, to signify the offence of polygamy, or the having a plurality of wives or husbands at once. 3 Inst. 88.

Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow. Such were esteemed incapable of holy orders; probably on the round of St. Paul's words, 1 Tim. c. 5. v. 2. "That a bishop should be the husband of one wife," and they were by a canon of the council of Lyons, A. D. 1274, denied all clerical privileges. This canon was adopted and explained in England by the stat. 4 Edw. I. st. 3. (commonly called the stat. de bigamis) c. 5. and bigamy, thereupon, became no uncommon counterplea to the claim of the benefit of clergy. The cognisance of the plea of bigamy was declared by stat. 18 Edw. III. st. 3. c. 2. to belong to the court Christian, like that of bastardy. But by stat. 1 Edw. VI. c. 12. § 16. bigamy was declared to be no longer an impediment to the claim of clergy. See Dal. 21. Dyer, 201. and 1 Inst. 80. b. note 1.

A second marriage, living the former husband or wife, is, by the ecclesiastical law of England, simply void, and a mere nullity; but the legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well-ordered state. By stat. 1 Jac. I. c. 11. it is enacted, "that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony," within the benefit of clergy; but now, by 35 Geo. III. c. 67. such offenders are subject to the penalties of grand or petty larceny (i.e. transportation, &c.) The act 1 Jac. I. c. 11. however, makes exception to five cases, in which such second marriage (though in the three first it is void) is yet no felony. (See 3 Inst. 89. Kel. 27. 1 Hal. P. C. 694.) 1. Where either party has been continually abroad for seven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years within this kingdom; and the remaining party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce; (or separation à mensá et thoro, 1 Hawk. P. C. 174.) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence; and the parties loosed à vinculo matrimonii; or, 5. Where either of the parties was under the age of consent at the time of the first marriage. 1 Hawk. P. C. 174. 1 Inst. 79.

In the last case the first marriage was voidable by the disagreement of either party; which the second marriage very clearly amounts to. But if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage, and afterwards one of them should marry again, it seems undoubted that such second marriage would be within the reason and penalties of the act. 4 Comm. 164.

If the first marriage were beyond sea, and the latter in England, the party may be indicted for it here; because the latter marriage is the offence; but not vice versá. See 1 Hawk. P. C. 174, 175. 1 Hale's.
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. Duchess of Kingston's case.

As to husband and wife being evidence against each other on trial for this offence, see tit. Baron and Feme 1. 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 linguae, under stat. 28 Edw. III. c. 13. See tit. Jury.

BILL, billa.] Is diversly used in law proceedings: it is a declaration in writing, expressing either the wrong the complainant hath suffered by the party complained of, or else some fault committed against some law or statute of the realm: and this bill is sometimes addressed to the lord chancellor of England, especially for unconscionable wrongs done to the complainant; and sometimes to others having jurisdiction, according as the law directs. It contains the fact complained of, the damage thereby sustained, and petition of process against the defendant for redress; and it is made use of as well in criminal as civil matters. See tit. Chancery, Equity. In criminal cases, when a grand jury upon a presentment or indictment find the same to be true they indorse on it billa vera; and thereupon the offender is said to stand indicted of the crime, and is bound to make answer unto it: and if the crime touch the life of the person indicted, it is then referred to the jury of life and death, viz. the petty jury, by whom if he be found guilty, then he shall stand convicted of the crime, and is by the judge condemned to death. Terms de Ley, 86. 3 Inst. 30. See Ignoramus and Indictment.

Many of the proceedings in the king's bench are by bill; it is the ancient form of proceeding, and was, and yet should be, filed in parchment, in all suits, not by original. The declaration is a transcript of it, or supposed so to be. See tit. Amendment, Original Privilege, Process.

Bill is also a common engagement for money given by one man to another; being sometimes with a penalty, called a penal bill, and sometimes without a penalty, then called a single bill, though the
latter is most frequently used. By a *bill* we ordinarily understand a single bond, without a condition; and it was formerly all one with an obligation, save only its being called a *bill* when in English, and an obligation when in Latin. *West. Symbol.* lib. 2, § 146. Where there is a *bill* of 100l. to be paid on demand, it is a duty presently, and there needs no actual demand. *Cro. Litt.* 548. And a single obligation or *bill*, upon the scaling and delivery, is *debitum in presenti*, 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 30l. and by the same *bill* binds him and his heirs in 100l. and says not to whom he is bound, it shall be intended he is bound to the person to whom the *bill* is made. *Roll. Abr.* 148. A *bill* obligatory written in a book, with the party's hand and seal to it, is good. *Cro. Eliz.* G 13. See 2 *Roll. Abr.* 146.

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

**BILL IN CHANCERY.** See *tit. Chancery, Equity.*

**BILL OF EXCEPTIONS TO EVIDENCE.** At common law a writ of error lay for an error in law, apparent in the record, or for error in fact, where either party died before judgment; yet it lay not for an error in law not appearing in the record; and therefore, where the plaintiff or demandant, tenant or defendant, alleged any thing _ores tenus_, which was overruled by the judge, this could not be assigned for error, not appearing within the record, not being an error in fact, but in law; and so the party grieved was without remedy. 2 *Inst.* 426. And therefore by the stat. of *Westm.* 2. 13 *Edw. I.* c. 31.

"When one implicated before any of the justices, alleges an exception, praying they will allow it, and if they will not if he that alleges the exception writes the same, and requires that the justices will put to their seals, the justices shall so do; and if one will not, another shall; and if upon complaint made of the justice, the king cause the record to come before him, and the exception be not found in the roll, and the plaintiff show the written exception, with the seal of the justice thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed."

This statute extends to the plaintiff as well as defendant, also to him who comes *in loco tenentis*, as one that prays to be received, or the vouchee; and in all actions, whether real, personal or mixt. 2 *Inst.* 427. The statute extends not only to all pleas dilatory and peremptory, but to prayers to be received, *oyer* of records and deeds, &c. also to challenges of jurors, and any material evidence offered and overruled. 2 *Inst.* 427. *Dyer,* 231. *tit.* 3. *Raym.* 486.

The *exceptions* ought to be put in writing *sedente curia*, in the presence of the judge who tried the cause, and signed by the counsel on each side; and then the bill must be drawn up and tendered to the judge who tried the cause, to be sealed by him; and when signed there goes out a *scire facias* to the same judge *ad cognoviscendum scriptum*, and that is made part of the record, and the return of the judge...
with the bill itself, must be entered on the issue-roll; and if a writ of error be brought, it is to be returned as part of the record. 1 Nels. Abr. 373. If a bill of exceptions is drawn up, and tendered to the judge for sealing, and he refuses to do it, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. 3 Comm. 372. Reg. Br. 182. 2 Inst. 427.

If one of the justices sets his seal to the bill, it is sufficient; but if they all refuse, it is a contempt in them all. 2 Inst. 427. Raym. 182. S. P. 2 Lev. 327. S. P.

When a bill of exceptions is allowed, the court will not suffer the party to move any thing in arrest of judgment on the point on which the bill of exceptions was allowed. 1 Vent. 366, 367. 2 Lev. 237. 2 Jones, 117.

A bill of exceptions is in the nature of an appeal: examinable, not in the court out of which the record issues for the trial at nisi prius, but in the next immediate superior court, upon a writ of error after judgment given in the court below. 3 Comm. 372.

These bills of exceptions are to be tendered before a verdict given, 2 Inst. 427. and extend only to civil actions, not to criminal. 3 Comm. 372. Raym. 182. S. P. 2 Lev. 327. S. P.

But in 1 Leon. 3. it was allowed in an indictment for trespass; and in 1 Vent. 366. in an information in nature of a quo warranto.

For a precedent of a bill of exceptions, see Bull. N. P. 317.

Bills of exceptions are now seldom used, since the liberality practised by the courts in granting new trials.

BILL OF EXCHANGE, A negotiable security for money, well known among merchants. The laws relating to this subject, and that of Promissory (and negotiable) Notes, being implicated together, are here considered under one head, and thus arranged:

I. Of the nature of, 1. Bills of Exchange; 2. Inland and Foreign; 3. Promissory Notes. 4 The parties to them. 5. The distinction and resemblance between the several kinds of bills and notes. 6. Bank and Bankers' notes. 7. The essential qualities of bills and notes.

II. Of the acceptance of bills; how, when, by and to whom made.

III. Of the transfers of bills and notes by indorsement, &c.

IV. Of the engagements of the several parties.

V. Of 1. the action and remedy on bills and notes; 2. Manner of declaring and pleading; 3. The evidence; and, 4. The defence.

VI. Of bills lost, stolen, or forged; and see III.

I. 1. A Bill of Exchange is an open letter of request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third person shall order it to be paid; or it may be made payable to bearer.

The person who makes the bill is called the drawer; he to whom it is addressed, the drawer; 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 shown and averred in a declaration on such a bill. Double or treble usance is double or treble the usual time; and half usance is half the time. Where the time of payment is limited by months, it must be computed by calendar, not lunar, months; and where one month is longer than the succeeding one, it is a rule not to go in the computation into the third. Thus, on a bill dated the 28th, 29th, 30th, or 31st of January, and payable one month after date, the time expires on the 28th of February in common years, and in the three latter cases in leap year, on the 29th. [To which are 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 first day of a month, the 10 days expire on the 11th; where it is dated the 1st, and payable 20 days after date, these expire on the 21st.

A custom has obtained among merchants, that a person to whom a bill is addressed, shall be allowed a few days for payment beyond the term mentioned in the bill, called days of grace. In Great Britain and Ireland, three days are given; in other places more. If the last of these three days happen to be Sunday, the bill is to be paid on Saturday. These days of grace are allowed to promissory notes; but not to bills payable at sight.

2. Bills of exchange are distinguished by the appellation of foreign and inland bills; the first being those which pass from one country to another, and the latter such as pass between parties residing in the same country; and the universal consent of merchants had long since established a system of customs relative to foreign bills, which was adopted as part of the law in every commercial state.

It does not appear that inland bills of exchange were very frequent in England before the reign of Charles II. (see 6 Mod. 29.) And when they were introduced, they were not regarded with the same favour as foreign bills. At length the legislature, by two different statutes, 9 and 10 Wm. III. c. 17. and 3 and 4 Ann. c. 9. set both on nearly the same footing; so that what was the law and custom of merchants with respect to the one, is now, in 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.

100l.

London, January 1, 1793.

One month after date please to pay to A. B. or order [or to me or my order] the sum of one hundred pounds, and place the same to the account of T. T.

To Mr. C. D.

[Place of abode and business.]

Acc. C. D.
London, January 1, 1793.

Exchange for 50l. sterling.
At sight [Or At sight of this my only bill of exchange] pay to Mr. A. B. or order, fifty pounds sterling value received of him, and place the same to account, as per advice [Or without further advice] from V. S.
To Mr. C. D. &c.

London, January 1, 1793.

Exchange for 10,000 liv. Tournoises.
At fifteen days after date [Or, at one, two, &c. usances] pay this my first bill of exchange, (second and third of the same tenor and date not paid) to Messrs. A. B. & Co. or order, ten thousand livres Tournoises, value received of them, and place the same to account, as per advice from C. D.
To Mr. E. F.
Banker in Paris.

The two other bills of the foreign set are varied thus “first and third,” and “first and second not paid.”

3. A promissory note is a less complicated kind of security, and may be defined to be, an engagement in writing to pay a certain sum of money mentioned in it, to a person named, or to his order, or to the bearer at large. At first these notes were considered only as written evidence of a debt; for it was held that a promissory note was not assignable or indorsable over, within the custom of merchants; and that if, in fact, such a note had been indorsed or assigned over, the person to whom it was so indorsed or assigned, could not maintain an action within the custom against the drawer of the note; nor could even the person to whom it was in the first instance made payable, bring such action. 1 Salt. 129. 2 Ld. Raym. 757, 759. But at length they were recognised by the legislature, and put on the same footing with inland bills of exchange, by stat. 3 and 4 Ann. c. 9. (made perpetual by stat. 7 Ann. c. 25. § 3.) which enacts that promissory notes, payable to order or bearer, may be assigned and indorsed, and action maintained thereon, as on inland bills of exchange.

Form of Promissory Notes.

20l.

London, January 1, 1793.

I promise to pay A. B. or bearer on demand twenty pounds for value received.

T. T.

20l.

London, January 1, 1793.

Two months after date, we and each of us promise to pay to Mr. C. B. or order, twenty pounds, value received.

A. B.
C. D.
4. By the stats. 15 Geo. III. c. 51. and 17 Geo. III. c. 30. made perpetual by stat. 27 Geo. III. c. 16. all negotiable notes and bills for less than 20s. are declared void; and notes or bills between that sum and 5l. must be made payable within twenty-one days after date; must particularize the name and descriptions of the payees; the same strictness in all respects, and made before the notes must be stampt paper. The stamp is declared to the amount of the bill.

No. 25. It was continued, as amended, during the then war.

By 45 Geo. III. c. 41. (respecting former acts as to small notes in Ireland,) all promissory notes for less than 20s. Irish currency are declared void.

Bills of exchange and promissory notes must now be drawn on stampt paper. The stamp is proportioned, under the various acts, to the amount of the bill. If foreign bills are drawn here, the whole act must be stampt. But bills drawn abroad, of necessity, are not liable to any stamp duty.

Bills of exchange having been first introduced for the convenience of commerce, it was formerly thought that no person could draw one, or be concerned in the negotiation of it, who was not an actual merchant; but it soon being found necessary for others, not at all engaged in trade, to adopt the same mode of remittance and security, it has been since decided that any person capable of binding himself by a contract, may draw or accept a bill of exchange, or be in any way engaged in the negotiation of it, (and, since the stat. 3 and 4 Ann. c. 9. be a party to a promissory note,) and shall be considered as a merchant for that purpose. 

Carr. 82. 2 Vent. 292. Comb. 152. 1 Show. 125.

But an infant cannot be sued on a bill of exchange. Carr. 160. Nor a feme covert; except in such cases as she is allowed to act as a feme sole. 1 Ld. Raym. 147. Salk. 116. See tit. Baron and Feme.

Where there are two joint-traders, and a bill is drawn on both of them, the acceptance of one binds the other, if it concern the joint trade; but it is otherwise if it concern the acceptor only, in a distinct interest and respect. 1 Salk. 126. 1 Ld. Raym. 175.

Sometimes exchange is made in the name, and for the account of a third person, by virtue of full power and authority given by him, and this is commonly termed procuration; and such bills may be drawn, subscribed, indorsed, accepted and negotiated, not in the name or for the account of the manager or transactor of any or all of these branches of remittances, but in the name and for the account of the person who authorized him. Lex Merc.

5. A promissory note, in its original form of a promise from one man to pay a sum of money to another, bears no resemblance to a bill of exchange. When it is indorsed the resemblance begins, for
then it is an order by the 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 fixed, the law is fully settled to be
exactly the same in bills of exchange and promissory notes; and
whenever the law is reported to have been settled with respect to the
acceptor of a bill, it is to be considered as applicable to the (drawer,
or) maker of a note; when with respect to the drawer of a bill, then
the first indorser of a note; the subsequent indorsors and indorsees
bear an exact resemblance to one another. 2 Burr. 675.

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 Shaw. 8. Comb. 401. Carth. 405. 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.
459. The mode of transfer, however, is different; bills and notes
payable to bearer are transferred by mere delivery, the others by in-
dorsement.

6. The bills and notes mentioned above are considered merely as
securities for money; but there is a species of each which is con-
sidered 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 of
transactions of business by common consent, which gives them the
credit and currency of money to every effectual purpose; they are as
much considered to be money as guineas themselves; 1 Burr. 457. and
it seems are as lawful a tender. See STAT. 5 Wm. 2d. c. 20. § 28,
3 Term Rep. 554.

Bankers' cash notes and drafts on bankers, are so far considered as
money among merchants, that they receive them in payment as ready
cash; and if the party receiving them do not within a reasonable time
demand the money he must bear the loss in case of the banker's
failure. What shall be construed to be a reasonable time has been
subject to much doubt; it was formerly considered as a question of
fact depending on the circumstances of the case, to be determined by
a jury; but it is now established to be a question of law to be de-
"ided by the court, though the precise time is necessarily unde-
termined. 1 Black. Rep. 1. See 1 Ld. Raym. 744. 1 Stra. 415,
416, 550. 2 Stra. 910. 1175. 1248. And on the whole the best rule in
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
c\ conveniently be done.

A draft on a banker, post-dated, and delivered before the day of the
date, though not intended to be used till that day, must be stamped,
by the stat. 31 Geo. III. c. 25. Allen v. Keeves, 1 East, 435.

Bills of exchange and promissory notes, though according to the
general principles of law, they are to be considered only as evi-
ences of a simple contract, are yet in one respect regarded as specialties; and on the same footing with bonds; for unless the contrary be shown by the defendant, they are always presumed to have been made on a good consideration; nor is it incumbent on the plaintiff either to show a consideration in his declaration, or to prove it at the trial. 1 Black. Ref. 445. Peckham v. Wood, K. B. East, 18 Geo. III. However, though foreign bills were always entitled to this privilege, it was not without some difficulty that it was extended to inland bills: and notes are indebted for it to the statute. 2 Ld. Raym. 758. 1 Black. Ref. 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 anything else which can itself be only considered as a security. Bull. N. P. 273.

Another requisite quality is, that the instrument must carry with it a personal and certain credit, given to the drawer or maker, not confined to credit on any particular fund. 3 Wils. 213. But in the application of this principle there seems to be a material distinction between bills and notes. As to the former, where the fund is supposed to be in the hands of the drawee, the objection holds in its full force; not only because it may be uncertain whether the fund will be productive, but because the credit is not given to the person of the drawer; but where the fund on account of which the money is payable, either is in the hands of the drawer, or he is accountable for it, the objection will not hold, because the credit is personal to him, and the fund is only the consideration of his giving the bill. With respect to a note, if the drawer promise to pay out of a particular fund, then within his power, the note will be good under the statute: the payment does not depend on the circumstance of the fund's proving unproductive or not, but there is an obligation on his personal credit; the bare making of the note being an acknowledgment that he has money in his hands. See Joscelyne v. Lassere, For. 281. 10 Mod. 294. 316. Jenney v. Herle, 1 Stra. 591. 2 Ld. Raym. 1361. 8 Mod. 263. Dawkes et ux. v. Deloraine, 3 Wils. 207. 2 Black. Ref. 782.

On the principle which governed these cases an order from an owner of a ship to the freighter to pay money on account of freight, was held to be no bill of exchange. 2 Stra. 1211. But such a bill from the freighters of a ship, to any other person, if good in other respects would certainly not be bad, though made payable on account of freight; because indisputably there is a personal credit given to the drawer, the words "on account of freight," only expressing the consideration for which the bill was given. See Pierson v. Dunlop, Doug. 571. And there may be cases where the instrument may appear at
first sight to be payable out of a particular fund, but in reality be only a distinction how the drawee is to reimburse himself, or a recital of the particular species of value received by the maker of a note; in which cases their validity rests on the personal credit given to the acceptor of the bill, or drawer of the note. 2 Ld. Raym. 1481. 1545. 2 Stra. 762. Barn. K. B. 12.

Another essential quality to make a good bill or note is, that it must be absolutely payable at all events; and not depend on any particular circumstances which may or may not happen in the common course of things. 3 Wils. 213. 1 Burr. 325. See 2 Ld. Raym. 1362. 1396. 1563. 8 Mod. 363. 4 Vin. 240, pl. 16. 2 Stra. 1151. 4 Mod. 242. 1 Burr. 323. In the case of notes, however, it is not necessary, that the time of payment should be absolutely fixed; it is sufficient if, from the nature of the thing, the time must certainly arrive on which their payment is to depend; (2 Stra. 1217. 1 Burr. 227.) for here the words of engagement make the debt; and it is no direction to another person; the former part of the note is a promise to pay the money and the rest is only fixing the particular time when it is to be paid. It is sufficient if it be certainly, and at all events payable at that time, whether the maker live till then, or die in the interim. And it has been decided that a promise to pay "within two months after such a ship shall be paid off," will make a good note; for the paying off the ship is a thing of a public nature and morally certain. See 1 Stra. 24. 1 Wils. 262, 263. But this indulgence seems to have been carried almost too far; and such a latitude seems incompatible with the nature and original intention of a bill of exchange; its allowance in favour of promissory notes arising entirely from a liberal construction of the statute on which the negotiability of those notes depends.

In most of the cases where the several instruments have been denied the privilege of bills and notes, it is not for that reason to be concluded that they are of no force: when the fund from which they are to be paid, can be proved to have been productive, or the contingency on which they depend has happened, they may be used as evidence of a contract according to the circumstances of the case, or according to the relation in which the parties stand to one another. See 2 Black. Ref. 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. Alt. 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. 83. 8 Mod. 267. 1 Show. 5. 497. 3 Ld. Raym. 1536. 1481. Lusw. 889. 1 Mod. Eat. 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. 2 Geo. III.*

Whether it be essential to the constitution of a bill of exchange, that it should contain words which render it negotiable, as *to order* or *to bearer*, seems not hitherto to have received a direct judicial decision. There are two cases in which the want of such words was taken as an exception; but as there were other exceptions, the point was not decided. 2 *Stra.* 1212. 3 *Wils.* 212. In another case, the same exception was taken and overruled, but under such circumstances that the point was not generally determined. 2 *Wils.* 533. 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 *specialties*, however they may be sufficient as evidence to maintain an action of another kind. *Kyd*, 42. But it has been ruled that such words are not necessary in notes, and that the person to whom they are made payable may maintain an action on them, within the statute against the maker. *Moor v. Paine*, *Hardw.* 288.

II. An *Acceptance* is an engagement to pay a bill of exchange according to the tenure of the acceptance. The circumstances which generally concur in an acceptance are that the party to whom it is addressed binds himself to the payment, after the bill has issued, before it has become due and according to its tenor; by either subscribing his name, or writing the word *accept* or *accepted*, or *accepted*. But a man may be bound as acceptor without any of these circumstances.

An acceptance may be either written or verbal; if the former, it may be either on the bill itself, or in some collateral writing, as a letter, &c. 1 *Stra.* 648. In foreign bills it has always been understood that a collateral or parol acceptance was sufficient. 1 *Stra.* 648. 3 *Burr.* 1674. *Hardw.* 75. And it is now settled that such acceptance is also good in cases of inland bills; as by word, *Lumley v. Palmer*, 2 *Stra.* 1000. or by letter, 1 *Atk.* 717. (613.)

The acceptance is usually made between the time of issuing the bill and the time of payment; but it may also be made before the bill has issued, or after it has become due; when it is made before the bill is issued, it is rather an agreement to accept, than an actual acceptance; but such agreement is equally binding as an acceptance itself. 3 *Burr.* 1663. *Doug.* 284. 1 *Atk.* 715. (611.) When the acceptance is made after the time of payment is elapsed, it is considered as a general promise to pay the money: and if it be to pay according to the tenor of the bill, this shall not invalidate the acceptance, though the time being past, it be impossible to pay according to the tenor; but these words shall be rejected as surplusage. 1 *Salk.* 127. 129. 1 *Ld. Raym.* 564. 574. 12 *Med.* 214. 410. *Carth.* 459.

Acceptance is usually made by the drawee, and when before the issuing of the bill, is hardly ever made by any other person; but after the issuing the bill it often happens, either that the drawee cannot be found, or refuses to accept, or that his credit is suspected; or that he cannot by reason of some disability render himself responsible: in any of these cases an acceptance by another person, in order either to prevent the return of the bill, to promote the negotiation of it, or to save the reputation of, and prevent an action against the drawer, or some of the other parties, is not uncommon: such an acceptance is
called an acceptance for the honour of the person on whose account it is made.

That engagement which constitutes an acceptance, is usually made to the holder of the bill, or to some person who has it in contemplation to receive it; and then the acceptor must answer to him, and to every one who either has had the bill before, or shall afterwards have it by indorsement; but it is frequently made to the drawer himself; and then it may be binding on the party making the engagement or not, according to the circumstances of the case.

The mere answer of a merchant to the drawer "that he will duly honour his bill," is not of itself an acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement: but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer.

At. 286. (299.)

A. in consideration of having commissioned B. to receive certain African bills payable to him, drew a bill upon B. for the amount, payable to his own order; B. acknowledged by letter the receipt of the list of the African bills, and that A. had drawn for the amount, and assured him that it would meet due honour from him. This is an acceptance of the bill by B. and the purport of such letter having been communicated by A. to third persons, who, on the credit of it, advanced money on the bill to A. who indorsed it to them; held that B. was liable as acceptor in an action by such indorses, although after the indorsement, in consequence of the African bills having been attached in B.'s hands, who was ignorant of his letter having been shown, A. wrote to B. advising him not to accept the bill when tendered to him; which as between A. and B. would have been a discharge of B.'s acceptance if the bill had still remained in A.'s hands. Clark and others v. Cock, 4 East, 57.

An acceptance is generally according to the tenor of the bill; and then it is called a general and absolute acceptance: but it may differ from the tenor in some material circumstances, and yet, as far as it goes, be binding on the acceptor. Thus it may be for a less sum than that mentioned in the bill; or it may be for an enlarged period.

A bill was payable the first of January; the drawee accepted to pay the 1st of March; the holder struck out the 1st of March, and inserted the 1st of January, and when it was payable according to that date, presented it for payment, which the acceptor refused; on which the holder restored the acceptance to the original form; and the court held that it continued binding. Price v. Shute, East. 33 Car. II. So the acceptance may direct the payment to be made at a different place from that mentioned in the bill; as at the house of a banker. See 2 Stra. 1105. 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.
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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 drawer intend that it should be only conditional, he must be careful to express the condition in writing as well as the acceptance; for if the acceptance should on the face of it appear to be absolute, he cannot take advantage of any verbal condition annexed to it, if the bill should be negotiated and come to the hands of a person unacquainted with the condition; and even against the person to whom the verbal condition was expressed, the burden 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. 309. Hard. 487.

A very small matter will amount to an acceptance; and any words will be sufficient for that purpose, which show the party's assent or agreement to pay the bill; as if upon the tender thereof to him, he subscribes, accepted, or accepted by me A. B. or, I accept the bill, &c. These clearly amount to an acceptance. Molloy, book 2. cap. 10. § 15.

If the party underwrites the bill, presented such a day or only the day of the month; this is such an acknowledgment of the bill as amounts to an acceptance. 3 New Abr. 610. Comb. 401. So if he order a direction to another person to pay it. Bull. N. P. 270.

If the party says, leave your bill with me and I will accept it, or, call for it to-morrow and it shall be accepted; these words, according to the custom of merchants, as effectually bind, as if he had actually signed or subscribed his name according to the usual manner.

But if a man says, leave your bill with me; I will look over my accounts and books between the drawer and me, and call to-morrow, and accordingly the bill shall be accepted; this does not amount to a complete acceptance; for the mention of his books and accounts shows plainly that he intended only to accept the bill, in case he had effects of the drawer's in his hands. And so it was ruled by the Lord C. J. Hale, at Guildhall. Molloy, book 2. cap. 10. § 20.

A foreign bill was drawn on the defendant, and being returned for want of acceptance, the defendant said, that if the bill came back again he would pay it; this was ruled a good acceptance. 3 New Abr. 610. cites Mich. 6 Geo. 1. B. R. Carr v. Coleman.

If a merchant he 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.

A letter from the drawees of a bill in England to the drawer in
America, stating that "their prospect of security being so much
improved they shall accept or certainly pay the bill," is an acceptance in
law; although the drawees had before refused to accept the bill when
presented for acceptance by the holder, who resided in England, and
again after the writing such letter refused payment of it when pre­
sent­ed for payment: and although such letter written before were not received by the drawer in America, till after the bill became due.

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.

If a bill be drawn on a servant (as a clerk of a corporation, &c.)
with direction to place the money to the account of his employer, and
the servant accept it generally, this renders him liable to answer per­
sonally to an indorsee.

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 paid, although the money becomes due before there can be
administration, &c.

Forging the acceptance of any bill of exchange, or the number or
principal sum of any accountable receipt, is made felony, by stat. 7
Geo. II. c. 22.

III. According to the difference in the style of negotiability of bills
and notes, the modes of their transfer also differ. Bills and notes
payable to bearer are transferred by delivery; if payable to A. B. or
bearer they are payable to bearer, as if A. B. were not mentioned.

Indorsements are either in full or in blank; a full indorsement is
that by which the indorser orders the money to be paid to some
particular person, by name; a blank indorsement consists only of the
name of the indorser. 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 indorser shows his inten­
tion that the instrument should have a general currency, and be trans­
ferred by every possessor.

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. Ref. 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 indorser is liable for any sum, at any time of payment that may be afterwards inserted; and it is immaterial whether the person taking the note on the credit of the indorsement knew whether it was made before the drawing of the note or not; for in such a case the indorsement is equivalent to a letter of credit for any indefinite sum. Doug. 496. (514.)

On a transfer by delivery, it is said that the person making it ceases to be a party to, or security for the payment of a bill or note; (1 Ld. Raym. 442. 12 Mod. 241. 1 Salk. 128.) yet it seems there can be little doubt that he is liable in another sort of action; as for money had and received, &c. see 3 Term Rep. 757. 4 Term Rep. 177.

Though a blank indorsement be a sufficient transfer, and may enable the person, in whose favour it is made, to negotiate the instrument, yet it is in his option, to take it either as indorsee, or as servant or agent to the indorsor; and the latter may, notwithstanding his indorsement, declare as holder in an action against the drawer or acceptor. Nothing is more usual than for the holder of a bill or note to indorse it in blank, and send it to some friend for the purpose of procuring the acceptance or the payment; in this case it is in the power of the friend, either to fill up the blank space over the indorsor's name, with an order to pay the money to himself, which shows his election to take as indorsee; or to write a receipt, which shows he is only the agent of the indorsor. 1 Salk. 123. 128. 150. 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 indorser 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 indorser for a valuable consideration cannot limit his indorsement by any restriction on the indorsee, so as to preclude him from transferring it to another as a thing negotiable. 2 Burr. 1222. 1223. 1225. 1227. See also Com. 311. 1 Sira. 457. 2 Burr. 1216. 1 Black. Rep. 295. and as to the effect of restrictive indorsements, see Doug. 615. (637.) 517. (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 indorser in blank, if such holder gave a valuable consideration without knowledge of the accident. 1 Burr. 452. 3 Burr. 1516. 1 Black. Ref. 485. The same principle applies also
to the case of a bill negotiated with a blank indorsement; *Peacock v. Rhodes et al.* Doug. 611. (613.) where the court held, that there was no difference between a bill or note indorsed blank, and one payable to bearer. They both pass by delivery, and possession proves property in both cases. The holder of either cannot with propriety be considered as assignee of the payee: an assignee must take the thing assigned, subject to all the equity to which the original party was subject: if this rule were applied to bills and notes, it would stop their currency, and would render it necessary for every indorsee to inquire into all the circumstances, and the manner in which the bill came to the indorser; but the law is now clearly settled, that a holder coming fairly by a bill or note is not to be affected with the transaction between the original parties.

But a transfer by indorsement where that is necessary, can only be made by him who has a right to make it, and that is strictly only the payee, or the person to whom he or his indorsees have transferred it, or some one claiming in the right of some of these parties. Bills and notes in favour of partners must be indorsed by them all, or at least by one in the firm of the house; and a bill drawn by two persons payable to them or order, must be indorsed by both. *Doug.* 630. (653.) in note.

If a bill or note be made or indorsed to a woman while single, and she afterwards marry, the right to indorse it over belongs to her husband, for by the marriage he is entitled to all her personal property. 1 *Stra.* 516. Ca. L. E. 246.

If a man become bankrupt, the property of bills and notes of which he is the payee or indorsee, vests in his assignees, and the right to transfer is in them only. If the holder of a bill or note die, it devolves to his executors or administrators, and they may indorse it, and their indorsee maintain an action, in the same manner as if the indorsement had been made by the testator or intestate. But on their indorsement they are liable personally to the subsequent parties, for they cannot charge the effects of the testator. They may also be the indorsee 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 *Barne*s, 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 *Shaw.* 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 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 Grev. 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 indorser and indorsee, it is a new bill of exchange; as it is also between every subsequent indorser and indorsee: the indorser 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 indorser from his engagement but the absolute payment of the money, not even a judgment recovered against the drawer, or any previous indorser. 3 Mod. 86. 2 Show. 441. 494. Neither is the engagement of an indorser discharged by an ineffectual execution against the drawer, or any prior or subsequent indorser. 2 Black. Rep. 1235. and see 4 Term Rep. 823.

The engagement of the drawer and indorsors is, however, still but conditional. The holder, in order to entitle himself to call upon them in consequence of it, undertakes to perform certain requisites on his part, a failure in which precludes him from his remedy against them. Where the payment of a bill is limited at a certain time after sight, it is evident the holder must present it for acceptance, otherwise the time of payment would never come: it does not appear that any precise time, within which this presentment must be made, has in any case been ascertained: but it must be done as soon as, under all the circumstances of the case, that can conveniently be done; and what has been said on the presentment of bills and notes payable on demand, seems exactly to apply here. See ante, I. 6.

Whether the holder of a bill, payable at a certain time after the date, be bound to present for acceptance immediately on the receipt of it, or whether he may wait till it become due, and then present it for payment, is a question which seems never to have been directly

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**BILL OF EXCHANGE IV.**

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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 Ref. 713.

If, however, the holder in fact present the bill for acceptance, and that be refused, he is bound to give regular notice to all the preceding parties to whom he intends to resort for non-payment; to the drawee, 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 Ref. 712.

It is also the duty of the holder of a bill, whether accepted or not, to present it for payment within a limited time; for otherwise the law will imply that payment has been made; and it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time, when all accounts might be adjusted between him and the drawee. For the old cases on this subject, see 1 Salk. 127. 132, 133. 1 Sho. 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 reasonable hours; which are the common hours of business in the place where the party lives to whom the presentment is to be made.

If acceptance or payment be refused, or the drawee of the bill, or maker of the note, has become insolvent, or has absconded, notice from the holder himself must be given to the preceding parties; and in that notice it is not enough to say that the drawee or maker refuses, is insolvent, or has absconded, but it must be added, that the holder does not intend to give him credit. The purpose of giving notice is not merely that the indorsor should know default has been made, for he is chargeable only in a secondary degree; but to render him liable, it must be shown that the holder looked to him for payment, and gave him notice that he did so. See 1 Stra. 441. 515. 2 Black. Ref. 747. as to bills; and 1 Stra. 649. 2 Stra. 1087. 1 Term Ref. 170. as to notes.

What should be considered as reasonable time within which notice should be given, either of non-acceptance or non-payment, has been subject to much doubt and uncertainty; it was once held, that a fortnight was a reasonable time, but that is now much narrowed. 1 Mod. 27.

With respect to acceptance, it is usual to leave a bill for that purpose with the drawee till the next day, and that is not considered as giving him time; it being understood to be the usual practice; but if on being called on the next day, he delay or refuse to accept according to the tenor of the bill, the rule now established, where the parties, to whom notice is to be given, reside at a different place from the holder and drawee, is, that notice must be sent by the next post. Under the same circumstances, the same rule obtains in the case of non-payment. 1 Term Ref. 169. So also, in case the drawee or maker has absconded, or cannot be found, notice of these circumstances, either in case of non-acceptance or non-payment, must be sent by the first post.
The great difficulty has been to establish any general rule, where the party entitled to notice resides in the same place, or at a place at a small distance from that in which the holder lives. On this point, as well as on the question of what shall be considered as a reasonable time for making the demand of payment, it has been an object of no little controversy, whether it was the province of the jury or of the judge to decide: (see ante, I. 6.) till lately it seems the jury had been permitted to determine on the particular circumstances of each individual case, what time was reasonably to be allowed, either for making demand or giving notice. *Doug.* 515. (681.)

But it having been found that this was productive of endless uncertainty and inconvenience, the court, on several occasions, have laid it down as a principle, that what shall be considered as reasonable time in either case is a question of law; juries have, however, struggled so hard to maintain their privilege in this respect, that in two cases they narrowed the time for demand, contrary to the opinion of the court; and, on a second trial being granted, they, in both cases, adhered to their opinion, contrary to the direction of the judge. In one of them, however, application being made for a third trial, the court would have granted it, had not the plaintiff precluded himself by proving his debt under a commission of bankruptcy which had issued against the drawees of the bill between the time of the verdict and the application. See *Doug.* 515. *1 Term* Ref. 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* Ref. 167. 169. *Tindal* v. *Brown.* It seems therefore fully established, that what shall be reasonable time is a question of law; and generally that a demand must be made, and notice given, as soon as under all the circumstances, it is possible so to do.

The reason why the law requires notice is, that it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and that if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he have no effects in the other's hands, then he cannot be injured for want of notice; and if it be proved on the part of the plaintiff, that from the time the bill was drawn, till the time it became due, the drawer 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 drawer'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* Ref. 410. and see *1 Term* Ref., 405.

Yet, though it appear that the drawer had no effects in the hands of the drawer, 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 for want of such notice, such a subsequent promise is an acknowledgment that he had no right to draw on the drawer; and if he has in fact suffered—
ed damage, it is his own fault. But where damage in such a case has been sustained, and no subsequent promise appears, it may be very doubtful whether want of notice can be waived. See 2 Term Rep. 713, 714.

In the manner in which notice, either of non-acceptance or non-payment, is given, there is a remarkable difference between inland and foreign bills; in the former no particular form of words is necessary to entitle the holder to recover against the drawer or indorsers, 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. 179. But in foreign bills other formalities are required; if the person to whom the bill is addressed, on presentment, will not accept it, the holder is to carry it to a person vested with a public character, who is to go to the drawee and demand acceptance, and if he then refuse, the officer is there to make a minute on the bill itself, consisting of his initials, the month, the day and the year, with his charges for minuting. He must afterwards draw up a solemn declaration, that the bill has been presented for acceptance, which was refused, and that the holder intends to recover all damages which he, or the deliverer of the money to the drawer, or any other, may sustain on account of the non-acceptance: the minute is, in common language, termed the noting of the bill; the solemn declaration, the protest; and the person whose office it is to do these acts, a public notary: and to his protestation all foreign courts give credit. Mal. 264. Mar. 16.

This protest must be made within the regular hours of business, and in sufficient time to have it sent to the holder’s correspondent by the very next post after acceptance refused; for if it be not sent by that time, with a letter of advice, the holder will be construed to have discharged the drawer and the other parties entitled to notice; and noting alone is not sufficient; there must absolutely be a protest to render the preceding parties liable. Bull. N. P. 271. 2 Term Rep. 713.

But in this case the holder is not to send the bill itself to his correspondent; he must retain it, in order to demand payment of the drawee when it becomes due.

When the bill becomes due, whether it was accepted or not, it is again to be presented for payment within the days of grace, and if payment be refused, the bill must be protested for non-payment, and the bill itself, together with the protest, sent to the holder’s correspondent, unless he shall be ordered by him to retain the bill, with a prospect of obtaining its discharge from the acceptor.

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 indorsers, not only with the payment of the principal sum, but with interest, damages and expenses; which latter consist usually of the exchange, re-exchange, provision and postage, together with the expenses of the protest. See Str. 649.

Whenever interest is allowed, and a new action cannot be brought for it, which is the case on bills and notes, the interest is to be calculated up to the time of signing final judgment. 2 Burr. 1086, 1087. and see 2 Term Ref. 52.

The principal difference between foreign and inland bills of exchange at common law, seems to have been this. A protest for non-acceptance or non-payment of a foreign bill was, and still is, essentially necessary to charge the drawer on the default of the drawee; nothing, not even the principal sum, could or can, at this time, be recovered against him without a protest; no other form of notice having been admitted by the custom of merchants as sufficient; but on inland bills, simple notice, within a reasonable time, of the default of the drawee, was held sufficient to charge the drawer, without the solemnity of a protest; the disadvantage arising from thence was this, that notice entitled the holder to recover only the sum in the original bill, which, in many cases, might be a very serious disadvantage: to remedy this inconvenience in some degree, the stat. 9 and 10 Wm. III. c. 17. and afterwards the stat. 3 and 4 Ann. c. 9. were passed; the professed intention of which acts was to put inland bills on the same footing as foreign ones; so far as relates to the recovery of damages, interests and costs, (i.e. expenses,) by means of the protest they have done it; but there are several minute particulars, in which, from an attentive perusal of the acts, it will appear they still differ.

To the constitution of a bill of exchange, as has been said before, it is not necessary that the words value received should be inserted; and the want of these in a foreign bill cannot deprive the holder of the benefit of a protest; but that benefit, in case of non-payment, is not given by the statutes to inland bills which want these words, and therefore they cannot be protested for non-payment; and the second act provides, that "where these words are wanting, or the value is less than 20l. 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 20l. shall continue as at common law, and shall not be entitled to the privilege of a protest, either for non-acceptance or non-payment.

An inland bill, payable at so many days after sight, cannot be protested at all; and no inland bill can be protested till after the expiration of the three days of grace; notice of which protest is, by the statute, to be sent within fourteen days after the protest. 4 Term Ref. 170.

There appears also to be another difference subsisting between foreign and inland bills of exchange; for where acceptance and payment both are refused on foreign bills, it seems necessary that there should be a protest for each; but under the stat. 3 and 4 Ann. c. 9. it seems that one protest for either, on an inland bill, is sufficient.

On inland bills, where damages, interest and costs [expenses] are to be recovered, there is more indulgence in the time allowed for no-
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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 and 4 Ann. c. 9, which puts notes on the same footing with inland bills, makes no express provision for protesting them for non-payment; but there can be no doubt that the practice under which such a protest is frequently made is founded in justice.

As to several niceties relative to qualified acceptances, and protests under peculiar circumstances, see Beawes' Lex Merc. See also 1 Wils. 185. Doug. 249.

When a bill is once accepted absolutely, it cannot in any case be revoked, and the acceptor is at all events bound, though he hear of the drawer’s having failed the next moment, even if the failure was before the acceptance. The acceptor may, however, be discharged by an express declaration of the holder, or by something equivalent to such declaration. Doug. 237. (249.) But no circumstances of indulgence shown to the acceptor by the holder, nor an attempt by him to recover of the drawer, will amount to an express declaration of discharge. Doug. 235. (247.) Neither will any length of time short of the statute of limitations, nor the receipt of part of the money from the drawer or indorsor, nor a promise by indorsement on the bill by the drawer to pay the residue, discharge the holder’s remedy against the acceptor. Doug. 238. (250.) in note; but see Stra. 733. See ante, II.

Though the receipt of part from the drawer or indorsor be no discharge to the acceptor, yet the receipt of part from the acceptor of a bill, or the maker of a note, is a discharge to the drawer and indorsors in the one case, and to the indorsors in the other, unless due notice be given of the non-payment of the residue; for the receipt of part from the maker or acceptor without notice, is construed to be a giving of credit for the remainder, and the undertaking of the preceding parties is only conditional to pay, in default of the original debtor, on due notice given; but where due notice is given that the bill is not duly paid, the receipt of part of the money from an acceptor or maker, will not discharge the drawer or indorsors; for it is for their advantage that as much should be received from others as may be. 1 Ld. Raym. 744. 2 Stra. 745. 1 Wils. 48. Bull. N. P. 271. So the receipt of part from an indorsor, is no discharge of the drawer or preceding indorsor.

In ex parte Wilson, in the matter of Portales, a bankrupt, it was determined by Lord Eldon, "that if a person held the security of a drawer upon an acceptor of a bill of exchange, and such holder gave the acceptor time upon the bill, he, from that moment, had no demand against the drawer, whether antecedent or not." Petitions after Trin. term, 1803, (which had been frequently determined by Lord Thurlow in preceding cases of a similar nature.)

If the drawer of a note, or the acceptor of a bill, be sued by the indorsor, 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 indorsor. 1 Wils. 46.

Though in order to entitle himself to call on any of the preceding parties, in default of the acceptor of a bill, or maker of a note, it be
necessary that the holder should give due notice of such default to the party to whom he means to resort, yet notice to that party alone is sufficient as against him; it is not necessary that any attempt should be made to recover the money of any of the other collaterals; or, in case of such attempt being made, to give notice of its being without effect. Thus, in order to entitle himself to recover against an indorser, it is not necessary for the indorsee to show an attempt to recover against the drawer of a bill of exchange, or the payee-indorser of a promissory note. See 1 Salk. 131, 133. 1 Stru. 441. 1 Ld. Raym. 443. and, finally, Heylin v. Adamson, 2 Burr. 669. on the principles of all which cases it is now finally settled, that to entitle the indorsee to recover against the indorser of an inland bill of exchange, it is not necessary to demand the money of the first drawer.

By the said stat. 3 and 4 Ann. c. 9. § 7. it is enacted, "that if any person accept a bill of exchange for and in satisfaction of any former debt or sum of money formerly due to him, this shall be accounted and esteemed a full and complete payment of such debt; if such person accepting of any such bill for his debt, do not take his due course to obtain payment of it, by endeavouring to get the same accepted and paid, and make his protest according to the directions of the act, either for non-acceptance or non-payment."

V. 1. Before the doctrine of bills of exchange was well understood, and the nature and extent of the customs relative to them fully recognised by the courts, the remedy on them was sought in different forms of action, according to the opinions which were entertained of the applicability of the several forms to the respective situations of the parties. See Hardr. 485, 487. 1 Mod. 285. 1 Vent. 152. 1 Freem. 14. 1 Lev. 298. 11 Mod. 190. Comb. 204. 1 Salk. 123. 12 Mod. 37. 96. 8 Skirn. 340. 8 Stru. 660. 8 Mod. 373. 1 Mod. Ent. 312. pl. 13. Morg. Prec. 548. Kesseb. v. Tims, B. R. E. 22 Geo. III. Bailey, 47. The conclusion resulting from all which cases seems to be, that where a privity exists between the parties, there an action of debt, or of indebitatus assumptus 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 indorser of either the one or the other; and perhaps between the drawer and acceptor of a bill: provided that in all these cases, a consideration passed respectively between the parties.

But it seems to be considered, that no privity exists between the indorsee and acceptor of a bill, or the maker of a note, or between an indorsee and a remote indorser of either.

The action which is now usually brought on a bill of exchange, is a special action on the case, founded on the custom of merchants. That custom was not at first recognised by the court, unless it was specially set forth, and therefore it was deemed necessary to set forth by way of inducement, so much of it as applied to the particular case, and imposed on the defendant a liability to pay. See 1 Wils. 189. 1 Ld. Raym. 21. 175. 3 Mod. 86. 4 Mod. 242.

But when the custom of merchants was recognised by the judges as part of the law of the land, and they declared they would take notice of it, as such, ex officio, it became unnecessary to recite the custom at full length; a simple allegation, that "the drawer, (mentioning him by his name,) according to the custom of merchants, drew his bill of exchange," &c. was sufficient. And if the plaintiff, still adhering to
former precedents, thought proper to recite the custom in general terms, and did not bring his case within the custom so set forth; yet if by the law of merchants, as recognised by the court, the case as stated, entitled him to his action, he might recover; and the setting forth of the custom was reckoned surplusage and rejected. See 1 Show. 317. 2 Ld. Raym. 1542.

Whether the drawer of a bill, or the indorser of a bill or of a note, receiving the bill or the note in the regular course of negotiation before it has become due, can maintain an action on it against the acceptor or maker, in the character of indorsee, seems undecided; but there is a case which clearly shows that a drawer or indorser 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 indorser, its negotiability is at an end. Beck v. Robley, Trim. 14 Geo. III. 1 H. Black. Rep. 89, in the notes.

The action therefore in which the drawer or indorser, 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 indorser, and not as indorsee. Vide Simonds v. Parmentier, 1 Wils. 185. Vide Morg. Prec. 43, 44, 50. 4 Term Rep. 82, 83.

If the drawee, without having effects of the drawer, accept and duly pay the bill without having it protested, he may recover back the money in an action for money paid, laid out and expended to the use of the drawer. Vide Smith v. Nissen, 1 Term Rep. 269.

Instead of bringing an action on the custom, or on the statute, the plaintiff may in many cases use a bill or note, only as evidence in another action; and where the instrument wants some of the requisites to form a good bill or note, the only use he can make of it is to give it in evidence; or if the count on the instrument be defective he may give it in evidence, in support of some of the other counts for money had and received, or money lent and advanced, according to the circumstances of the transaction. Tatlock v. Harris, 3 Term Rep. 174.

The holder of the bill or note may sue all the parties who are liable to pay the money; either at the same time, or in succession; and he may recover judgment against all, if satisfaction be not made by the payment of the money before judgment obtained against all; and proceedings will not be stayed in any one action but on payment of the debt and costs in that action, and the costs in all the others in which he has not obtained judgment. Vide Golding v. Grace, 2 Black. Rep. 749.

But though he may have judgment against all, yet he can recover but one satisfaction; yet though he be paid by one he may sue out execution for the costs in the several actions against the others. 2 Vesey, 115. and see 1 Stra. 515. See ante, IV. and tit. Bankrupt IV. 5. &c.

To this action the defendant may plead the statute of limitations; and by the express provision of the statute of Queen Anne, all actions on promissory notes must be brought within the same time as is limited by the statute of James with respect to actions on the case, and it is no good replication to this plea, that it was on account between merchants, where it appears to be for value received. Comb. 190. 392.

2. As the action on a bill of exchange is founded on the custom of merchants, so that on a promissory note is founded on the statute 3
and 4 Ann. c. 9. and usually, though perhaps not necessarily, refers to it. In both cases however it is necessary, that all those circumstances should either be expressly stated, or clearly and inevitably implied, which, according to the characters of the parties to the action, must necessarily concur in order to entitle the plaintiff to recover.

An action lies by the indorsee against the indorsor upon a bill of exchange, immediately on the non-acceptance by the drawee, though the time for which the bill was drawn be not closed. 

In stating the bill or the note, regard must be had to the legal operation of each respectively. 1 Burr. 324, 325. It has been decided that the legal operation of a bill, or of a note, payable to a fictitious payee, is, that it is payable to the bearer, and therefore it is proper in the statement of such a bill, to allege that the drawer thereby requested the drawee to pay so much money to the bearer; in the statement of such a note, that the maker thereby promised to pay such a sum to the bearer. Vere v. Lewis, 3 Term Rep. 183. Minet et al. v. Gibson et al. Id. 485. Confirmed in Dom. Proc. See 1 H. Black. Rep. 569. Collis v. Emmet, H. Black. Rep. 313. and more fully as to this subject post. 3. of this division.

Or in such a case, the plaintiff may state all the special circumstances, and if the verdict correspond with them he will be entitled to recover. See 1 H. Black. Rep. 569.

A bill or note payable to the order of a man, may, in an action by him, be stated as payable to himself, for that is its legal import; or it may be stated in the very words of it, with an averment that he made no order.

If a note purport to be given by two, and be signed only by one, a declaration generally, as on a note by that one who signed it will be good; for the legal operation of such a note is, that he who signed, promised to pay. Semb. 1 Burr. 323.

On a note to pay jointly and severally, a declaration against one in the terms of the note will be good. Burchill v. Stocock, 2 Ld. Raym. 1544. So on a note to pay jointly or severally, Camp. 832. contrary to former determinations.

Inland bills and notes may be stated to have been made at any place where the plaintiff chooses to lay his action, because the action on them is transitory, and may be stated to have arisen any where. In an action against the acceptor, it must be alleged that he accepted the bill, for the acceptance is the foundation of the action, but the manner of acceptance needs not to be alleged. 2 Ld. Raym. 1542. 1 Ld. Raym. 364, 365, 374, 375. 1 Stat. 127, 129. Carth. 459.

If the bill or note was payable to order, and the action by an indorsee, such indorsements must be stated as to show his title; an indorsement by the payee must at all events be stated, because without that, it cannot appear that he made any order, on the existence of which depends the title of the indorsee. If the first indorsement was special, to any person by name, in an action by an indorsee after him, his indorsement must, for the same reason, be stated: so also must all special indorsements.

But if the indorsement was in blank, and the action be against the drawer, acceptor or payee, no other indorsement is necessary to be stated than that of the payee: in an action against a subsequent indorsee, 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 note, III.
In an action against the drawer or indorser of a bill, or against the indorser of a note, it is absolutely necessary, on account of non-payment of the bill or note, to state a demand of payment from the acceptor of the bill, or the maker of the note, and due notice of refusal given to the party against whom the action is brought; for these circumstances are absolutely necessary to entitle the plaintiff to maintain his action; and a verdict will not help him on a writ of error. The general rule of pleading in this case is, that where the plaintiff omits altogether to state his title or cause of action, it is not necessary to prove it at the trial; and therefore there is no room for presumption that there was actual proof. *Rushton v. Aspinall, Doug. 679.* (684.) But if the title be only imperfectly stated, with the omission only of some circumstances necessary to complete the title, they shall, after a verdict, be presumed to have been proved; and in some cases no advantage can be taken of the want of them on a general demurrer. *Doug. 684.* in the notes.

3. Most part of what might be said as to the proof and defence in actions on bills or notes, necessarily arises out of the general doctrine already explained.

The plaintiff must in all cases prove so much of what is necessary to entitle him to his action, and of what must be stated in his declaration, as is not, from the nature of the thing and the situation of the parties, necessarily admitted.

In an action against the acceptor it is a general rule that the drawer's hand is admitted, because the acceptor is supposed to be acquainted with the writing of his correspondent; and by his acceptance he holds out to every one who shall afterwards be the holder, that the bill is truly drawn. *1 Ld. Raym. 444.* *Stra. 946.* *3 Burr. 1554.* See *1 Rl. 280.* 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 indorser. *See 4 Term. Ref. 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 indorser; but in this case, in order to render the evidence correspondent to the declarations, all the subsequent names must be struck out, either at or before the trial. *See ante, III.*

But the plaintiff in the case of a transfer by delivery (see *ante, III.*) may be called upon to prove that he gave a good consideration for the bill or note, without the knowledge of its having been stolen, or of any of the names of the blank indorsors having been forged. *1 Burr. 542.* *Doug. 633.* *Peacock v. Rhodes.* And though the acceptance be subsequent to the indorsements, yet the necessity of proving the payee's hand-writing is not, by this means, superseded. *Say. 233.* *1 Term. Ref. 654.*
In an action by an indorsee against the drawer, the same rules obtain with respect to the proof of the handwriting of the indorsors as in an action against the acceptors. See *Collis v. Emmett*, 1 *H. Black. Rep.* 313. That of the drawer himself must of course be proved. It must be also proved that the plaintiff has used due diligence. See ante, IV.

From the rule, that in an action against the drawer or acceptor of a bill payable to order, there must be proof of the signature of the payee being the drawer or first indorsor, and of all those to whom an indorsement has been specially made, arose the question which long, and greatly, agitated the commercial world, on the subject of indorsements in the name of fictitious payees. A bill payable to the order of a fictitious person, and indorsed in a fictitious name, is not a novelty among merchants and traders. See *Stone v. Freeland*, *B. R.* Sittings after Easter, 1769, alluded to in 3 *Term Rep.* 176. See also *Peacock v. Rhodes*, *Eng.* 633. *Price v. Neat*, 3 *Burr.* 1534. But in the years 1786, 1787, and 1788, two or three houses connected together in trade, entering into engagements far beyond their capital, and apprehending that the credit of their own names would not be sufficient to procure currency to their bills, adopted, in a very extensive degree, a practice which before had been found convenient on a smaller scale. So long as the acceptors or drawers could either procure money to pay these bills, or had credit enough with the holder to have them renewed, the subject of these fictitious indorsements never came in question. But, when the parties could no longer support their credit, and a commission of bankrupt became necessary, the other creditors felt it their interest to resist the claims of the holders of these bills; and insisted that they should not be admitted to prove their debts, because they could not comply with the general rule of law requiring proof of the handwriting of the first indorsor.

The question came before the chancellor by petition. He directed trials at law, and several were had; three against the acceptor in the King's Bench, and one against the drawer in the Common Pleas, though not all expressly by that direction. See *Tatlock v. Harris*, 3 *Term Rep.* 174. *Vere v. Lewis*, 3 *Term Rep.* 183. *Minet et al. v. Gibson et al.* 3 *Term Rep.* 483. 1 *H. Black. Rep.* 559. *Collis v. Emmett*, 1 *H. Black. Rep.* 313. From the decisions on these cases, the principle of which was affirmed in the house of lords, and which have settled that such bills are to be considered as payable to bearer, (see ante, 2, of this division V.) it follows, that proof of the acceptor's handwriting is sufficient to entitle the holder to recover on the bill; and in the case of *Tatlock v. Harris*, where a bill was drawn by the defendant and others on the defendant, it was determined that a bonâ fide holder for a valuable consideration might recover the amount against the acceptor in an action for money paid, or money had and received.

The principal case above alluded to, as affirmed in the house of lords, is that of *Minet et al. v. Gibson et al.* already so often mentioned. It is better known by the name of *Gibson and Johnson v. Minet and Factor*; and the opinions of the judges in the house of lords, are very fully and accurately reported in 1 *H. Black. Rep.* 561. 1 *Brow. P. C.* 48. The effect of the determination, as there stated, is as follows:

If a bill of exchange be drawn in favour of a fictitious payee, with the knowledge, as well of the acceptor as the drawer; and the name of such payee be indorsed on it by the drawer, with the knowledge of the acceptor, which fictitious indorsement purports to be to the drawer
himself or his order; and then the drawer indorses the bill to an innocent indorsee for a valuable consideration, and afterwards the bill is accepted; but it does not appear that there was an intent to defraud any particular person; such innocent indorsee for a valuable consideration may recover against the acceptor, as on a bill payable to bearer. Perhaps also, in such case, the innocent indorsee might recover against the acceptor, as on a bill payable to the order of the drawer; or on a count stating the special circumstances.

Other cases, Master et al. v. Gibson et al. and Hunter v. Gibson et al. were afterwards brought before the house of lords, (June, 1793,) on demurrers to evidence; on which the judges gave their opinion, that it was not competent to the defendants to demur; and that on the record, as stated, no judgment could be given. See Bro. P. C. A venire de novo was accordingly awarded, and a new trial had in Hunter v. Gibson, in which a bill of exceptions to evidence was tendered; on this the court of K. B. gave judgment for plaintiff, and that judgment was affirmed in Dom. Prot. See Bro. P. C. tit. Prom. Notes, ca. 2, 3. The whole disclosed a system of bill-negotiation to the amount of a million a year, on fictitious credit, which ended in the bankruptcy of many; but which had at least the good effect of showing, that the obligations of law, are not so easily eluded, as those of honour and conscience.]

In an action by an indorsee against an indorsor, it is not necessary to prove either the hand of the drawer or of the acceptor, or of any indorsor, before him against whom the action is brought; every indorsor being, with respect to subsequent indorsees or holders, a new drawer. 1 Ld. Raym. 174. Str. 444. 2 Burr. 675. Where an action is by one indorser who has paid the money, proof must be given of the payment. 1 Ld. Raym. 743.

An indorser on a note, who has received money from the drawer to take it up, is a competent witness for the drawer, in an action against him by the indorser, to prove that he had satisfied the note; being either liable to the plaintiff on the note, if the action were defeated, or to the defendant for money had and received, if the action succeeded. And his being also liable in the latter case to compensate the defendant for the costs incurred in the action by such non-payment makes no difference. Birt v. Kershaw, 2 East, 458.

In an action by the drawer against the acceptor, where the bill has been paid away and returned, it is necessary to prove the hand-writing of the latter, demand of payment from him, and refusal, the return of the bill and payment by the plaintiff. 10 Mod. 36, 37. 1 Wils. 185. See ante, 1, of this division V.

In an action on the case by the acceptor against the drawer, the plaintiff must prove the hand-writing of the defendant, and payment of the money by himself; or something equivalent, as his being in prison on execution. 3 Wils. 18.

Where a bill is accepted, or a bill or note is drawn or indorsed by one of two or more partners, on the partnership account, proof of the signature of the partner accepting, drawing, or indorsing, is sufficient to bind all the rest. 1 Salk. 126. 1 Ld. Raym. 173. See Carwick 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. 430. 12 Mod. 346.
An action on a bill of exchange being by an executor, and upon a debt laid to be due to testator, it was held necessary to prove that the acceptance was in the testator's life-time. 12 Mod. 447.

Where the defendant suffers judgment by default, and the plaintiff executes a writ of inquiry, it is sufficient for the latter to produce the note or bill without any proof of the defendant's hand. See 2 Stra. 1149. Burnet, 233. 234. 2 Black. Ref. 748. 3 Wils. 155. and finally. 3 Term Ref. 301. Green v. Hearne; in which the court said, that by suffering judgment to go by default, the defendant had admitted the cause of action to the amount of the bill, because that was set out on the record; and the only reason for producing it to the jury on executing the writ of inquiry, was to see whether any part of it had been paid. And now it seems, on such judgment, a writ of inquiry is not necessary; for the court on application by the plaintiff, will, if no good reason be shown to the contrary, refer it to the proper officer, to ascertain the damages and costs, and calculate the interest. Ruled in Rez. Bailey, 67. Rashleigh v. Salmon, H. Black. Ref. C. P. 252. 2.

Besides the different subjects of defence, which may be collected from the whole of the general principles here so fully entered into, the most usual are those which arise either from the total want of consideration, or from the illegality of the consideration for which the bill or note was given. See this Dict. tit. Consideration.

In general no advantage can be taken of the illegality of the consideration, but as between the persons immediately concerned in the transaction; any subsequent holder of the bill or note, for a fair consideration, cannot be affected by it. But there are cases in which it has been determined, that, by the construction of certain statutes, even the innocent indorsee shall not recover against the acceptor of the bill, or drawer of the note. As on stat. 9 Ann. c. 14. § 1. which absolutely invalidates notes, bills, &c. given for money won at play. 2 Stra. 1135. So on stat. 12 Ann. st. 2. c. 16. § 1. as to securities on usurious contracts. Lowe v. Weller, Doug. 736. And reasoning by analogy, on stat. 5 Geo. II. c. 30. § 11. against notes given by a bankrupt to procure his certificate, see this Dict. tit. Bankrupt.

It has however been repeatedly ruled at nisi prius, that wherever it appears that a bill or note has been indorsed over, after it is due, which is out of the usual course of trade, that circumstance alone throws such a suspicion on it, that the indorsee must take it on the credit of the indorser, and must stand in the situation of the person to whom it was payable. See 3 Term Rep. 80. 82.

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 Salt. 71.

If the possessor of a bill by any accident loses it, he must cause intimation to be made by a notary public before witnesses, that the bill is lost or mislaid, requiring that payment be not made of the same to any person without his privity. And by stat. 9 and 10 Wm. III. c. 17. if any inland bill of exchange for five pounds or upwards, shall be lost, the drawer of the bill shall give another bill of the same tenor, security being given to indemnify him in case the bill so lost be found again.
BILL OF SALE.

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 SleTk. 128. 1 Ld. Rayn. 738. See Master v. Miller, 4 Term Rep. 330.

Staining of bills of exchange, notes, &c. is felony in the same degree, as if the offender had robbed the owner of so much money, &c. And the forging bills of exchange, or notes for money, indorsements, &c. is felony by stat. 2 Geo. II. c. 25. 9 Geo. II. c. 18. And vide stat. 31 Geo. II. c. 22. § 78.

By stat. 43 Geo. III. c. 139, persons forging, &c. foreign bills of exchange, &c. or uttering the same, guilty of felony; punished by fourteen years transportation. § 1.

No person shall engrave plates for foreign bills of exchange, &c. nor print them, &c. without written authority. Penalty misdemeanor, punished by imprisonment, fine, &c. and for the second offence by fourteen years transportation. Idem. § 2.

"* For the new and additional duties imposed on bills of exchange, &c. see 44 Geo. III. c. 98.

There are also Bills of Credit between merchants, of which the following is a form:

THIS present writing witnesseth, That J. A. B. of London, merchant, do undertake, to and with C. D. of, &c. merchant, his executors and administrators, that if he the said C. D. do deliver, or cause to be delivered unto E. F. of, &c. or to his use, any sum or sums of money, amounting to the sum of, &c. of lawful British money, and shall take a bill under the hand and seal of the said E. F. confessing and showing the certainty thereof; that then I, my executors or administrators, having the same bill delivered to me or them, shall and will immediately, upon the receipt of the same, pay, or cause to be paid, unto the said C. D. his executors or assigns, all such sums of money as shall be contained in the said bill, at, &c. For which payment, in manner and form afore-said, I bind myself, my executors, administrators and assigns, by these presents. In witness, &c.

BILL OF LADING, A memorandum signed by masters of ships, acknowledging the receipt of the merchants' goods, of which there usually are three parts, one kept by the consignor, one sent to the consignee, and one kept by the captain. See tit. Factor, Merchant. BILL OF MIDDLESEX, see tit. Process. BILL OF RIGHTS. The statute 1 Wm. & M. stat. 2, cap. 2, is so called; as declaring the true rights of British subjects. See tit. Liberty, where this important act is stated at large.

BILL OF SALE, Is a solemn contract under seal, whereby a man passes the right or interest that he hath in goods and chattels; for if a man promises or gives any chattels without valuable consideration, or without delivering possession, this doth not alter the property, because it is natura factum, unde non vivat 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.

Yett. 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 Ediz. cap. 5, by which it is enacted, "That all fraudulent con-
veyances 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 bond-
fide, and on a good (which is construed a valuable) consideration."

A. being indebted to B. in 400l. and to C. in 200l. C. brings debt
against him, and, pending the writ, A. being possessed of goods and
chattels to the value of 500l. 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 pos-
session, is a fixed and undoubted character of a fraudulent convey-
ance, because the possession is the only indicium of the property of a
chattel, and therefore this sale is not made bonafide.

As the owner's continuing in possession of goods after his bill of
sale of them, is an undoubted badge of a fraudulent conveyance, be-
cause 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 him-
self 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 se-
cret manner of transacting such bill of sale, and unusual clauses in
it: as that it is made honestly, truly, and bonafide, 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. 2 Bulst. 226.

If goods continue in possession of the vendor after a bill of sale of
them, though there is a clause in the bill that he shall account annu-
ally with the vendee for them, yet it is a fraud: since, if such colour-
ing 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 re-
quired in such sales, by 13 Ediz. cap. 5.

If A. makes a bill of sale to B. a creditor, and afterwards to C. an-
other creditor; and delivers possession at the time of sale to neither;
afterwards C. gets possession of them, and B. takes them out of his
possession, C. cannot maintain trespass, because, though the first bill
of sale is fraudulent against creditors, and so is the second, yet they
both bind *A*. As therefore *B*'s is the elder title, the naked possession of *C.* ought not to prevail against it.

See further on this subject tit. _Fraud_. See also tit. _Bankrupt_ II.

BILL or STORE; A kind of license granted at the custom-house to merchants, to carry such stores and provisions as are necessary for their voyage custom-free. A _bill of sufferance_ is a license granted to a merchant, to suffer him to trade from one English port to another without paying custom. See tit. _Navigation Acts_.

_BILLET or GOLD_, [Fr. _billot_.] Are wedges or ingots of gold, mentioned in the statute 27 Edw. III. c. 27.

_BILLETS of GOLD_, [Fr. _billot_.] Are wedges or ingots of gold.

_BILLET WOOD_, Is small wood for fuel, which must be three foot and four inches long, and seven inches and a half in compass, &c. Justices of peace shall inquire, by the oaths of six men, of the assise of _billet_, and being under size, it is to be forfeited to the poor. Stat. 43 Eliz. c. 14. _Vide_ 9 Ann. c. 15. 10 Ann. c. 6. See _Fact._ 7 Edw. VI. c. 7.

_BILLINGSGATE_ market to be kept every day, and toll is appointed by statute: all persons buying _fish_ in this market may sell the same in any other market by retail; but none but fishmongers shall sell them in shops: if any person shall buy any quantity of fish at Billingsgate for others, or any fishmonger shall ingross the market, they incur a penalty of 20l. And fish imported by foreigners shall be forfeited, and the vessel, &c. See 10 and 11 Wm. III. c. 24. 1 Geo. I. stat. 2. c. 18. § 1. 36 Geo. III. c. 118. § 1. &c. _Vide_ _Fish_ and _Fishermen_.

_BILLUS_, A bill, stick or staff, which in former times was the only weapon for servants. It was long in use for watchmen, and we are told is still carried by those at Litchfield. See Stevens's _Shakespeare_.

_BIO Thanetus_, One who deserves to come to an untimely end. _Odericus Vitalis_, writing of the death of _William Rufus_, who was shot by _Walter Tyrrel_, tells us, that the bishops, considering his wicked life and bad exit, adjudged him _ecclesiasticus velutum_, _biothanetum_ abso-lutione indignum. _Lib._ 10. p. 782.

_Birretium_, 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, _Stelm_.

_Births, Burials_ and _Marriages_, &c. By statute, a duty was granted on _births_ and _burials_ of persons, from _sot._ a duke, &c. down to _10s._ and _2s._ And the like on _marriages_; also _bachelors_, above twenty-five years of age, were to pay _1s._ yearly. _Stat._ 6 and 7 _Wm._ III. c. 6. Exp. as to the duties. See tit. _Stamps, Taxes_.

_Bisacutus_, An iron weapon double-edged, so as to cut on both sides. _Fleta, lib._ 1. c. 33.

_Bisantium_, _besantine_, or _besant_, An ancient coin, first coined by the western emperors at _Bizantium_ or _Constantinople_. It was of two sorts, gold and silver; both which were current in England. _Chaucer_ represents the gold _besantine_ to have been equivalent to a ducat; and the silver _besantine_ was computed generally at two shillings. In some old leases of land there have been reserved, by way of rent, _unum bisantium, vel duos solidos_.

_Bi-Scot_, At a session of _sewers_ held at _Wigenhale_, in _Norfolk_, 9 _Edw._ III. it was decreed, that if any should not repair his proportion of the banks, ditches and causeys by a day assigned, _12d._ for every perch un repaired 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 2s. which is called bisocot.

BISHOPS and ARCHBISHOPS. A Bishop (Episcopus) is the chief of the clergy in his diocese, and is the archbishop's suffragan or assistant.

An Arch Bishop (Archiepiscopus) is the chief of the clergy in his province, and is that spiritual secular person who hath supreme power under the king in all ecclesiastical causes: and the manner of his creation and consecration, by an archbishop and two other bishops, &c. is regulated by stat. 25 Hen. VIII. c. 20. (See post, Bishop.) An archbishop is said to be inthroned, when a bishop is said to be installed; and there are four things to complete a bishop or archbishop, as well as a parson: first, election, which resembles presentation; the next is confirmation, and this resembles admission; next, consecration which resembles institution; and the last is installation, resembled to induction. 3 Salk. 72. In ancient times the archbishop was bishop over all England, as Austin was, who is said to be the first archbishop here; but, before the Saxon conquest, the Britons had only one bishop, and not any archbishop. 1 Roll. Refs. 228. 2 Roll. 440.

But at this day the ecclesiastical state of England and Wales is divided into two provinces or archbishopricks, to wit, Canterbury and York. Each archbishop hath within his province bishops of several dioceses. The archbishop of Canterbury hath under him, within his province, of ancient foundations, Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Coventry and Lichfield, Hereford, Llandaff, St. David's, Bangor, and St. Asaph; and four founded by King Henry VIII. erected out of the ruins of dissolved monasteries, viz. Gloucester, Bristol, Peterborough and Oxford. The archbishop of York hath under him four, viz. the bishop of the county palatine of Chester, newly erected by King Henry VIII. and annexed to the archbishoprick of York; the county palatine of Durham, Carlisle and the Isle of Man, annexed to the province of York by King Henry VIII. but a greater number this archbishop anciently had, which time hath taken from him. Co. Lit. 94.

Westminster was one of the new bishopricks created by Henry VIII. out of the revenues of the dissolved monasteries. 2 Burn. L. 78. Thomas Thirlby was the only bishop that ever filled that see. He surrendered the bishoprick to Edw. VI. A. D. 1550, 30th March; and, on the same day, it was dissolved, and added again to the bishoprick of London. Rym. Fad. 15, p. 222. Queen Mary afterwards filled the church with Benedictine monks, and Eliz. by authority of parliament, turned it into a collegiate church, subject to a dean. The archbishop of Canterbury is now styled metropolitamus et primus totius Anglie; and the archbishop of York styled primum et metropolitam Anglie. 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 superintendent throughout his whole province, of all ecclesiastical matters, to correct and supply the defects of other bishops.
The archbishop is entitled to present, by lapse, to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. (See tit. Advowson.) And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own, to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over, by deed, to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose; which is therefore called his option, which options are only binding on the bishop himself who grants them, and not on his successors. The prerogative itself seems to be derived from the legatine power formerly annexed, by the popes, to the metropolitan of Canterbury.

The archbishop of Canterbury hath the privilege to crown all the kings of England; and to have prelates to be his officers; as for instance, the bishop of London is his provincial dean; the bishop of Winchester his chancellor; the bishop of Lincoln his vice-chancellor; the bishop of Salisbury his precentor; the bishop of Worcester his chaplain, &c. It is the right of the archbishop to call the bishops and clergy of his province to convocation, upon the king's writ: he hath a jurisdiction in cases of appeal, where there is a supposed default of justice in the ordinary; and hath a standing jurisdiction over his suffragans: he confirms the election of bishops, and afterwards consecrates them, &c. And he may appoint coadjutors to a bishop that is grown infirm. He may confer degrees of all kinds; and censure and excommunicate, suspend or depose, for any just cause, &c. 2 Roll. Abr. 223. And he hath power to grant dispensations in any case, formerly granted by the see of Rome, not contrary to the law of God: but if the case is new and extraordinary, the king and his council are to be consulted. Stats. 25 Hen. VIII. c. 21. 28 Hen. VIII. c. 16. § 6. This dispensing power is the foundation of the archbishop's granting special licenses, to marry at any place or time; to hold two livings, and the like; and in this also is founded the right he exercises of conferring degrees in prejudice of the two universities. He may retain eight chaplains; and during the vacancy of any see, he is guardian of the spiritualities. Stats. 21 Hen. VIII. c. 13. 25 Hen. VIII. c. 21. 28 Hen. VIII. c. 16.

The archbishop of Canterbury hath the precedence of all the clergy; next to him the archbishop of York; next to him the bishop of London; next to him the bishop of Durham; next to him the bishop of Winchester; and then all the other bishops of both provinces, after the seniority of their consecration; but if any of them be a privy councillor, he shall take place next after the bishop of Durham. Co. Lit. 94. 1 Ought. Ord. Jud. 486.

The first archbishop of York that we read of, was Paulinus, who, by pope Gregory's appointment, was made archbishop there, about the year of our Lord 622. Godol. 14.

The archbishop of York hath the privilege to crown the queen-consort, and to be her perpetual chaplain.

The archbishop of Canterbury is the first peer of the realm, and hath precedence, not only before all the other clergy, but also (next and immediately after the blood royal) before all the nobility of the realm: and as he hath the precedence of all the nobility, so also of all the great officers of state. Godol. 13.
The archbishop of York hath the precedence over all dukes, not being of the blood royal; as also before all the great officers of state, except the lord chancellor. Godol. 14.

A Bishop is elected by the king's congé d'eslie, or license to elect the person named by the king, directed to the dean and chapter; and if they fail to make election in twelve days, they incur the penalty of a premonstrare, and the king may nominate whom he pleases by letters patent. Stat. 25 Hen. VIII. c. 20. This was to avoid the power of the see of Rome. This election or nomination, if it be of a bishop, must be signified by the king's letters patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest and consecrate the person so elected, which they are bound to perform immediately. After which the bishop elect shall sue to the king for his temporalties, shall make oath to the king and none other, and shall take restitution for his secular possessions out of the king's hands only. Archbishops and bishops refusing to confirm such election, incur the penalties of a premonstrare. On confirmation, a bishop hath jurisdiction in his diocese; but he hath not a right to his temporalties till consecration. The consecration of bishops, &c. is confirmed by act of parliament.

It is directed in the form of consecrating bishops, that a bishop, when consecrated, must be full thirty years of age.

It is held a bishop hath three powers; 1st. His power of ordination, which is gained on his consecration, and not before; and thereby he may confer orders, &c. in any place throughout the world. 2. His power of jurisdiction, which is limited, and confined to his see. 3. His power of administration and government of the revenues; both which last powers he gains by his confirmation: and some are of opinion, that the bishop's jurisdiction, as to ministerial acts, commences on his election. Palm. 473—475.

The king may not seize into his hands the temporalties of bishops, but upon just cause, and not for a contempt, which is only finable. See tit. Temporalties. Bishops are allowed four years for payment of their first fruits, by stat. 6 Ann. c. 27. Every bishop may retain four chaplains. Vide stat. 21 Hen. VIII. c. 13. § 16. 8 Ediz. c. 1.

A bishop hath his consistory court, to hear ecclesiastical causes; and is to visit the clergy, &c. He consecrates churches, ordains, admits and institutes priests; confirms, suspends, excommunicates, grants licenses for marriage, makes probate of wills, &c. Co. Lit. 96. 2 Rolli. Abr. 230. He hath his archdeacon, dean and chapter, chancellor, and vicar-general, to assist him; may grant leases for three lives, or twenty-one years, of land usually letten, reserving the accustomed yearly rents. Stats. 32 Hen. VIII. c. 28. 1 Ediz. c. 19. § 5. See this Dict. tit. Leases.

The chancellor to the bishop is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some university. Stat. 37 Hen. VIII. c. 17.

By stat. 24 Geo. III. sess. 2. c. 35. the bishop of London, or any bishop by him appointed, may admit to the order of deacon or priest, subjects of countries out of his majesty's dominions, without requiring the oath of obedience. But no person shall be thereby enabled to exercise such offices within his majesty's dominions.

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By stat. 25 Geo. III. c. 84, the archbishops of Canterbury or York, with such other bishops as they shall call to their assistance, may consecrate subjects of countries out of his majesty’s dominions to be bishops, without requiring the usual oaths; pursuing the forms prescribed by the act. But no such bishops or their successors, or persons ordained by them, shall exercise their functions within his majesty’s dominions.

The right of trial by the lords of parliament, as their peers, it is said, does not extend to bishops; who, though they are lords of parliament, and sit there by virtue of their baronies, which they hold jure ecclesiast., yet are not emmobil in blood, and consequently not peers with the nobility. 3 Inst. 30, 31. see 1 Comm. 401. 4 Comm. 264, and this Diet. tit. Parliament.

Archbishops and bishoprics may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior. Therefore a bishop must resign to his metropolitan, but the archbishop can resign to none but the king himself. 1 Comm. 382.

The following are some of the popular distinctions between archbishops and bishops. The archbishops have the style and title of Grace, and Most Reverend Father in God by Divine Providence. The bishops, those of Lord, and Right Reverend Father in God by Divine Permission. Archbishops are inthroned; bishops installed.

Mr. Christian, in his notes on 1 Comm. 380. says, that the supposed answer of a bishop on his consecration, "Nolo episcopari," is a vulgar error. See tit. Parson, Advowson, Session.

BISHOPRIICK. The diocese of a bishop.


BISSEXTILE, bissextillis. 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 bissextil, 21 Hen. III. that the day increasing in the leap-year, and the day next before, shall be accounted but one day. Brit. 209. Dyer, 17. See tit. Year.

BISUS, bisius, mica bisu, janus bisus, Fr. pain bisu. A brown bread, a brown loaf. Cowel.

BLACK ACT, or WALTHAM BLACK ACT. The stat. 9 Geo. I. cap. 22, is so called, having been occasioned by some devastations committed near Waltham, in Hampshire, by persons in disguise, or with their faces blacked. By this act, persons hunting armed and disguised, and killing or stealing deer, or robbing warrens, or stealing fish out of any river, &c. or any persons unlawfully hunting in his majesty's forests, &c. or breaking down the head of any fish-pond, or killing, &c. of cattle, or cutting down trees, or setting fire to houses, barn or wood, or shooting at any person, or sending anonymous letters, or letters signed with fictitious names, demanding money, &c. or rescuing such offenders, or not surrendering, are guilty of felony without benefit of clergy. This act is made perpetual by 31 Geo. II. c. 42. And see further, stat. 6 Geo. II. c. 37. 27 Geo. II. c. 15.

See also stat. 16 Geo. III. c. 30, against deer-stealers; the milder punishment inflicted by which act has been thought a virtual repeal.
of the punishment inflicted by the Black Act above recited. Leach’s Hawk. P. C. 1. c. 49. § 7. and this Dict. tit. Forest, Game, Deer-stealing.


BLACK LEAD. By stat. 25 Geo. II. c. 10. entering mines of black lead, with intent to steal, is made felony; and by the same act, offenders committed or transported for entering mines of black lead with intent to steal, escaping or breaking prison, or returning from transportation, are excluded from clergy. By various acts a duty is imposed on foreign black lead imported.

BLACK MAIL, Fr. maille, a link of mail, or small piece of metal or money. Signifies in the north of England, in the counties of Cumberland, Northumberland, &c. a certain rent of money, corn or other thing, anciently paid to persons inhabiting upon or near the borders, being men of name and power, allied with certain robbers within the said counties, to be freed and protected from the devastations of those robbers. But by stat. 43 Eliz. cap. 13. to take any such money or contribution, called black-mail, to secure goods from rapine, is made a capital felony, as well as the offences such contribution was meant to guard against.

It is also used for rents reserved in work, grain or baser money; which were called reditus nigri; in contradistinction to the blanc farms, reditus albii. See tit. Alba Firma, and Bich Firma.

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 virgis nigri, et hostiarius; and in other places virgo basilus. His duty is ad portandum virgam corum domino sed ad festum sancti Georgii infra castrum de Windsor: 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.


BLACK WARD, is when a vassal holds ward of the king; and a sub-vassal holds ward of that vassal. Scotch Dict.

BLACKWELL HALL. The public market of Blackwell Hall, London, is to be kept every Thursday, Friday and Saturday, at certain hours; and the hall-keepers not to admit any buying or selling of woollen cloth at the said hall upon any other days or hours, on penalty of 100L. Factors selling cloth out of the market shall forfeit st. &c. Registers of all the cloths bought and sold are to be weekly kept: and buyers of cloth, otherwise than for ready money, shall give notes to the sellers for the money payable; and factors are to transmit such notes to the owners in twelve days, or be liable to forfeit double value, &c. Stat. 8 and 9 Wm. III. c. 9. See also stat. 4 and 5 P. and M. c. 5. § 26. 39 Eliz. c. 20. § 12. 1 Geo. I. c. 15.
BLADARIUS, A corn-monger, meal-man, or corn-chandler. It is used in our records for such a retailer of corn. Pat. 1. Edw. III. par. 3. m. 13. See tit. Clothiers.

BLADE, bladum.] In the Saxon signifies generally fruit, corn, hemp, flax, herbs, &c. Will. de Mohun released to his brother all the manor of T—. Salvo instauro suo et blado, &c. excepting his stock and corn on the ground. Hence bladier is taken for an ingrosser of corn or grain.

BLANCH FIRMES. In ancient times the crown-rents were many times reserved in libris albis, or blanch firmes: in which case the buyer was holden de-albare firmam,—viz. his base money or coin, worse than standard, was molten down in the Exchequer, and reduced to the fineness of standard silver; or instead thereof, he paid to the king 12d. in the pound by way of addition. Lowndes's Essay upon Coins, p. 3.

BLANDFORD, An act was passed for rebuilding the town of Blandford in the county of Dorset, burnt down by fire in the year 1731. Stat. 5 Geo. II. c. 16.

BLANHORNUM, A little bell. Leg. Adelstan. c. 8.

BLANK BAR, Is used for the same with what we call a common bar, and is the name of a plea in bar, which, in an action of trespass, is put in to oblige the plaintiff to assign the certain place where the trespass was committed. 2 Cro. 594.

BLANK BOND, Is equivalent to an assignation, and must be intimated. Scotch Diet.

BLANKS, Were a kind of white money coined by Hen. V. in those parts of France which was then subject to England, the value whereof was 8d. Stow's Annals, p. 586. These were forbidden to be current in this realm. 2 Hen. VI. c. 9. See tit. Alba Firma.

BLANKS, In judicial proceedings, certain void spaces sometimes left by mistake. A blank (supposing something material wanting) in a declaration abates the same. 2 Cro. 594. 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.

BLASPHERY,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. Lindew. 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 Blauek. P. C. And by stat. 9 and 10 Wm. III. c. 32. if any one shall by writing, speaking, &c. deny any of the persons in the Trinity to be God; assert there are more Gods than one, &c. he shall be incapable of any office; and, for the second offence, be disabled to sue any action, to be executor, &c. and suffer three years' imprisonment. Likewise, by stat. 3 Jac. I. c. 21. persons jestingly or profanely using the name of God, or of Jesus Christ, or of the Holy Ghost, or of the Trinity, in any stage-play, &c. incur a penalty of 10l. See Religion.

BLE, Signifies sight, colour, &c. And ble is taken for corn: as Boughton under the Ble, &c.

BLENCH, BLENCH-HOLDING. See tit. Alba Firma.

BLENHEIM. See Marlborough, Duke of.

BLETA, Fr. blette.] Peat, or combustible earth dug up and dried for burning. Rot. Parl. 35 Edw. I.
BLINKS, Boughs broken down from trees, and thrown in a way where deer are likely to pass.

BLISSOM, Corruptly called blossom, is when a ram goes to the ewe, from the Teutonick Blets, the bowels.

BLOATED FISH OR HERRING, Are those which are half dried.

BLOODEUS, Sax. blod. Deep red colour; from whence comes blot and bloated, viz. sanguine and high-coloured, which, in Kent, is called a blossing colour; and a blouse is there a red faced wench. The prior of Burcester, A. D. 1425, gave his liveries of this colour.

BLOATED FISH OR HERRING, Are those which are half dried.

BLODEUS, Sax. blod.

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.

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.

BLUBBER, Whale oil, before it is thoroughly boiled and brought to perfection. It is mentioned in stat. 12 Car. II. c. 18.

BOCK-HORD, or book-hoard, librorum horreum. A place where books, evidences or writings are kept.

BOCKLAND, Sax. quasi bookland. A possession or inheritance held by evidence in writing, See L. L. Aliened, 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 Pre dentum nobile, liberum et immune à servititia vulgariis et servilibus, and was the same as altodium, descendible unto all the sons, according to the common course of nations and of nature, and therefore called gavel-kind; devisable only by will, and thereupon termed Terræ Testamentalis. System 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 Fawkland, 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.

BOIS, Fr. Wood, and sub-bois, underwood. See Boscis.

BOLHAGIUM, or boldagium, A little house or cottage. Blount.

BOLT. A bolt of silk or stuff, seems to have been a long narrow piece; in the accounts of the priory of Burcester. It is mentioned, Paroch. Antiq. p. 574.

BOLTING. A term of art used in our Inns of Court, whereby is intended a private arguing of cases. The manner of it at Gray's Inn is thus: an ancient and two barristers sit as judges, three students bring each a case, out of which the judges choose one to be argued, which done, the students first argue it, and after them the barristers. It is inferior to mooting, and may be derived from the Sax. bolt, a house, because done privately in the house for instruction. In Lincoln's Inn, Mondays and Wednesdays are the bolting days, in vacation time; and Tuesdays and Thursdays the moot days.

BONA FIDE. That we say is done bona fide, which is done really, with a good faith, without a fraud or deceit.

BONA GESTURA, Good abearing, or good behaviour. See Good Behaviour.

BONAIGHT, or bonaghty, Was an exaction in Ireland, imposed on the people at the will of the lord, for relief of the knights called bonaght, who served in the wars. Antiq. Hibern. p. 60.

BONA NOTABILIA. See it. Executor V. 3.

BONA PATRIA, An assise of countrymen, or good neighbours: it is sometimes called assisa bona patria, when twelve or more men are chosen out of any part of the county to pass upon an assise; otherwise called juratores, because they are to swear judicially in the presence of the party, &c. according to the practice of Scotland. Skene. See Assisors.

BONA PERITURA, Goods that are perishable. The stat. Westm. 1. 3 Edw. I. cap. 4. as to wrecks of the sea ordains, that if the goods within the ship be bona peritura, such things as will not endure for a year and a day, the sheriff shall sell them, and deliver the money received to answer it. See this Dict. ut. Wreck.

BONCHA, A bunch, from the old Lat. bona, or bunna, a rising bank, for the bounds of fields: and hence bonn is used in Norfolk, for swelling or rising up in a bunch or tumour, &c.

BOND. A Bond or Obligation, is a deed whereby the obligor or person bound, obliges himself, his heirs, executors and administrators, to pay a certain sum of money to another (the obligee) at a day appointed.

I. General rules as to the nature and form of this security.

II. Who may be obligors and obligees.

III. The ceremonies necessary to constitute a bond or obligation.

IV. Of the condition, and what shall be a performance or breach thereof.

V. Of the discharge and satisfaction of bonds; 1. by the act of the party; or, 2. by the act of law.

VI. Of actions and pleadings on bonds.

I. If the bond be without a condition, it is called a single one, simplex obligatio; but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void or else shall remain in full force; as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee, with interest; which principal sum is usually one-half
of the penal sum specified on the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor while living; and after his death the obligation descends on his heir, who, (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a direct, yet a collateral charge upon the lands.

The condition may be either in the same deed, or in another, and sometimes it is included within, and sometimes indorsed upon the obligation: but it is commonly at the foot of the obligation. Bros. 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 matum in se, the obligation itself is void; for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency. Co. Lit. 206. See post, IV. and tit. Condition.

On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law, but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought, viz. his principal, interest and expenses, in case the forfeiture accruing 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. 533. Salk. 596, 597. 6 Mod. 11. 60. 191.) the stat. 4 and 5 Ann. c. 18. at length enacted, in the same spirit of equity, that in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited, and suit commenced thereon, shall be a full satisfaction and discharge.

And this rule of compelling the party to do equity who seeks equity, seems to be the reason why an obligee shall have interest after he has entered up judgment; for though in strictness it may be accounted his own fault why he did not take out execution, and therefore not entitled to interest; yet, as by the judgment he is entitled to the penalty, it does not seem reasonable that he should be deprived of it, but upon paying him the principal and interest, which incurred as well before as after the entering up of the judgment. Abr. Eq. 92. 288.

The court of chancery will not generally carry the debt beyond the penalty of a bond. Yet where a plaintiff came to be relieved against such penalty, though it was decreed, it was on the payment of the principal money, interest and costs; and notwithstanding they ex-
ceeded the penalty, this was affirmed. 1 Vern. 350. 1 Eq. Abr. 92. 16 Vin. tit. Penalty. 3 Comm. 435. And where the condition of a bond is to perform a collateral act, damages may be recovered beyond the penalty, and the court of K. B. will not stay the proceedings on payment of the money into court. 2 Term Rep. 388. See White v. Sealy, Doug. 49. semb. contra; but the authority of which is much shaken by the case in 2 Term Rep. 388. where Buller, J. remarked that there were several cases where the judgment had been carried beyond the penalty. In Elliot v. Davis, (Bunb. 23.) Interest on a bond was decreed to be paid, though it exceeded the penalty. See also Collins v. Collins, the case of an annuity, Burr. 820. Holdip v. Otway, 2 Saund. 106. Dewall v. Price, Show. P. C. 15.

FORM OF A BOND OR OBLIGATION, with condition for the payment of money.

KNOW all men by these presents, That I, David Edwards, of Lincoln's Inn, in the county of Middlesex, esquire, am held and firmly bound to Abraham Barker, of Dale Hall, in the county of Norfolk, esquire, in the penal sum of ten thousand pounds, of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors and administrators, firmly, by these presents, sealed with my seal. Dated the fourth day of September, in the forty-sixth year of the reign of our sovereign Lord George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the Faith, and so forth, and in the year of our Lord one thousand eight hundred and —.

The condition of this obligation is such, that if the above bounden David Edwards, his heirs, executors or administrators, do and shall well and truly pay, or cause to be paid unto the above-named Abraham Barker, his executors, administrators or assigns, the full sum of five thousand pounds of lawful money of Great Britain, with lawful interest for the same, on the fourth day of March next ensuing the date of the above written obligation, then this obligation shall be void, and of none effect, or else shall be and remain in full force and virtue.

Sealed and delivered, being first duly stamped, in the presence of

A. B.

For irregular forms of bonds and obligations, see 1 Leon. 25. 3 Leon. 299. Cro. Jac. 208. 607. Bro. tit. Obligation, &c. from whence, and other authorities, which the regularity of modern practice has rendered uninteresting, it appears that the courts always inclined to support the justice of the plaintiff's case, without much regard to mere errors in form, or arising from accident.

II. All persons who are enabled to contract, and whom the law supposes to have sufficient freedom and understanding for that purpose, may bind themselves in bonds and obligations. 5 Co. 119. 4 Co. 124. 1 Roll. Abr. 340.

But if a person is illegally restrained of his liberty, by being confined in a common gaol or elsewhere, and, during such restraint, en-
ters into a bond to the person who causes the restraint, the same may be avoided for *duress* of imprisonment. *Co. Lit. 253.* 2 *Inst. 482.* Vide tit. *Dureos.*

So in respect to that power and authority which a husband has over his wife, the bond of *feme covert* is *ipso facto* void, and shall neither bind her nor her husband. See tit. *Baron and Feme.*

So though an infant shall be liable for his necessaries, such as meat, drink, clothes, physic, schooling, &c. yet if he bind himself in an obligation, with a penalty for payment of any of those, the obligation is void. *Duct. and Stud. 113.* *Co. Lit. 172.* *Cro. Juc. 494.* 560. 1 *Sid. 112.* 1 *Salk. 279.* *Cro. Ediz. 930.* 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 bind his bond, by reason of insanity and distraction, yet may a privy

bind him who sealed; and the rather, because otherwise the obligee would lose his debt, he having no remedy against the master. *Yelv. 137.* *Taibot v. Godbolt.*

Infants, idiots, as also *femce covert,* may be obligees; and here the husband is supposed to assent, being for his advantage; but if he disagrees, the obligation hath lost its force; so that after the obligor may plead *non est factum*; but if he neither agrees nor disagrees, the bond is good, for his conduct shall be esteemed a tacit consent, since it is to his advantage. 5 *Co. 119.* b. *Co. Lit. 3.* a. See tit. *Baron and Feme.*

An alien may be an obligee, for since he is allowed to trade and traffick with us, it is but reasonable to give him all that security which is necessary in his contracts, and which will the better enable him to carry on his commerce and dealings amongst us. *Co. Lit. 129.* b. *Moor, 431.* *Cro. Ediz. 142.* 683. *Cro. Car. 9.* 1 *Salk. 46.* 7 *Mod. 13.* 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 enthr obligees; and therefore a bond made to any of these, shall enthrce to them in their natural capacities; for no sole body politic cannot be obligees, and therefore a bond made to any of these, shall enthr be made to them in their natural capacities; for no sole body politic cannot be obligees, and therefore a bond made to any of these, shall enthr 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. Ediz. 464.* *Dyer, 48.* a. *Co. Lit. 9.* a. 46. a. *Hob. 64.* 1 *Roll. 40.* 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. *Sext. Cent. 109.* But see *Coly v. Robins,* *Hit. 2 Am. per Holt,* referred to in *Bull. N. P. 172.* that on the gene-
r al issue, defendant may give in evidence that they made him sign the bond when he was so drunk that he knew not what he did. A person enters voluntarily into a bond, though there was not any consideration for it, if there be no fraud used in obtaining the same, the bond shall not be relieved against in equity; but a voluntary bond may not be paid in a course of administration, so as to take place of real debts, even by simple contract; yet it shall be paid before legacies. 1 Chan. Cas. 157. An heir is not bound unless he be named expressly in the bond; though the executors and administrators are. Dyer, 13.

It is clearly agreed that two or more may bind themselves jointly in an obligation, or they may bind themselves jointly and severally; in which last case, the obligee may sue them jointly, or he may sue any one of them, at his election; but if they are jointly and not severally bound, the obligee must sue them jointly; also in such case, if one of them dies, his executor is totally discharged, and the survivor and survivors only chargeable. 2 Rolls Abr. 148. Dyer, 19. 310. 5 Co. 19. Dal. 85. pl. 42. 1 Salk. 393. Cartth. 61. 1 Lutw. 696.

If three enter into an obligation, and bind themselves in the words following, Obligamus nos et utrumque nostrum; per se pro solo et in solido, these make the obligation joint and several. Dyer, 19. b. pl. 114.

III. It is said, that there are only three things essentially necessary to the making a good obligation, viz. writing on paper or parchment, sealing and delivery; but it hath been adjudged not to be necessary, that the obligor should sign or subscribe his name; and that therefore if in the obligation the obligor be named Erwin, and he signs his name Erwine, 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. Nov, 21. 85. Moor, 28. Style, 97. 2 Salk. 465. 5 Mod. 261.

And though the seal be necessary, and the usual way of declaring on a bond, that the defendant, by his bond or writing obligatory scaled with his seal, acknowledged, &c. yet if the word scaled be wanting, it is cured by verdict and pleading over, for all necessary circumstances shall be intended; and if it were not scaled, 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. 538. 1 Mod. 107. In these cases, though there be a verdict, there shall not be judgment. Where an obligor's name is omitted to be inserted in the bond, and yet he signs and seals it, the court of chancery may make good such an accident; and in case a person takes away a bond fraudulently, and cancels it, the obligee shall have as much benefit thereby, as if not cancelled. 3 Chan. Rep. 99. 184.

An obligation is good though it wants a date, or hath a false or impossible date; for the date, as hath been observed, is not of the substance of the deed; but herein we must take notice, that the day of the delivery of a deed or obligation is the day of the date, though there
is no day set forth. 2 Co. 5. a. Godard's case. Nay, 21. 83, 86. Hob.

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 Satk. 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.

If a man declare on a bond, bearing date such a day, but does not take the said writing, it is always taken most by this the condition is broken. 4

A bond may be void by rasure, &c. As where the obligor says to the obligee, go and deliver another day. 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. 883. 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 Nela. 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 anything: in this case the condition was not broken for non-payment, and the other part is become impossible by the act of God. 1 Mod. Rep. 265. And when a condition is doubtful, it is always taken most favourably for the obligor, and against the obligee; but so as a reasonable construction be made as near as can be according to the intention of the parties. Dyer, 51.

If no time is limited in a bond for payment of the money, it is due presently, and payable on demand. 1 Brownl. 53. But the judges have sometimes appointed a convenient time for payment, having regard to the distance of place, and the time wherein the thing may be performed. And if a condition be made impossible in respect to time, as to make payment of money on the 30th of February, &c. it shall be paid presently; Jones, 140. See 1 Leon. 101.

A bond made to enfeoff two persons, if one dies before the time is past, wherein it should be done, the obligor must enfeoff the survivor of them; or the condition will be broken; and if it be that B. and others shall enjoy land, and the obligor and B. the obligee do disturb the rest; by this the condition is broken. 4 Hen. VII. 1. Co. Lit. 384. Where one is bound to do an act to the obligee himself, the doing it to a stranger by appointment of the obligee, will not be a
performance of the condition. 2 Butst. 149. But in such case equity
would relieve, and probably a judge, on such action coming before
him, would order plaintiff to be nonsuited. If the act be to be done
at a certain place, where the obligor is to go, to Rome, &c. and he is
to do the sole act without limitation of time, he hath term during life
to perform the same; if the concurrence of the obligor and obligee is
requisite, it may be hastened by the request of the obligee. 6 Rep.
30. 1 Roll. Abr. 437. Where no place is mentioned for performance
of a condition, the obligor is obliged to find out the person of the ob-
ligee, if he be in England, and tender the money, otherwise the bond
will be forfeited; but when a place is appointed, he need seek no
further. Co. Lit. 210. Lit. 340. And if, where no place is limited
for payment of money due on a bond, the obligor, at or after the day
of payment, meets with the obligee, and tenders him the money, but
he goes away to prevent it, the obligor shall be excused. 8 Edw. IV.

The obligor, or his servant, &c. may tender the money to save the
forfeiture of the bond, and it shall be a good performance of the con-
dition, if made to the obligee, though refused by him; yet if the ob-
ligor 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 tes-
tator, if he plead that he had delivered letters testamentary, it is suf-

If the condition of an obligation be to procure a lawful discharge,
this must be by a release, or some discharge that is pleadeble, and not
by acquittance, which is but evidence. 1 Kct. 739.

If the party who is bound to perform the condition disables himself,
this is a breach; as where the condition is, that the feoffor shall reen-
feoff, or make a gift in tail, &c. to the feoffor, and the feoffee, before
he performs it, make a feoffment or gift in tail, or lease for life or
years in præsenti or futuro to another person, or marry, or grant a
rent-charge, or be bound in a statute, or recognisance, or become
professed; in all those cases the condition is broken; for the feoffee
has either disabled himself to make any estate, or to make it in the
same plight or freedom in which he received it; and being once dis-
abled, he is ever disabled, though his wife should die, or the rent,
&c. should be discharged, or he should be derelicted, &c. before the
time of the reconveyance. Co. Lit. 221, 222. Poth. 110. 1 Co. 25. a.
1 Roll. Abr. 447. 5 Co. 21. a.

Where the condition is in the conjunctive, regularly both parts must
be performed; yet, to supply the intention of the parties, it is held,
that if a condition in the conjunctive be not possible to be performed,
it shall be taken in the disjunctive; as if the condition be, that he and
his executors shall do such a thing, this shall be taken in the disjunc-
tive, because he cannot have an executor in his life-time; so if the
condition be, that he and his assigns shall sell certain goods, this
shall be taken in the disjunctive, because both cannot do it. 1 Roll.
Abr. 444. Owen, 52. 1 Leon. 74. Goulds. 71.

See further this Dict. tit. Condition, Consideration, Gaming, Mar-
riage; as to Resignation Bonds, see tit. Possession.

A bond made with condition not to give evidence against a felon,
&c. is void; but the defendant must plead the special matter. 2 Wils.
341. &c. Condition of a bond to indemnify a person from any legal
prosecution is against law, and void. 1 Lutw. 667. And if a sheriff takes a bond as a reward for doing of a thing, it is void. 3 Salk. 75.

V. 1. Where a lesser sum is paid before it is due, and the payment is accepted, it shall be good in satisfaction of a greater sum; but after the money is due, then a lesser sum, though accepted, shall not be a satisfaction for a greater sum. Thus in debt upon bond conditioned to pay st. defendant pleaded payment of st. 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 16l. conditioned to pay 8l. 10s. on a certain day; the defendant pleaded, that before that day, he, at the request of the plaintiff, paid him 8l. which he accepted in satisfaction of the debt; and upon demurrer, the plaintiff had judgment, because the defendant had pleaded the payment of the st. generally, without alleging that it was in satisfaction of the debt. It is true, he sets forth, that it was accepted in satisfaction of the debt, but it ought likewise to be paid in satisfaction. 5 Rep. 117. Debt upon bond, conditioned, that in consideration the plaintiff had paid 12l. to the defendant; he became bound to pay the plaintiff 12l. if he lived one month after the date of that bond; and if not paid at that time, then to pay him 14l. If he lived six months after the date of the bond; the defendant pleaded, that after the six months he paid the plaintiff 8l. and then gave him another bond in the penalty of 20l. conditioned to pay him 10l. on a certain day, in full satisfaction of the other bond, and that the plaintiff did accordingly accept the said bond; upon a demurrer to this plea it was held ill; for admitting that one bond might be given in satisfaction of another, yet it cannot be after the other is forfeited, as it was in this case; because after the forfeiture, the penalty is vested in the obligee, and a less sum cannot be a satisfaction for a greater. 1 Lut. 464.

It hath been adjudged, that the acceptance of one bond cannot be pleaded in satisfaction of another bond. Cro. Car. 85. Moor, 873. Cro. Eliz. 716. 727. 2 Cro. 579. Thus in debt on a bond of 100l. conditioned for the payment of 52l. 10s. on a certain day, the defendant pleaded that at the day, &c. he and his son gave a new bond of 100l. conditioned for the payment of 52l. 10s. at another day then to come, which the plaintiff accepted in satisfaction of the old bond; and upon demurrer it was adjudged for the plaintiff, because the acceptance of a new bond to pay money at another day, could not be a present satisfaction for the money due on the day when it was to be paid on the old bond. Hob. 68. But it is otherwise where the second bond is not given by the obligor; as in debt upon bond against the defendant as heir, &c. he pleaded that his ancestor, the obligor, died intestate, and that W. R. administered, who gave the plaintiff another bond, in satisfaction of the former: there was a verdict for the defendant; and it being moved in arrest of judgment, this distinction was made; that if the obligor, who gave the first bond, had likewise given the second, it would not have discharged the first; but in this case the second bond was not given by him who gave the first, but by his administrator, which had mended the security, because he may be chargeable de bonis jurofris; and for that reason the second bond was held to be a discharge of the first. 1 Mod. 225.
2. A bond on which neither principal nor interest has been demanded for 20 years, will be presumed in equity to be satisfied, and be decreed to be cancelled; and a perpetual injunction granted to stay proceedings thereon. 1 Ch. Rep. 79. Finch. Rep. 78. See Mod. Ca. 22. But satisfaction may be presumed within a less period, if any evidence be given in aid of the presumption; as if an account between the parties has been settled in the intermediate time, without any notice having been taken of such a demand. Yet length of time is no legal bar; it is only a ground for the jury to presume satisfaction. 1 Term Rep. 270.

If several obligors are bound jointly and severally, and the obligee make one of them his executor, it is a release of the debt, and the executor cannot sue the other obligor. 8 Co. 136. 1 Salk. 300. And vide 1 Jon. 545. 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 cauciones, here the death or escape of one shall not release the other; but the same kind of execution must be taken forth against them: it is otherwise when they are sued severally. 

Hob. 59.

Also, if two or more be jointly bound, though regularly one of them alone cannot be sued, yet if process be taken out against all, and one of them only appears, but the others stand out to an outlawry, he who appeared shall be charged with the whole debt. 9 Co. 119.

If a bond is made to three, to pay money to one of them, they must all join in the action because they are but as one obligee. Yelv. 177.

So if an obligation be made to three, and two bring their action, they ought to show the third is dead. 1 Sid. 238. 420. 1 Vent. 34.

Though there be several obligees, yet a person cannot be bound to several persons severally; and therefore an obligation of 200l. to two, to pay 100l. to the one, and the other 100l. to the other, is a void condition. Dyer, 350. a. ml. 20. Hob. 172. 2 Brownl. 207. Yelv. 177.

If A. bind himself in a sum to B. to pay to C. who is a stranger, a payment to C. is a payment to B. and in an action upon it, the count must be upon a bond payable to B. 1 Sid. 295. 2 Keb. 81.

In debt the declaration was, that the defendant became bound in a bond of —— for the payment of —— to him, his attorney or assigns, and on oyer of the bond it appeared, that it was to pay to the plaintiff's attorney or assigns, without mention of himself; and on demurrer for this variance 'twas said, that the declaration must not be according to the letter of the obligation, but according to the operation of the law thereupon. 6 Mod. 228. Robert v. Harnage.

So if A. makes a bond to B. to pay to such person as he shall appoint; if B. does appoint one, payment to him is a payment to B. and if B. appoint none, it shall be paid to B. himself. 6 Mod. 228.

If A. by his bill obligatory, acknowledges himself to be indebted to B. in the sum of 10l. to be paid at a day to come, and binds himself and his heirs in the same bill in 20l. 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 10l. to be due. 2 Roll. Abr. 148. Franklin v. Turner.

If an infant seal a bond, and be sued thereon, he is not to plead non est factum, but must avoid the bond by special pleading; for this bond is only voidable, and not in itself void. 5 Reft. 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 Reft. 119. Or plead non est factum, and give coverture in evidence. If a bond depends upon some other deed, and the deed becomes void, the bond is also void.

As to the pleading of performance, the defendant must set forth in what manner he hath performed it. Thus, in debt on a bond, with condition for performance of several things, the defendant pleads that the condition of the said deed was never broken by him, and held an ill plea: because, for saving the bond, it is necessary for the defendant to show how he hath performed the condition; and this sort of pleading was never admitted. 2 Vent. 156.

So if he had pleaded that he performed every thing, it had been ill; for the particulars being expressed in the condition, he ought to plead to each particularly: but if the condition were for performance
of covenants in an indenture, performance were generally a good plea. 1 Lev. 302. This must be understood where the covenants are set forth, and appear to be all in the affirmative. For if some are in the affirmative, some in the negative, or any in the disjunctive, the defendant should plead specially.

In debt on an obligation for payment of money, &c. the defendant pleads, that at the time and place he was ready to pay the money, but that nobody was there to receive it: and held ill on a general demurrer, for want of stating a tender, for the tender only is traversable. 3 Lev. 104.

In debt on a bond with condition, the defendant pleads a collateral plea, which is insufficient; the plaintiff demurs, and hath judgment, without assigning a breach; for the defendant, by pleading a defective plea, by which he would excuse his non-performance of the condition, saves the plaintiff the trouble of assigning a breach, and gives him advantage of putting himself on the judgment of the court, whether the plea be good or not; but if the plaintiff had admitted the plea, and made a replication which showed no cause of action, it had been otherwise; but if the replication were idle, and the defendant demurred, yet the plaintiff should have judgment without assigning a breach. 1 Lev. 55. 84. 3 Lev. 17. 24. This must mean, if the plea was bad in substance.

And in all cases of debt on an obligation with condition, (that of a bond to perform an award only excepted,) if the defendant plead a special matter, that admits and excuses a non-performance, the plaintiff need only answer, and falsify the special matter alleged; for he that excuses a non-performance admits it, and the plaintiff need not show that which the defendant hath supposed and admitted. Salk. 138.

But if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff, in his replication, must show a breach; for then he has no cause of action, unless he show it: and this difference will give the true reason, and reconcile the following cases. 1 Salk. 138. 1 Lev. 55. 84. 226. 1 Sound. 102. 159. 317. 8 Lev. 17. 24. 1 Vent. 114. Cro. Eliz. 320. Yelv. 78.

But by stat. 4 Ann. c. 16. if an action of debt be brought on single bill, or judgment, after money paid, such payment may be pleaded in bar. So of a bond with a condition, upon payment of principal and interest due by the condition, though such payment was not strictly made according to the condition, yet it may be pleaded in bar. But by stat. 8 and 9 Wm. III. c. 11. § 8. in actions on bonds for performance of covenants, the plaintiff may assign as many breaches as he pleases, and the jury may assess damages. The defendant paying the damages, execution may be stayed; but the judgment to remain to answer any future breach, and plaintiff may then have sci. sa. against the defendant; and so totes quotes.

In debt on a bond, the defendant may have several pleas in bar; as if the plaintiff sue as executor, the defendant may plead the release of the testator for part, and for the residue the release of the plaintiff; so he may plead payment as to part, and as to the rest an acquittance. 1 Salk. 180.

But a defendant in an action on a bond cannot plead non est factum, and a tender as to part. 5 Term Rep. 97.

In debt on an obligation the defendant cannot plead nil debet, but must deny the deed by pleading non est factum; for the seal of the
party continuing, it must be dissolved eo ligamine quo ligatur. Hard. 332. Hob. 218.

In bonds to save harmless, the defendant being prosecuted, is to plead non damnificatus, &c.

The stealing of any bond or bill, &c. for money, being the property of any one, made felony, as if offenders had taken other goods of like value. Stat. 2 Geo. II. c. 25. See tit. Felony.

BONDAGE, Is slavery; and bondmen, in Domesday, are called servi, but rendered different from villani. El de toto tenemento, quod de ioso tenet in bondagio in sese de Nortone cum pertin. Mon. Angl. 2. par. fol. 609. See Natives.

BOND-TENANTS, Copyholders, and customary-tenants, are sometimes so called. Calthorpe on Copyholds, 51. 54. See tit. Copyhold Tenures.

BONIS NON AMOVENDIS, A writ directed to the sheriffs of London, &c. where a writ of error is brought; to charge them that the person against whom judgment is obtained be not suffered to remove his goods, till the error is tried and determined. Reg. Orig. 131.

BOOKS. By stat. 25 Hen. VIII. c. 15. no person shall buy any printed books brought from beyond sea to sell the same again, and no one shall buy books by retail brought from beyond sea by any stranger. Likewise the prices of books, excessively increased, shall be qualified by the king’s great officers. See tit. Literary Property.

By stat. 7 Ann. c. 14, § 10. if any book shall be taken, or otherwise lost out of any parochial library, any justice may grant his warrant to search for it; and if it shall be found, it shall, by order of such justice, be restored to the library.

The sole right of printing books, bequeathed to the two universities of England, the four universities of Scotland, and the colleges of Eton, Westminster and Winchester is secured to them, by stat. 15 Geo. III. c. 53.

From the seventh to the eleventh century, books were very scarce. To that was chiefly owing the universal ignorance which prevailed during that period. After the Saracens conquered Egypt in the seventh century, the communication with that country (as to Europe, &c.) was almost entirely broken off, and the papyrus no longer in use. So that paper was used, and as the price of that was high, books became extremely rare, and of great value. Vide Robertson’s History of Charles the Fifth, vol. 1. 233, 234.

In the eleventh century the art of making paper was invented, the number of manuscripts was thereby increased, and the study of the sciences greatly facilitated. See further as to books, tit. Literary Property.

BOOK or RATES. See tit. Customs.

BOOK or RESPONSES, Is that which the director of the chancery keeps, particularly to note a seizure, when he gives order to the sheriff in that part to give it to an heir, whose service has been returned to him. The form of it is respondat vice comes, &c. Scotch Dict.

BOOKSELLERS, And authors of books, &c. See tit. Literary Property.

It is thought to be so called, as being paid by the tenants by way of *bote* or *boor*, 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 *vil-lani*; 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 Galt. *bards*, the limits or extreme parts of any extent; as the borders of a country, and the borderers, inhabitants in those parts. *Splem.*

**BORD-HALFPENY**, Sax. *bord*, a table, and *halfpeny*, or half-penny. *Splem.*] 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. Splem.*

**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. *Splem.*

**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, bord-bryche, or burg-brych**, Sax.] A breach or violation of suretyship, pledge-breach, or breach of mutual fidelity.

**BOREL-POLK, i.e.** Country people, from the Fr. *bourse, slocus*, because they covered their heads with such stuffs. *Blount.*

**BORGH UPON WEIR OF LAW**, Is to find caution to answer as law will. *Scotch Dict.*

**BOROUGH, Fr. *burg*, Lat. *burgus*, Sax. *borho*.**] Signifies a corporate town, which is not a city; and also such a town or place as sends burgesses to parliament. *Verstegan* saith, that *burg*, or *burgh*, whereof we make our *borough*, metaphorically signifies a town having a wall, or some kind of enclosure about it: and all places that, in old time, had among our ancestors the name of *borough*, were one way or other fenced or fortified. *Litt.* § 164. But sometimes it is used for *villa insignis*, 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 *Hec. II.* *burghs* had so great privileges, that if a bondman or servant remained in a *borough* a year and a day, he was by that residence made a freeman. *Glauvile.*

And why these were called *free burgs*, 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 *borho*, 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. Bruct. lib. 3. tract. 2. cap. 10. Lamb. Duty of Const. p. 8. Vide Squire's Anglo-Saxon Government, 256. 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 §. Burgage-Tenure. Parliament.

BOROUGH COURTS. Vide Court. BOROUGH-HOLDERS, BORSHOLDERS, or BURSHOLDERS, quasi borh-edders. See tit. Headborough.

BOROUGH-ENGLISH, A custom relative to the descent of lands, in some ancient boroughs, and copyhold manors, that estates shall descend to the youngest son; or, if the owner hath no issue, to his younger brother; Litt. § 165. as in Edmonton, &c. Ritch. 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 stronger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding night; and that therefore the youngest son was most certainly the tenant's offspring. But it does not appear that this custom ever prevailed in England, (nor even in Scotland,) though that error for a long time prevailed. See this Dict. tit. Merchaeta Mulieriam. Possibly this custom of Borough-English may be the remnant of the pastoral state of our British and German ancestors, in which the youngest child was necessarily most helpless. See 2 Comm. 83.

This custom goes with the land, and guides the descent to the youngest son, although there be a devise to the contrary. 2 Lev. 138. If a man seised in fee of lands in Borough-English, makes a feoffment to the use of himself and the heirs male of his body, according to the course of the common law, and afterwards die seised, having issue two sons, the youngest son shall have the lands by virtue of the custom, notwithstanding the feoffment. Dyer, 179.

If a copyhold in Borough-English be surrendered to the use of a person and his heirs, the right will descend to the youngest son, according to the custom. 1 Mod. 102. And a youngest son shall inherit an estate in tail in Borough-English. Nay, 106. But an heir at common law shall take advantage of a condition annexed to Borough-English land; though the youngest son shall be entitled to all actions in right of the land, &c. 1 Nels. Abr. 395. And the eldest son shall have tithes arising out of land Borough-English; for tithes of common right are not inheritances descendent 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 representationis. 1 Salk. 243. It hath been adjudged where a man hath several brothers, the youngest may inherit lands in Borough-English: yet it is said where a custom is, that land shall go to the youngest son, it doth not give it to the youngest uncle, for customs shall be taken strictly; and those which fix and order the descents of inheritance, can be altered only by parliament. Dyer, 179. 4 Leon. 384. Jenk. Cent. 220.
By the custom of Borough-English, the widow shall have the whole of her husband's lands in dower, which is called her free-bench; and this is given to her the better to provide for the younger children, with the care of whom she is entrusted. Co. Litt. 33. 111. F. N. B. 150. Mo. pl. 366.

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 Robius. Appendix. See 1 Inst. 110. b. in n.


BOSCAGE, bosca.ugium. That food which wood and trees yield to cattle; as mast, &c. from the Ital. bosco, silva: but Manwood observes, to be quit de bosca, to be discharged of paying any duty of windfall wood in the forest. See Sphman in n.

BOSCARIA, Wood-houses. from bosca; or ox-houses, from bos. See Bostar. Mon. Angl. tom. 2. fol. 302.

BOSCUS, An ancient word, signifying all manner of wood : bosco, Ital. bois, Fr. Boscus is divided into high wood or timber, hautboys, and coppice or under-woods, sub bosca, sub bois: but the high wood is properly called a1tus, and in Fleta we read it maeremium. Cum una Carecta de mortuo bosco. Pat. 10 Hen. VI.


BOTE, Sax. A recompense, satisfaction or amends. The Saxon bote is synonymous to the word estovers. See tit. Common of Estovers. House-bote is a sufficient allowance of wood to repair, or burn in the house; which latter is sometimes called fire-bote. Plough-bote, and cart-bote, are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing of hays, hedges or fences. 2 Comm. 35. Hence also comes man-bote, compensation, or amends for a man slain, &c. In King Eda'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. compensations gratìa.

BOTELESS. In the charter of Hen. I. to Tho. Archbishop of York, it is said that no judgment or sum of money shall acquit him that commits sacrilege; but he is in English called boteless, viz. without emendation. Lib. Albis fínes Caf. de Suthnet. int. Plac. Trin. 12 Edw. II. Edor. 48. We retain the word still in common speech; as it is bootless to attempt such a thing; that is, it is in vain to attempt it.

BOTELLARIA, A buttery or cellar, in which the butts and bottles of wine, and other liquors are deposited.

BOTA, A booth, stall, or standing in a fair or market. Mon. Angl. 2. far. 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 bontha, seems to be a park where cattle are enclosed and fed. Hector Boethius, lib. 7. cap. 123. Bothna 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 Ecb. III. st. 5. cap. 21. See tit. Customs.

BOTTOMRY, or bottomree, fennis nauticum.] Is generally where a person lends money to a merchant, who wants it to traffic, and is to be paid a greater sum at the return of a certain ship, standing to the hazard of the voyage; and in this case, though the interest be greater than that allowed by law, it is not usury. See this subject more fully treated under tit. Insurance.

BOVATA TERRÆ, As much land as one ox can plough. Mon. Angl. far. 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.


BOVETTUS, A young steer or castrated bullock. Paroch. Antig. ft. 287.

BOVICULA, A heifer or young cow; which, in the east riding of Yorkshire, is called a whee, or whey.

BOUGH OR A TREE, Seisin of land given by it, to hold of the donor, in capite, Mad. Exch. 1. 62. See tit. Entry.

BOUND, or boundary, bounda.] The utmost limits of land, whereby the same is known and ascertained. See 4 Inst. 318. and tit. Abuttals.

BOUND BAILIFFS, See tit. Bailiffs.


BOUNTY OF QUEEN ANNE, for maintaining poor clergymen. See First Fruits.

BOW-BEARER, An under officer of the forest, whose office is to oversee, and true inquisition make, as well of sworn men as unsworn, in every bailiwick of the forest; and of all manner of trespasses done, either to vert or venison, and cause them to be presented, without any concealment, in the next court of attachment, &c. Crompt. Juris. fol. 201.

BOWYERS, One of the ancient companies of the city of London. By stat. 8 & 9 Eliz. c. 10, a bowyer dwelling in London, was to have always ready fifty bows of elm, witch-basilc or ash, well made and wrought, on pain of 10s, for every bow wanting; and to sell them at certain prices, under the penalty of 40s. And by stat. 12 Edw. IV. c. 2, pa-
rents and masters were to provide for their sons and servants, a bow and two shafts, and cause them to exercise shooting, on pain of 6s. 8d. &c. See also stat. 33 Hen. VIII. c. 6. and tit. Game.

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

BRACENARIUS, Fr. bracconier.] A huntsman, or master of the hounds. Anno 25 Edw. I. Rot. 10. in dorso.

BRACETUS, A hound: brachetius is in Fr. brachet, braco canis sagax, indicagator leporum: so braco was properly the large fleet hound; and brachetus, the smaller hound; and brachete the bitch of that kind. Monast. Ang. tom. 2. p. 283.

BRACINUM, A brewing: the whole quantity of ale brewed at one time, for which relator was paid in some manors.

BRANDING in the hand or face, with a hot iron, a punishment inflicted by law, for various offences, after the offender hath been allowed clergy. See tit Clergy, benefit of.

BRANDY, A liquor made chiefly in France, and extracted from the lees of wine. In the stat. 20 Car. II. cap. 1. upon an argument in the Exchequer, anno 1668, whether brandy were a strong water or spirit, it was resolved to be a spirit: but in the year 1669, by a grand committee of the whole house of commons, it was voted to be a strong water perfectly made. See the stat. 22 Car. II. cap. 4. See tit. Customs, Excise, Navigation Act.

BRASIL, Malt: in the ancient statutes braziator is taken for a brewer, from the Fr. brasseur; and at this day is used for a maltster or malt-maker. Paroch. Antig. p. 496.

BRASS, Is to be sold in open fairs and markets, or in the owners' houses, on pain of 10l. 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 of offices, and in counties by justices of peace, &c. and in default thereof, any other person skilful in that mystery, by oversight of the head officer, may take upon him the search of defective brass, to be forfeited, &c. Stat. 19 Hen. VII. c. 6. Brass and pewter, bell-metal, &c. shall not be sent out of the kingdom, on pain of forfeiting double value, &c. Stats. 33 Hen. VIII. c. 7. and 3 Edw. VI. c. 37.

BRAWLING OR QUARRELLING IN THE CHURCH. See Church, Churchwarden.

BREACH or CLOSE. See tit. Trespass.

BREACH or COVENANT, The not performing of any covenant, expressed or implied, in a deed; or the doing an act, which the party covenanted not to do. See tit. Covenant.

BREACH or DUTY, The not executing any office, employment or trust, &c. in a due and legal manner.

BREACH or PEACE. Offences against the public peace, are either such as are an actual breach of the peace, or constructively so, by aiding to make others break it. See tit. Peace.

BREACH or POUND, The breaking any pound or place where cattle or goods distrained are deposited, to rescue such distress. See tit. Distress, Pound-break.

BREACH or PRISON. See tit. Escape, Prison-breaking.

BREACH or 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
hond, conditioned to give account of goods, &c. a breach must be alleged, or the plaintiff will have no cause of action. 1 Saund. 102. See tit. Bond, Condition, Covenant.

BREAD AND BEER. The assise of bread, beer, and ale, &c. is granted to the lord mayor of London and other corporations: bakers, &c. not observing the assise to be set in the pillory. Stat. 51 Hen. III. st. 1. Ord. Pastor. and 51 Hen. III. st. 6. Vide 2 and 3 Edw. VI. c. 15.

By stat. 31 Geo. II. c. 29. (explained and restrained as to time of prosecution to seven days, 33 Geo. III. c. 37.) containing regulations concerning the assise of bread, and to prevent adulteration, so much of stat. 51 Hen. III. st. 6. entitled, assisa jwnis et cervisit, as relates to the assise of bread, and the stat. 8 Ann. c. 18. and all amendments by subsequent acts are repealed. The weight of the peck loaf, when well baked, is fixed at 17lb. 6oz. And the rest in proportion. The weight of a sack of flour, at 2 cwt. 2 yrs. or 280lb. net, which is to produce twenty peck loaves, weighing 34lbs. 8oz. So that 3lbs. 6oz. is added to the weight of the flour by the materials of each peck loaf when baked. And see farther stat. 32 Geo. II. c. 18. how penalties not appropriated by stat. 31 Geo. II. c. 29. shall be distributed. See also stat. 5 Geo. III. c. 6. (for Scotland), &c. and c. 11. wherein there are farther regulations concerning the assise of bread, and for preventing the adulteration thereof.

See also stat. 13 Geo. III. c. 62. as to standard wheaten bread. And see tit. Corn.

See 36 Geo. III. c. 22. now in force, and amended by 41 Geo. III. (U. K.) c. 12. respecting inferior sorts of bread. 37 Geo. III. c. 98. 38 Geo. III. c. 62. and c. 53. 39 and 40 Geo. III. c. 74. and c. 97. and 43 Geo. III. c. 25. as to the assise and price of bread in London and its environs. 39 and 40 Geo. III. c. 18. and c. 74. 41 Geo. III. st. 1. c. 16. 17. and 41 Geo. III. (U. K.) c. 1, 2. for temporary regulations to prevent the sale of bread till baked twenty-four hours.

By stat. 54 Geo. III. c. 61. bakers are prohibited from carrying on their trade during Sundays, except at certain hours.

Under these statutes bread deficient in weight or quality, may be seized by justices, mayors, &c. and bread is to be marked by the bakers according to its quality, W. for wheaten, and H. for household.

BREAD OF TREET, or TRITE, panis tritici.] Is bread mentioned in the statute 51 Hen. III. of assise of bread and ale, wherein are particularized wastel-bread, cocket-bread, and bread of treet, which answer to the three sorts of bread mentioned in the statute of Anne, called white, wheaten, and household bread. In religious houses they heretofore distinguished bread by these several names panis armoriorum, panis conventualis, panis fuenorum et panis famulorum. Antig. Nat.

BREAKING of ARRESTMENT. Is an action wherein it is narrated, that though arrestment was laid on, payment, nevertheless, was made; the pursuer therefore concludes, that the breaker should rebound him, and besides should be punished according to law. Scotch Dict.

BRECCA, From the Fr. breche.] A breach or decay. In some ancient deeds there have been covenants for repairing muros et breccas portas et fossatas, &c. De brecca aque inter Woolwich et Greenwich supervenient. Pat. 16. Rich. II. A duty of 3d. per ton on shipping was granted for amending and stopping of Dagenham breach, by stat. 12 Ann. c. 17.
BRECEINA. Vide Bracium.

BREDE, A word used by Bracton for broad; as too large and too brede, is proverbially too long and too bread. 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.


BREISNALIGM, A payment in bran, which tenants anciently made to feed their lord's hounds. Blount.

BRETOYSE, or BRETOISE, The law of the marches of Wales in practice among the ancient Britons.

BREVE, A writ; by which a man is summoned or attached to answer in action; or whereby any thing is commanded to be done in the king's courts, in order to justice, &c. It is called breve, from the brevity of it; and is directed either to the chancellor, judges, sheriffs, or other officers. Bract. lib. 5. tract. 5. cap. 17. See Skene de verb. Breve. and this Dict. tit. Writ.

BREV PERQUIRERE, To purchase a writ or license of trial, in the king's courts, by the plaintiff, qui breve jurequisivit: and hence comes the usage of paying 6s. 8d. fine to the king, where the debt is 40l. and of 10s. where the debt is 100l. &c. in suits and trials for money due upon bond. &c.

BREV DE RECTO, A writ of right, or license for a person ejected out of an estate, to sue for the possession of it when detained from him. See tit. Right.

BREVIA TESTATA. It is mentioned by the feodal writers. Vide Feud. l. 1. 64. Our modern deeds are in reality nothing more than an improvement or amplification of the brevia testata. See tit. Deed.

BREVIBUS ET ROTULIS LIBERANDIS, A writ or mandate to a sheriff to deliver unto his successor the county, and the appurtenances, with the rolls, briefs, remembrances, and all other things belonging to that office. Reg. Orig. fol. 295.

BREWERS. As to the dimensions of their casks, see tit. Cooperers. By stat. 24 Geo. III. st. 2. c. 41. brewers of strong and small beer are to take out annual licenses from the officers of excise. Brewers are by this and other acts subject to various regulations under the excise laws. Duties of excise are imposed on beer and ale by various acts. Notice to the excise office must be given, and entry made, of places for brewing beer and ale. See stats. 12 Car. II. c. 24. 15 Car. II. c. 11. and 5 Geo. III. c. 43. See also stats. 1 Wm. & M. st. 1. c. 24. 7 and 8 Wm. III. c. 39. 8 and 9 Wm. III. c. 19. 33 Geo. III. c. 23. 42 Geo. III. c. 38. to prevent frauds by brewers. Private persons may brew beer in their own houses, for their family, or to give away, but must not lend their brew-house for other purposes, on penalty of 50l. Stat. 22 and 23 Car. II. c. 5. § 10. By stat. 32 Geo. III. c. 8. § 1. common brewers must not sell beer in less quantities than casks of 4 1/2 gallons. By a by-law of the common council, brewers' drays shall not be in the streets of London after eleven in the forenoon in summer, and one in winter. 2 Stra. 1085. Hardw. 405. Anstr. 91.

BРИBERY, From the Fr. briber, to devour or eat greedily.] Is a high offence, where a person, in a judicial place, takes any fee, gift,
reward or brocage, for doing his office, or by colour of his office, but of the king only. 3 Inst. 145. Hawk. P. C. 1. c. 67.

Taken more largely, it signifies the receiving, or offering, any undue reward, to or by any person concerned in the administration of public justice, whether judge, officer, &c. to influence his behaviour in his office; and sometimes it signifies the taking or giving a reward for appointing another to a public office. 3 Inst. 9. 4 Comm. 139.

To take a bribe of money, though small, is a great fault; and judges' servants may be punished for receiving bribes. If a judge refuse a bribe offered him, the offerer is punishable. Fortescue, cap. 51.

Bribery in inferior judicial or ministerial officers is punished by fine and imprisonment, which may also be inflicted on those who offer a bribe, though not taken. 4 Comm. 149. 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 Tho. was hanged for this offence in the reign of Edw. III. And by stat. 11 Hen. IV. all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service for ever. 4 Comm. 149. cites 3 Inst. 146. In the reign of King James I. the earl of Middlesex, lord treasurer of England, being impeached by the commons for refusing to hear petitions referred to him by the king, till he had received great bribes, &c. was, by sentence of the lords, deprived of all his offices, and disabled to hold any for the future, or to sit in parliament; also he was fined fifty thousand pounds, and imprisoned during the king's pleasure. 1 Hawk. P. C. c. 67. § 7. But the fine was remitted on the accession of Car. I. and the proceeding appears to have been instigated rather by revenge than justice. In 11th King George I. the lord chancellor was impeached by the commons with great zeal, for bribery, in selling the places of masters in chancery, for exorbitant sums, and other corrupt practices, tending to the great loss and ruin of the suitors of that court; and the charge being made good against him, being before devested of his office, he was sentenced by the lords to pay a fine of thirty thousand pounds, and imprisoned till it was paid. See 6 & 7. T. 112.

By stat. 12 Rich. II. c. 2. the chancellor, treasurer, justices of both benches, barons of the exchequer, &c. shall be sworn not to ordain or nominate any person in any office for any gift, brocage, &c. And the sale of offices concerning the administration of public justice, &c. is prohibited on pain of forfeiture and disability, &c. by 5 and 6 Edw. VI. c. 16. In the construction of the last-mentioned statute, it has been resolved that the offices of the ecclesiastical courts are within the meaning of that act, as well as the offices in the courts of common law, but no office in fee is within the statute, and it hath been adjudged, that one who contracts for an office, contrary to the purport of the said statute 5 and 6 Edw. VI. c. 16. is so disabled to hold the same, that he cannot be restored to the capacity of holding it by any grant or dispensation whatsoever. Cro. Jac. 269. 386. 1 Hawk. P. C. c. 67. It is said the statute does not extend to the plantations. Salk. 411. 1 Hawk. P. C. c. 67. § 5.

To bribe persons either by giving money or promises, to vote at elections for members of corporations, which are erected for the sake of public government, is an offence for which an information will lie. 12 Mod. 314. 2 Ld. Raym. 1577. 1 Black. 383. But the court will
grant such information very cautiously, since the additional penalties by statute. 1 Black. 380. See tit. Parliament.

An attempt to induce a man to advise the king under the influence of a bribe, is criminal, though never carried into execution. 4 Burr. 2499. Offering money to a privy councillor, to procure the revision of an office in the gift of the crown, has been adjudged a misdemeanor and punishable by information. Rex v. Vaughan, 1 Hawk. P. C. c. 67. § 7. in note.

As to officers of customs, &c. taking bribes, see tit. Custom.

Taking money to excuse persons from serving on juries subjects the offender to a fine, not exceeding ten pounds, at the discretion of the judge. Stat. 3 Geo. II. c. 25. § 6.

As to bribery in elections to parliament, see tit. Parliament VI. (B. 3.) and further in general tit. Extortion.

BRIBOUR, Fr. brièur.] Seems to signify in some of our old statutes, one that pilfers other men's goods. 28 Edw. II. cap. 1.

BRICOLLS, An engine mentioned in Blount by which walls were beaten down.

BRICKS AND TILES. By stat. 17 Edw. IV. c. 4. the earth for tiles is to be dug and cast up before the first of November yearly, stoned and turned before the first of February, and wrought before the first of March following. Every common tile must be 10 1-2 inches long, 6 1-4 bread, and half an inch thick. Roof tiles 13 inches long, &c. And persons selling tiles contrary hereto, forfeit double the value, and are liable to fine.

By stat. 17 Geo. III. c. 42. bricks when burnt are to be 8 1-2 inches long, 2 1-2 thick, and four wide. Contracts for engrossing and enhancing the price of bricks made void, and a penalty of 20l. imposed on the parties, and directions are given as to pantiles.

Bricks and tiles are liable to duties of excise, and to regulations for securing that duty, in Great Britain and Ireland. See 24 Geo. III. st. 2. c. 24. 25 Geo. III. c. 66. 34 Geo. III. c. 15. 37 Geo. III. c. 14. 15. 41 Geo. III. (U. K.) c. 91. 43 Geo. III. c. 69. 45 Geo. III. c. 30.

BRIDGE, pont.] A building of stone or wood erected across a river, for the common ease and benefit of travellers. Public bridges, which are of general convenience, are of common right to be repaired by the whole inhabitants of that county in which they lie. Hale's P. C. 143. 13 Co. 33. Cro. Car. 365.

Where a particular district rebuilt a foot bridge over a more convenient part of the stream, and convert it into a bridge for horses, carts and carriages; as the district was not bound by custom to build or repair such a bridge, but a foot-bridge only, and as they built quite a different bridge in a different place, which proved of common public utility to the county, the county, and not the district, are bound to repair it. Burr. 2594. Black. 665.

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. Dalh. 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. Le Raym. 856.
At common law those who are bound to repair public bridges, must make them of such height and strength as shall be answerable to the course of the water; and they are not trespassers if they enter on any land adjoining to repair them, or lay the materials necessary for the repairs thereon. *Dalt.* cap. 16. If a man erects a bridge for his own use, and the people travel over it as a common bridge, he shall notwithstanding, repair it: though a person shall not be bound to repair a bridge, built by himself for the common good and public convenience, but the county must repair it. 2 *Inst.* 701. 1 *Salk.* 359. Where inhabitants of a county are indicted for not repairing a bridge, they must set forth who ought to 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 demesne 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 *Daw.* Abr. 744. 1 *Salk.* 358.

So if a manor, subject to such charge, comes into the hands of the crown, yet the duty upon it continues; and any person claiming afterwards under the crown, the whole manor, or any part thereof, shall be liable to an indictment or information, for want of due repairs. 1 *Salk.* 358.

If part of a bridge lie within a franchise, those of the franchise may be charged with the repairs for so much: also by a special tenure, a man may be charged with the repairs of one part of a bridge; and the inhabitants of the county are to repair the rest. 1 *Hawk.* P. C. c. 77. § 2. *Raym.* 384, 385. Indictments for not repairing of bridges, will not lie but in case of common bridges on highways; though it hath been adjudged they will lie for a bridge on a common footway. *Mod.* Cas. 256. Not keeping up a ferry, being a common passage for all the king's people, is indictable, as well as not keeping up bridges. 1 *Salk.* 12.

By stat. 22 *Hen.* VIII. c. 5. all householders dwelling in any county or town, whether they occupy lands or not: and all persons who have land in their own possession, whether they dwell in the same county or not, are liable to be taxed as inhabitants, towards the repairs of a public bridge. Where it cannot be discovered who ought to repair a bridge, it must be presented by the grand jury in quarter-sessions; and after their inquiry, and the order of sessions upon it, the justices may send for the constables of every parish, to appear at a fixed time and place, to make a tax upon every inhabitant, &c. but it has been usual, in the levying of money for repairs of bridges, to charge every hundred with a sum in gross, and to send such charge to the high constables of each hundred, who send their warrants to the petty constables, to gather it, by virtue whereof they assess the inhabitants of
parishes in particular sums, according to a fixed rate, and collect it; and then they pay the same to the high constables, who bring it to the sessions.

This method of raising money was long observed; but by statute 1 Ann. cap. 18. justices in sessions, upon presentment made of want of reparations, are to assess every town, parish, &c. in proportion, towards the repairs of a bridge; and the money assessed is to be levied by the constables of such parishes, &c. and being demanded, and not paid in ten days, the inhabitants shall be distrained; and when the tax is levied, the constables are to pay it to the high constable of the hundred; who is to pay the same to such persons as the justices shall appoint, to be employed according to the order of the justices, towards repairing of the bridge; and the justices may allow any person concerned in the execution of the act, 3d. per pound out of the money collected. All matters relating to the repairing and amending of bridges, are to be determined in the county where they lie, and no presentment or indictment shall be removed by certiorari. And by this statute, the evidence of the inhabitants of those places where the bridges are in decay, shall be admitted at any trial upon an information or indictment, &c.

By 14 Geo. II. c. 33. the justices at their general sessions, may purchase or agree with persons for any piece of land, not above one acre, near to any county bridge, in order to enlarge or more conveniently rebuild it; and the ground shall be paid for out of the money raised by statute of 12 Geo. II. c. 29. for better assessing, collecting and levying of county rates, &c. See tit. County Rates.

By the said stat. 12 Geo. II. c. 29. § 14. when any public bridges, &c. are to be repaired at the expense of the county, the justices at their general or quarter sessions, after presentment made by the grand jury, of their want of repairation, may contract with any person for rebuilding or repairing the same, for any term not exceeding seven years, at a certain annual sum. They are to give public notice of their intention to make such contracts, which are to be made at the most reasonable prices, and security given by the contractors for performance; which contracts are to be entered with the clerk of the peace.

43 Geo. III. c. 39. surveyors of county bridges, &c. in England, empowered to get materials for the repair of bridges in the same manner as surveyors of highways, under 13 Geo. III. c. 78. Quarter sessions may widen and improve or alter the situation of county bridges, &c. Id. § 2. Tools and materials provided by the quarter sessions vested in the surveyor. Id. § 3. Inhabitants of counties may sue for damage done to bridges in the name of surveyors. Id. § 4. What sort of bridges inhabitants of counties shall be liable to repair. Id. § 5. Act shall not extend to bridges repaired by tenure. § 7.

No persons are compellable to make a new bridge but by act of parliament; and the inhabitants of the whole county cannot, of their own authority, change a bridge from one place to another.

If a man has toll for men and cattle, passing over a bridge, he is to repair it; and toll may be paid in these cases, by prescription or statute.

BRIDGE-MASTERS. There are bridge-masters of London-bridge, chosen by the citizens, who have certain fees and profits belonging to their office, and the care of the said bridge, &c. Lex Londin. 283.

BRIEF, brevis.] An abridgment of the client's case, made out for the instruction of counsel on a trial at law; wherein the case of the party is to be briefly but fully stated, the proofs must be placed in due
order, and proper answers made to whatever may be objected against the client's cause, by the opposite side; and herein great care is requisite that nothing be omitted to endanger the cause.

An attachment has been granted against a party and his attorney for surreptitiously getting possession of the brief of a counsel on the other side, and applying the same to an improper purpose in his defence. See Bateman v. Conway, 1 Bro. P. C. 519. 8vo. ed.

Though a brief is not of itself evidence against the party for whom it is prepared, yet, as a discovery of the secrets and merits of his case may be productive of perjury, or subornation of perjury, and thereby obstruct the justice of the court in which the suit is depending; the obtaining of it in a surreptitious manner is an offence highly deserving censure and punishment. Id.

**Brief at Evesque**, A writ to the bishop, which in Quare Impeedit, shall go to remove an incumbent, unless he recover, or be presented pendente lite. 1 Keb. 386.

**Brief of the Chancery**, is a writ or command from the king to a judge, to examine by an inquest, whether a man be nearest heir. Scotch Dict.

**Brief of Distress**, Is a writ out of the chancery, after decree obtained against any landlord to distress his readiest goods, according to the old custom, now obsolete. Scotch Dict.

**Brief of Mortanestry**, Is that which is used for entering of all heirs of defuncts. Scotch Dict.

Briefs, or licenses to make collection for repairing churches, restoring loss by fire, &c. See tit. Churchwardens, III. 1.

**Briga**, Fr. briguer.] Debate or contention.

**brigandine**, Fr. Lat. lorica.] A coat of mail or ancient armour, consisting of many jointed and scale-like plates, verypliant 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 ancient name for the inhabitants of Yorkshire, Lancashire, bishoprick of Durham, Westmorland and Cumberland. Blount.

**brigbote**, or **brug-bote**, Sax. brig, fontus, and bote, compen-satio.] 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. Spen. v. Brigboe and Burghbote.

**bristol**, A great city, famous for trade. The mayor, burgesses, and commonalty of the city of Bristol, are conservators of the river Avon, from above the bridge there, to King-road, and so down the Severn to the two islands called Holmes; and the mayor and justices of the said city may make rules and orders for preserving the river, and regulating pilots, masters of ships, &c. Also for the government of their markets; and the streets are to be kept clean and paved, and lamps or lights hung out at night. Stat. 11 & 12 W. III. c. 23. No person shall act as a broker in the city of Bristol, till admitted and licensed by the mayor and aldermen, &c. on pain of forfeiting 500L. and those who employ any such, to forfeit 50L. &c. by stat. 3 Geo. II. c. 31. By the stat. 22 Geo. II. c. 20. the stat. 11 & 12 W. III. is rendered more effectual, so far as it relates to the paving and enlightening the streets;
and divers regulations are made in relation to the hackney-coachmen, halliers, draymen, and carters, and the markets and sellers of hay and straw, within the said city; and liberties thereof.

**BROCAJGE**, brocagium.] The wages or hire of a broker, which is also termed brokerage. 12 Rich. II. c. 2.

**BROCELLA.** This word, as interpreted by Dr. Thoroton, signifies a wood; and it is said to be a thicket or covert of bushes and brushwood, from the obsolete Lat. *brusca, terra bruscosa et brocia*, Fr. *broce, brocelle*; and hence is our broce of wood, and brouning 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 succus to carry dry, and brochie liquid things.

**BRODEHALFPENY, or BROADHALFPENY.** See Bordha!.

**BROKERS, broccatores, broccarii et auxionarii.** Are those that contrive, make, and conclude bargains and contracts between merchants and tradesmen, in matters of money and merchandise, for which they have a fee or reward. These are Exchange brokers; and by the stat. 10 Rich. II. cap. 1. they are called broggers; also broggers of corn is used in a proclamation of Queen Elizabeth, for badgers. Baker's Chron. fol. 411. The original of the word is from a trader broken, and that from the Sax. *broc*, misfortune, which is often the true reason of a man's breaking; so that the name of broker came from one who was a broken trader by misfortune, and none but such were formerly admitted to that employment; and they were to be freemen of the city of London, and allowed and approved by the lord mayor and aldermen, for their ability and honesty.

By the stat. 6 Ann. c. 16. they are to be annually licensed in London by the lord mayor and aldermen, who administer an oath, and take bond for the faithful execution of their offices. If any person shall act as brokers, without being thus licensed and admitted, they shall forfeit the sum of 500l. And persons employing them 50l. and brokers are to register contracts, &c. under the like penalty; also brokers shall not deal for themselves, on pain of forfeiting 200l. They are to carry about them a silver medal, having the king's arms, and the arms of the city, &c. and pay 40s. a year to the chamber of the city.

As to brokers in Bristol, see tit. Bristol. And as to Pawnbrokers, see that title. As to Brokers illegally dealing in the funds or stocks, who are usually known by the appellation of stock-jobbers, see tit. Funds.

**BROK, An old sword or dagger.**

**BROSSUS, Bruised or injured with blows, wounds, or other casualty.** Cowel.

**BROTHEL-HOUSES, Lewd places, being the common habitations of prostitutes. A brothelman was a loose, idle fellow; and a femme bordelier or brotheliere, a common whore; and borelman is a contraction of brothelman. Chaucer. See Bawdy House.**

**BRUDEBOTE.** See Briggote.

**BRUERE, Lat. erica.** Signifies heath-ground; and bruerea, briars, thorns, or heath, from the Sax. *bret, briaw*. Paroch. Antiq. 630.

**BRUIILLUS, A wood or grove, Fr. brelt, bresul, a thicket or clump of trees in a park or forest. Hence the abbey of Bruer, in the forest of Wicewood, in com. Oxon. and Bruel, Brexul, or Brill, a hunting seat of our ancient kings in the forest of Burnwood, in com. Bucks.**
BRUILLETUS, A small coppice or wood.
BRUNETIA, Properly Burnetia, which see.
BRUSCIA, Seems to signify a wood. Monast. tom. 1. pag. 753.

BUBBLES. The South Sea project, and various other schemes, similar in the end intended, that of defrauding the subject, though different as to the means, were called by the name of bubbles. The stat. 6 Geo. I. c. 18. makes all unwarrantable undertakings, by unlawful subscriptions, subject to the penalties of a pernament. See tit. Funds.

BUCKLARIUM, A buckler. Claus. 26 Ed. I. n. 8. intus.

BUCKSTALL, A toil to take deer, which, by the stat. 19 Hen. VII. c. 11. is not to be kept by any person that hath not a park of his own, under penalty. See also 3 Jac. I. c. 13. There is a privilege of being quit of amerciements for buckstalls. Privileg. de Sempringham. See 4 Inst. 306.

BUCKWHEAT, French wheat, used in many counties of this kingdom; in Essex it is called branke, and in Worcestershire, craft. It is mentioned in the stat. 15 Cor. II. c. 5.

BUCINUS, A military weapon for a footman. Tenures, p. 74.

BUGGERY, or Sodomy. Comes from the Italian bugarone or buggerme, 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. 38. 12 Co. Rep. 36. This sin against God, nature, and the law, it is said, was brought into England by the Lombards. Rot. Part. 50 Ed. III. numb. 38. 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, and punished as other felonies, by stat. 25 Hen. VIII. cap. 6, enforced by 5 Eliz. c. 17.

By the articles of the navy, (Art. 29. stat. 22 Geo. II. c. 33.) if any person in the fleet shall commit the unnatural and detestable sin of buggery or sodomy with man or beast, he shall be punished with death by the sentence of a court martial.

It is felony both in the agent and patient consenting, except the person on whom it is committed is 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 accessories before and after the fact; but though none of the principal offenders shall be admitted to clergy, the accessories are not excluded. 1 Hale's Hist. P. C. 670.

In every indictment for this offence, there must be the words rem. habuit venerem et carnaliter cognovit, &c. and of consequence some kind of penetration and emission must be proved; but any the least degree is sufficient. 1 Hawk. P. C. c. 4. The general words of those indictments are, that A. B. on such a day, at, &c. with force and arms, made an assault upon C. D. and then and there wickedly, devilishly, feloniously, and against the order of nature, committed the venereal act with the said C. D. and carnally knew him, and then and there wickedly, &c. did with him that sodomitical and detestable sin called buggery, (not to be named among Christians,) to the great displeasure of God, and disgrace of all mankind, &c. This crime is
excepted out of our acts of general pardon. This, says Blackstone, is a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for, if false, it deserves a punishment inferior only to that of the crime itself.

BUILDINGS. If a house new built exceeds the ancient foundation, whereby that is the cause of hindering the lights or air of another house, action lies against the builder. Hob. 131. In London a man may place ladders or poles upon the ground, or against houses adjoining, for building his own, but he may not break ground; and builders of houses ought to have license from the mayor and aldermen, &c. for a board in the streets, which are not to be encumbered. Cit. Lib. 30. 146. In new building of London it was ordained, that the outsides of the buildings be of brick or stone, and the houses for the principal streets to be four stories high, having, in the front, balconies, &c. by stat. 19 Car. II. c. 3.

The laws for regulating of all buildings in the cities of London and Westminster, and other parishes and places in the weekly bills of mortality, the parishes of St. Mary-le-bone and Paddington, St. Pancras, and St. Luke at Chelsea, for preventing mischief by fire, are reduced into one act by stat. 14 Geo. III. c. 75. The regulations of this law being very minute and technical, we must refer the reader to the statute itself. See tit. Fire.

BULL. bulla.] A brief or mandate of the pope or bishop of Rome, from the lead, or sometimes gold seal affixed thereto, which Mat. Paris., anno 1237, thus describes: In bulla domini sancta stat imago Pauli in dextra crucis in medio bulla figurae et Petri a sinistra. These decrees of the pope are often mentioned in our statutes, as 25 Ed. III. 28 Hen. VIII. cap. 16. 1 & 2 P. & M. c. 8, and 13 Eliz. cap. 2. They were heretofore used, and of force, in this land; but by the stat. 28 Hen. VIII. c. 16. it was enacted, That all bulls, briefs, and dispensations had or obtained from the bishop of Rome, should be void. And by stat. 13 Eliz. c. 2. (see stat. 23 Eliz. c. 1.) if any person shall obtain from Rome any bull or writing, to absolve or reconcile such as forsake their due allegiance, or shall give or receive absolution by colour of such bull, or use or publish such bull, &c. it is high treason. See Rome, Papist.

BULL AND BOAR. By the custom of some places, a parson may be obliged to keep a bull and a boar for the use of the parishioners, in consideration of his having tithes of calves, pigs, &c. 1 Roll. Abr. 559. 4 Mod. 241.

BULLIO SALIS, As much salt as is made at one weighing or boiling. A measure of salt, supposed to be twelve gallons. Mon. Ang. Ion. 2.

BULLION, Fr. bullon.] The ore or metal whereof gold is made; and signifies with us gold or silver in bullæ, in the mass before it is coined. Anno 9 Edw. III. st. 2. c. 2. See tit. Coin, Money. Sec 43 Geo. III. c. 49.

BULTEL, The bran or refuse of meal after dressed; also the bag wherein it is dressed is called a bulter, or rather boulter. The word is mentioned in the statute de assisâ panis et cervitâ, anno 51 Hen. III. Hence comes bulted or boulted bread, being the coarsest bread.

BUNDLES. A sort of records of the Chancery, lying in the office of the Rolls; in which are contained, the files of bills and answers;
of hab. cor. cum causa; certioraris; attachments, &c.; seire facias; certificates of statute-staple; extents and liberates; supersedeases; bail 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. Par. 17 Hen. VIII.

Bur dare, To jest or trifle. Mat. Paris, Addit. p. 149.


Tenure in Burgage, is described by Glanvill, (lib. 7. c. 3.) and is expressly said by Littleton, § 162. to be but tenure in socage; and it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain. Litt. § 162, 163.

It is indeed only a kind of town-socage; as common socage, by which other lands are held, is usually of a rural nature. A borough is usually distinguished from other towns by the right of sending members to parliament; (see tit. Borough;) and where the right of election is by burgage-tenure, that alone is a proof of the antiquity of the borough. Tenure in Burgage, or Burgage Tenure, therefore is, where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage by a certain established rent. 2 Comm. 82.

The free socage in which these tenements are held seems to be plainly a remnant of Saxon liberty; which may also account for the great variety of customs affecting many of these tenements so held in ancient burgage, the principal and most remarkable of which is, that called Borough-English. See that title.

Other special customs there are, in different burgage-tenures; as in some, that the wife shall be endowed of all her husband's tenements, and not of the third part only, as at common law. Litt. § 166. In others that a man might (previous to stat. Hen. VIII.) dispose of his tenements by will; Litt. § 167. though this power of disposal was allowable in the Saxon times, a pregnant proof that these liberties of socage tenure were fragments of Saxon liberty. 2 Comm. 84.

Burg, A small walled town, or place of privilege, &c. See Borough.

Burgbote, from burg, castellum, and bote, compensatio.] Is a tribute or contribution towards the building or repairing of castles, or walls of a borough or city; from which divers had exemption by the ancient charters of the Saxon kings. Raval. burg-bote significat qui tantum reparations murorum civitatis vel burgi. Fleta, lib. 1. c. 47. Sheil. v. Burghbote.

Burgesses, burgari et burgenses.] Properly men of trade, or the inhabitants of a borough or walled town; but this name is usually given to the magistrates of corporate towns.

In Germany, and other countries, they confound burgess and citizen; but we distinguish them, as appears by the stat. 5 Rich. II. c. 4. where the classes of the commonwealth are thus enumerated: count, baron, baronet, chevalier de countee, citizen de cite, burgess de burgh. See Co. Lit. 80. Those are also called burgesses, who serve in parliament for any borough or corporation. See tit. Parliament. Burgesses.
of our towns are called, in Domesday, the homines of the king, or of some other great man; but this only shows whose protection they were under, and is not any infringement of their civil liberty. Squire, Ang. Sax. Gov. 260. n. Burgenes et homines burgorum et villarum, Madox. Excheg. 1 V. 333. The aid of burghs, ib. 1 V. 600, 601. See it. Borough.

BURGH-BRECHE, Fidejussionis violatio. A breach of pledge, Splem.] It is used for a fine imposed on the community of a town, for a breach of the peace, &c. Leg. Canuti, cap. 55.

BURGERHISTHE, or burgberiche, used in Domesday-book for a breach of the peace in a city. Blount.

BURGHOTE. See Burgbote.

BURGMOTE, A court of a borough. LL. Canuti, MS. cap. 44.

BURGHWARE, quasi burgover. A citizen or burgess.

BURGLARY, Burgi latrocinium; by our ancient law called hame­wecken, as it is in Scotland to this day. 4 Comm. 223.] A felony at common law, in (1) breaking and entering (2) the mansion-house of another, or the walls or gates of a walled town, or a church, (see Sacrilege,) (3) in the night, (4) to the intent to commit some felony within the same; whether the felonious intent be executed or not. 1 Hawk. P. C. c. 38. § 1. 10. 4 Comm. 224.

It seems the plainest method to consider the subject according to the four parts of the above definition; and (5) to add something on the punishment of this offence.

1. There must be both a breaking and an entry to complete this offence. 1 Hawk. P. C. c. 38. § 3.

Every entrance into the house by a trespasser is not a breaking in this case, but there must be an actual breaking. As if the door of a mansion-house stand open, and the thief enters, this is no breaking. So it is if the window of the house be open, and a thief, with a hook or other engine, draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 Inst. 64. But the following acts amount to an actual breaking, viz. opening the casement, or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 Hale's H. P. C. 552.

Having entered by a door which he found open, or having lain in the house by the owner's consent, unlatching a chamber-door, or coming down the chimney. 1 Hawk. P. C. c. 38. § 4.

If thieves pretend business to get into a house by night, and thereupon the owner of the house opens his door, and they enter and rob the house, this is burglary. Kel 42.

So if persons designing to rob a house, take lodgings in it, and then fall on the landlord and rob him; or where persons intending to rob a house, raise a hue and cry, and prevail with the constable to make a search in the house, and having got in by that means, with the owner's consent, bind the constable, and rob the inhabitants; in both these instances they are guilty of burglary, for these evasions rather increase the crime. 1 Hawk. P. C. c. 38. § 5.

If a person be within the house, and steal goods, and then open the house on the inside, and go out with the goods, this is burglary, though the thief did not break the house. 3 Inst. 64. But this
BURGLARY 2.

was not admitted to be law with any certainty; and, therefore, by stat. 12 Ann. st. 1. c. 7. it is enacted, "that if any person shall enter into the mansion-house of another, by day or by night, without breaking the same, with an intent to commit felony, or being in such house shall commit any felony, and shall, in the night-time, break the said house to get out, he shall be guilty of burglary, and ousted of the benefit of clergy; in the same manner as if he had broken and entered the house in the night-time, with intent to commit felony."

Any the least entry, either with the whole, or with but part of the body, or with any instrument or weapon, will satisfy the word entered in an indictment for burglary; as if one do put his foot over the threshold, or his hand, or a hook, or pistol, within a window, or turn the key of a door which is locked on the inside, or discharge a loaded gun into a house, &c. 1 Hawk. P. C. c. 38. § 7. and the authorities there cited. But where thieves had bored a hole through the door, with a centre-bit, and part of the chips were found in the inside of the house, yet as they had neither got in themselves, nor introduced a hand or instrument for the purpose of taking the property, the entry was ruled incomplete. Id. ib. in note.

When several come with a design to commit burglary, and one does it while the rest watch near the house, here his act is, by interpretation, the act of all of them. And, upon a like ground, if a servant confederating with a rogue, let him in to rob a house, it has been determined by all the judges, upon a special verdict, that it is burglary both in the servant and the thief. Leach’s Hawk. P. C. i. c. 38. § 9, and n.

2. It is certainly a dangerous, if not an incurable fault, to omit the word dwelling house in an indictment for a burglary in a house. But it seems not necessary or proper, in an indictment for burglary in a church, which, by all the ancient authorities, is taken as a distinct burglary. See 1 Hawk. P. C. c. 38. § 10. and the authorities there cited.

If a man hath two houses, and resides, sometimes in one of the houses, and sometimes in the other, if the house he doth not inhabit is broken by any person in the night, it is burglary. Poph. 53.

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. Ket. 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, 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. *Kelt. 84.*

To break and enter a shop, not parcel of the mansion-house, in which the shop-keeper never lodges, but only works or trades there in the day-time, is not burglary, but only larceny; but if he, or his servant, usually or often lodge in the shop at night, it is then a mansion-house in which a burglary may be committed. *1 Hale's H. P. C. 557, 558.* But see *stat. 13 Geo. III. c. 38.* respecting burglary in the work-shops of the plate-glass manufactury, which is made single felony, and punishable with transportation for seven years. If the shop-keeper sleep in any part of the building, however distinct that part is from the shop, it may be alleged to be his mansion-house, provided the owner does not sleep under the same roof also. *Leach's Hawk. P. C. i. c. 38. § 15. in n.*

A lodger in an inn hath a special interest in his chamber, so that if he opens his chamber-door, and takes goods in the house, and goes away, it seems not to be burglary. And where A. enters into the house of B. in the night, by the doors open, and breaks open a chest and steals goods, without breaking an inner door, it is no burglary by the common law, because the chest is no part of the house; though it is felony, ousted of clergy, by *stat. 3 W. & M. c. 9.* and if one break open a counter or cupboard, fixed to a house, it is burglary. *1 Hale's H. P. C. 554.*

All out-buildings, as barns, stables, warehouses, &c. adjoining to a house, are looked upon as part thereof, and consequently burglary may be committed in them. And if the warehouse, &c. be parcel of the mansion-house, and within the same, though not under the same roof, or contiguous, a burglary may be committed therein. But an out-house occupied with, but separated from the dwelling-house by an open passage, eight feet wide, and not within or connected by any fence, enclosing both, is not within the curtilage or homestall. *Leach’s Hawk. P. C. i. c. 38. § 12. n.* 4 *Comm. 225.*

No burglary can be committed by breaking into any ground enclosed, or booth, or tent, &c. but by *stat. 5 § 6. Edw. VI. c. 9.* clergy is taken from this offence. See *Larceny, II. 1.*

3. In the day-time there is no burglary. As to what is reckoned night, and what day, for this purpose, anciently the day was accounted to begin only at sun-rising, and to end immediately upon sunset; 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. *Sta. 481. Kel. 67.*

A servant embezzled money entrusted to his care; left ten guineas in his trunk; quitted his master's service; returned; broke and entered the house in the night, and took away the ten guineas, and adjudged no burglary. *Leach's Hawk. P. C. I. c. 38. § 18. m. 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 sta. 24 Hen. VIII. c. 5. expressly permitted to repel the violence by the death of the assailants, without incurring the penalties even of excusable homicide. For a course of time, however, the life of a burglar was saved by the plea of clergy; but as the increase of national opulence furnished further temptations, additional terrains became necessary; therefore, by sta. 18 Eliz. c. 7. clergy is taken away from the offence; and by sta. 5 & 4 W. & M. c. 9. from accessories before the fact.

Still further to encourage the prosecution of offenders, it is enacted by sta. 10 & 11 W. III. c. 23. that whoever shall convict a burglar, shall be exempted from parish and ward offices where the offence was committed. To this, sta. 5 Ann. c. 31. and 6 Geo. I. c. 23. have superadded a reward of 40l. And if an accomplice, being out of prison, shall convict two or more offenders, he is entitled also to a pardon of the felonies as enumerated in the act. See tit. Accessory. Rewards.

See likewise sta. 23 Geo. II. c. 35. 27 Geo. II. c. 3. and 18 Geo. III. c. 19. which provide, That the charges of prosecuting and convicting a burglar shall be paid by the treasurer of the county where the burglary was committed, to the prosecutor and poor witnesses.

To remove one inducement to the frequent commission of burglaries, sta. 10 Geo. III. c. 48. provides, that buyers or receivers of stolen jewels, gold, or silver plate, where the stealing shall have been accompanied by burglary, (or robbery,) may be tried and transported for fourteen years, before the conviction of the principal.

And to check this offence in its progress, sta. 23 Geo. III. c. 88. enacts, That any person apprehended, having upon him any pick-lock, key, &c. or other implement, with intent to commit a burglary, shall be deemed a rogue and a vagabond, within sta. 17 Geo. II. c. 5.

For further matter, see tit. Clergy, Felony, Larceny.

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A servant embezzled money entrusted to his care; left ten guineas in his trunk; quitted his master's service; returned; broke and entered the house in the night, and took away the ten guineas, and adjudged no burglary. *Leach's Hawk. P. C. I. c. 38. § 18. m. 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 sta. 24 Hen. VIII. c. 5. expressly permitted to repel the violence by the death of the assailants, without incurring the penalties even of excusable homicide. For a course of time, however, the life of a burglar was saved by the plea of clergy; but as the increase of national opulence furnished further temptations, additional terrains became necessary; therefore, by sta. 18 Eliz. c. 7. clergy is taken away from the offence; and by sta. 5 & 4 W. & M. c. 9. from accessories before the fact.

Still further to encourage the prosecution of offenders, it is enacted by sta. 10 & 11 W. III. c. 23. that whoever shall convict a burglar, shall be exempted from parish and ward offices where the offence was committed. To this, sta. 5 Ann. c. 31. and 6 Geo. I. c. 23. have superadded a reward of 40l. And if an accomplice, being out of prison, shall convict two or more offenders, he is entitled also to a pardon of the felonies as enumerated in the act. See tit. Accessory. Rewards.

See likewise sta. 23 Geo. II. c. 35. 27 Geo. II. c. 3. and 18 Geo. III. c. 19. which provide, That the charges of prosecuting and convicting a burglar shall be paid by the treasurer of the county where the burglary was committed, to the prosecutor and poor witnesses.

To remove one inducement to the frequent commission of burglaries, sta. 10 Geo. III. c. 48. provides, that buyers or receivers of stolen jewels, gold, or silver plate, where the stealing shall have been accompanied by burglary, (or robbery,) may be tried and transported for fourteen years, before the conviction of the principal.

And to check this offence in its progress, sta. 23 Geo. III. c. 88. enacts, That any person apprehended, having upon him any pick-lock, key, &c. or other implement, with intent to commit a burglary, shall be deemed a rogue and a vagabond, within sta. 17 Geo. II. c. 5.

For further matter, see tit. Clergy, Felony, Larceny.

**BURNOTS** Persons dying are to be buried in woollen, on pain of forfeiting 5l. And affidavit is to be made of such burying before a justice, &c. under the like penalty. *Sta. 30 Car. II. c. 3. 34 Geo. III. c. 11. repeals the duty imposed by 23 Geo. III. c. 67. 25 Geo. III. c. 75. on the registry of burials, &c. But act not to affect the validity of any register.

**BURNET** Cloth made of dyed wool. A burnet colour must be dyed; but brunes colour may be made with wool without dying, which are called medleys or russets. Lyndewood. Thus much is mentioned because this word is sometimes wrote bruneta.

**BURNTING IN THE HAND. Vide Branding.**
BURNING, Of houses, out-houses, malicious burnings, &c. See tit. Arson. To the malicious burnings mentioned under tit. Arson, may be added, that by stat. 6 Geo. I. c. 23. assaulting with intention to burn the garments of another in the public street, (by aqua-fortis, &c.) is punishable with transportation. By stat. 22 & 23 Car. II. c. 11. and 1 Ann. st. 2. c. 9. to burn any shift to the prejudice of the owners or freighters; and by stat. 4 Geo. I. c. 12. to the prejudice of the underwriters, is made felony without clergy. By stat. 12 Geo. III. c. 24. to burn the king's ships of war afloat or building, dockyards, or any of the arsenals or stores, &c. therein, is also made felony without clergy. By stat. 27 Geo. II. c. 15. threatening, by anonymous or fictitious letters, to burn houses, barns, &c. is felony without clergy. As to penalty on servants setting fire to houses by negligence, see tit. Fire. See further titles, Felons, Navy, Ships, Insurance.

BURNING to DEATH. See tit. Felony, Treason.

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

BURROWS OR BURGH, By our ancient style, signifies caution. Scotch Dict.

BURSA, A purse. Ex Chart. vet.

BURSARIA, The burse, or exchequer of collegiate and conventual bodies; or the place of receiving and paying; and accounting by the bursar or bursars. Parac. Antiq. p. 288. But the word bursar did not only signify the bursars of a convent or college; but formerly stipendiary scholars were called by the name of bursar, as they lived on the burse or fund, or public stock of the university. At Paris, and among the Cistercian monks, they were particularly termed by this name. Johan. Major. Gest. Scot. lib. 1. c. 5.

BURSE, bursa, cambium, basilica.] An exchange or place of meeting of merchants.

BURSHOLDERS. See tit. Headborough.

BUSONES COMITATUS. Bract. lib. 3. tract. 2. cap. 1. Blount says, busones is used for barons.

BUSSA, A ship. Blount's Dict. The vessels used in the herring fisheries are called Busses and Smacks.

BUSSELLUS, A bushel; from buza, butta, butis, a standing measure; and hence buticella, buticellus, bussellus, a less measure. Some derive it from the old Fr. boute, leather continents of wine; whence come our leather budget and bottles. Kennet's Gloss.

BUST and BUSTUS, busce, and buscus, &c. See Brucia and Brussula.

BUSTARD, A large bird of game, usually found on downs and plains, mentioned in the stat. 25 Hen. VIII. c. 11. See tit. Game.

BUTCHERS. These were anciently compelled by statute to sell their meat at reasonable prices, or forfeit double the value, to be levied by warrant of two justices of peace, &c. And were not to buy any fat cattle to sell again, on pain of forfeiting the value; but this not to extend to selling calves, lambs, or sheep, dead, from one butcher to another. Stat. 25 Edw. III. c. 6. By stat. 2 & 3 Edw. VI. c. 15. (revived, continued and confirmed by stat. 22 & 23 Car. II. c. 19. which is now expired,) butchers (and others) conspiring to sell their victuals at certain rates, are liable to 10l. penalty, or twenty days imprisonment for the first offence—20l. or pillory for the second—and 40l. or pillory, and loss of ear for the third. The offence to be tried by the sessions or leet. See tit. Conspiracy. By stat. 4 Hen.
VII. c. 3. no butcher shall slay any beast within any walled town, except Carlisle and Berwick. By the ordinance for bakers, uncert. temp. butchers are not to sell swine's flesh mezzled, or flesh dead of the murrain. By stat. 3 Car. I. c. 1. butchers are not to kill or sell meat on Sunday. By stats. 1 Jac. I. c. 22, and 9 Ann. c. 11. regulations are made as to the watering and gashing hides; and the selling putrefied and rotten hides by butchers; and by the said stat. 1 Jac. no butcher shall be a tanner or currier.

See further tit. Cattle, Forestalling, Victuals.

BUTLER. See Boilier.

BUTLERAGE. See Prisage.

BUTHSCARLE, butsecarl, buscarles, (buscarli et buthsecarli,) Mariuers or seamen. Selden's Mare Clausum, fol. 184.

BUTT, butticam. A measure of wine, &c. well known among merchants, and containing 126 gallons of Malmsey wine, by stat. 1 Rich. III. c. 13.

BUTTER AND CHEESE. By stat. 9 Hen. VI. c. 8. a weigh of cheese shall contain thirty-two cloues, each cloue 7lb. = 2c7ut. Every kilderkin of butter shall contain 112 pounds, the firkin 56, and pot 14 pounds of good butter, (every pound 16oz.) 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 10s. per c7ut. Stat. 13 & 14 Car. II. cap. 26. Buyers of butter are to put marks on casks; and persons opening them afterwards, or putting in other butter, &c. shall forfeit 20s. 4 & 5 W. & M. c. 7. The said stat. 4 & 5 W. & M. c. 7. also contains regulations to compel warehouse keepers, weighers, searchers, and shippers, to receive all butter and cheese for the London market, without undue preference. The stats. 8 Geo. I. c. 27. and 17 Geo. II. c. 8. regulate the sale of butter; the former in the city of York, the latter at New Malton; explained by § 18. of stat. 56 Geo. III. c. 86. 38 Geo. III. c. 73. § 1. such regulations not to extend to vessels not containing more than 14lb. nor to Scotland. See tit. Weights and Measures.

BUTTONS. Foreign buttons are not to be imported on penalty of 100L. on the importer, and 50L. on the seller, by stats. 13 & 14 Car. II. c. 13. and 4 W. & M. c. 10. And by the same statutes, a justice may issue his warrant to search for and seize the same. By stat. 10 W. III. c. 2. no person shall make, sell, or set on, any buttons made of wood only, and turned in imitation of other buttons, under penalty of 40s. a dozen. A shank of wire being added to the button makes no difference. Ld. Raym. 712. By the said stat. W. III. no person shall make, sell, or set on, buttons made of cloth, or other stuffs of which clothes are usually made, on penalty of 40s.

By stat. 8 Ann. c. 6. no tailor, 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 3L. a dozen. By this act no power is given to make distress.

Stat. 4 Geo. I. c. 7. is said in Burn's Justice (tit. Buttons) to be a loose, injudicious, ungrammatical act, and which, by its garb, may seem to have been drawn up by tailors, or button makers. This act imposes (indistinctly enough) 40s. a dozen, on all such buttons and button-holes, with an exception of velvet; it seems levelled against
BY-LAWS 1.

the tailors only, but clothes with such buttons and button-holes exposed to sale, are to be forfeited and seized.

By stat. 7 Geo. I. st. 1. c. 12. no person shall use or wear, on any clothes, (velvet excepted,) any such buttons or button-holes, on pain of 40s. 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 reconcilable to the usual rules of evidence. This statute is also incorrect, particularly in making no disposal of a moiety of the penalty, in case of conviction or confession by the party.

These acts are seldom enforced, and do not seem very consistent with general policy. See tit. Taylors. See 36 Geo. II. c. 60. regulates the making and vending of metal buttons.

BUTTS, The place where archers meet with their bows and arrows to shoot at a mark, which we call shooting at the butts. Also butts are the ends or short pieces of land in arable ridges and furrows; buttum terra, a butt of land. See tit. Abuttals.

BUTLERAGE OF WINES. See tit. Customs.

BUZONIS, The shaft of an arrow, before it is fledged or feathered. Stat. Ed. I.

BY. Words ending in by or bee, signify a dwelling-place or habitations, from the Sax. by, habitatio.

BY-LAWS, bitagines, from Sax. by, pagus, civitas, and lagen, lex, i.e. the laws of cities, Stelmx. Bellagines. Or perhaps laws made obiter, or by the by.] Certain orders and constitutions of corporations, for the governing of their members; of courts-leet and court-baron; commoners or inhabitants in vills, &c. made by common assent, for the good of those that made them, in particular cases, whereunto the public law doth not extend; so that they lay restrictions on the parties, not imposed by the common or statute law. Guilds and fraternities of trades, by letters patent or incorporation, may likewise make by-laws, for the better regulation of trade among themselves, or with others. Kitch. 45. 72. 6 Ref. 63.

In Scotland those laws are called laws of birlaw, or burlaw, which are made by neighbours elected by common consent in the birlaw-courts, wherein knowledge is taken of complaints betwixt neighbour and neighbour; which men so chosen are judges and arbitrators, and styled birlaw-men. And birlaws, according to Skene, are leges rusticorum, laws made by husbandmen, or townships, concerning neighbourhood amongst them. Skene, p. 33.

The power of making by-laws, being included in the very act of incorporating a corporation, and most by-laws being made by corporations, it seems more regular to consider the nature and effect of them under that head. See tit. Corporations.

In this place, therefore, we shall chiefly consider, 1. who may make by-laws; and, 2. the general requisites of them.

1. The inhabitants of a town, without any custom, may make ordinances or by-laws, for repairing of a church, or highway, or any such thing, which is for the general good of the public; and in such cases, the greater part shall bind all; though if it be for their own private profit, as for the well ordering of their common, or the like, they cannot make by-laws without a custom to warrant it; and if there be a custom, the greatest part shall not bind the rest in these cases, unless it be warranted by the custom. 5 Ref. 63. A custom to make a by-law, may be alleged in an ancient city or borough. So in an upland
BY-LAWS 2.

2. All by-laws are to be reasonable; and ought to be for the common benefit, and not private advantage of any particular persons; and must be consonant to the public laws and statutes, as subordinate to them. And by stat. 19 Hen. VII. c. 7. by-laws made by corporations are to be approved by the Lord Chancellor, or Chief Justices, &c. on pain of

A by-law may be reasonable, though the penalty be to be paid to those who make the by-law. 1 Salk. 397. And generally it shall be reasonable, if it be for the public good of the corporation. Carth. 482.

By-laws made in restraint of trade are not favoured, but the distinction between such as are made to restrain, and those made to regulate trade seems very nice. See tit. Corporation. Under a general power to make by-laws, a by-law cannot be made to restrain trade. 1 Burr. 12. A custom that no foreign tradesman shall use or exercise a trade in a town, &c. will warrant that which a grant cannot do; and where custom has restrained, a by-law may be made, that upon composition foreigners may exercise a trade. Carter, 120. See 4 Burr. 1951.

So by-laws may regulate, but not totally restrain a private right, as in cases of common, &c. See Com. Dig. tit. By-law, (B. 2.) and (C. 4.)

If a by-law impose a charge without any apparent benefit to the party, it will be void. R. Raym. 328. And a by-law being entire, if it be unreasonable for any particular, shall be void for the whole. 2 Vent. 183.

A by-law cannot impose an oath, nor empower any person to administer it. Str. 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. 434.

If a by-law does not mention how the penalty shall be recovered, debt lies for it. 1 Roll. Abr. 366. l. 48. See 5 Co. 54. Hob. 279. Or action on the case on assumption. 2 Lev. 252. It seems that a by-law to levy the penalty by distress, sale, or imprisonment, is void, unless by custom. See Com. Dig. tit. By-law, (D. 2.) (E. 1, 2.)

The court of K. B. will not enter into a question on the validity of a by-law, on the return of a hab. cor. cum causa, 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.